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**THE JUDICIAL PENAL PROCEDURE FOR THE DISMISSAL  
OF A DIOCESAN PRIEST FROM THE CLERICAL STATE  
ACCORDING TO THE 1983 CODE OF CANON LAW**

by  
John DIRAVIAM

A dissertation submitted to the Faculty of Canon Law  
Saint Paul University, Ottawa, Canada, in partial  
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## ABSTRACT

This study consisting of four chapters is an examination of the judicial penal procedure for dismissal of a diocesan priest from the clerical state for the commission of certain grave delicts. It mainly focuses on two areas: first, the identification of certain delicts that merit dismissal from the clerical state; second the application of right penal measures to deal with such delicts.

While in light of the constant social teaching of the Church, the Code affirms the inviolable dignity and rights of the faithful, it does not fail to assert its right to impose appropriate penalties on members who violate the law (c. 1311). The exercise of personal rights is contingent upon the promotion of common good (c. 223). Therefore, threats to justice, gravity of scandal and contumacy of an offender necessitate the imposition of appropriate penalties (c. 1341).

The right of a competent ecclesiastical authority to impose penalty presupposes proper understanding of delicts and penalties prescribed in the Code. By and large, penal laws operate in the juridical not moral sphere; that is to say, while all delicts are sinful, not all sins are considered delicts before law (I Jn. 5, 17). Delicts and penalties operate solely in the external forum. In order to impose appropriate penalties, the ecclesiastical superior must evaluate various factors that affect imputability and other factors related to delict (cc. 1322-1327).

It is not uncommon for clerical delicts to be punished with severe penalties because they are a breach of trust and against the integrity of the sacrament of Orders. Clerical delicts against human dignity, celebration of the sacraments and morals are considered more serious; and some of them are reserved to the Apostolic See. In judging the clerical delictss meriting the serious expiatory penalty of dismissal from the clerical state, the Code prefers judicial procedure which guarantees better the right of defence (c.1620, 7<sup>o</sup>) and counterchecks possible arbitrariness. A judicial penal procedure follows the norms of the ordinary contentious process (cc. 1501-1670) and the canons on penal process provided in the Code (cc. 1717-1731). The norms which supplement the Code are to be observed for reserved delicts. The faithful observance of substantive and procedural norms will safeguard the superior from slipping away from justice and the protection of rights. The lawfully imposed penalty of dismissal from the clerical state on a guilty cleric results in certain prohibitions and deprivations such as the deprivation of exercise of sacred ministry, office, power, function, faculty, privilege, etc. All rights and obligations pertaining to the clerical state become extinct (cc. 273-283) except the obligation of celibacy (c. 291).

Because the expiatory penalty of dismissal from the clerical state has severe consequences for the offending cleric, Christian charity in the application of the precepts of the Code calls for justice and equity recommended by the Code for cases involving dismissal from the clerical state.

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## ABBREVIATIONS

<i>AAS</i>	<i>Acta Apostolicae Sedis</i>
<i>Apol</i>	<i>Apollinaris</i>
c.	Canon
cc.	Canons
CCCB	Canadian Conference of Catholic Bishops
<i>CCEO</i>	<i>Codex canonum Ecclesiarum orientalium</i>
CDF	Congregation for the Doctrine of the Faith
CDWDS	Congregation for Divine Worship and the Discipline of the Sacraments
<i>CIC</i>	<i>Codex iuris canonici</i> 1983
<i>CIC/17</i>	<i>Codex iuris canonici</i> 1917
<i>CLD</i>	<i>Canon Law Digest</i>
<i>1985 Commentary</i>	<i>The Code of Canon Law: A Text and Commentary</i> , J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), New York/Mahwah, Paulist Press, 1985
<i>New Commentary</i>	<i>New Commentary on the Code of Canon Law</i> , J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), New York/Mahwah, NJ, Paulist Press, 2000
<i>CLSA Proceedings</i>	<i>Proceedings of the Annual Convention of Canon Law Society of America</i>
CLSA	Canon Law Society of America
<i>CLSGB &amp; I Newsletter</i>	Canon Law Society of Great Britain & Ireland, <i>Newsletter</i>
<i>DH</i>	<i>Dignitatis humanae</i>
<i>Exegetical Commentary</i>	Á. MARZOA, J. MIRAS, and R. RODRÍGUEZ-OCAÑA (eds.), <i>Exegetical Commentary on the Code of Canon Law</i> , prepared under the responsibility of the Martín de Azpilcueta Institute, University of Navarre, Montréal, Wilson & Lafleur, 2004, 5 vols.

FLANNERY 1	A. FLANNERY (gen. ed.), <i>Vatican II: The Conciliar and Postconciliar Documents</i> , Grand Rapids, MI, Wm B. Eerdmans Publishing Co., 1982
FLANNERY 2	A. FLANNERY (gen. ed.), <i>Vatican II: More Postconciliar Documents</i> , Grand Rapids, MI, Wm B. Eerdmans Publishing Co., 1982
<i>GS</i>	<i>Gaudium et spes</i>
<i>HPR</i>	<i>Homiletic and Pastoral Review</i>
<i>LE</i>	<i>Laborem exercens</i>
<i>LEF</i>	<i>Lex Ecclesiae fundamentalis</i>
<i>LG</i>	<i>Lumen gentium</i>
<i>ME</i>	<i>Monitor ecclesiasticus</i>
<i>MM</i>	<i>Mater et magistra</i>
NBCLC	The National Biblical Catechetical and Liturgical Centre
NCCB	National Conference of Catholic Bishops
<i>OA</i>	<i>Octogesima adveniens</i>
<i>ORE</i>	<i>L'Osservatore romano</i> , English edition
<i>PB</i>	<i>Pastor bonus</i>
<i>PDV</i>	<i>Pastores dabo vobis</i>
<i>PO</i>	<i>Presbyterorum ordinis</i>
<i>PP</i>	<i>Populorum progressio</i>
<i>PT</i>	<i>Pacem in terris</i>
<i>QA</i>	<i>Quadragesimo anno</i>
<i>RN</i>	<i>Rerum novarum</i>
<i>RR</i>	<i>Roman Replies and CLSA Advisory Opinions</i>
<i>RRT Dec.</i>	ROTAE ROMANAE TRIBUNAL, <i>Decisiones seu sententiae</i>

<i>SRR Dec.</i>	TRIBUNAL APOSTOLICUM SACRAE ROMANAE ROTAE, <i>Decisiones seu sententiae</i>
<i>SRS</i>	<i>Sollicitudo rei socialis</i>
<i>SST</i>	<i>Sacramentorum sanctitatis tutela</i>
<i>StC</i>	<i>Studia canonica</i>

## GENERAL INTRODUCTION

In recent decades, the Catholic Church had to face painfully the scandal of sexual abuse of minors by clerics, which has caused considerable damage to the Catholic community in general and to the dignity of priesthood in particular. In order to protect the dignity and rights of persons, and in particular of innocent children, the Church has responded to such crimes with appropriate penal measures against accused clerics; notable among such measures is the judicial or administrative imposition of the penalty of dismissal of a cleric from the clerical state, if found guilty of the delict. Grave clerical delicts against morals, and particularly against minors, are to be punished appropriately in order to maintain the ecclesiastical discipline. However, the manner in which such a penalty is imposed on a Christian faithful, let alone on a cleric, has raised considerable consternation among canonists. Canonists are rightfully concerned about the arbitrary manner in which expiatory penalties are imposed often without due process, and especially with no regard to the principle of due process and one's right to protect one's good name. Though the present Code favours judicial procedure for imposition of the penalty of dismissal from the clerical state, there have been numerous instances of administrative dismissal from the clerical state. This approach has been seriously questioned by seasoned canonists because of lack of due process and possible denial of the right of defence.

One opinion maintains that the judicial penal process is not a right of an accused cleric and such a procedure is no longer mandatory in canon law in the case of dismissal of a cleric from the clerical state. Moreover, the proponents of this view hold that clerics who commit such delicts destroy the trust and common good of the Church and,

therefore, merit the strict penalty of dismissal from the clerical state. On the other hand, others argue that the increased awareness of the rights and freedom of the faithful of the Church after Vatican II excludes any form of arbitrariness in imposing any penalty. All the Christian faithful have the right to defend and vindicate their rights in a competent ecclesiastical forum. Thus, an accused person has a right to due process, to be heard and to defend himself in a competent forum; justice and equity will be rendered only through a legitimate judicial penal trial. To a certain extent, these opposing views illustrate the complexity of the principles involved in penal processes. Particularly in cases of sexual abuse of minors, one of the *graviora delicta*, while the good of innocent people, particularly that of children, must be protected from every type of criminal behaviour, the principles of justice and equity, the cornerstones of Church's ministry in the world, cannot be set aside or trampled under foot by those who interpret and apply the law to concrete cases.

Guided and inspired by the teaching of the Second Vatican Council, the Supreme Legislator has incorporated into the new Code an ecclesiastical charter of rights of all the Christian faithful (cc. 208-231). Four among these rights are considerably significant to the study on the judicial penal process, and these rights are: **First**, the right to one's good name; no one is permitted to harm illegitimately the good reputation a person enjoys nor to injure the right of any person to protect his or her own privacy (c. 220). **Second**, 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 (c. 221, §1). **Third**, if the Christian faithful are summoned to a trial by a competent authority, they also have the right to be judged according to the prescripts of the law applied with

equity (c. 221, §2). **Fourth**, the Christian faithful have the right not to be punished with canonical penalties except according to the norm of law (c. 221, §3).

If these fundamental rights are to be real, any person, including priests, accused of a delict should be able to claim and vindicate them legitimately in the Church. Therefore, a priest accused of a delict that merits the penalty of dismissal from the clerical state must have the benefit of all the legal provisions the Supreme Legislator has made to safeguard the right of self defence.

Does the Church have a procedural system that guarantees the effective defence of one's rights, especially when a priest is accused of a delict which entails serious penalties? If so, does a diocesan priest accused of a canonical crime to which the law attaches the penalty of dismissal from the clerical state have such protection in ecclesiastical law? We believe that, at least theoretically, the Church has such a system embodied in its substantive and procedural norms. But whether this is effective enough to protect the rights of accused priests is a question that demands a scientific inquiry into the various aspects of penal procedural law in regard to the imposition of the penalty of dismissal from the clerical state. This question was the primary inspiration behind the choice and pursuit of the theme of our project.

A number of canonical studies have already commented on topics related to clerical delicts and the application of penalties. Among these major works is K. McKenna's *The Right of Confidentiality and Diocesan Clergy Personnel Records*<sup>1</sup> which identifies a serious violation of rights in making information about the accused priest

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<sup>1</sup> K. MCKENNA, *The Right of Confidentiality and Diocesan Clergy Personnel Records*, JCD diss., Ottawa, Faculty of Canon Law, Saint Paul University, 1990.

accessible to third parties through the Priest Personnel Board. Though this study concentrates on the conciliar themes incorporated in the Code, it is not a direct study on clerical delicts and the judicial penal process. W.C. Michalicka, in her dissertation, *Judicial Procedure in Dismissal of Clerical Exempt Religious*<sup>2</sup> identifies the basic principles of imputability and notoriety of crime and outlines the stages of the judicial process according to the 1917 Code. In his doctoral dissertation, *Procedures: Loss of the Clerical State: From the 1917 CIC to the 1983 CIC*,<sup>3</sup> R. C. Tronqued studies various norms and documents on laicisation issued after the 1917 Code up to the 1983 Code. Obviously, both works are limited either to the 1917 Code or to laicisation.

The following two studies are on laicisation. B. Phiri, in his study, *Loss of the Clerical State in the Religious and Diocesan Priesthood*,<sup>4</sup> analyses systematically a number of curial documents and the procedural norms governing laicisation issued after the 1917 Code up to the present Code. C. M. Padazinski's doctoral dissertation, *Loss of Clerical State: A Penalty or Rescript*,<sup>5</sup> identifies both the judicial and the penal procedures defined in various documents issued by the appropriate congregations of the Roman Curia; he prefers that the offending priests themselves request the Holy See for laicisation (c. 290, 3°), instead of being punished by dismissal, making use of canon 290, 2°.

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<sup>2</sup> W.C. MICHALICKA, *Judicial Procedure in Dismissal of Clerical Exempt Religious*, Canon Law Studies, no. 19, Washington, DC, Catholic University of America, 1923.

<sup>3</sup> R.C. TRONQUED, *Procedures: Loss of the Clerical State: From the 1917 CIC to the 1983 CIC*, JCD diss., Rome, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1994.

<sup>4</sup> B. PHIRI, *Loss of the Clerical State in the Religious and Diocesan Priesthood*, JCD diss., Rome, Pontificia Universitas Urbaniana, 2002.

<sup>5</sup> C.M. PADAZINSKI, *Loss of Clerical State: A Penalty or Rescript?*, JCD diss., Rome, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1999.

A more direct study related to our topic is the doctoral dissertation of E.N. Peters, *Penal Procedural Law in the 1983 Code of Canon Law*<sup>6</sup> which examines the judicial penal procedure as outlined in the 1917 Code and the present Code and reviews the revision of penal procedural law. Canons 1717-1728 of *CIC* are examined with a critical approach. However, our project studies each individual clerical delict involving dismissal from the clerical state with a description of the various stages of judicial penal procedure outlined in the legislation of the Church applicable to cases involving serious clerical delicts.

The method used in our study is analytical in nature. We intend to analyze primarily the procedural laws contained in the 1983 Code of Canon Law and other related complementary norms as well as Rotal jurisprudence on dismissal from the clerical state.

Our study examines in its four chapters a number of inter-related issues concerning grave delicts meriting the most serious penalty of dismissal from the clerical state. The first issue, to be dealt with in chapter one, concerns the Catholic Church's teaching on the dignity and fundamental rights of the human person and its concern for their effective protection, particularly within the context of ecclesiastical law. The social teachings of the Church are drawn from the conciliar and post-conciliar magisterial documents. Based on this teaching, the ecclesiastical legislator has identified a number of individual rights in the present Code. All the Christian faithful are reminded of their ecclesial rights, their right to privacy (c. 220), as well as their obligations in exercising their rights. The specific rights highlighted in c. 221 in regard to penal matters are the

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<sup>6</sup> E.N. PETERS, *Penal Procedural Law in the 1983 Code of Canon Law*, Canon Law Studies no. 537, Washington, DC, Catholic University of America, 1994.

following: Christian faithful have the right to defend and vindicate their rights before a competent ecclesiastical forum in accordance with the law (c. 221, §1); no one can be summoned to court or judged apart from the provision of law (c.221, §2); and they have the right not to be inflicted with canonical penalties except in accordance with the law (c. 221, §3).

Chapter two includes an analysis of canonical delicts and penalties in general and, in particular, of those delicts involving the penalty of dismissal from the clerical state. In its first part, issues relating to essential elements of a delict, namely the objective and subjective elements, and the various circumstances affecting imputability are discussed. Furthermore, the different kinds of penalties and their nature are identified. Specifically, grave clerical delicts are analysed in light of curial and magisterial documents issued after the 1917 Code up to the present *motu proprio Sacramentorum sanctitatis tutela*. In this context, the essential elements of seven delicts meriting the penalty of dismissal from the clerical state as prescribed by the 1983 Code are examined in detail.

In chapter three our focus will be on the various phases of the judicial penal procedure as outlined in cc. 1717-1731 in conjunction with canons 1501-1670 on the ordinary contentious process. The basic structure of an ordinary contentious process, divided into the introductory phase, the instructional phase and the concluding phase will be applied to the judicial penal procedure, which is our principal focus. We will also discuss further the preliminary inquiry (c. 1717), the determination to be made by the ordinary (c. 1718) and the precautionary measures to be imposed (c. 1722). Wherever applicable, our analysis of judicial procedure will include reference to the application of substantive and procedural norms articulated in *SST* over reserved delicts. The properly

imposed expiatory penalty of dismissal from the clerical state entails juridical consequences, such as certain deprivations and prohibitions except release from the obligation of celibacy (c. 291). We will critically look at those consequences as well as various issues related to the imposition of the expiatory penalty of dismissal from the clerical state.

An ecclesiastical judge should be faithful to the penal principles as well as to the salvific character of ecclesiastical laws in the administration of justice (c. 1752). Both rigidity and laxity in the application of penal principles to concrete cases will result in travesty of justice. Accurate evaluation of imputability and protection of the right of defence must be an ecclesiastical judge's primary concern in rendering justice in a penal case. In chapter four, we will analyse three rotal sentences involving the penalty of dismissal from the clerical state.

The study is not without certain limitations. First, the subject matter of this dissertation is limited exclusively to the judicial penal procedure for dismissal of a diocesan priest from the clerical state. Therefore, our discussion will prescind from any reference to the procedure for the dismissal of a bishop or a deacon, who too are clerics. Nor do we include in our analysis the dismissal of a religious priest from the clerical state. Furthermore, the diocesan priest discussed in our study would not have any reference to his office, such as parish priest, parochial vicar, etc.

Second, there are two different procedures for imposing the penalty of dismissal from the clerical state, namely judicial and administrative; our study will be limited exclusively to the ordinary judicial procedure.

Third, though the norms of *SST* complement to the penal procedures provided in

the Code, we do not intend to provide a comprehensive analysis of the norms of *SST*, for only three delicts of *graviora delicta*, (c. 1364, §2; c. 1387 and c. 1395, §2) identified in it, merit the penalty of dismissal. Our focus will be on all those delicts that merit dismissal from the clerical state.

Fourth, although we will refer *passim* to the Eastern Code, the primary focus of this study will be on the Latin Code.

Finally, due to the fear of violating confidentiality and the dignity and the good name of the persons involved in penal cases, the Roman dicasteries are hesitant to make their sentences available for study. For this reason, we will be limited to an analysis of only a few Rotal sentences.

## CHAPTER ONE

# THE DIGNITY AND THE FUNDAMENTAL RIGHTS OF THE HUMAN PERSON IN THE 1983 CODE

### INTRODUCTION

During the past 150 years, the Catholic Church has been one of the ardent champions of human rights and has constantly proclaimed to the world its unflinching commitment to the defence of the dignity and inviolability of the human person.<sup>1</sup> Through various encyclicals, the popes have continued to voice the Church's concerns about human dignity by stressing the sacredness of human rights frequently threatened by totalitarian regimes, sectarian ideologies or dehumanising sciences, especially when they, either individually or collectively, proposed to undermine the wholesome well-being of human persons. Several encyclicals from *Rerum novarum* to the recent *Redemptor hominis* have expressed the Church's genuine solicitude for human rights.<sup>2</sup>

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<sup>1</sup> It was the encyclical of Pope Leo XIII, *Rerum novarum*, the first comprehensive document on social justice, which laid the foundation for the Church's social doctrine, though right from its beginning, the Church had always expressed solidarity with the workers and the less privileged. See LEO XIII, Encyclical, *Rerum novarum* (=RN), 15 May 1891, in *Acta Sanctae Sedis* (=ASS), 23 (1890-1891), pp. 641-670; English trans. in *The Pope and the People; Select Letters and Addresses on Social Questions* (= *The Pope and the People*), London, Catholic Truth Society, 1937, pp. 133-168.

<sup>2</sup> After the Encyclical, *Rerum novarum*, of Pope Leo XIII, the following magisterial documents focused, in a special way, on social issues: Pius XI's Encyclical letter, After Forty Years, *Quadragesimo anno* (15 May 1931); John XXIII's Encyclical letter on Christianity and Social Progress, *Mater et magistra* (15 May 1961); John XXIII's Encyclical letter on Establishing Universal Peace in Truth, Justice, Charity and Liberty, *Pacem in terris* (11 April 1963); Second Vatican Council's Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* (7 December 1965), and its Declaration on Religious Liberty, *Dignitatis humanae* (7 December 1965); Paul VI's Encyclical letter on the Development of Peoples, *Populorum progressio* (26 March 1967) and his Apostolic letter on a Call to Action on the Eightieth Anniversary of *Rerum novarum*, *Octogesima adveniens* (14 May 1971); John Paul II's Encyclical letter on the Redeemer of the Human Being, *Redemptor hominis* (4 March 1979), and his Encyclical letters on Human Work, *Laborem exercens* (14 September 1981), and Social Concern, *Sollicitudo rei socialis* (30 December 1987). For all the above documents, see D. J. O'BRIEN and T.A. SHANNON (eds.), *Catholic Social Thought: The Documentary Heritage*, New York, Orbis Books, 1992; R.W. ROUSSEAU, *Human Dignity and the Common Good: The Great Papal Social Encyclicals from Leo XIII to John Paul II*,

The teaching of the Church on human rights gives rise to several crucial questions pertinent to our study: is there a true human rights tradition in the Church? If there is, has it been sufficiently incorporated into its own legal system? If it has been, are there appropriate mechanisms in place in the juridical order of the Church to protect effectively the rights of its own members before proclaiming them to the world? With respect to penal issues, do Church authorities resort to arbitrary use of power and act in a capricious manner, solely to placate social indignation?<sup>3</sup> Are there in the Church appropriate procedural safeguards for the exercise of subjective rights of its members, including those accused of canonical delicts?<sup>4</sup> These are only a few fundamental questions that we raise here with regard to the Church's own approach to human rights. We will try to answer these questions within the context of the common good and personal salvation of the faithful in Christ.

The principal object of this first chapter is an analysis of the human rights tradition of the Church.<sup>5</sup> This analysis will be preceded by a very brief exposition of the influence of other views on human rights issues for the purpose of highlighting the Church's own approach to them. We will study the teaching of the Church and the juridical affirmations found in the Code on the dignity of every human person based on

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London, Greenwood Press, 2002.

<sup>3</sup> See J. LLOBELL, "The Balance of the Interests of Victims and the Rights of the Accused: The Right to Equal Process," in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Proceedings of the Conference held at the Pontifical University of the Holy Cross, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2005, p. 85.

<sup>4</sup> One of such important canonical safeguards in both penal and marriage nullity cases is the right of defence. See F. DANEELS, "The Right of Defence," in *Studia canonica (=StC)*, 27 (1993), pp. 77-95.

<sup>5</sup> For a brief historical trajectory on the evolution of rights of persons starting from Justinian's *Digest* up to the 1983 Code, see R. JACQUES, "Les droits et devoirs des fidèles: aperçus historiques," in *StC*, 38 (2004), pp. 439-460.

the “biblical image of man.”<sup>6</sup> The goal of this chapter is to determine whether the provisions of the Code have mechanisms to protect effectively the rights of individual members of the Church within the context of the common good.

### 1.1 – HUMAN RIGHTS TRADITIONS PRIOR TO THE SECOND VATICAN COUNCIL

A word about the terms “right” and “obligation.” The English term “right” derives from the Latin word, “*ius*,” which in turn is said to come from “*iussum*,” the past participle of the verb “*iubere*,” meaning commanded.<sup>7</sup> It essentially means a moral or legal power to possess, to claim and to use a thing as one’s own.<sup>8</sup> This faculty of a person’s possessing and claiming would be a subjective right which presupposes the objective right. The term “right” has a very comprehensive significance. In Roman law, the concept of “right” was closely linked to the notion of justice, which was defined as the constant and perpetual disposition to render one’s due.<sup>9</sup> It was on the basis of this Roman law concept of right that Thomas Aquinas defined right as the object of justice.<sup>10</sup> Thus the scholastic thinking adopted an interrelated approach to rights and justice. Although the notion of “right” is distinct from that of “obligation,” they are nevertheless

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<sup>6</sup> See JOHN PAUL II, “Man’s Awareness of Being a Person,” in *L’Osservatore romano*, Weekly English language edition (= *ORE*), 29 October 1979, p. 19.

<sup>7</sup> See A.G. CICOGNANI, *Canon Law*, 2<sup>nd</sup> rev. ed., Philadelphia, The Dolphin Press, 1935, pp. 9-10.

<sup>8</sup> See G. HERBERMANN et al. (eds.), *The Catholic Encyclopaedia*, vol. 3, New York, Robert Appleton Company, 1922, p. 55. For the notion of right as a claim upheld by the law, see P. EDWARDS (ed.), *The Encyclopaedia of Philosophy*, vol. 7, New York, The Macmillan Company & the Free Press, 1967, p. 195.

<sup>9</sup> See A. MENDONÇA, “Promotion and Protection of Rights in the Church,” in *Philippine Canonical Forum*, 2 (2000), p. 34.

<sup>10</sup> *Summa theologica*, IIa-IIae, q. 57, aa. 1-3.

correlative terms. The right of one person usually corresponds to an obligation on the part of others, so that right and obligation condition each other.<sup>11</sup>

According to c. 96 of the 1983 Code of Canon Law, an individual is incorporated into the Church of Christ through valid baptism and is constituted in it a person with the rights and obligations proper to a member of the Church. These rights and obligations are to be exercised within the context of the common good (c. 223) and this exercise is contingent upon each one's condition, ecclesial communion and legitimate sanction, if any (c. 96). Thus, with this new identity, every baptised Christian is endowed with both natural human rights and ecclesial rights together with the corresponding obligations.<sup>12</sup> "In this regard, Mahatma Gandhi said wisely, 'The Ganges of rights flows from the Himalaya of duties'."<sup>13</sup> The inter-relationship between these sets of rights and obligations is such that, as J.H. Provost says, the "Church's *magisterium* presents human dignity as the basis for human rights, and some canonists see the fundamental equality of dignity within the Church as the basis for ecclesial rights."<sup>14</sup>

Therefore, it may not be an exaggeration to say that Christian, ecclesial rights complement natural rights and natural rights provide the foundation for ecclesial rights and obligations.<sup>15</sup> There is no doubt that, because of its biblical approach to fundamental

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<sup>11</sup> See J.P. MCINTYRE, "Rights and Duties Revisited," in *The Jurist*, 56 (1996), p. 112.

<sup>12</sup> MENDONÇA, "Promotion and Protection of Rights in the Church," pp. 41-43.

<sup>13</sup> BENEDICT XVI, 2007 World Day of Peace Message, in *Origins*, 36 (Dec. 21, 2006), p. 441.

<sup>14</sup> J.H. PROVOST, "The Nature of Rights in the Church," in *CLSA Proceedings*, 53 (1991), p. 6.

<sup>15</sup> Some studies in volumes 45-47 of *The Jurist* discuss how the natural rights could be actualised more effectively in the Code. See J.H. PROVOST, "Promoting and Protecting the Rights of Christians: Some Implications for Church Structure," in *The Jurist*, 46 (1986), pp. 289-342; J.P. BEAL, "Protecting the Rights of the Lay Catholics," in *The Jurist*, 47 (1987), pp. 129-164; J.A. CORIDEN, "A Challenge: Make the Rights Real," in *The Jurist*, 45 (1985), pp. 1-23.

human dignity (Gen. 1:26-28), the anthropological foundation of the Catholic Church's teaching on human rights differs from the views promoted by the secular-political traditions on human rights.<sup>16</sup> Pope Benedict XVI says, "as one created in the image of God, each individual human being has the dignity of a human person."<sup>17</sup> Nevertheless, we cannot ignore the fact that long-standing secular traditions have had notable influence on the Church's own evolving view on human rights.<sup>18</sup>

Human rights are those basic claims and necessities without which people cannot live in dignity as human beings. According to John Paul II, the dignity of the human person is the basis of all human rights. It is only when human dignity is respected that other channels of rights such as freedom, justice and peace open up, and these allow for the full development of human potential of every human being.<sup>19</sup> The recognition of human rights is historically rooted in the human struggle for freedom and equality. This is evident in the English Habeas Corpus Act (1679), the English Bill of Rights (1689), the American Declaration of Independence (1776), the Declaration of the Rights of Man and Citizen of the French Revolution (1789), The Bill of Rights of the United States Constitution (1791), and the Universal Declaration of Human Rights of the United Nations (1948)<sup>20</sup> – these are but a few examples of attempts at enumeration of human

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<sup>16</sup> JOHN PAUL II, 1998 World Day of Peace Message: "Respect for Human Rights: The Secret of True Peace," in *Origins*, 28 (Dec. 24, 1998), p. 489.

<sup>17</sup> BENEDICT XVI, 2007 World Day of Peace Message, p. 438.

<sup>18</sup> See D. HOLLENBACH, *Claims in Conflict: Retrieving and Renewing the Catholic Human Rights Tradition*, New York, Paulist Press, 1979, pp. 43-44.

<sup>19</sup> See JOHN PAUL II, Address to the Governor-General (Government, Parliament and Diplomatic Corps) of Canada, 19 September 1984, in *ORE*, 8 October 1984, p. 21.

<sup>20</sup> JACQUES, "Les droits et devoirs," pp. 454-456. For more details on these documents, see W. LAQUEUR and B. BROWN (eds.), *The Human Rights Reader*, Philadelphia, Temple University Press, 1979,

rights in history. Human rights are now concretely embodied in international and constitutional laws, which uphold the dignity of human persons and human rights.<sup>21</sup>

History tells us that, although different in their approaches, all human rights traditions seem to have one goal in common, that is, effective recognition of the dignity of the human person, the equality of all human beings, the alleviation of poverty and eradication of class differences in all aspects of life. We will very briefly explore here the influence that three main secular traditions, namely Liberal Democracy, Marxist Socialism, and the United Nations' Charter of Human Rights, have had on the approaches taken by most nations of the world to the recognition and promotion of human rights.

### **1.1.1 – Liberal Democracy**

The American Constitution stands as the representative of liberal democracy in the world. The rights to freedom of religion, speech and assembly, the right to own private property, and the right to due process, are the distinctive hallmarks of liberal democracy.<sup>22</sup> The rights set forth in this theory are based on the freedom of the individual person. Individual freedom is the foundation of liberal democracy.<sup>23</sup>

According to J. Rawls, the proponent of the theory of liberal democracy, all rights flow from the natural right to liberty, which is the moral foundation that undergirds the

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pp. 104-201.

<sup>21</sup> T. MCCARRICK, "Fifty Years After Universal Declaration's Adoption," in *Origins*, 28 (1998), p. 484.

<sup>22</sup> J. RAWLS, *Political Liberalism*, New York, Columbia University Press, 1993, pp. 4-6, 134-140 and 308-309.

<sup>23</sup> J. RAWLS, *A Theory of Justice*, Cambridge, MA, The Belknap Press of Harvard University Press, 1972, pp. 108-114.

political theory espoused by it.<sup>24</sup> But those opposed to this theory argue that it fosters unbridled greed of individuals to amass wealth, leading to cut-throat competition, which destroys the moral foundation of the dignity of the human person.<sup>25</sup> But J. Loche and J. Rawls, the defenders of democratic liberalism, contend that the basic principle enshrined in this theory is that the increased productivity stimulated by competition will and should benefit not only the wealthy but also the poor.<sup>26</sup> According to Rawls, the very concept of justice calls for equal distribution of primary goods to people at all levels of the society in such a way that even the least advanced benefit from it. The pluralistic society, in which we live today, with its various cultures and religions, cannot survive and progress without such freedoms.<sup>27</sup>

### 1.1.2 – Marxist Socialism

Liberal democracy is vigorously opposed by Marxist socialism, which does not differentiate political freedom from social, economic and cultural freedom.<sup>28</sup> Social right and economic right, especially “the right to work”<sup>29</sup> and “the right to a just wage”<sup>30</sup> constitute the basic foundation of the Marxist-Socialist theory of rights. The

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<sup>24</sup> Ibid., pp. 201-205.

<sup>25</sup> See PIUS XI, *Quadragesimo anno*, no. 47; JOHN XXIII, *Mater et magistra*, no. 36; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 52 and 89.

<sup>26</sup> RAWLS, *A Theory of Justice*, p. 303; also see J.W. CHAPMAN, “Natural Rights and Justice in Liberalism,” in D.D. RAPHAEL (ed.), *Political Theory and the Rights of Man*, Bloomington, Indiana University Press, 1967, pp. 1-15.

<sup>27</sup> RAWLS, *A Theory of Justice*, pp. 303-310.

<sup>28</sup> K. MARX, *Capital: The Communist Manifesto and Other Writings*, With an essay on Marxism by V.I. LENIN, New York, The Modern Library, 1959, pp. x-xvi.

<sup>29</sup> See K. MARX, *Frühe Schriften*, Stuttgart, H.J. Lieber und P. Furth, Cotta, 1962, pp. 510-511.

<sup>30</sup> See R. C. TUCKER (ed.), *The Marx-Engels Reader*, New York, W.W. Norton & Company, Inc., 1972, pp. 184-190.

inseparability of personal freedom and social solidarity is the cornerstone of Socialist philosophy.<sup>31</sup> According to the Communist Manifesto, a truly communist society provides for the full development of every person, as its ultimate goal is the full development of all its members.<sup>32</sup> The abolition of class distinctions in society based on economic status is the ultimate goal of this philosophy, wherein everyone will be equal.<sup>33</sup> What has happened since the collapse of the Soviet empire and the dismantling of communist states around the world clearly proves the fallacy and the practical inefficacy of such a philosophy, which essentially promotes the advantages of the communist state at the expense of the inherent dignity of every human being.

### 1.1.3 – The United Nations and Human Rights

The 1948 Universal Declaration of Human Rights, which was approved by the General Assembly of the United Nations, in articles 55<sup>34</sup> and 56,<sup>35</sup> was an attempt to incorporate the salient features of the above two traditions<sup>36</sup> into a charter of human

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<sup>31</sup> D. RYAZANOFF (ed.), *The Communist Manifesto of Karl Marx and Friedrich Engels*, New York, Russel & Russel, 1963, pp. 63-66.

<sup>32</sup> K. MARX and F. ENGELS, *The Communist Manifesto*, in LEWIS S. FEUER (ed.), *Basic Writings on Politics and Philosophy: Karl Marx and Friedrich Engels*, Garden City, NY, Doubleday, Anchor Books, 1959, pp. 20-29.

<sup>33</sup> MARX, *Capital: The Communist Manifesto*, pp. 351-353.

<sup>34</sup> Article 55: “With a view to the creation of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a) higher standards of living, full employment, and conditions of economic and social progress and development; b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

<sup>35</sup> Article 56: “All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purpose set forth in Article 55.”

<sup>36</sup> Articles 3-21 list the rights of the Liberal Tradition such as life, liberty, security of person, property, association and freedom from arbitrary arrest. Articles 22-27 list the rights that are unique to the Soviet Marxist theory such as the right to social security work, just wages, education, etc. See I. BROWNLIE

rights. Article 1 explains the foundations of rights proclaimed in the charter: all human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of mutual respect.<sup>37</sup> The Universal Declaration of Human Rights authentically defines those human rights and fundamental freedoms which the member states of the United Nations undertake to respect and observe. The charter is one of the greatest achievements of the international community after two world wars in relation to the protection of the freedom and the dignity of human beings.<sup>38</sup>

D. Hollenbach states that the countries dominated either by the tradition of liberal democracy or by the socialist theory have failed to commit themselves fully to the protection of human rights as agreed upon by the UN Covenants as is evident from gross violations of human rights on both sides. Therefore, in their stead, various non-governmental organisations have attempted to present more comprehensive approaches to the formulation of human rights. Among these organisations, the Catholic Church has made a significant contribution to the promotion of human rights.<sup>39</sup> In the following section we will briefly analyse this contribution in light of the magisterial pronouncements and the canonical norms on human rights and the dignity of human beings.

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(ed.), *Basic Documents on Human Rights*, 2<sup>nd</sup> ed., Oxford, Clarendon Press, 1981, pp. 23-27.

<sup>37</sup> The contributions of the social doctrines of the Church defined in *Rerum novarum* (1891) and *Quadragesimo anno* (1931) to the Universal Declaration of Human Rights were far from insignificant. See M.A. GLENDON, *Catholicism and Human Rights*, Dayton, University of Dayton, 2001, p. 12-14.

<sup>38</sup> JOHN PAUL II, Message to the Secretary-General of the United Nations, 1 March 1993, in *ORE*, 17 March 1993, p. 2.

<sup>39</sup> HOLLENBACH, *Claims in Conflict*, p. 34.

#### 1.1.4 – The Church’s Doctrine on Human Dignity and Human Rights

As stated earlier, the Church’s teaching on human rights differs fundamentally from the secular human rights traditions in the sense that the Church draws its inspiration from the Word of God. The theological foundation of human rights drawn from divine revelation concerning the origin and nature of human beings has evolved progressively from Pope Leo XIII’s encyclical *Rerum novarum* of 15 May 1891.<sup>40</sup> Since then, several papal encyclicals, conciliar and post conciliar documents and the 1983 Code of Canon Law have continued to affirm and promote human rights. This is principally due to the theology the Church has adhered to concerning the creation of human beings in the image of God (Gen. 1: 27), Christ’s mandate of love of neighbour (Jn 13: 34), his redemptive sacrifice on the cross for all people, the indwelling of the Holy Spirit (I Cor 3: 16), and the dignity and sacredness of the human person, the characteristic values of God’s kingdom. Based on this biblical foundation, the Church teaches that the fundamental human rights and duties are universal and inviolable, and therefore, altogether inalienable.<sup>41</sup>

At the heart of the human rights theory espoused by the Church are God’s deeds of Incarnation and Redemption, the definitive expression of God’s ultimate love for humanity (Jn 3: 16). One can see in the papal encyclicals of the past hundred years the focus on the Church’s respect for human dignity and promotion of human rights arising

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<sup>40</sup> PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, no. 87, Libreria editrice Vaticana, Ottawa, Canadian Conference of Catholic Bishops, 2005, p. 39.

<sup>41</sup> JOHN XXIII, *Pacem in terris*, nn. 9-10; English trans. in O’BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 132.

from the Gospel.<sup>42</sup> Though the reasons for the papal pronouncements on human rights are to be found in their historical contexts, their theological basis is always the Incarnation and Redemption. This teaching of the Church has an “inevitable impact on canon law, since the Church’s legal apparatus must recognise, guarantee, and foster the fundamental rights of the faithful in the same manner in which the social teachings of the Church have recognised the fundamental rights of man.”<sup>43</sup> Bishop J.F. Kinney says that for “the Church in her own juridic order to ignore rights which she fostered in other orders” would be tantamount to hypocrisy.<sup>44</sup>

Pope Leo XIII’s teaching on specific rights, such as adequate remuneration for one’s labour, the right to cherish and retain one’s labour in the form of private property, the right to fulfil the basic needs, such as adequate food, clothing and shelter (*RN* no. 3), right to own private property<sup>45</sup> and the workers’ right to form private associations (*RN* no. 49), laid the foundation for the modern Catholic theory of human rights.

In his landmark encyclical *Quadragesimo anno* of 15 May 1931,<sup>46</sup> Pius XI stressed the primacy of the human person against the possible dangers it faced from both

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<sup>42</sup> JOHN PAUL II, Encyclical letter *On the Hundredth Anniversary of Rerum novarum, Centesimus annus*, no. 5, 1 May 1991, in *AAS*, 83 (1991), pp. 793-867; English trans. in O’BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 443.

<sup>43</sup> See K.E. MCKENNA, *The Right of Confidentiality and Diocesan Clergy Personnel Records*, Ottawa, Saint Paul University, 1990, p. 17.

<sup>44</sup> J.F. KINNEY, *The Juridic Condition of the People of God: Their Fundamental Rights and Obligations in the Church*, Roma, Officium Libri Catholici, 1972, p. 32-34.

<sup>45</sup> For the first time ever, the *magisterium* emphasized that a human being has the right to private property. “E questo non può essere altro che il diritto di proprietà stabile; né soltanto proprietà di quelle cose che si consumano usandole, ma anche di quelle che restano dopo l’uso che ne viene fatto” (LEO XIII, *Rerum novarum*, no. 5; English trans. in O’BRIEN and SHANNON [eds.], *Catholic Social Thought*, p. 16).

<sup>46</sup> PIUS XI, Encyclical letter on the Reconstruction of the Social Order, *Quadragesimo anno* (=QA), 15 May 1931, in *AAS*, 23 (1931), pp. 177-128; English trans. in O’BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 40-79.

capitalism and communism. Both the destructiveness of unbridled competition and greed of capitalism (*QA* no. 14) and the negation of personal freedom and dignity of the human person (*QA* no. 10) by Marxist socialism were denounced by Pius XI. His teaching pointed to a synthesis of both “right to labour” and “right to individual freedom”, which need each other to assert the primacy and the dignity of the human person.<sup>47</sup>

The encyclical *Pacem in terris* of John XXIII is one of the greatest papal documents in history; it was addressed not only to the members of the Catholic Church but to all humanity.<sup>48</sup> In this encyclical, the Pope develops the theme that human dignity is internally conditioned by human interdependence (*PT* no. 34), an interdependence which exists both within states and across them. Human dignity is closely linked to the protection of the common good of all persons. The common good is not a summation of the goods of individual members in society, but a set of social conditions which facilitate the realisation of personal good by individuals. In another encyclical, *Mater et magistra*,<sup>49</sup> John XXIII gave a new definition of human dignity within the context of socialization and structural relationships.

Though most of the rights identified and explained by John XXIII in *Pacem et terris* are not new, some are a breakthrough in magisterial teaching. Among the many rights dealt within this document is the right to good reputation and the right to freedom

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<sup>47</sup> M. MCGOWAN, “Human Rights and Canon Law,” an unpublished paper presented at the Annual Conference of the Canadian Canon Law Society, 18-21 October 2004, Charlottetown, PEI, p. 93.

<sup>48</sup> JOHN XXIII, Encyclical letter on Establishing Universal Peace in Truth, Justice, Charity and Liberty, *Pacem in terris* (=PT), 11 April 1963, in *AAS*, 55 (1963), pp. 257-304; English trans. in P. RIGA, *Peace on Earth: A Commentary on Pope John's Encyclical*, New York, Herder and Herder, 1964, pp. 197-249.

<sup>49</sup> JOHN XXIII, Encyclical letter on Christianity and Social Progress, *Mater et magistra*, 15 May 1961, in *AAS*, 53 (1961), pp. 401-464; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 81-127.

in search of truth (*PT* no. 12), and to defend one's fundamental human rights in a legitimate legal forum (*PT* no. 27).<sup>50</sup>

Every human being with intelligence and freewill is endowed with certain inalienable rights and corresponding obligations (*PT* no. 9). All human rights traditions acknowledge this fundamental principle. But not all traditions accord equal importance to those rights. For example, Marxist Socialism would view the good of an individual as something that is subject to the good of the political community, that is, the State, while liberal democracy makes the individual the measure of all things. The Church's own position on this fundamental issue is that there is an intrinsic relationship between these two goods, the good of the individual and the common good.

We may summarize the Church's teaching on fundamental human rights as follows: every human being is endowed with certain God-given fundamental rights. But these rights are not absolute. Their exercise is contingent upon the common good.<sup>51</sup> In other words, the community, or the state, can only moderate the individual's rights and obligations. This moderation, however, must be carried out within the bounds of just laws. While the secular traditions claim that human rights are guaranteed by positive law, the Church holds that the natural freedom, dignity and responsibilities of human beings are sacred, and humans are endowed with them by God, the creator, and not by the state.

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<sup>50</sup> The basic rights noted in this document are the natural right to the basic necessities of life such as food, clothing and shelter (*PT* no. 11), the right to freedom of expression (*PT* no. 12), the right to medical care (*PT* no. 11), the right to culture and education (*PT* no. 13), the right to association and to the free expression of one's faith (*PT* no. 14), the right to choose freely one's state of life (*PT* nos. 15-17), the right to work (*PT* no. 19), the right to organise and to form workers' unions and hold meetings (*PT* nos. 23,24), the right to own private property (*PT* no. 21), the rights of association and freedom of assembly (*PT* nos. 23-24), the right to immigrate and emigrate (*PT* no. 25) and to defend one's human rights in a legitimate legal forum (*PT* no. 27).

<sup>51</sup> See JOHN XXIII, *Mater et magistra*, no. 37; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 89.

Therefore, “the Church vigorously defends human rights, because she considers them a necessary part of the recognition that must be given to the dignity of the human person created in the image of God and redeemed by Christ.”<sup>52</sup>

## 1.2 – SECOND VATICAN COUNCIL ON HUMAN RIGHTS

The Catholic human rights theory that was shaped by the teachings of the Church reached its culmination at the Second Vatican Council. The Pastoral Constitution on the Church in the Modern World *Gaudium et spes* (GS)<sup>53</sup> spoke eloquently on human rights, equality, freedom and dignity of the human person. This important document is the foundation of the current Catholic rights theory. The Declaration on Religious Liberty *Dignitatis humanae* (DH)<sup>54</sup> is the watershed document on human dignity and freedom; it concerns one particular and important human right, that is, religious liberty. In our exploration of the conciliar contribution to the promotion of rights and dignity of the human person, these two documents will be of major interest to us.

### 1.2.1 – *Gaudium et spes*: Church’s Duty to Protect Human Rights

This conciliar Constitution is a powerful document, because it represents the opinion of the overwhelming majority of the world’s bishops. The Church’s openness to the contemporary situation and its willingness to learn from the modern world (GS 2) is the basic characteristic of this document.

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<sup>52</sup> JOHN PAUL II, Address to the European Commission and the European Court of Human Rights, 8 October 1988, in *AAS*, 81 (1989), pp. 683-686, here at p. 685.

<sup>53</sup> SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes* (= GS), 7 December 1965, in *AAS*, 58 (1966), pp. 1025-1120; English trans. in A.P. FLANNERY (gen. ed.), *Vatican Council II: The Conciliar and Post Conciliar Documents* (= FLANNERY 1), Costello Publishing Company, Northport, New York, Dominican Publications, Dublin, Ireland, 1998, pp. 903-1001. Unless otherwise indicated, the English translation of all Vatican II Documents is from this source.

<sup>54</sup> SECOND VATICAN COUNCIL, Declaration on Religious Liberty, *Dignitatis humanae* (= DH), 7 December 1965, in *AAS*, 58 (1966), pp. 929-946; English trans. in I, pp. 799-812.

The Constitution presents an anthropology which strengthens the foundation of rights and dignity of each human being by saying that “through his very bodily condition he sums up in himself the elements of the material world.”<sup>55</sup> Therefore, the total well-being of the human person necessarily includes also the material needs of every human being. Looking from this viewpoint, a human being is more than just “a peck of nature” or a “nameless unit” in the world, but the image of the unseen God. In the deep “recesses of his being,” every human being recognises him/her self as spiritual and immortal, and not just a product of merely physical or social causes. The dignity of the human being lies in one’s response to God’s call, which echoes in the inner depths of human soul; therefore, the dignity of a human being lies in his/her freedom to choose.<sup>56</sup>

Quoting the encyclicals *Mater et Magistra* and *Pacem in terris*, *GS* (no. 26) teaches that the rights of human beings encompass all the social, spiritual, economical, cultural and political needs of human living:

There is a growing awareness of the sublime dignity of the human person, who stands above all things and whose rights and duties are universal and inviolable. He ought, therefore, to have ready access to all that is necessary for living a genuinely human life: for example, food, clothing, housing, the right freely to choose his state of life and set up a family, the right to education, work, to his good name, to respect, to proper knowledge, the right to act according to the dictates of conscience and to safeguard his privacy, and rightful freedom even in matters of religion.<sup>57</sup>

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<sup>55</sup> *GS* no. 14; FLANNERY 1, p. 914.

<sup>56</sup> *GS* no. 17; FLANNERY 1, p. 917.

<sup>57</sup> “Simul vero conscientia crescit eximiae dignitatis quae personae humanae competit, cum ipsa rebus omnibus praestet, et eius iura officiaque universalis sint atque inviolabilia. Oportet ergo ut ea omnia homini pervia reddantur, quibus ad vitam vere humanam gerendam indiget, ut sunt victus, vestitus, habitatio, ius ad statum vitae libere eligendum et ad familiam condendam, ad educationem, ad laborem, ad bonam famam, ad reverentiam, ad congruam informationem, ad agendum iuxta rectam suae conscientiae normam, ad vitae privatae protectionem atque ad iustam libertatem etiam in re religiosa” (*AAS*, 58 [1966], p. 1046; FLANNERY I, p. 927).

This Conciliar statement presents in a capsule form, the fundamental rights of every human being. The entire human race is involved in the protection of the human rights and obligations because of the innate equality of all human beings. Consequently it allows no discrimination among human beings on the basis of any ground. This is expressed in *GS* no. 29 as follows:

All men are endowed with a rational soul and are created in God's image; they have the same nature and origin and, being redeemed by Christ, they enjoy the same divine calling and destiny; there is here a basic equality between all men and it must be given ever greater recognition [...]. It is regrettable that these basic personal rights are not yet being respected everywhere, as is the case with women who are denied the chance freely to choose a husband, or a state of life, or to have access to the same educational and cultural benefits as are available to men.<sup>58</sup>

The basic conviction that runs through *GS* is the duty of the Church to protect rights<sup>59</sup> whenever the dignity and respect of human beings (*GS* nn. 12, 15, 16) are violated by any system whether political, social, or economic (*GS* no. 29). Cautioning against the modern tendency toward anthropocentrism,<sup>60</sup> it affirms that the modern man is in a process of fuller personality development and of a growing discovery and

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<sup>58</sup> "Cum omnes homines, anima rationali pollentes et ad imaginem Dei creati, eadem naturam eandemque originem habeant, cumque a Christo redempti, eadem vocatione et destinatione divina fruuntur, fundamentalis aequalitas inter omnes magis magisque agnoscenda est [...] vere enim dolendum est iura illa fundamentalia personae adhuc non ubique sarta tecta servari. Ut si mulieri denegetur facultas libere sponsum eligendi et vitae statum amplectendi, vel ad parem educationem et culturam quae viro agnoscitur accedendi" (*AAS*, 58 [1966], pp. 1048–1049; FLANNERY I, p. 929).

<sup>59</sup> In *GS* the rights of persons are mentioned at least 30 times, and this shows the Constitution's intent on rights. These rights are expressed in various terms, such as the right of the person (*GS* nn. 29, 42, 59, 73, 75, 76), personal rights (nn. 41, 73), rights of the persons (nn. 52, 68), the right of man (no. 41), the right of men (nn. 29, 41), the rights of all (no. 73), and the rights of the entire human race (no. 26). See KINNEY, *The Juridic Condition of the People of God*, p. 45.

<sup>60</sup> The magisterial teaching against anthropocentrism and crass materialism has been prophetic with respect to the promotion of human rights and dignity. See PIUS XI, Apostolic letter, *Meditantibus nobis*, in *AAS*, 14 (1922), p. 630; Pius X's encyclical on St. Charles Borromeo, *Editae saepe*, in *AAS*, 2 (1910), 357-380, which explains the historical setting of the decline of Reformation principles and the encyclical of Pius XII, *Summi pontificatus* in *AAS*, 31 (1939), 413-453, which analyses the decline of materialism during the Second World War situation.

affirmation of his own rights (*GS* no. 41). This insight of the Church was often expressed in the form of a proposal for a “third way” between socialism and capitalism. Hollenbach says that this middle path of the Church proves to be the effective means for many models such as capitalism, socialism, and Christian democracy (*GS* no. 36) for safeguarding civil and political rights without harming social and economic rights.<sup>61</sup>

According to *GS*, the protection of human rights should journey towards the achievement of interdependence and the common good of all the people (*LG* no. 26). For, the very starting point of *Gaudium et spes* states: “The joy and hope, the grief and anguish of the men of our time, especially of the poor or afflicted in any way, are the joy and hope, the grief and anguish of the followers of Christ as well.”<sup>62</sup> What it implies is that there can be no individual rights of the human person outside the context of the common good (*GS* no. 26).<sup>63</sup> For “by his innermost nature man is a social being; and if he does not enter into relations with others, he can neither live nor develop his gifts.”<sup>64</sup>

The document explicitly mentions the ailments that torment society when the common good is ignored, while the rights of the individuals are glorified. It reads:

The varieties of crime are numerous: all offences against life itself, such as murder, genocide, abortion, euthanasia and wilful suicide; all violations of the integrity of the human person such as mutilation, physical and mental torture, undue psychological pressures; all offences against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation,

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<sup>61</sup> D. HOLLENBACH, “Global Human Rights: An Interpretation of the Contemporary Catholic Understanding,” in A. HENNELLY and J. LANGAN (eds.), *Human Rights in the Americas*, Washington, DC, Georgetown University Press, 1982, p. 19.

<sup>62</sup> *GS* no. 1; FLANNERY I, p. 903.

<sup>63</sup> See JOHN PAUL II, *Sollicitudo rei socialis*, no. 38, in O’ BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 421; JOHN PAUL II, Address to the Diplomatic Corps in Tanzania, 1 September 1991, in *AAS*, 83 (1991), pp. 209-213.

<sup>64</sup> *GS* no. 12; FLANNERY I, p. 913.

slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than free and responsible persons ... they poison civilization; and they debase the perpetrators more than the victims and militate against the honour of the creator.<sup>65</sup>

Thus *GS* recognises a rich dimension of interdependence in the dignity and rights of human persons; we can say that this dimension of dignity and rights is affirmed in a society where the rights of the individual persons and the value of the common good are equally protected and strengthened.<sup>66</sup>

### 1.2.2 – *Dignitatis humanae*: The Individual Conscience and Religious Freedom

The conciliar Declaration on Religious Liberty *Dignitatis humanae* bridged the relationship between Catholic teaching and western constitutional thinking on religious liberty and the Church-State relationship (*DH* no. 15). Like *Gaudium et spes*, this declaration emphasizes the increasing awareness of human dignity and rights of persons. It states that the intention of the Council is to reaffirm the doctrine of recent Popes on the inviolability of rights and the constitutional order of society. According to the document, the ecclesial concern to protect the dignity and freedom of human person relates chiefly to the spiritual values of persons, especially the free practice of religion in society.<sup>67</sup>

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<sup>65</sup> “Quaecumque insuper ipsi vitae adversantur, ut cuiusvis generis homicidia, genocidia, abortus, euthanasia et ipsum voluntarium suicidium; quaecumque humanae personae integritatem violant, ut mutilationes, tormenta corpori mentive inflictas, conatus ipsos animos coërcendi; quaecumque humanam dignitatem offendunt, ut infrahumanae vivendi condiciones, arbitrariae incarcerationes, deportationes, servitus, prostitutio, mercatus mulierum et iuvenum; condiciones quoque laboris ignominiosae, quibus operari et mera quaestus instrumenta, non ut liberae et responsables personae tractantur: haec omnia et alia huiusmodi probra quidem sunt, ac dum civilizationem humanam inficiunt, magis eos inquinant qui sic se gerunt, quam eos qui iniuriam patiuntur et Creatoris honori maxime contradicunt” (*AAS*, 58 [1966], no. 27, p. 1047; *FLANNERY* 1, p. 928).

<sup>66</sup> In order to understand the interrelation between communion and common good, see J. HAMER, *The Church is a Communion*, London, Geoffrey Chapman, 1964; J.H. PROVOST (ed.), *The Church as Communion*, Washington, DC, Canon Law Society of America, 1984.

<sup>67</sup> *DH* no. 1; *FLANNERY* 1, p. 799.

This declaration explains the right to religious freedom in following words:

Freedom of this kind means that all men should be immune from coercion on the part of individuals, social groups and every human power so that, within due limits, nobody is forced to act against his convictions in religious matters in private or in public, alone or in associations with others... that the right to religious freedom is based on the very dignity of the human person as known through the revealed word of God and by reason itself.<sup>68</sup>

The thirst for truth is innate in every human being without distinction of caste, creed, language or race. The search for truth is to be pursued in a manner suited to the dignity and social nature of human person (*DH* no. 3). For this reason, the right of the human person to religious freedom must be given due recognition in the constitutional order of every society so as to make it also a civil right (*DH* no. 2).<sup>69</sup> In reaffirming this teaching, the council proclaimed that “[...] religious freedom must be given effective constitutional protection everywhere and that highest of man’s rights and duties – to lead a religious life with freedom in society – must be respected.”<sup>70</sup>

The fundamental conciliar teaching, which shines forth in the declaration on religious freedom, is the sanctity of the human person in relationship with God which is encountered always within the context of human family. A human being cannot and does not exist and function outside of concrete human community. This necessarily implies

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<sup>68</sup> “Huiusmodi libertas in eo consistit, quod omnes homines debent immunes esse a coërcitione ex parte sive singulorum sive coetuum socialium et cuiusvis potestatis humanae, et ita quidem ut in re religiosa neque aliquis cogatur ad agendum contra suam conscientiam agat privatim et publice, vel solus vel aliis consociatus, intra debitos limites [...]. Insuper declarat ius ad libertatem religiosam esse revera fundatum in ipsa dignitate personae humanae, qualis et verbo Dei revelato et ipsa ratione cognoscitur” (*AAS*, 58 [1966], no. 2, p. 930; *FLANNERY* 1, p. 800).

<sup>69</sup> See JOHN PAUL II, Address to the Diplomatic Corps Accredited to the Holy See, 9 January 1989, in *ORE*, 13 February 1989, p. 3.

<sup>70</sup> *DH* no. 15; *FLANNERY* 1, p. 812; also see JOHN PAUL II, Address to the Diplomatic Corps Accredited to the Holy See, 15 January 1983, in *ORE*, 21 February 1983, p. 8.

that the fundamental rights and obligations of a person are always to be exercised within the context of the common good.

### **1.2.3 – *Presbyterorum ordinis*: Duty to Uphold the Common Good**

The decree on the ministry and life of priests *Presbyterorum ordinis*<sup>71</sup> is primarily concerned with the formation and ministry of priests. However, in the course of discussion on the different aspects of the ministry and life of priests, the council addresses some important issues related to fundamental human rights and common good. The decree stresses the duty of every priest to respect and care for the rights of people entrusted to their pastoral care. They are to defend the dignity of every person as well as the common good of the people, following the Good Shepherd in humility and charity. In a special way they have to commit themselves to the pastoral care of the poor and the weak members of Christ's flock. While emphasising the priest's special solicitude for the sick and the dying (*PO* no. 6), the decree underscores the inherent human dignity of all the Christian faithful.

## **1.3 – POST CONCILIAR TEACHING ON HUMAN RIGHTS**

The human rights tradition of the Church saw further developments in the post-conciliar ecclesial *magisterium*, especially during the period which marked the demise of Communism in Russia and the emergence of independent countries. In several encyclicals and documents Paul VI and John Paul II declared human dignity as the basis for human rights and the fundamental equality of all members of the human family, and

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<sup>71</sup> SECOND VATICAN COUNCIL, Decree on the Ministry and Life of Priest, *Presbyterorum ordinis*, 7 December 1965, in *AAS*, 58 (1966), pp. 991-1024; here at nn. 3-9, pp. 993-1006; English trans. in FLANNERY 1, pp. 863-902.

also as a basis of rights and obligations of Christ's faithful in the Church.<sup>72</sup> What follows is a very brief analysis of the teachings of Paul VI and John Paul II concerning the promotion and advancement of rights in the world and in the Church.

### 1.3.1 – Pope Paul VI

The insights on human dignity and fundamental human rights provided by Vatican II were reiterated and explained further by Pope Paul VI in his encyclical *Populorum progressio* (PP),<sup>73</sup> and in the Apostolic Letter *Octogesima adveniens* (OA),<sup>74</sup> commemorating the 80<sup>th</sup> anniversary of *Rerum novarum*. His writings on the human rights theory are unique and they focus on the development of the people.

Paul VI's vision for the development of the people, in a post war era, consisted in the idea of economic justice which is one of the rights of human beings. He, like his predecessors, stressed the need for an equitable distribution of the world's resources, which ultimately would affirm the dignity and the right of each person.<sup>75</sup>

#### 1.3.1.1 – *Populorum progressio*: The Integral Development of the Human Person

In *Populorum progressio*, human dignity is identified with the concept of “development”. According to this encyclical, a human being has a multifaceted personality. The respect for human dignity is intrinsically connected with the social,

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<sup>72</sup> For an overall examination of the post-conciliar social doctrines of the Church, see PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *Compendium of the Social Doctrine of the Church*, pp. 1-225.

<sup>73</sup> PAUL VI, Encyclical letter on the Development of Peoples, *Populorum progressio*, 26 March 1967, in *AAS*, 59 (1967), pp. 257-299; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 240 - 262.

<sup>74</sup> PAUL VI, Apostolic letter on A Call to Action on the Eightieth Anniversary of *Rerum novarum*, *Octogesima adveniens*, 14 May 1971, in *AAS*, 63 (1971), pp. 401-441; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 265-286.

<sup>75</sup> See O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 238.

cultural, economic, interpersonal, and religious development of every human being (*PP* 17-18). Human dignity is also intrinsically connected to freedom, which is both personal and related to the other. In respecting one's own freedom and that of the other, the Pope says, human dignity is easily enhanced.<sup>76</sup> Moreover, the growth of the person is actualised through the fulfilment of his or her various needs. The encyclical states: "Development cannot be limited to mere economic growth. In order to be authentic, it must be complete: integral that is, it has to promote the good of every man and of the whole man."<sup>77</sup> The identification of an essential link between the material development of a human being and human dignity constitutes the centre piece of this encyclical. Reflecting on this teaching of *Populorum progressio*, Hollenbach states:

Development of persons must simultaneously include progress on the material level and greater realization of the higher values of human existence. Human dignity can only be respected and realized within a society when the essentially moral call to mutual interdependence is heeded. This does not imply that all the desires and freedoms of all people will be realized in an unlimited way in such a society. Rather, *Populorum Progressio* argues that when human dignity is treated with mutual respect, a society, which is *morally developed*, will be realized.<sup>78</sup>

The encyclical also identifies an intrinsic relationship between the rights of the individual and the common good. The dignity of the person is connected with others in a society. There can be "no progress towards complete development without the simultaneous development of all humanity in the spirit of solidarity" (*PP* 43). The solidarity between human beings, nations and brothers and sisters on the level of mutual

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<sup>76</sup> See P. MADRWA, *The Fundamental Individual Rights of the Human Person in the Teachings of Pope Paul VI*, Roma, Pontificia Università Lateranense, 1983, pp. 31-34.

<sup>77</sup> PAUL VI, *PP* no. 14; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 243.

<sup>78</sup> HOLLENBACH, *Claims in Conflict*, p. 82.

understanding and friendship is what will cement the future of human race. Thus the *magisterium* stresses both the development of the individual members and of the collective development of the human community. According to Pope Paul VI, therefore, both are necessary for a balanced view of human development.<sup>79</sup>

### 1.3.1.2 – *Octogesima adveniens*: Human Dignity and Social Justice

In his Apostolic Letter *Octogesima adveniens*, Paul VI reaffirms the conciliar teaching on the dignity of the human person. He links in this letter human dignity with the concept of social justice. Pursuit of justice is a personal responsibility of every Christian and every Christian organisation. It involves personal and communal attestation to the principles of justice (*OA 2*).

According to the synodal document *Justice in the World*,<sup>80</sup> the rights of every person, especially the rights of the poor and the weak should be protected. The document urges the hierarchy and its members to evaluate their lifestyles in light of “the lifestyle of poor Jesus Christ.” Both the hierarchy and the laity should “continually submit their privileges and positions to the test of evangelical witness” to the right and dignity of human beings.<sup>81</sup>

The central teaching of Paul VI on human dignity and human rights, in these documents, emphasises the all-round development of human beings. Only this wholistic development of the peoples, i.e., spiritual, economic, social, cultural etc., can bring about

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<sup>79</sup> PAUL VI, *PP* no. 21; English trans. in O’BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 244.

<sup>80</sup> SYNOD OF BISHOPS, *Convenientes ex universo*, 30 November 1971, in *AAS*, 63 (1971), pp. 923-942; English trans. in D.J. O’BRIEN and T.A. SHANNON (eds.), *Renewing the Earth: Catholic Documents on Peace Justice and Liberation*, New York, Image Books, 1977, pp. 390-408.

<sup>81</sup> *Justice in the World*, nn. 41- 48; English trans. in O’BRIEN and SHANNON (eds.), *Renewing the Earth*, p. 399.

justice, freedom and peace. For the Pope the dignity and rights of persons are intrinsically connected to social justice which should be the concern of all Christians. In promoting social justice in various levels the dignity and rights of persons can be easily safeguarded.

### 1.3.2 – Pope John Paul II

The pastoral ministry of John Paul II was centred on human dignity and human well-being.<sup>82</sup> The pope constantly expressed the Church's concern over the human rights issues in the world. He took great pains to translate into action the teachings of the Second Vatican Council. His encyclicals, letters, addresses and his countless pastoral visits to many countries of the world promote the dignity and the rights of the human person. For example, he was the staunchest supporter of the cause of the workers in his native Poland and was the loudest voice in favour of the rights of the poor on the world stage. Through his encyclical letters *Redemptor hominis*,<sup>83</sup> *Laborem exercens*,<sup>84</sup> and *Sollicitudo rei socialis*,<sup>85</sup> he spelled out the Christian understanding of rights. In all these documents he expounded the theory of the transcendence of human rights and Christian humanism, thus continuing the teaching of his predecessors.

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<sup>82</sup> For a collection of Pope John Paul II's statements and addresses on promotion of human dignity and rights, see A. DUPUY, *Words That Matter: The Holy See in Multilateral Diplomacy: Anthology (1970-2000)*, Vatican City, The Pontifical Council for Justice and Peace, New York, The Path to Peace Foundation, 2003; A. DUPUY, *Pope John Paul II and the Challenges of Papal Diplomacy: Anthology (1978-2003)*, The Pontifical Council for Justice and Peace, New York, The Path to Peace Foundation, 2004.

<sup>83</sup> JOHN PAUL II, Encyclical letter, *Redemptor hominis* (= RH), 4 March 1979, in *AAS*, 71 (1979), pp. 257-324; English trans. Encyclical letter, *Redemptor Hominis of the Supreme Pontiff*, Ottawa, Canadian Conference of Catholic Bishops, 1979.

<sup>84</sup> JOHN PAUL II, Encyclical letter in commemoration of the ninetieth anniversary of *Rerum novarum*, *Laborem exercens* (=LE), 14 September 1981, in *AAS*, 73 (1981), pp. 577-647; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 352-392.

<sup>85</sup> JOHN PAUL II, Encyclical letter in commemoration of the twentieth anniversary of *Populorum progressio*, *Sollicitudo rei socialis* (=SRS), 30 December 1987, in *AAS*, 80 (1987), pp. 513-586; English trans. in O'BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 395-436.

The focus of *Redemptor hominis* is the human dignity based on the doctrines of creation and redemption. In this encyclical, the Pope insists that individuals and communities should “set a rigorous respect” for the moral, spiritual and cultural values on the basis of the dignity of the person. From the Catholic viewpoint, the ultimate source of human rights is one’s relationship with the person of Jesus Christ who redeemed all human beings from their sins and restored the original dignity of all human beings.<sup>86</sup>

Even one’s labour, according to the encyclical *Laborem exercens* of John Paul II, is an expression of human dignity. The Pope stresses in the encyclical that capital cannot be the sole measure of human labour, because through work human beings achieve a deeper realisation of their personhood and affirm their membership in the state.<sup>87</sup>

In *Sollicitudo rei socialis*, John Paul II explores the concern of the Church for authentic human development. The transcendence of human beings, the importance of work, the option for the poor, religious freedom and solidarity based on the dignity of human persons (*SRS* no. 42), are once again identified as the core of the Christian rights theory.

### 1.3.3 – Pope Benedict XVI

In the first encyclical of his pontificate, *Deus caritas est*, Pope Benedict XVI distinguishing accurately the relationship between the commitment to justice and ministry of charity, which belongs respectively to the State and the Church, states: “A just society must be the achievement of politics, not of the Church. Yet the promotion of justice through efforts to bring about openness of mind and will to the demands of the common

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<sup>86</sup> *RH* no. 10; English trans. in Encyclical letter, *Redemptor hominis*, p. 28.

<sup>87</sup> *LE* nn. 24-27; English trans. in O’BRIEN and SHANNON (eds.), *Catholic Social Thought*, pp. 384-390.

good is something which concerns the whole Church.”<sup>88</sup> According to Benedict XVI, the Church, through her charitable work world-wide, should protect the dignity and well-being of human beings living in poverty and suffering.

In our study of pre and post conciliar teaching, we find two basic principles emerging from the Church’s teaching on human dignity with respect to human rights. First, human dignity is the natural foundation of human rights which are to be exercised within the context of legitimate good of the human community. Second, for this reason, human rights are not absolute because the parameters of their exercise are determined by the exigencies of the common good of a society. This is true also of ecclesial rights. These principles have their juridic consequences with respect to the exercise of rights and obligations in the Church.

#### **1.4 – HUMAN RIGHTS IN THE 1983 CODE**

The Church’s teaching on human rights and human dignity is a challenge to its own legal system which should embolden it to recognize and promote human rights within the web of its own communal and social relationships. How credible would the Church be, if its own teaching on the fundamental rights of human beings is devoid of effective juridic expression while decrying constantly the violation of the same rights in the world at large? We believe that it would not be unfair to question the authenticity of the Church’s teaching, if the human rights of its own members were to lack appropriate provision for their protection in its legislation. However, as we will explore in this section, the 1983 Code of Canon Law contains important norms, which are meant to recognize and safeguard the subjective rights of the Christian faithful and the common

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<sup>88</sup> BENEDICT XVI, Encyclical letter, *Deus caritas est*, 25 December 2005; English trans. in *Origins*, 35 (2 February 2006), pp. 541-556, here at p. 551.

good of the people of God. In this section, therefore, we will briefly analyze the 1983 Code's contribution to the Catholic rights theory, and see how this theory can advance a just and equitable evolution of due process in the Church's legal system.

#### 1.4.1 – Fundamental Principles Guiding the Revision of the Code

There is no doubt that the Second Vatican Council laid a solid theological and pastoral foundation for the revision of the Church's legal system. The Pontifical Commission for the Revision of the Code of Canon Law was entrusted with the task of drafting a Code that would reflect the "*novus habitus mentis*," born of the conciliar teaching.<sup>89</sup> The mind of Pope Paul VI with respect to the revision of the Code of Canon Law was clear: he wanted the Code to be faithful to the Gospel of Christ and to translate the *communio* ecclesiology of Vatican II into appropriate juridic language.<sup>90</sup> The ten fundamental principles approved by the first General Synod of Bishops, 1967, were drafted precisely to guide the revision of the Code in light of the conciliar teaching. Important among these are the first, the sixth and the seventh principles, which stress the need to define rights and obligations of persons in relation to the community; to make the rights in the Church real; and to provide appropriate legal structures and processes for their defence.<sup>91</sup> The first principle stipulates that the Code should be a juridic document:

In bringing the law up-to-date, the juridical character of the new Code, demanded by the juridical nature of the Church, should be preserved. For

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<sup>89</sup> See PAUL VI, Address to the Members of the Pontifical Commission for the Revision of the Code of Canon Law, 20 November 1965, in *Communicationes*, 1 (1969), p. 41; English trans. in *The Jurist*, 26 (1966), p. 39.

<sup>90</sup> See J. CANOSA, "Considerazioni sull'ordine sistematico del Codice latino a trenta anni dalla formulazione dei 'Principia quae Codicis iuris canonici recognitionem dirigant,'" in J. CANOSA (ed.), *I principi per la revisione del Codice di diritto canonico: la ricezione giuridica del Concilio Vaticano II*, Milano, A. Guiffrè, 2000, pp. 724-725.

<sup>91</sup> See J.H. PROVOST, "Ecclesial Rights," in *CLSA Proceedings*, 44 (1982), p. 41.

this reason, it rests with the Code to present the rules in such a manner that by practising the Christian life, the faithful can participate in the blessings offered to them by the Church, and which lead to eternal salvation. For this reason, the Code must specify and preserve the rights and duties of each person towards others and towards the ecclesial society as they pertain to divine worship and the salvation of souls.<sup>92</sup>

As expressed in the first principle, one of the principal goals of the Code is to specify the obligations and rights of all the Christian faithful and to determine the ways and means whereby they can be effectively protected and preserved.<sup>93</sup> Because rights in the Church are not mere claims as in civil society, but are the “recognition of the action of Christ taking place among those in ecclesial communion,”<sup>94</sup> the Church must blend the nature of ecclesial rights with the final goal of its mission, which is the salvation of all people, without losing their juridical character.

In the sixth principle, the Code Commission affirms the fundamental equality of all the Christian faithful and insists on having their rights and duties clearly codified in concrete legal norms in order to protect and safeguard them from any capricious and arbitrary use of power:

By reason of the fundamental equality of all the faithful and the diversity of offices and functions based on the hierarchical order of the church, it is fitting that the rights of persons be correctly defined and protected; this brings with it the result that the exercise of power appears more clearly to

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<sup>92</sup> “In renovando iure indoles iuridica novi Codicis, quam postulat ipsa natura socialis Ecclesiae, omnino retinenda est. Quare Codicis est normas praebere ut christifideles in vita chirstiana degenda bonorum ab Ecclesia oblatores participes fiant, quae eos ad salutem aeternam ducant. Ideoque hunc ad finem Codex iura et obligationes uniuscuiusque erga alios et erga societatem ecclesiasticam definire atque tueri debet, quatenus ad Dei cultum et animarum salutem pertineant” (E. CAPARROS, M. THÉRIAULT and J. THORN [eds.], *Code of Canon Law Annotated* [= *Code of Canon Law Annotated 2004*], prepared under the responsibility of the Instituto Martín de Azpilcueta, 2<sup>nd</sup> ed. rev. and updated of the 6<sup>th</sup> Spanish language edition, E. CAPARROS et al. [eds.], Montréal, Wilson & Lafleur Limitée, 2004, p. 16; English trans. in *ibid.*, p. 17); also see *Communicationes*, 1 (1969), p. 79.

<sup>93</sup> See J. LLOBELL, “Il sistema giudiziario canonico di tutela dei diritti. Riflessioni sull’attuazione dei principi 6° e 7° approvati dal sinodo del 1967,” in CANOSA (ed.), *I principi per la revisione*, p. 502.

<sup>94</sup> See PROVOST, “Promoting and Protecting the Rights of Christians,” p. 293.

be one of service, that its use is better established and that abuses are eliminated.<sup>95</sup>

According to Llobell, the sixth principle includes two major areas of rights: first that the faithful can vindicate their rights either administratively before a diocesan bishop or they can introduce a case of a contentious or penal nature and, secondly, that the code clearly demarcate and define the role and duty of persons exercising judicial power and of the judicial system (cc. 1423-1439) in adjudicating cases. For example, cases of a penal nature involving clerical delicts should be tried by a collegiate tribunal and specific offices of the tribunal should be clerics.<sup>96</sup>

The seventh principle states that in order to protect the subjective rights of persons in the Church, great attention should be given to the establishment of appropriate structures and effective procedures. This principle reads:

In order that these objectives are suitably put into practice, it is necessary that particular attention be given to regulating a procedure which protects subjective rights. For this reason, in revising the Code attention must be given to that which, to date, has been lacking in this domain, namely administrative recourse and the administration of justice; to this end the various functions of ecclesiastical power (the legislative, administrative and judicial power) must be clearly distinguished and the organs which are to exercise a given function must be adequately defined.<sup>97</sup>

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<sup>95</sup> “Propter fundamentalem aequalitatem omnium christifidelium et propter diversitatem officiorum et munerum, in ipso ordine hierarchico Ecclesiae fundatam, expedit ut iura personarum apte definiantur atque in tuto ponantur. Quod efficit ut exercitium potestatis clarius appareat veluti servitium, magis eius usus firmetur, et abusus removeantur” (*Code of Canon Law Annotated 2004*, p. 18; English trans. in *ibid.*, p. 19); also see *Communicationes*, 1 [1969], p. 82.

<sup>96</sup> LLOBELL, “Il sistema giudiziario canonico di tutela dei diritti,” pp. 504-519.

<sup>97</sup> “Quae ut apte in praxim deducantur, necesse est ut peculiaris cura tribuatur ordinandae procedurae, quae ad iura subiectiva tuenda spectat. In novando igitur iure ad ea attendatur quae hac in re hucusque magnopere desiderabantur, scilicet ad recursus administrativos et administrationem iustitiae. Ad haec obtinenda, necesse est ut varia potestatis ecclesiasticae munera clare distinguantur, videlicet munus legislativum, administrativum et iudiciale, atque apte definiatur a quibusdam organis singula munera exercenda sint” (*Code of Canon Law Annotated 2004*, p. 18; English trans. in *ibid.*, p. 19); also see *Communicationes*, 1 (1969), p. 83.

It is not enough to say that adequate provision has been made in the Code for safeguarding human rights, but there must be concrete juridic mechanisms in place for such a protection of rights of both superiors and subjects alike. Therefore, if one thinks that his or her rights have been violated in the first instance (e.g., marriage nullity cases), he or she should be able to appeal to a higher instance. Similarly persons grieved by the administrative acts of a superior should have the right to place hierarchic recourse.<sup>98</sup> Moreover, this principle envisioned the establishment of administrative tribunals in each diocese for the protection of such rights and the promotion of justice.<sup>99</sup>

#### **1.4.2 – Rights in Light of *Lex Ecclesiae fundamentalis***

On 2 November 1965, Pope Paul VI instructed the consulters of the Code Commission to draft a schema on the fundamental law outlining constitutional principles that would provide a common basis for both Codes of the Latin and of the Eastern Churches.<sup>100</sup> The *Lex Ecclesiae fundamentalis* (*LEF*), as it developed in different drafts, was a response to that papal instruction. Several identical canons on the fundamental rights and obligations of the Christian faithful also appeared in the schemata on *De populo Dei* and *LEF*. But when the final decision was made just before the 1983 Code was promulgated not to include a separate book entitled *Lex Ecclesiae fundamentalis*, most of the principal norms on fundamental rights and obligations of the Christian

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<sup>98</sup> LLOBELL, "Il sistema giudiziario canonico di tutela dei diritti," pp. 524- 546.

<sup>99</sup> For a committee's report on the administrative tribunal based on cc. 149, §2 and 1400, §2, see CLSA COMMITTEE ON PROCEDURES FOR THE PROTECTION OF RIGHTS OF PERSONS IN THE CHURCH, *Protection of Rights of Persons in the Church: Revised Report of the Canon Law Society of America on the Subject of Due Process*, Washington, DC, Canon Law Society of America, 1991, pp. 23-26; T.J. PAPROCKI, *Vindication and Defense of the Rights of the Christian Faithful Through Administrative Recourse in the Local Church*, Romae, Pontificia Universitas Gregoriana, Facultas Iuris Canonici, 1991, pp. 51-60.

<sup>100</sup> See *AAS*, 57 (1965), p. 985. For the developments of the texts of *LEF*, see V. G. D'SOUZA, *The Juridic Condition and Status of Minors According to the Code of Canon Law*, Ottawa, Saint Paul University, 1994, pp. 33-35; CORIDEN, "A Challenge: Make the Rights Real," pp. 4-6.

faithful became an integral part of the present Code.<sup>101</sup> The charter of obligations and rights, which found its way into in the 1983 Code, teaches us that the right of one person is to be seen in correlation with the obligation of another. Therefore, the ministry of justice in the Church cannot overlook or minimize either the rights of an individual or the interest of the community (society) in question.

### 1.4.3 – Promotion of Rights in the 1983 Code

The present Code contains several lists of obligations and rights of different categories of Christian faithful in the Church. The fundamental obligations and rights common to all Christian faithful, whether they be clerical, religious or lay, are the first to be listed in cc. 208-223. Then there are other sets of obligations and rights proper to laity (cc. 224-231), proper to clerics (cc. 273-289) and to religious (cc. 662-672). The obligations and rights mentioned in cc. 208-223 are common to all the Christian faithful by virtue of natural law and valid Baptism (c. 96). Some view these obligations and rights as fundamental or constitutional,<sup>102</sup> but according to Cardinal Castillo Lara, a doctrinal consensus is lacking on their nature, *i.e.*, whether or not they are fundamental and primary in the Church.<sup>103</sup>

Cardinal Castillo Lara, who was very closely involved in the final stages of the revision of the Code, explains that the basic attitude of the faithful, who by Baptism are incorporated into the mystical body of Christ, is not that of vindicating rights, but of

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<sup>101</sup> See *Communicationes*, 12 (1980), pp. 79 - 91; see also PROVOST, "Ecclesial Rights," p. 53; Castillo Lara is of the opinion that because the *LEF* was deficient on some doctrinal issues from an ecumenical point of view, Pope John Paul II decided not to promulgate it as a separate book. See R.J. CASTILLO LARA, "Some General Reflections on the Rights and Duties of the Christian Faithful," in *StC*, 20 (1986), p. 12.

<sup>102</sup> See, for example, CORIDEN, "A Challenge: Make the Rights Real," pp. 1-3.

<sup>103</sup> CASTILLO LARA, "Some General Reflections on the Rights," p. 16.

living in communion with all the members of the faithful. Therefore, though the rights mentioned in cc. 208-223 are important, “it is difficult to establish that they would be the most important element of the juridic system. Furthermore, I do not think that they could be said to be the foundation of other rights of the faithful.”<sup>104</sup> He adds that in the section, *De omnium christifidelium obligationibus et iuribus*, “all the other elements and the constituent factors which are necessary to provide a complete juridical situation” of the Christian faithful are lacking and therefore these rights cannot be considered constitutional for all the rights identified in the Code.<sup>105</sup> Then, why are these obligations and rights placed at the beginning of Book II of the Code? Castillo Lara answers that these rights are placed there for a pragmatic reason, and not for the purpose of granting them a constitutional status.<sup>106</sup>

J.H. Provost explains that the rights in the Church are of a different nature. He maintains that the Church, because it is a divine reality, is antecedent to the individual. Therefore, “attempting to place the rights of the individuals as central to the structuring of the Church would in effect result in a major shift in what is considered constitutional for the Church – the word and the sacraments. From another perspective, the nature of the Church as communion and mission are not based on the rights of individuals,” but on the divine mystery.<sup>107</sup> Provost argues, however, that the free will of the individual to be in

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<sup>104</sup> Ibid., p. 17.

<sup>105</sup> Ibid., p. 18.

<sup>106</sup> Ibid., pp. 20-21.

<sup>107</sup> PROVOST, “Promoting and Protecting the Rights of Christians,” p. 291.

communion with the Church, expressed at the time of baptism (c. 96), can be regarded as a claim of the faithful towards their “duties and rights” in the Church.<sup>108</sup>

On the basis of the sources from which the rights emanate, rights in the Church may be grouped into six categories: a) natural/human rights, which have their source in human dignity (cc. 215, 218, 219, 220, 221); b) ecclesial rights, which derive from valid baptism (cc. 210, 211, 213, 216, 217); c) ecclesiastical rights, which rights are acquired in virtue of being appointed to an office to which they are attached (e.g., the rights and duties of the bishop, the priest and other officials in the Church); d) communal or religious rights, which have their source in religious profession (cc. 662-672 and 607 §2); e) civil rights, which Catholics have in virtue of their citizenship (cc. 22, 492, 1259, 1286, 2° and 231, §2); and f) contractual rights, which arise from a contract or a pact (cc. 681, §2, 1290).<sup>109</sup>

For their importance to our study, we will briefly analyse the following rights: the right of one’s good reputation and privacy (c. 220); the right to vindicate one’s rights (c. 221, §1); the right to be judged in accord with the norm of law (c. 221, §2); the right not to be punished except in accord with the law (c. 221, §3).<sup>110</sup> Because the arena in which these rights are exercised is the common good, we will discuss the relationship between subjective rights and the common good (c. 223, §1), and the right of competent authority to regulate, in view of the common good, the exercise of subjective rights (c. 223, §3).

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<sup>108</sup> *Ibid.*, p. 293.

<sup>109</sup> MCINTYRE, “Rights and Duties Revisited,” p. 115; MENDONÇA, “Promotion and Protection of Rights,” pp. 37-40.

<sup>110</sup> See *CCEO* c. 24

#### 1.4.4 – The Right to One’s Good Reputation and Privacy (c. 220)

One of the most fundamental rights a human being enjoys in this world is the right to his or her “good reputation” (*bona fama*). Because of its natural character, all societies and cultures recognise and respect this right. Therefore, it is no surprise that the Church has enshrined its recognition and protection in its legal system. In this section, we will briefly look at c. 220 (*CCEO* c. 23) which speaks of the right to one’s good reputation and privacy, and examine its development, its placement in the Code, its importance in the Catholic rights theory and the legitimate vindication of the right to good reputation.<sup>111</sup>

Canon 220 (*CCEO* c. 23) reads: “No one may unlawfully harm the good reputation which a person enjoys, or violate the right of every person to protect his or her privacy.”<sup>112</sup> In general, the notion of reputation derives from the judgement or opinion people have of a person. It is formulated through the public (and not private) perception of the external behaviour of a person. It may be defined as the “overall quality of a person, as seen and judged by people in general which creates a good name within a

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<sup>111</sup> See M. BRADLEY, “The Evolution of the Right to Privacy in the 1983 Code: Canon 220,” in *StC*, 38 (2004), pp. 527-574; see also M.P. ORSI, “Priests’ Privacy and Reputation Need Protection,” in *Homiletic and Pastoral Review*, 10 (2003), p. 54-57.

<sup>112</sup> Canon 220: “Nemini licet bonam famam, qua quis gaudet illegitime laedere, nec ius cuiusque personae ad propriam intimitatem tuendam violare.” Article 12 of the Universal Declaration of Human Rights reads: “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, not to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks” (BROWNLIE [ed.], *Basic Documents*, p. 24).

society,”<sup>113</sup> or simply put, “a reputation is always the public evaluation of at least two people regarding another person.”<sup>114</sup>

Although this right is of natural law,<sup>115</sup> it has a very long history in the system of positive human legislation from the time of ancient Roman Law. It was found in the *Decretum* of Gratian and in the *Decretalia* of Gregory IX. Later the ‘defamation law’ and the law of ‘infamia’ (false accusation) evolved into a canonical tradition as a right to protect one’s good name. Article 12 of the Universal Declaration of Human Rights protects this right against all possible intrusion of privacy. Although the 1917 Code did not contain a canon akin to c. 220 of the 1983 Code,<sup>116</sup> it provided for damages and penalties to be imposed against those who violated another’s good reputation. There were two canons in procedural law defining certain procedural principles in dealing with a case of defamation (cc. 1618 and 1938, *CIC/17*), and one canon among penal norms (c. 2355, *CIC/17*) specifying the manner in which one’s good reputation may be injured, “by words or writings or in any other manner.”<sup>117</sup> In his excellent analysis of the approaches taken by Rotal jurisprudence on this issue, R.E. Jenkins says: “Jurisprudence arising out of the

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<sup>113</sup> See J. ERTEL et al. (eds.), *The New Britannica-Webster Dictionary & Reference Guide*, Chicago, IL, Encyclopaedia Britannica, 1981, p. 774.

<sup>114</sup> See R.E. JENKINS, “Defamation of Character in Canonical Doctrine and Jurisprudence,” in *StC*, 36 (2002), pp. 423-424.

<sup>115</sup> See J. HERVADA, Commentary on c. 220, in *Code of Canon Law Annotated 2004*, p. 177.

<sup>116</sup> BRADLEY, “The Evolution of the Right to Privacy,” p. 538.

<sup>117</sup> See D.L. BARR, *The Right to One’s Reputation: Applicable Legislation in the United States of America*, Ottawa, Saint Paul University, 1993, pp. 2-15.

codified ecclesiastical law has also consistently recognized the natural character of the right to a good reputation, and the legitimate means available to protect and defend it.”<sup>118</sup>

The right to one’s good reputation embodies the conciliar theological principle of incarnation that God’s dignity is enshrined in the soul of every human being and it must be accorded appropriate protection in law. In its Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, the Second Vatican Council declared one’s right to good reputation as one of the inviolable rights all human beings enjoy in virtue of the “sublime dignity of the human person.”<sup>119</sup> Pope John XXIII taught “that due honour be given to all people and that their good name be respected.”<sup>120</sup> This doctrine was already upheld in St. Thomas Aquinas’ writings where he considered the reputation or public opinion of a person as the most precious temporal asset and any unlawful assault on a person’s reputation could be considered more serious than theft itself, since it is akin to the spiritual asset which involves values and virtues of a given person.<sup>121</sup> Though the right to good reputation emanates from the natural law, it acquires an ecclesial dimension in baptized persons because their good reputation refers “to their human qualities and, above all, to their Christian virtues, to their integrity of faith and to their permanence in communion; and that this good reputation can be unjustly and gravely injured as a result

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<sup>118</sup> See JENKINS, “Defamation of Character,” p. 421.

<sup>119</sup> “Eximiae dignitatis quae personae humanae competit [...] ad bonam famam” (*GS* no. 26; English trans. FLANNERY 1, p. 927).

<sup>120</sup> “[Homo praeterea, iure naturae postulat], ut in debito habeatur honore; ut bona existimatione afficiatur [...]” (*PT* no. 7, in *AAS*, 55 [1963], p. 260; English trans. in O’BRIEN and SHANNON (eds.), *Catholic Social Thought*, p. 132).

<sup>121</sup> See *Summa theologiae*, II-II, q. 73, a. 2 and a. 3.

of the spread of unfounded accusations pertaining to behaviours assumed to be contrary to doctrine and morals.”<sup>122</sup>

From the very beginnings of the revision of the Code, the Supreme Legislator had in mind to include the natural right to one’s good reputation in the Church’s legal *corpus*. This is evident in the evolution of the *Lex Ecclesiae fundamentalis*, which attempted to spell out the duty of all Christians to respect the good reputation of others. In c. 23 of the 1971 schema of *LEF*, we read: “It is the right of all Christian faithful to enjoy the good name which is to be kept in honour by all; therefore, no one is allowed to injure it unlawfully.”<sup>123</sup> This draft norm apparently included three affirmations: first, every member of the Christian faithful has the natural right to enjoy his or her good name; second, all the faithful ought to respect the good reputation of the other; third, no one is allowed to injure the good reputation of another unlawfully. The 1980 schema of *LEF* reported the same norm in its c. 20 as follows: “No one may unlawfully harm the good reputation which a person enjoys.”<sup>124</sup> This text has been reproduced *verbatim* in the first part of c. 220 of the 1983 Code.

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<sup>122</sup> D. CENALMOR, Commentary on c. 220, in Á. MARZOA, J. MIRAS and R. RODRÍGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law (= Exegetical Commentary)*, prepared under the responsibility of the Martín de Azpilcueta Institute, University of Navarre, English edition, E. CAPARROS (ed.), Montréal, Wilson & Lafleur, 2004, vol. II/1, p. 128.

<sup>123</sup> “Christifidelibus ius est ut bona fama qua gaudent ab omnibus in honore habeantur; quapropter nemini licet illegitime eandem laedere” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Legis Ecclesiae fundamentalis*, Textus emendatus cum relatione de ipso schemate deque emendationibus receptis, Roma, Typis polyglottis Vaticanis, 1971, p. 19). This norm was already found in c. 32 of the schema *De populo Dei*: “Fidelibus ius est ut bona fama qua gaudent ab omnibus in honore habeantur; quapropter nemini licet illegitime eandem laedere” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema canonum libri II De populo Dei*, Roma, Typis polyglottis Vaticanis, 1977, p. 30).

<sup>124</sup> “Nemini licet bonam famam qua quis gaudet illegitime laedere” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Lex Ecclesiae fundamentalis, seu Ecclesiae catholicae universae lex canonica fundamentalis*, 24 April 1980, Romae, Typis polyglottis Vaticanis, 1980; English trans. by J.P. MCINTYRE, Ottawa, Saint Paul University, 1994, p. 7).

It is important to note a change in emphasis in the evolution of c. 220. In c. 23 of the 1971 schema of *LEF*, the direct emphasis was on the right to the good reputation of each and every member of the Christian faithful. The second draft of 1980 shifted the emphasis to the natural duty of all Christian faithful to respect the good reputation of others which they enjoy in virtue of natural law itself. The final text reverted to the stress on the natural right of every Christian to his or her good name. This change of emphasis in essence informs us that in the legislator's view the right to good reputation has two dimensions, one of which refers to the natural right of each Christian to good reputation and the other relates to the natural obligations others have to respect and protect that right. This right, like any other one, necessarily has a correlative obligation.

As stated above, the right to one's good reputation and privacy and the others' duty to respect it flow from natural law. This remains so, despite the fact that the two rights are included among the obligations and rights common to all Christian faithful. In his comments on c. 220, D. Cenalmor says that although human rights and the "obligations and rights of Christian faithful" have their source at different levels, the former in the nature of the human beings while the latter in one's conformation in Christ through baptism, they are not opposed to each other. "Just as grace does not exist in opposition to nature, but rather perfects and elevates it, the incorporation of a person into the people of God through baptism, without adversely affecting one's patrimony of human rights and duties, lifts one up and guides one towards a supernatural end."<sup>125</sup>

The two important words of c. 220 need some explanation. The canon says "*nemini*," that is to say, "no one." To whom does this expression refer? There are two

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<sup>125</sup> CENALMOR, Commentary on c. 220, in *Exegetical Commentary*, vol. II/1, p. 127.

actors in the juridic arena: physical persons and juridic persons (cf. c. 113, §2; *CCEO* c. 920). Both these persons can be the subject of the juridic act of violation of another person's (whether physical or juridic) good reputation. Therefore, the term "*nemini*" includes both physical and juridic persons who are subject to ecclesiastical law.<sup>126</sup> Some others would opine that it includes also moral persons (c. 113, §1).

The adverb '*illegitime*' used in c. 220 (*CCEO* c. 23) has a specific meaning within the context of the norm. The expression, *illegitime laedere*, implies that in certain situations the violation of the good reputation of a person can be legitimate or justified. The public good or the legitimate defence of the good reputation or good of one person might warrant disclosure of facts that could result in harming the good reputation of another. However, the penal norm (c. 1717, §2) says that care should be taken (*cavendum est*) not to make suspicious of one's good name while involved in a penal trial. In a concrete situation, there might not be "illegitimate" harm to the good reputation of a person.<sup>127</sup>

The "good reputation" of a person is presumed until the contrary is proven. Therefore, the right to one's good reputation has safeguards in law. One who thinks that his or her good reputation has been unlawfully violated by someone can legitimately bring that person to court for determination of the allegation and for compensation for damages. This is provided in both penal contentious and administrative processes.<sup>128</sup>

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<sup>126</sup> See BARR, *The Right to One's Reputation*, pp. 33-42.

<sup>127</sup> G.D. TORRE, Commentary on c. 220, in P.V. PINTO (ed.), *Commento al Codice di diritto canonico*, 2<sup>nd</sup> ed., Città del Vaticano, Libreria editrice Vaticana, 2001, p. 127.

<sup>128</sup> See Z. GROCHOLEWSKI, "Il sistema dei ricorsi e la giurisdizione dei tribunali amministrativi," in CANOSA (ed.), *I principi per la revisione*, pp. 462-463.

The second part of c. 220 refers to the inviolability of one's "privacy." This segment reads: "No one may unlawfully ... violate the right of every person to protect his or her privacy." There was no mention of this right in any of the schemata of c. 220, including the 1982 schema, or in those of *LEF*. But it was in the prescript of c. 33 of the 1977 schema of *De populo Dei*, which stated: "Christifideles officium et ius habent servandi secretum commercii epistolaris aliusve personalis indolis."<sup>129</sup> This draft canon referred specifically to privacy in correspondence and other personal matters, while the present canon expresses the right to privacy in a more general form.<sup>130</sup> What does this right to privacy really imply?

The "*intimitas*" mentioned in the canon stands for one's intimate life, the inner *sanctuary* of one's personal space, or in the words of Cenalmor, "*intimitas* in a strict sense is the psychological and moral privacy of individuals; it is that which belongs to the specifically personal sphere of the internal forum, the forum of one's conscience. But the right to one's own privacy also extends, within the Church, to everything that does not fall under the scope of the public nor commonly known, that is, to all that pertains to the purely private sphere of persons and institutions."<sup>131</sup> This right to privacy enjoys the same legal security as the right to one's good reputation. It may not be "unlawfully" violated by anyone.<sup>132</sup> Only when there is a *legitimate* reason, either in virtue of divine or explicit

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<sup>129</sup> As reported in CENALMOR, Commentary on c. 220, *Exegetical Commentary*, vol. II/1, p. 130.

<sup>130</sup> Cf. J.H. PROVOST, Commentary on c. 220, in J.A. CORIDEN, T.J. GREEN, D.E. HEINTSCHEL (eds.), *The Code of Canon Law, A Text and Commentary*, (= 1985 Commentary) commissioned by The Canon Law Society of America, New York/Mahwah, Paulist Press, 1985, p. 153.

<sup>131</sup> CENALMOR, Commentary on c. 220, in *Exegetical Commentary*, vol. II/1, p. 131.

<sup>132</sup> See PIUS XII, Allocution to the 13<sup>th</sup> Annual Conference of the International Society of Applied Psychology, in *AAS*, 50 (1958), pp. 268-277; BRADLEY, "The Evolution of the Right to Privacy," p. 559; S.

ecclesiastical law, is the violation of this right permitted. Otherwise no inquiries may be made into the private life of others. Furthermore, “the right to defend the forum of one’s conscience is absolutely inviolable: no one can force another to let one’s personal privacy be analysed; one must first have explicit, informed and absolutely free permission.”<sup>133</sup> The Code itself in several canons provides explicit safeguards against violation of both these rights.

The right to “privacy” in the Church primarily applies to those matters which pertain to the forum of conscience, such as the obligations of the confessor and the faithful who approach him for the celebration of the sacrament of reconciliation (cf. cc. 970, 983, 984, 1388 and 1550, §2, 2°), the choice of one’s confessor (cf. cc. 240, §1, 976 and 991), and the norms which regulate matters of confession or spiritual direction in general (for example, cc. 240, §2 and 985). The Code also has provisions for the protection of one’s privacy in penal contentious or administrative processes, in religious life, etc.<sup>134</sup>

This right of privacy in a sense limits the authority of a superior with respect to access to ones’ personal correspondence, to information derived from psychological testing of the candidate for priesthood, or for admission to religious life, etc.<sup>135</sup> Furthermore, the medical expert’s reports obtained for the purpose of evaluating one’s

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MCDONALD, “The Use of Psychological Testing in Light of *Graviora delicta* Cases,” in P.M. DUGAN (ed.), *Advocacy Vademecum*, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2006, pp. 23-25.

<sup>133</sup> CENALMOR, Commentary on c. 220, in *Exegetical Commentary*, vol. II/1, p. 131.

<sup>134</sup> *Ibid.*, pp. 131-132.

<sup>135</sup> See MCKENNA, *The Right of Confidentiality*, p.199.

psychic condition should not be admitted as evidences in a penal case.<sup>136</sup> The Code also provides norms for seeking redress from the author of the unlawful violation of a person's good reputation and privacy: for example, the Code allows action for imposition of a just penalty (c. 1390, §2), introduction of a contentious action for reparation of damages (c. 1729, §1), etc.

#### **1.4.5 – The Right to Vindicate One's Rights (c. 221, § 1)**

An impressive list or charter of rights is wonderful to look at or to read. But rights without appropriate provisions for their vindication are not at all true rights. To be real, the rights are to be recognized, and must have the concrete possibility for their legitimate vindication. For this reason, the sixth fundamental principle guiding the revision of the Code said that it is not sufficient for the law simply to recognize the rights of persons, but it should guarantee the possibility of their vindication in a competent forum.<sup>137</sup>

The right to vindicate one's rights in the Church is the basic human and ecclesial right of each and every Christian. In fact, this is a right common to every human being, irrespective of one's religious affiliation, and which can be vindicated in a competent ecclesiastical forum.<sup>138</sup> Canon 221 (*CCEO* c. 24), which upholds three important juridical rights of persons, is made up of three parts. The first paragraph declares the primary principle that there should be effective provision for the vindication of a person's rights in the Church. The second articulates the right of the faithful to be judged in accord with the prescripts of the law. The third declares the right of the faithful not to be punished

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<sup>136</sup> See CONGREGATION FOR CLERGY, Letter, Psychological Testing and the Right to Privacy, 9 June 1998, in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, 2<sup>nd</sup> ed. rev. and updated, Ottawa, Faculty of Canon Law, Saint Paul University, 2003, p. 232.

<sup>137</sup> *Communicationes*, 1 (1969), pp. 82-83.

<sup>138</sup> CENALMOR, Commentary on c. 221, in *Exegetical Commentary*, vol. II/1, p. 134.

with canonical penalties except in accordance with the legal norms of the Church. In this section we will consider only the primary principle stated in §1 of c. 221; the other two principles will be analysed in the two following sections. Canon 221, §1 reads:

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.<sup>139</sup>

This canon was originally contained in c. 20, §1 of the 1971 *LEF* schema,<sup>140</sup> and this later became c. 22 in the 1980 *LEF* schema.<sup>141</sup> Finally this c. 22 of *LEF* was incorporated *verbatim* into the 1983 Code.

The subjective rights of a Christian are protected and exercised within the Church. The Church is a *communio* of believers and, therefore, the disputes and conflicts between them are to be settled in a spirit of mutual understanding and forgiveness (cf. Mt. 18:15-17). The Code enunciates in c. 1446 several principles applicable to peaceful resolution of conflicts between the Christian faithful at all levels of the Church. Accordingly, a right cannot be exercised at the expense of *communio* and the common good, or when there is a just limitation imposed on any right by the Church.<sup>142</sup> On the other hand, there is no room in the Church for arbitrary limitation of the exercise of a person's subjective rights.

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<sup>139</sup> Canon 221, §1: "Christifidelibus competit ut iura, quibus in Ecclesia gaudent, legitime vindicent atque defendant in foro competenti ecclesiastico ad normam iuris." Canon 24, §1 of *CCEO* is identical.

<sup>140</sup> "Christifidelibus competit ut iura quibus in Ecclesia gaudent legitime defendant in foro ecclesiastico, et quidem via iudiciali necnon, in casibus iure definitis, via administrativa, ad normam sacrorum canonum" (*Schema of Lex Ecclesiae fundamentalis*, 1971, p. 19).

<sup>141</sup> See MCINTYRE, *Lex Ecclesiae fundamentalis*, 1980, p. 7.

<sup>142</sup> See CENALMOR, Commentary on c. 221, in *Exegetical Commentary*, vol. II/1, p. 136.

In support of this principle, the Church assures that one can find redress to the injustice one suffers in appropriate ecclesiastical *fora* in accord with the norm of law.<sup>143</sup>

How is the vindication of rights as stipulated c. 221, §1 to be concretely realized? The positive ecclesiastical law indicates two ways open for this purpose: first, whenever one of the faithful has the need to claim or have a right recognized, he or she can do so by placing the claim legitimately before a competent ecclesiastical authority, or before other members of the Church, etc. This approach, if adopted prudently and in a spirit of charity, would avoid the complex and complicated process of vindicating rights in a court of law. Although this is an ideal to be pursued in the Church, as far as possible, the law of the Church does not fail to provide for the juridical vindication of subjective rights. Therefore, the second means for legitimately vindicating one's rights is either before a judicial or in an administrative *forum*. Even when recourse is made to these *fora*, the supreme legislator stipulates that the judge (including administrative authority) "is not to fail to exhort and assist the parties to seek an equitable solution to their controversy in discussion with one another. He is also to indicate to them suitable means to this end and avail himself of serious-minded persons to mediate" (c. 1446, §2; cf. c. 1676 in a marriage nullity case). The Church's preference is for amicable resolution of conflicts between its members. But that does not in any way minimise the need for effective means for legitimate vindication of subjective rights in the Church's courts.<sup>144</sup>

The very first canon (1400) of book VII on canonical trials identifies the object of ecclesiastical trials, and implicitly designates different kinds of processes in the legal

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<sup>143</sup> See LLOBELL, "Il sistema giudiziario canonico di tutela dei diritti," pp. 504-506.

<sup>144</sup> See MENDONÇA, "Promotion and Protection of Rights in the Church," p. 51.

system of the Church. According to c. 1400, there are four objects of a trial. The first paragraph of c. 1400 states that the object of a trial is: “the pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts” (§1,1<sup>o</sup>). In this statement, two distinct objects of a trial are identified. Thus, the first object of a trial is “the pursuit or vindication of rights.” Any time there is a controversy involving the rights of the faithful, that controversy, after exhausting all extra-judicial means, can be brought before an ecclesiastical court for its resolution through a trial, and the court must decide the controversy according to the norm of law. The second object of a trial according to the same paragraph is “the declaration of juridic facts” (§1,2<sup>o</sup>). The trial related to this object involves declaration of the personal status of the faithful in the Church, like the marital status of persons through a declaration of marriage nullity, or the clerical state of a cleric through a sentence of invalidity of ordination. But, practically, our local tribunals deal mostly with marriage nullity cases. The third object of a trial is the imposition or declaration of a penalty for delicts. Although there are instances in which the use of administrative procedures for the imposition or declaration of canonical penalties is foreseen in the Code, the Church’s preference in penal cases is for a judicial trial, because they involve restriction of the exercise of peoples’ rights which might not be as easily protected in an administrative process (cf. c. 1342, §§1 and 2). More will be said concerning this object in the following section.

The fourth object of a trial is a controversy which arises from the exercise of executive power of governance (whether ordinary, vicarious or delegated). The second paragraph of c. 1400 states: “Nevertheless, controversies arising from an act of administrative power can be brought only before the superior or an administrative

tribunal.” Two possible avenues are indicated when it comes to a controversy arising from the exercise of executive power. These are: hierarchic recourse or an administrative tribunal. The procedure for hierarchic recourse is outlined in cc. 1732-1739, but, although c. 1400, §2 (and also c. 149, §2) speaks of “an administrative tribunal,” the Code itself has no mandatory provision for the establishment of such a tribunal at the local level. The Code, however, does not prohibit the establishment of local administrative tribunals. There are only a couple of instances in the Church where this is being done.<sup>145</sup> At this time, the only administrative tribunal available in the universal Church is the Supreme tribunal of the Apostolic Signatura (c. 1445, §2),<sup>146</sup> which does not seem easily accessible, in terms of correspondence, language, space and time, to the ordinary Christian faithful.

As Cenalmor says, the prescript of c. 221 provides the faithful with a general principle through which they can find apt juridical means to defend their own rights legitimately and effectively in all cases.<sup>147</sup> The right to vindicate one’s rights in a competent ecclesiastical forum according to the norm of law entails a series of derived rights, such as, the right to be assisted by an advocate (cc. 1481 and 1482), the guarantee of initiating a procedure (cc. 1504 and 1505), the right to have economic obstacles (for example, by means of effectively providing assistance needed) removed, and “the right to

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<sup>145</sup> According to Bishop T.J. Paprocki, the Archdioceses St. Paul and Minneapolis and Milwaukee in United States of America established first instance administrative tribunals in 1996. See T. J. PAPROCKI, in J.P. BEAL, J.A. CORIDEN and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law (=New Commentary)*, Commissioned by the Canon Law Society of America, New York, NY/Mahwah, NJ, Paulist Press, 2000, p. 1826. There is no further report on whether there are any attempt at establishing appeal tribunals to deal with the decision of the first instance tribunals. Also see R.J. KASLYN, Commentary on c. 221, in *New Commentary*, pp. 280-281.

<sup>146</sup> See JOHN PAUL II, Apostolic Constitution, *Pastor bonus*, art. 123, 28 June 1988, in *AAS*, 80 (1988), pp. 891-892.

<sup>147</sup> See CENALMOR, Commentary on c. 221, in *Exegetical Commentary*, vol. II/1, p. 136.

inspect the acts (c. 1598, §2),” etc. These derived rights are intrinsically linked to the right of defence; and the courts, therefore, must regard them as essential to any process.

#### **1.4.6 – The Right to be Judged According to the Provisions of Law (c. 221, §2)**

One of the fundamental rights persons have in any society is the right to be judged in accord with the law, both natural and positive. The very purpose of the law is not merely to create or identify people’s rights but also to see that those rights are properly safeguarded and legitimately vindicated. The law *per se* leaves no room for arbitrariness and partiality in meeting out justice to people. That is why canon law explicitly affirms the right of the faithful to be judged according to the provisions of law, applied with equity. This is clearly stated in c. 221, §2 (CCEO c. 24, §2), which reads: “If any members of Christ’s faithful are summoned to trial by the competent authority, they have the right to be judged according to the provisions of law, to be applied with equity.”<sup>148</sup> This prescript of law is a general principle which governs all judicial and administrative procedures outlined in Book VII of the 1983 Code that provide for the vindication of rights.

In an ordinary judicial contentious or penal trial, the fundamental rights of persons are to be respected. Canonical doctrine and jurisprudence have identified several fundamental procedural rights that must be respected and safeguarded in every ecclesiastical trial. In his 1989 address to the Roman Rota, Pope John Paul II insisted that one who is called to court has the right to *contradictorium*, that is, the right to contradict

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<sup>148</sup> Canon 221, § 2: “Christifidelibus ius quoque est ut, si ad iudicium ab auctoritate competenti vocentur, iudicentur servatis iuris praescriptis, cum aequitate applicandis.” This canon is *verbatim* the same as c. 22, §2 of 1980 *LEF* schema. See MCINTYRE, *Schema Lex Ecclesiae fundamentalis*, 1971, p. 7; also see E.N. PETERS (Compiler), *Incrementa in Progressu 1983 Codicis iuris canonici*, with a multilingual introduction, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2005, p. 159.

the proofs and arguments introduced by the opposing party.<sup>149</sup> One called to appear in court has the right to know what he or she is called for, that is, to know the object of the trial. The related rights are: the right to counsel (c.1481), the right to review the acts of the case in order to proffer new proofs or present new arguments (c. 1598, §1), “the right to receive a copy of the definitive sentence” (cc. 1614, 1615)<sup>150</sup> and to appeal that sentence (c. 1628), etc. These are only a few of the many examples of the fundamental rights that the law is meant to safeguard in a trial. Substantial violation of such rights is sanctioned with the invalidity of a sentence (e.g., c.1620, 7<sup>o</sup>). The law has no place for arbitrariness, for arbitrariness is odious to the law. This is particularly true in the application of penal law.

The administrative processes also fall within the scope of c. 221, §2, because they are equally “formal procedures of contradiction, established by law to protect certain rights or interests, whether general or particular.” For example, c. 221, §2 is applicable to the removal and transfer of parish priests (cc. 1740-1752).<sup>151</sup> Here the rights of a parish priest and of the parish are involved. The parish priest has the right to stability of office established by law (c. 522) for the well being of the community of the faithful (*CD*, no. 31). The rights of both are to be respected by the bishop while executing removal and transfer of parish priests.

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<sup>149</sup> JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 (1989), pp. 922-927; English trans. in W.H. WOESTMAN (ed.), *Papal Allocutions to the Roman Rota, 1939-2002*, Ottawa, Faculty of Canon Law, Saint Paul University, 2002, p. 205.

<sup>150</sup> See DANEELS, “The Right of Defence,” pp. 89-90.

<sup>151</sup> For a detailed study on the procedural rights and the violations involved in transfer and removal, see A. MENDONÇA, “Justice and Equity in Decisions Involving Priests,” in *Philippine Canonical Forum*, III (2001), pp. 51-86. The author analyses two cases judged at the Apostolic Signatura which involved allegations of violation of law in procedure in the removal parish priests. Also see T.J. GREEN, “Possible Recourse to Congregation Against Removal of Pastor,” in *CLSA Advisory Opinions*, 2003, pp. 107-113.

The law is very explicit in requiring the application of equity in a trial; the faithful have the right to be judged according to the provisions of law applied with equity (c. 221, §2). Canonical equity “safeguards the natural justice recognised through human reason. It abets the effort of ecclesiastical law always to be open to the possibility of supernatural evangelical love, compassion and mercy.”<sup>152</sup> Canonical equity respects persons and protects rights, and corrects injustice in situations where a strict application of law would harm the rights or where law is incapable of correcting an injustice. As Cenalmor puts it:

Equity, or the softening of the rigor of law through charity, so that the ideal of justice may be more fully achieved and the inevitable insufficiencies of laws (c.19) be compensated for, is an essential principle in the canonical system, and in general, in Catholic thought. Related to *epieikeia* in Aristotelian ethics [...] canonical equity is rooted in the biblical interpretation of law, in which the demands of justice are inseparable from mercy.<sup>153</sup>

The canonical principle of equity invites an ecclesiastical judge to take into consideration all situations of a given case while making a decision on it. Emphasizing the importance of this principle in an ecclesiastical trial, Mendonça says “when judged before a competent court, *the faithful* have the right to be judged in accord with the provisions of law, *to be applied with equity*. It is in this principle that we find the meeting of *justice and equity*, and the Church correctly recognizes this as a *right*.”<sup>154</sup> Therefore, the prescripts of law and the principle of equity must be followed in the course of a trial without any semblance of partiality or arbitrariness. The norms of law are meant to ensure the objectivity of a trial. However, because universal laws cannot be applied with

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<sup>152</sup> See J. COUGHLIN, “Canonical Equity,” in *StC*, 30 (1996), p. 433.

<sup>153</sup> CENALMOR, Commentary on c. 221, in *Exegetical Commentary*, vol. II/1, p. 139.

<sup>154</sup> MENDONÇA, “Justice and Equity in Decisions Involving Priests,” p. 54.

the same rigor to every case, the principle of equity tempers that rigor in a concrete case, especially in a penal trial. Equity, however, does not supplant or disregard the law; it rather forces the judge to take into account all the circumstances of a concrete case to mitigate the rigor of law in its application. In Pope Paul VI's words, equity consists in the application of law in a congenial atmosphere of pastoral care.<sup>155</sup>

#### **1.4.7 – The Right Not to be Punished Except in Accord with the Law (c. 221, §3)**

Punishment is not pleasant. Everybody hates punishment even when it is justly inflicted. The very reason for the existence of a penal system in a society is rooted in its responsibility to preserve and promote the common good and to reform the delinquent. In other words, a society cannot survive without a *just* penal system. On the other hand, any civilized society must respect the rights of its members and not subject them to arbitrary and inhumane treatment even when punishment is legitimately imposed. This is true also of the Church, which also is a society. Therefore, like any other civilized society, the Church respects this fundamental principle. This is what we read in c. 221, §3: "Christ's faithful have the right that no canonical penalties be inflicted upon them except in accordance with the law."<sup>156</sup> This is a specific right to be respected in a penal process. It mirrors the principle of legality, namely no penalty can be imposed except in accord with the prescripts of law (*nulla poena sine praevia lege*). Historically, this principle of legality has roots in Roman law. In the Middle Ages, the principle of legality in penal

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<sup>155</sup> See PAUL VI, Allocution to the Roman Rota, 8 February 1973, in *AAS*, 65 (1973), pp. 95-103; English trans. in WOESTMAN, *Papal Allocutions to the Roman Rota*, p. 116.

<sup>156</sup> Canon 221, §3: "Christifidelibus ius est, ne poenis canonicis nisi ad normam legis plectantur." Cf. *CCEO* c. 24, §3.

matters was acknowledged in article of 39 of the *Magna Carta*, and in modern times it is acknowledged as a constitutional principle in most civil societies.<sup>157</sup>

The right not to be punished except in accordance with the norm of law is not of divine, natural or positive, law, but it is a right that arises from human positive law. It is a principle derived from the necessity demanded by the social and juridical order and converted into a canonical (civil) right so as to give to the Christian faithful maximum protection against the arbitrary use of coercive power on the part of the authority.<sup>158</sup> The prescript of c. 221, §3 is intended to ensure the proper implementation of procedural law, the protection of individual rights and the legitimate application of penalties. This canonical norm has flowed out of c. 21 of the 1971 *LEF* schema that was newly introduced into the *corpus* of canonical rights.<sup>159</sup>

The Church claims, as a society, its native right to impose legitimate penalties on the faithful in order to protect the common good. Since penalties restrict the exercise of the rights of persons (c. 96), this innate right of the Church must be guarded against the unjust decisions of ecclesiastical authorities. Therefore, this particular right must be exercised in accord with the procedural norms provided in the Code by the supreme legislator in the application of penalties.<sup>160</sup>

The Church considers the imposition of penalties only as a last resort (c. 1341), that is, when all the other means, such as fraternal correction, due warnings, including all

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<sup>157</sup> J. KASNY, *The Right of Defense in Administrative Procedure: A Comparative and Analogical Study*, Canon Law Studies no. 555, Washington, DC, Catholic University of America, 1998, p. 71.

<sup>158</sup> HERVADA, Commentary on c. 221, in *Code of Canon Law Annotated 2004*, p. 177.

<sup>159</sup> "Nemo puniri potest nisi in casibus ipsa lege definitis atque modo ab eadem determinato" (MCINTYRE, *Schema Lex Ecclesiae fundamentalis*, 1971, p. 19).

<sup>160</sup> CENALMOR, Commentary on c. 221, in *Exegetical Commentary*, vol. II/1, p. 139.

three elements of c. 1341, have failed to reform the offender. Furthermore, the Church is clear in stating that “no one can be punished for the commission of an external violation of a law or precept unless it is gravely imputable by reason of malice or culpability.”<sup>161</sup> In penal matters, therefore, pastoral solicitude overrides any penal sanction. The value of c. 221, §3 consists in the fact that in the application of penalties, the penal substantive and procedural laws are to be scrupulously observed in ecclesiastical courts.

The objective element of the ecclesiastical penal procedure is a gravely imputable external violation of a law or a precept, which carries a legally determined penalty (c. 1321, §§ 2-3).<sup>162</sup> Application of any penalty must take into consideration all the elements related to imputability of a delict. Therefore, in order to ensure a just and equitable application of ecclesiastical penalties to concrete cases, the Church prefers *ferendae sententiae* penalties rather than *latae sententiae* ones. Even when the Church is obliged to have recourse to the imposition of a penalty (*ferendae sententiae*), the Code makes it clear that a penalty is to be considered only as a last resort in order to safeguard the common good and order in the Church (cf. cc. 1317, 1341). While it is certainly important to protect the ecclesial order by means of imposition of penalties, the subjective rights of persons must also receive sufficient safeguard demanded by the prescript of c. 221, §3.

Therefore, while it is important to uphold the need for sanctions in the Church, it is equally important to respect and protect the dignity and the rights of persons alleged to have perpetrated a punishable crime. The persons, structures and processes designated for

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<sup>161</sup> Canon 1321, §1: “Nemo punitur, nisi externa legis vel praecepti violatio, ab eo commissa, sit graviter imputabilis ex dolo vel ex culpa.”

<sup>162</sup> See KASNY, *The Right of Defense in Administrative Procedure*, pp. 210-211.

the imposition of penalties in the Church must take into consideration all the aspects of a particular case so that justice, equity and compassion shine forth, whenever a penalty is legitimately imposed on a delinquent person.

#### **1.4.8 – The Exercise of Subjective Rights and the Common Good**

The Church has always worked toward the promotion of human rights in the world, but it has also placed the exercise of those rights within the context of the common good. This is particularly evident in the present Code where we find an explicit listing of fundamental rights of all the Christian faithful as well as a clear reminder that those rights are guaranteed in as much as they are part of the common good and communion of the Church. Canon 223 (*CCEO* c. 26), which affirms these fundamental principles, is the product of the *communio* ecclesiology that shaped the new Code. This canon stresses the importance of the common good vis-à-vis the exercise of individual's subjective rights, and affirms the right of the ecclesiastical authority to regulate, when necessary, the exercise of those rights in view of the common good.

Canon 223, §1 states: “In exercising their rights, Christ’s faithful, both individually and in associations, must take account of the common good of the Church, as well as the rights of others and their own duties toward others.”<sup>163</sup> The text of this canon is drawn from c. 19 of the 1970 *LEF* schema, which was inspired by no. 7 of the conciliar declaration on religious liberty, *Dignitatis humanae*.<sup>164</sup> Canon 19 of 1970 *LEF* schema read:

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<sup>163</sup> Canon 223, §1: “In iuribus suis exercendis christifideles tum singuli tum in consociationibus adunati rationem habere debent boni communis Ecclesiae necnon iurium aliorum atque suorum erga alios officiorum.” Cf. *CCEO* c. 26, §1.

<sup>164</sup> *DH* no. 7, in *AAS*, 58 (1966), p. 934; English trans. in *FLANNERY* 1, p. 724.

In the exercise of their rights the Christian faithful are to observe the principle of personal and social responsibility: in the exercise of their rights, whether individually or joined together in associations, they must take account of the common good of the Church and the rights of others as well as their duties toward others; in the interest of the common good ecclesiastical authority is competent to regulate those rights which are proper to the Christian faithful or restrict them by invalidating and incapacitating laws.<sup>165</sup>

As one can see, there are in this canon two sources of regulations of subjective rights, namely the intrinsic and extrinsic sources. The intrinsic source of control is the person in relationship with the community, that is, the subjective rights of a person in relationship with the good of the community. Therefore, an individual must always consider his or her subjective rights within the context of the common good. In other words, those who exercise their subjective rights must be aware that their rights can be effectively and legitimately exercised only when the rights of others and the common good are respected. The extrinsic source is the legitimate authority, whose principal function is to promote the common good, which necessarily includes the protection of people's rights. In virtue of this understanding of the relationship between the exercise of subjective rights and the common good, c. 19 of the 1970 *LEF* Schema was split into two paragraphs in c. 24 of the 1976 *LEF* Schema, and this canon now read:

§1. In the exercise of their rights, the Christian faithful are to observe the principle of personal and social responsibility; in the exercise of their rights, whether individually or joined together in associations, they must take account of the common good of the Church, the rights of others, and their own duties toward others.

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<sup>165</sup> “ In usu suorum iurium christifideles observent oportet principium responsabilitatis personalis et socialis: in iuribus suis exercendis tum singuli tum in consociationibus adunati rationem habere debent boni Ecclesiae communis necnon iurium aliorum atque suorum erga alios officiorum; ecclesiasticae auctoritati competit intuitu boni communis exercitium iurium quae christifidelibus sunt propria moderari vel etiam legibus irritantibus et inhabilitantibus restringere” (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Legis Ecclesiae fundamentalis, Textus Emendatus cum relatione de ipso schemate deque emendationibus receptis*, Roma, Typis polyglottis Vaticanis, 1971, p. 18).

§2. In the interest of the common good ecclesiastical authority is competent to regulate those rights which are proper to the Christian faithful or restrict them by invalidating and incapacitating laws.<sup>166</sup>

With only some minor changes, the first paragraph of c. 24 of 1976 *LEF* schema became c. 223, §1 of the present Code. Thus, the present canon was shaped with the idea that the Christian faithful are protected in the exercise of their rights; at the same time the sole goal of their regulation by the competent ecclesiastical authority is to protect the common good.<sup>167</sup>

If we carefully analyse the first paragraph of c. 223, we find a deliberate reversal of the order of priority that was outlined in *DH* no. 7. This paragraph places first the “common good” of the Church and then speaks of the “rights of others,” and finally, “one’s own duties toward others.” The second paragraph of c. 223 (*CCEO* c. 26, §2) deals with the Church’s competence “to regulate the exercise of rights.” Both paragraphs of c. 223 express the dynamic interaction between the promotion and protection of the common good and the exercise of subjective rights in the Church. It obliges the faithful to consider the common good of the Church first when they exercise their rights, because this obligation is the concrete manifestation of their primary duty to preserve communion

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<sup>166</sup> 1976 *LEF* schema, c. 24, §1: “In usu suorum iurium christifideles observent oportet principium responsibilitatis personalis et socialis; in iuribus suis exercendis tum singuli tum in consociationibus adunati rationem habere debent boni communis Ecclesiae necnon iurium aliorum atque suorum erga alios officiorum.

§2. Ecclesiasticae auctoritati competit, intuitu boni communis, exercitium iurium, quae christifidelibus sunt propria moderari vel etiam legibus irritantibus et inhabilitantibus restringere” (*Communicationes*, 8 [1976], p. 87).

<sup>167</sup> D. A. ZWIFKA, *Regulation of the Rights of Individuals for the Common Good: An Analysis of Canon 223 Section 2 in Light of American Constitutional Law as Articulated in Opinions of the Supreme Court of the United States*, Ann Arbor, Michigan, Canon Law Studies no. 552, Catholic University of America, 1997, pp. 14-16.

in the Church (c. 209, §1).<sup>168</sup> The common good has been identified in the canon as the good of the Church, not merely as an institution but as the People of God. This is the interpretation Provost gives to the expression “common good of the Church.”<sup>169</sup>

The common good of the Church, as understood within the context of c. 223, §1, has two dimensions: an *ad extra*, that is, the Church’s responsibility to contribute to the good of civil societies; and *ad intra*, that is, the Church’s inner life and structure as communion of believers. In the *ad intra* dimension, the faithful have, in exercising their rights, the correlative duty to respect the rights of others as well as the duty to serve others.<sup>170</sup> Both dimensions of the common good implied in c. 223, §1 will be realized in the protection of the rights of others and in the fulfilment of each individual person’s duty toward the well-being of others. Needless to say that individualism is destructive of the community.

The importance of c. 223 for a proper understanding of subjective rights in the Church and their exercise within the context of the common good of the Church cannot be underestimated. It presents three valuable principles related to the exercise of a person’s rights in the Church. First, the exercise of rights is realised only in relation to the communion and mission of the Church, that is, the rights of one person are related to those of the others. Second, responsible exercise of rights obliges one to respect the rights others have in the Church and the duty one has toward others arising from one’s office, charism, vocation or function in the Church. Third, in order to protect and promote the

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<sup>168</sup> See CENALMOR, Commentary on c. 223, in *Exegetical Commentary*, vol. II/1, p. 148.

<sup>169</sup> See PROVOST, Commentary on c. 223, in *1985 Commentary*, p. 158.

<sup>170</sup> ZWIFKA, *Regulation of the Rights of Individuals for the Common Good*, pp. 32-64.

common good, the competent ecclesiastical authority has the duty to regulate the exercise of rights so that, through their appropriate exercise, the Christian faithful may manifest to the world the Church's fundamental nature, i.e., as a *communio* and *missio*.

## CONCLUSION

The social teachings of the Church have deeply respected and defended human dignity and promoted the protection of fundamental human rights in the world. The fundamental human rights of every person are sacred and inviolable because they flow from the very essence of the human being created in the image of God. The biblical vision of the human person, therefore, is at the core of the Church's commitment to the promotion and protection of human rights not only in the world but also in the Church itself. The documents of the Second Vatican Council affirmed these basic natural law principles and paved the way for the incorporation of the fundamental rights of the Christian faithful in the Code of Canon Law.

In response to the conciliar teaching on human rights and from the inspiration received from the un-promulgated *Lex Ecclesiae fundamentalis*, the 1983 Code has given explicit expression to the fundamental rights of all the Christian faithful. The fundamental obligations and rights of the Christian faithful are identified in Title I of Part I of Book II of the Code. This identification in a code of law represents a significant development in ecclesial legal history. We find in this Title several important fundamental obligations and rights of every member of the Christian faithful, who are first of all human persons. The Christian faithful, however, are reminded in no uncertain terms that their first and foremost obligation is to contribute to the building up of the

Body of Christ according to one's own condition (c. 208). Then, they are called upon to maintain communion with Church and to fulfil their duties toward the Church (c. 209). These are followed by a list of other fundamental obligations the Christian faithful have toward themselves and toward others.

Among the fundamental rights that have import to our study are: the right to one's good reputation, to privacy (c. 220), to vindicate legitimately and defend one's rights, both natural and ecclesial or ecclesiastical (c. 221, §), to be judged according to the prescripts of the law applied with equity (c. 221, §2), and not to be punished with canonical penalties except in accord with the norm of law (c. 221, §3). But these obligations and rights are not fulfilled or exercised in a vacuum; they are lived out in the community of which each Christian is a member through baptism. Therefore, all the faithful are reminded that in fulfilling their obligations and in exercising their rights, they must take into consideration the common good of the Church, the rights of others and their own duties toward others (c. 223, §1). Furthermore, the fulfilment of obligations and the exercise of rights are geared toward the promotion of common good, and the attainment of this common good is entrusted to legitimate ecclesiastical authority. This ecclesiastical authority has the obligation and right to moderate the fulfilment of the obligations and the exercise of the rights which are proper to the Christian faithful (c. 223, §2). Even this moderation is also subject to the norms of substantive and procedural law. It must be carried out in accord with norm of law. The Church should not only be just in its decisions but should also be perceived as just and equitable.

These fundamental substantive and procedural principles are applicable to all ecclesiastical processes. Thus, for example, a judge who is dealing with a penal case

involving possible dismissal of a priest from the clerical state cannot overlook the implications of these principles. A substantial violation of any of the fundamental rights discussed in this chapter and related to the right of defence of a cleric accused of a delict punishable by the penalty of dismissal from the clerical state could affect the validity of the definitive decision pronounced in a concrete case. Although the Church has the native right to inflict penalties legitimately in order to safeguard the common good and to reform the delinquent, it cannot do it in contravention of the procedures devised for this very purpose. The Church must follow its own legislation always with the principles of justice and equity in mind. In the following Chapter we will discuss canonical delicts that are subject to the penalty of dismissal from the clerical state within the framework of general principles on delicts and penalties.

## CHAPTER TWO

### CANONICAL DELICTS INVOLVING THE PENALTY OF DISMISSAL FROM THE CLERICAL STATE

#### INTRODUCTION

The social doctrine on the dignity and the fundamental rights of human persons is enshrined in the law of the Catholic Church. While ecclesial law establishes and promotes discipline in the communion of the faithful, it also meets out justice in case of its violation. In other words, law also determines when and under what circumstances a legal statute is violated and which penalty is incurred by its violation. All this is done with one purpose in mind - the salvation of all, including the delinquent.

A delict is a violation of a positive ecclesiastical law to which a penalty is ascribed. A penalty is imposed only as a last resort, all other pastoral efforts having been exhausted. In this chapter, we intend first to study some basic notions relating to canonical delicts (*delicta*) and penalties (*poenae*). An ecclesiastical judge is not to impose a penalty without first verifying whether the juridical elements that constitute a delict truly exist. The commission of a canonical delict is a human act; to incur a penalty as a result of this human act, certain requirements must be verified. Therefore, we will explore briefly the factors that are likely to affect the imputability of a delictual human act.

The punishment for clerical delicts has a long history in the life of the Church.<sup>1</sup> In keeping with this tradition, the 1917 Code established “degradation from the clerical state” as one of the most severe penalties for certain clerical delicts (*CIC/17*, c. 2305). The present Code prescribes “dismissal from the clerical state” (c. 290, 2°), the most severe expiatory penalty for certain canonical delicts. Important legislation determining specific “grave delicts” which incur the penalty of dismissal from the clerical state has been enacted in the Church up to and subsequent to the 1983 Code of Canon Law. We will discuss these “grave delicts” at length in this chapter.

## 2.1 – CANONICAL DELICT

The Second Vatican Council described the Church as a graced community, the Mystical Body of Christ, a visible earthly reality, whose members are both holy and sinful, always in need of purification and renewal.<sup>2</sup> The fact that the members are both graced and sinful (*simul iustus et peccator*) calls for a dialectical interaction in the Church between *communio* and coercive power.<sup>3</sup> In the Church, *communio* is safeguarded by *ius coactivum* which is primarily ordered towards *communio*.<sup>4</sup> When an act of a member of the Church violates a norm or law, it damages the entire ecclesial

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<sup>1</sup> For a historical background of penalties in the Church, see M. CONNOR, *The Administrative Removal of Pastors: An Historical Synopsis and Commentary*, Canon Law Studies (= CLS) no. 104, Washington, DC, Catholic University of America, 1934, pp. 7-9, 16-36; S.W. FINDLAY, *Canonical Norms Governing the Deposition and Degradation of Clerics*, CLS no. 130, Washington, DC, Catholic University of America, 1941, pp. 3-15, 41-62, 67-90; F.P. SWEENEY, *The Reduction of Clerics to the Lay State: An Historical Synopsis and Commentary*, CLS no. 223, Washington, DC, Catholic University of America, 1945, pp. 1-18, 19-35, and F.E. HYLAND, *Excommunication: Its Nature, Historical Development and Effects*, CLS no. 49, Washington, DC, Catholic University of America, 1928, pp. 11-24.

<sup>2</sup> *LG* no. 8; FLANNERY 1, p. 357.

<sup>3</sup> See T.J. GREEN, “Penal Law: A Review of Selected Themes,” in *The Jurist*, 50 (1990), p. 227.

<sup>4</sup> See “Principia quae Codicis iuris canonici recognitionem dirigant,” in *Communicationes*, 2 (1969), p. 78.

order. It affects the dignity and rights of all persons involved, not less destroying the common good.

### 2.1.1 – Notion of Delict

Etymologically, the term “delict” derives from the Latin word *delictum*, which means fault; a delict is a violation of law.<sup>5</sup> A canonical delict is an offence against the norm of ecclesial law to which a penal sanction is attached. In other words, a canonical delict is an external and morally imputable violation of a law or precept to which a canonical penalty is attached.<sup>6</sup>

It is important to distinguish between the notion of delict and the notion of sin. As stated above, a delict is a violation of an ecclesiastical law to which a penalty is attached, whereas a sin is a violation of any law in the moral order.<sup>7</sup> In this sense, every delict is a sin, but not all sins are delicts unless so determined by ecclesiastical positive law. Therefore, the concept of delict arises out of the juridical order and not out of the moral order.<sup>8</sup>

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<sup>5</sup> *Webster's New Collegiate Dictionary*, Toronto, Thomas Allen & Son Limited, G & C. Merriam Company, 1981, p. 297.

<sup>6</sup> See Á. MARZOA, “Offences and Punishment in General,” in Á. MARZOA, J. MIRAS and R. RODRÍGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law (= Exegetical Commentary)*, Prepared under the responsibility of the Martín de Azpilcueta Institute, University of Navarre; English Edition, E. CAPARROS (ed.), Montréal, Wilson & Lafleur, 2004, vol. IV/1, p. 210.

<sup>7</sup> H.A. AYRINHAC, *Penal Legislation in the New Code of Canon Law (Liber V)*, vol. V, New York, Benziger Brothers, 1936, p. 2.

<sup>8</sup> See V. DE PAOLIS, “Aspectus theologici et iuridici in systemate poenali canonico,” in *Periodica*, 75 (1986), pp. 226-229.

According to the 1917 Code (c. 2195, §1), a delict is “an external and morally imputable violation of a law to which a canonical sanction, at least an indeterminate one, is attached.”<sup>9</sup>

During the process for revision of the Code, it was asked whether there was a need in the Church for sanctions. It was opined that those who belong to the Church primarily through an act of faith should not be subjected to coercive laws of a penal nature; communion and charism in the Church should replace the rigid formalistic notion of offences and penalties. For, according to Vatican II, membership in the Church is exclusively voluntary.<sup>10</sup> During the drafting of Book VI of the present Code, there were suggestions to the effect that the penal nature of the book should be suppressed and a disciplinary approach to offences adopted. But the *coetus* decided to retain the penal nature of “*sanctio*” in the Church.<sup>11</sup> Addressing this issue, De Paolis states that, while the term “sanction” in *CIC/17* had both a penal and a disciplinary meaning, in the present Code, and especially in Book VI (c. 1311 and c. 1312, §1), it is used strictly with a penal meaning. This is evident from the technical terms used for offences and penalties in the Code and from the dedication of a separate book for penal law.<sup>12</sup>

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<sup>9</sup> Canon 2195: “[...] externa et moraliter imputabilis legis violatio cui addita sit sanctio canonica saltem indeterminata.” English translation of the canons of *CIC/17* used in this study is from E.N. PETERS, *The 1917 or Pio-Benedictine Code of Canon Law in English Translation*, San Francisco, Ignatius Press, 2001.

<sup>10</sup> See P. HUIZING, “Crime and Punishment in the Church,” in N. EDELBY et al. (eds.), *Renewal and Reform of Canon Law*, New York, Paulist Press, 1967, pp. 113-128, here at pp. 115-116.

<sup>11</sup> “R. Ius poenale ad essentielle tantum contractum est” (*Communicationes*, 16 [1984], p. 38).

<sup>12</sup> “Codex non continet tantum disciplinam, sed verum ius poenale distinctum ab aliis aspectibus disciplinae seu ordinamenti canonici, sive quia praebet notiones technicas delicti et poenae, sive quia separat hanc partem ab aliis partibus” (V. DE PAOLIS, *De sanctionibus in Ecclesia: Adnotationes in Codicem: Liber VI*, Rome, Pontificia Universitas Gregoriana, 1986, p. 17).

Is a mere “violation of law” (*violatio legis*) a canonical delict? In its strict legal sense, an offence can be defined as a violation of law. But, is this true in the ecclesial order? In its ecclesial sense, where the objective of all canonical legislation is the salvation of souls, reduction of a canonical delict to a mere “violation of law” would be too simplistic, because as Morzoa says: “To reduce the comprehensive co-ordinates of offense absolutely to positive law would be to reduce the foundation of penal law to the narrow margins of juridical positivism.”<sup>13</sup> The very reason for the existence of penal law in the Church is to facilitate and protect justice, sanctity and unity, governance and liberty, the sacraments, special obligations, human life and liberty, which are crucial values for the sanctifying mission of the Church. Therefore, a violation of law becomes a delict not merely because it is prescribed as such by law, but because it is anti-ecclesial to the extent it affects the sanctity and unity, rights and dignity, human life and liberty, common good and communion in the Church.<sup>14</sup>

### 2.1.2 – Elements of a Delict

Canon 1321 explains various elements of a delict. Based on the division proposed by De Paolis, we will group them into three, namely 1) The external act (*elementum obiectivum*), the objective element; 2) Imputability (*elementum subjectivum*), the subjective element; and 3) Provision of law (*elementum legale seu poenale*), the legal element.<sup>15</sup>

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<sup>13</sup> MARZOA, “Offences and Punishment in General,” in *Exegetical Commentary*, vol. IV/1, p. 211.

<sup>14</sup> See W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 2<sup>nd</sup> ed. rev. and updated, Ottawa, Faculty of Canon Law, Saint Paul University, 2003, p. 5.

<sup>15</sup> DE PAOLIS, *De sanctionibus in Ecclesia*, p. 40; F. NIGRO, Commentary on c. 1321, in P.V. PINTO (ed.), *Commento al Codice di diritto canonico*, 2<sup>nd</sup> ed., Città del Vaticano, Libreria editrice Vaticana,

The objective element: This refers to an *external and perceivable act* of violation of a law or precept that must be proved in the external forum. To be a delict, an act must be a human act, either doing something forbidden or omitting something which one ought to do, commanded by penal law or precept. The human act should be an external act contradistinguished from an internal one.<sup>16</sup> What does an “external” act really mean? An “external” act, in a juridical sense, means an act that has occurred externally even if it is unknown to others (occult). The important element is that it be provable in the external forum. Moreover, W. Woestman states that an external violation is characterized by 1) the harm inflicted on the Church, in its social order; 2) a transgression of either divine, natural or positive ecclesiastical law; and 3) a transgression of a law to which is attached at least an indeterminate penalty (c. 2195, §1, *CIC/17*).<sup>17</sup>

The subjective element: This element consists in the *imputability* of the act to the agent whereby he or she is proven guilty of the violation of the law. This subjective element is of utmost importance to our study of the offences which involve dismissal from the clerical state. The fundamental right of a person enshrined in the Code, in relation to penal law, is that no penalty can be inflicted on a person unless there exists “grave imputability” (c. 221, §3).<sup>18</sup> Imputability is often equated with responsibility. This may not be fully correct. In juridical terms, imputability is a scale by which a crime is judged with moral certitude and a determination is made whether a crime merits a penalty

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2001, p. 758; see also A. BORRAS, *Les sanctions dans l'Église: Commentaire des canons 1311-1399*, Paris, Tardy, 1990, pp. 15-17.

<sup>16</sup> MARZOA, Commentary on c. 1321, in *Exegetical Commentary*, vol. IV/1, p. 265; J. MARTIN, Commentary on c. 1321, in *The Canon Law – Letter & Spirit*, p. 754.

<sup>17</sup> WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 24; MARZOA, Commentary on c. 1321, in *Exegetical Commentary*, vol. IV/1, p. 265.

<sup>18</sup> Cf. *CCEO* c. 24, §3.

or not. The increase or decrease of imputability depends upon the subjective and objective factors enumerated in the Code (cc. 1321-1330). An external act of violation rooted in a certain amount of freedom and knowledge presumes imputability unless there are contrary proofs to rebut it. In a given act of violation, imputability is identified through two important factors, namely, *dolus* (malice) and *culpa* (culpability).<sup>19</sup>

*Dolus* is described in the 1917 Code as the “deliberate intent of violating law” (c. 2200, §1, *CIC/17*).<sup>20</sup> In the past, the term *dolus* was called an intention, plan, deliberation, decision, knowledge, malice, audacity, fraud, worthlessness, presumption, etc., but modern authors define it as a criminal intent, that is, a deliberate act of the will directed towards committing a violation.<sup>21</sup> According to c. 2200 (*CIC/17*), malice is understood as the mental attitude of the perpetrator of a crime who violates a law or precept in sufficient freedom and knowledge. De Paolis states that the essence of malice lies in the continuing positive act of the will to act with freedom against the law.<sup>22</sup> Two factors of malice are to be noted: will and intellect. Will refers to freedom (the choice) with which the offender positively chooses something contrary to law; as Saint Augustine says “*qui non voluntate peccat non peccat*”; one cannot formally violate a law unless one wills. Intellect refers to the knowledge of the delict and the penalty attached. Thus, intellect and will form part of a deliberate intent to violate a law. However, De Paolis states that in order for malice to exist, it is not required that the offender intends directly

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<sup>19</sup> See *CCEO* c. 1414, §1.

<sup>20</sup> F.X. WERNZ, *Ius canonicum ad Codicis normam exactum*, opera PETRI VIDAL, Tomus VII: *Ius penale ecclesiasticum*, Romae, Apud Aedes Universitatis Gregoriana, 1937, p. 57.

<sup>21</sup> See G. MICHIELS, *De delictis et poenis: commentarius libri V Codicis iuris canonici*, vol. I, Tornaci, Typis Societatis S. Joannis Evangelistae, Desclée et Socii, 1961, pp. 109-110.

<sup>22</sup> See DE PAOLIS, *De sanctionibus in Ecclesia*, p. 57.

and principally the violation of the law, or be motivated by hatred; rather it is sufficient that a person knows that his or her act is contrary to a law or precept.<sup>23</sup>

The second factor identifying imputability is *culpa* (c. 2199 *CIC/17*). “*Culpa* (or culpability) is an action through which criminality arises when one acts against the law either through ignorance or through omission of due diligence which one could and should have avoided, if foreseen.”<sup>24</sup> Everyone is expected to know the law in order to avoid its violation. Therefore, one who violates a law, even through negligence or omission of due diligence, commits an offence.<sup>25</sup> In other words, even in the absence of malice in an act of violation of a law, the presence of “inadvertence and error” could entail juridical culpability.<sup>26</sup> One is presumed to know the law that has been duly promulgated. Similarly, one should obey the law with due diligence and avoid any violation of it. However, when only a lack of due diligence leads to the violation of a law or a precept, the Code states that one is not to be punished “unless the law or precept provides otherwise” (c. 1321, §2), which means that mere culpability, that is, the lack of due diligence does not heighten imputability.<sup>27</sup> Guilt is not presumed by the mere negligence (*culpa*) of law unless a precept or a penal law stipulates otherwise.

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<sup>23</sup> “Non requiritur autem peculiaris mala voluntas. Sufficit quod aliquis sciat proprium modum agendi esse contra legem vel praeceptum” (DE PAOLIS, *De sanctionibus in Ecclesia*, p. 57); also see M. HUGHES, “The Presumption of Imputability in Canon 1321, §3,” in *StC*, 21 (1987), 20-25.

<sup>24</sup> “*Culpa* vero [...] est inconsulta actio vel omissio, ex qua ortus est eventus criminis [...] qui ab agente vel omittente potuit ac debuit praevideri [...]” (WERNZ, *Ius canonicum*, p. 60).

<sup>25</sup> NIGRO, Commentary on c. 1321, in *Commento al Codice di diritto canonico*, p. 767; A. CALABRESE, *Diritto penale canonico*, Cinisello Balsamo (Milano), Edizioni Paoline, 1990, p. 40.

<sup>26</sup> “Consultores unanimiter censent in his casibus haberi delictum culposum, non dolosum” (*Communicationes* 8 [1976], p. 176).

<sup>27</sup> MARZOA, Commentary on c. 1321, in *Exegetical Commentary*, vol. IV/1, p. 272; DE PAOLIS, *De sanctionibus in Ecclesia*, pp. 57-58.

How is imputability proven? Based on c. 1321, §3 (*CCEO* c. 1414, §2), if there is an external violation of law, imputability is presumed. The juridical principle states that once the objective element of an offence has been proven the subjective element is presumed, unless it appears otherwise.<sup>28</sup> In the 1917 Code (c. 2200, §2), *malice* was presumed once the external violation of law had been established; but in the present Code what is presumed is not malice but only *imputability*.<sup>29</sup> As per c. 1321, §3 (CIC), Hughes says that this presumption of imputability is subject to contrary proofs. In order to overturn this presumption, it is enough that the evidence or proofs raise doubt about the truth of the presumption of imputability (*nisi aliud appareat*); then, it is the duty of the ecclesiastical authority to evaluate the moral certitude of imputability and take appropriate decisions.<sup>30</sup>

The legal element: Prior to the 1917 Code, it was discussed whether the requirement of a legal prescript (law or precept) attached, with a penalty for its violation was constitutive of a delict. The 1917 Code determined that only those violations of law were to be punished which were designated as such in law. Thus the legal maxim, “*Nulla poena sine lege poenali praevia*,” became operative in canonical penal law (c. 2195, *CIC/17*).<sup>31</sup> Canon 1321 of the 1983 Code says that a person can be punished only when

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<sup>28</sup> *CCEO* c. 1414, §2. For an analysis of canon 1321, see E. MCDONOUGH, “A Gloss on Canon 1321,” in *StC*, 21 (1987), pp. 381-390.

<sup>29</sup> Hughes notes that there is an omission in the wording of c. 1321, §3 which was also in the 1973 schema. Canon 1321, §3 omits the phrase “of a law” and simply says “where there has been external violation” imputability is presumed. He concludes “by the omission of the words ‘of a law’ the distinction between a presumption of imputability and a presumption of malice is emphasized.” See HUGHES, “The Presumption of Imputability,” p. 23.

<sup>30</sup> *Ibid.*, p. 34; MCDONOUGH, “A Gloss on Canon 1321,” pp. 388-389.

<sup>31</sup> See MICHIELS, *De delictis et poenis*, pp. 85-88.

he/she has violated a law or a precept. The objective and subjective elements on their own are not enough to impose a penalty on someone who has broken a law; it is necessary that the law violated has a sanction or a penalty expressly attached to its violation.

From what has been said above, besides acknowledging the necessity of the principle of legality, the objective and subjective elements, that is, the external form and imputability of the violation must be proven in a given case for the infliction of a penalty.

## **2.2 – FACTORS AFFECTING IMPUTABILITY OF A DELICT**

It is a natural right of every human person not to be punished except in accord with law (c. 221, §3). The exercise of one's rights can be curtailed by a penalty when there is proof of the actual commission of a delict. However, while applying penalties, it is the responsibility of the ecclesiastical judge to evaluate various factors affecting imputability. Canons 1322-1330 deal with such factors and in this section we will discuss six of them.

### **2.2.1 – Incapacity to Commit a Delict**

Canon 1322 says: "Those who habitually lack the use of reason, even though they appeared sane when they violated a law or precept, are deemed incapable of committing an offence."<sup>32</sup> The one who habitually lacks the use of reason is considered incapable of personal responsibility (c. 99) and, therefore, cannot be punished for a crime committed. Deliberation and freedom are necessary for the imputability of a criminal act. Those who habitually lack the use of reason cannot deliberate and freely choose. In canon 1322, the ecclesiastical legislator is not providing any psychological criteria for determining the

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<sup>32</sup> Canon 1322 : "Qui habitualiter rationis usu carent, etsi legem vel praeceptum violaverint dum sani videbantur, delicti incapaces habentur."

reasoning ability of such persons; nor does he offer any canonical principle beyond the one found in natural law or positive divine law. But, since penal law is ecclesiastical law, not divine law, the legislator establishes an important canonical principle in order to safeguard the rights of the individuals who habitually lack the use of reason.<sup>33</sup> However, if sufficient imputability is proven in such cases, the perpetrator can be punished with an appropriate penalty.

### 2.2.2 – Exempting Circumstances

A delict is fundamentally a human act. A human act is elicited within the context of various human situations. Therefore, the imputability of a delict cannot be established without taking into account the circumstances in which it is perpetrated. Factors like age, sanity, force and fear, ignorance, etc., can lessen imputability and consequently, can mitigate any penalty attached to a delict. This principle is concretized in c. 1323 (nn. 1°-7°) which lists seven exempting factors.

First, the lack of sufficient age exempts a person from incurring a penalty in the Church. The law determines such age. Canon 1323, 1° of the present Code sets this age at a person's completion of the sixteenth year. A minor (c. 97 §1) below the age of sixteen years complete who violates a law or a precept is not liable to an ecclesiastical penalty.<sup>34</sup>

Second, if a person, through no personal fault, is ignorant of or in error concerning a law or a precept and violates a law, or acts inadvertently, he or she does not incur any penalty. However, it should be noted that such a lack of or erroneous

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<sup>33</sup> MARZOA, Commentary on c. 1322, in *Exegetical Commentary*, vol. IV/1, p. 276.

<sup>34</sup> NIGRO, Commentary on c. 1323, in *Commento al Codice di diritto canonico*, p. 769. The Eastern Code, however, prescribes 14 years complete as the age for exemption from an ecclesiastical penalty. See CCEO c. 1413, §1.

knowledge about “a law, or a precept, or a fact concerning oneself or a penalty” is not presumed in law (c. 15, §2). In penal matters such ignorance must be proved in the external forum in order to claim exemption from a penalty (c. 1323, 2°).<sup>35</sup>

Third, physical coercion is another exempting circumstance (c. 1323, 3°). According to c. 125, §1, an act performed as a result of force exerted from outside on a person, which its victim is not able to resist, is considered not to have taken place. An action performed as a consequence of force lacks deliberation and freedom on the part of its victim. Therefore, such an action performed in violation of the law is exempt from any penalty. This exempting principle is applicable also to a “fortuitous case,” where the result was unforeseen, or, even if foreseen, was unavoidable.<sup>36</sup>

Fourth, if an act is performed under “grave fear,” or in “a state of necessity” or “grave inconvenience,” no penalty is to be imposed (c. 1323, 4°). One cannot perform a free human act in a state of grave fear (c. 125, §2), because fear arising from a threat of harm morally coerces the mind of the person who acts. In the presence of either grave or relatively grave fear (i.e., grave for a given person though not necessarily for others) one cannot perform a free human act. Grave fear includes not only the objective elements of fear, but also the subjective disposition of the victim of the fear. Also a violation of law in “a situation of necessity” or “grave inconvenience” exempts the violator from any penalty. By “grave inconvenience” the law envisages a situation in which obedience to the law is likely to harm one’s life, goods or good name. If one acts against the law in such a situation so as to avert grave inconvenience to one’s life or goods or good name,

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<sup>35</sup> GREEN, Commentary on c. 1323, 2°, in *New Commentary*, p. 1542.

<sup>36</sup> MARZOA, Commentary on c.1323, 3°, in *Exegetical Commentary*, vol. IV/1, pp. 280-281.

the act is not imputable to that person. It should be noted though that these factors are considered exempting “unless the act is intrinsically evil or tends to the harm of souls.”<sup>37</sup>

Fifth, if a person “acted, within the limits of due moderation, in lawful self-defence or defence of another against an unjust aggressor,” his/her act is not imputable. The legitimate self defence mentioned in c. 1323, 5° is to be understood in light of the qualifier, “due moderation.” This qualifier implies that the defensive act should be rational and proportionate to the threat or harm.

Sixth, c. 1323, 6° states that the acts of those who actually lack the use of reason are not imputable. But this canon does not include the situation in which the lack of reason is voluntarily caused by the delinquent. This situation is considered in c. 1324, §1, 2°. If the lack of use of reason is the result of culpable drunkenness or some other mental disturbance caused deliberately to lower inhibitions so as to be willing to commit a crime or violate a law, then that crime is indeed liable to penalty.<sup>38</sup>

Seventh, inculpable error concerning “grave fear,” “state of necessity,” “grave inconvenience,” “legitimate defence,” etc., is not imputable (c.1323, 7°), provided the act is not intrinsically evil or harmful to souls.

### **2.2.3 – Mitigating Circumstances**

The mitigating circumstances are “those excusing causes which lack some requisite for the offence to be canonically complete as well as all those circumstances that diminish the gravity of the offence in its objective or subjective dimension.”<sup>39</sup> A person

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<sup>37</sup> Ibid., pp. 281-283.

<sup>38</sup> Ibid., p. 284.

<sup>39</sup> J. ARIAS, Commentary on c. 1324, in E. CAPARROS, M. THÉRIAULT, and J. THORN (eds.), *Code of Canon Law Annotated*, prepared under the responsibility of the Instituto Martín de Azpilcueta, 2<sup>nd</sup> ed.

acting in such circumstances (c. 1324) has the capacity to deliberate and to choose freely, but this capacity is somewhat diminished by the circumstances. Therefore, the penalty applicable to delicts perpetrated in such circumstances is to be mitigated.

Based on c. 1324, upon finding attenuating factors in any act of violation meriting a *ferendae sententiae* penalty, the penalty should be diminished, or a penance be substituted (c. 1340), or the judge may even refrain from inflicting any penalty at all (c. 1345). With regard to a *latae sententiae* penalty, the judge can impose a lighter *ferendae sententiae* penalty than the one prescribed by law (c. 1324, §3). The Code (c. 1324) lists ten mitigating circumstances. In brief, they are:

(i) Imperfect use of reason. In this circumstance, unlike the situation noted in c. 1323, 6°, the person who violates a law (c. 1324, 1°) enjoys the use of reason, but it is imperfect. Although there is sufficient basis for penal responsibility, because the use of reason is imperfect, the penalty is to be diminished.<sup>40</sup> (ii) Transitory mental disturbance caused by intoxication, hypnosis, drug abuse, etc., provided such disturbance is not voluntary. (iii) Impulse of passion such as anger, hatred, jealousy, sexual desire, etc. If the heat of passion precedes the act of violation, and hinders all mental deliberation and consent of the will, imputability is to be lessened, provided the heat of passion itself is not deliberately aroused. (iv) Age. A minor who has completed the sixteenth year of age, between the age of sixteen and eighteen does not have full penal imputability for a violation of a law.<sup>41</sup> (v) Grave fear, state of necessity, or grave inconvenience. A person

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rev. and updated version of the 6<sup>th</sup> Spanish language edition (=Code of Canon Law Annotated), Montréal, Wilson & Lafleur Limitée, 2004, p. 1032.

<sup>40</sup> MARZOA, Commentary on c.1323, in *Exegetical Commentary*, vol. IV/1, p. 288

<sup>41</sup> In *CCEO*, the corresponding age is 14-18. See *CCEO* c. 1413, §2.

in any of these circumstances is not considered fully responsible unless the crime is intrinsically evil and harmful to souls. (vi) Legitimate self-defence. The word “legitimate” implies “due moderation” in an act of self-defence against unjust aggression. (vii) Reaction to immediate, grave as well as unjust provocation. (viii) Culpable erroneous judgement on fear and self-defence. In comparison to c. 1323, 4<sup>o</sup>, which exempts from a penalty due to the actual influence of grave fear on a person, c. 1324, 8<sup>o</sup> merits only an attenuating factor due to an “erroneous” conception of the offender that there is grave fear. (ix) Non-culpable ignorance of law. A person, who through no personal fault thinks that there is no penalty attached to a law or precept which he or she violates, is to be punished but with a lesser penalty.<sup>42</sup> (x) Non-grave imputability. When an act of violation is imputable but not grave, its penalty is to be mitigated. This principle explains that though an act of violation is imputable it may not damage the common good; neither may cause scandal nor be harmful to souls.

#### 2.2.4 – Aggravating Circumstances

While certain circumstances mitigate a penalty, others can aggravate it. In case of aggravating circumstances, the judge can add a penalty to a *ferendae sententiae* penalty over and above the one stipulated by law, or add a penalty or a penance to a *latae sententiae* penalty already incurred. The Code, in c. 1326, identifies three such circumstances.

The first (c. 1326, §1; *CCEO* c. 1416) is juridical recidivism. This could be either generic or specific. “Generic” recidivism refers to a person who, after being condemned, or upon whom a penalty has been imposed, continues to commit *any* offence. “Specific”

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<sup>42</sup> See MARTIN, Commentary on c. 1324, in *The Canon Law – Letter & Spirit*, p. 758.

recidivism involves repetition of the same crime after having been condemned by law (c. 2208 *CIC/17*). The recidivist will of the offender can be deduced from the repetition of offences, which can become an aggravating circumstance.<sup>43</sup>

The second is the status of the offender. Canon 1326, §1, 2<sup>o</sup> says that the dignity and the ecclesiastical office held by the offender can aggravate imputability. If one uses or abuses a position of authority or an ecclesiastical office to commit a crime, imputability may become more serious.

The third is the deliberate lack of due diligence (1326, §1, 3<sup>o</sup>). If a person, after incurring a penalty for a culpable offence, through his or her own carelessness, fails to take precautions to avoid the situation of a crime, which any sensible person would take, such carelessness may call for a more severe penalty.

### **2.2.5 – Special Circumstances**

In certain special circumstances c. 1345 directs ecclesiastical authority to abstain from imposing any penalty, if the offender's spiritual well being can be better served through other pastoral and spiritual means. The special circumstances mentioned in c. 1325 are ignorance, drunkenness and passion. Since these factors have already been considered in the previous section, a brief note should suffice here. The special circumstances may be considered only under the following conditions: The ignorance should not be grave or supine or affected, and deliberately sought out, so as not to know the law. Passions, drunkenness or other mental disturbances should not have been deliberately provoked or sustained prior to the commission of a crime.<sup>44</sup>

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<sup>43</sup> GREEN, Commentary on c. 1326, in *New Commentary*, p. 1545.

<sup>44</sup> See MICHIELS, *De delictis et poenis*, pp. 203-206; CALABRESE, *Diritto penale canonico*, p. 69.

### 2.2.6 – Collaboration in a Delict

The imputability of a delict is related not only to an individual offender, but also to those *physical persons* who co-operate in carrying out an offence (c. 1329; *CCEO* c. 1417). The principal offender is the one who plans, forces others to co-operate, and executes the offence and, hence, he/she is gravely culpable. The various degrees of imputability of the collaborators measured in the 1917 Code (c. 2209) are no longer listed in the 1983 Code. However, an accurate understanding of those various degrees of collaboration is necessary in order to determine imputability for a given violation.

The co-operation is merely “material” if a person is physically forced to help in a criminal act and is unable to resist. It is “formal” if a person participates totally and physically in a criminal act. It is “physical” if a person by his or her own actions helps in the actual execution of the criminal act. It is merely “moral” if help is rendered morally, that is, to induce another person to commit an offence. Material, physical and moral co-operation in a delict are not always gravely imputable, but formal co-operation is gravely imputable.<sup>45</sup>

With regard to a *ferendae sententiae* penalty, all those who participate in a jointly committed offence are to be punished either with the same *ferendae sententiae* penalty as that of the principal offender, or by another penalty of the same order or of a lesser gravity (c. 1329, §1). With regard to *latae sententiae* penalties, the accomplices, even if not mentioned in the law or the precept, incur the same *latae sententiae* penalty as the principal offender, if without their assistance the crime would not have been committed

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<sup>45</sup> WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 39.

(c. 1329, §2). If the co-operation is merely moral or material, the accomplices can be punished with appropriate *ferendae sententiae* penalties.

### 2.2.7 – Attempted Delicts

An attempted delict is an incomplete delict. A person who voluntarily did not complete an initiated or inchoate offence, does not incur the penalty prescribed for the completed delict. According to *CIC/17*, there were three specific differences within this concept: 1) an attempted delict, 2) a frustrated delict,<sup>46</sup> and 3) an impossible delict.

According to the 1983 Code (c. 1328), an attempted delict is an act of a person who initiated a delict either by acting or by omitting something, but did not complete it. Such an attempted delict is not subject to the penalty prescribed for the completed delict, unless the law or a precept contains a specific provision relating to punishment for such an act. According to canonical doctrine, there are several stages in the *iter delicti*.<sup>47</sup> In other words, there are many successive acts from the preparatory act to the act of final consummation. The preparatory acts lead to an executive act at which stage the delict is completed. It is only at this last stage that the social harm is determined and, consequently, the act is termed a delict. An act of violation, which does not reach its final stage, is called an attempted delict.<sup>48</sup>

The attempted delicts can be grouped into two categories. The first category includes the non-completion of a delict for the reasons outside the will of the agent (c. 1328, §1; *CCEO* c. 1418, §1). The second category comprises the non-completion of a

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<sup>46</sup> In the present Code there is no distinction between an attempted offence and a frustrated one which the *CIC/17* made in cc. 2212 and 2213. See BORRAS, *Les sanctions dans l'Église*, pp. 34-36.

<sup>47</sup> See MICHIELS, *De delictis et poenis*, p. 277.

<sup>48</sup> See MARZOA, Commentary on c.1328, in *Exegetical Commentary*, vol. IV/1, p. 304.

delict due to refusal of the agent (c. 1328, §2). The offender in the second category who had initiated an action, which leads, in normal circumstances, to the execution of the offence, but who desists after some time from its execution, will not be burdened with imputability unless scandal or grave harm were to result. In case of serious scandal or grave harm, however, the offender may be punished with a just penalty, but with one that is lesser than the one determined for a completed delict.

### 2.3 – CANONICAL PENALTIES

The study of canonical delicts leads us now to examine the necessity, importance and the purpose of penalties in the Church. The life and mission of the Church (*LG* nn. 1 and 8) by its social nature requires a juridical form.<sup>49</sup> The Second Vatican Council affirmed the juridic order of the Church and the need for penal laws in the Church.<sup>50</sup> According to De Paolis, ecclesiastical penalties are biblically founded; they are rooted in Christian freedom and are not opposed to it. Quoting the ninth principle governing the revision of the Code of Canon Law, he justifies the necessity of sanctions in the Church.<sup>51</sup>

Pope John Paul II stated that the Church has the right to punish delicts with appropriate penalties whereby the offender is brought to penance and communion; the unity of faith is promoted; the innocent are protected from being led astray; and

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<sup>49</sup> *Communicationes*, 1 (1969), p. 78.

<sup>50</sup> PIO CIPROTTI, "Il diritto penale della Chiesa dopo il Concilio," in *Atti del Congresso Internazionale di diritto canonico: La Chiesa dopo il Concilio*, Roma, 14-19 gennaio 1970, Milano, A. Giuffrè, 1972, pp. 520-521.

<sup>51</sup> "In n. 9 statuitur necessitas iuris poenalis 'cum ius coactivum, cuiuslibet societatis perfectae proprium, ab Ecclesia abiudicari nequeat'" (DE PAOLIS, *De sanctionibus in Ecclesia*, p. 9).

deficiencies caused to the individual and common good by delicts are repaired.<sup>52</sup> According to Pope Paul VI, it is necessary and opportune to bring those who violated the law to experience painful medicinal consequences with fruitful humility; this action, however, is to be undertaken only in view of the spiritual and moral integrity of the whole Church and of the offender.<sup>53</sup>

Though the Church has the inherent right to impose penalties on those who commit an offence (c. 1311), the ultimate goal of any penalty in the Church is *salus animarum* (c. 1752). An ecclesial penalty is thus intended to achieve the reparation of scandal, restoration of justice and reform of the offender (c.1341).<sup>54</sup> In this section, we will analyse first the general canonical principles on penalties, then examine various kinds of penalties and their modes of application.

### 2.3.1 – The Notion of Penalty

What is a canonical penalty? The 1917 Code defined a penalty as the “deprivation of some good, imposed by the lawful authority in order to correct the offender and punish the offence” (c. 2215). This definition of penalty emphasizes its three aspects. First, a penalty can deprive a person of juridical as well as spiritual goods, which are translated into subjective rights that a person acquires as a member of the Church (c. 96). Second, a penalty can be imposed only by a lawful authority – the competent ecclesiastical superior who must apply equity while adhering strictly to the provisions of law (c. 1752). Third,

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<sup>52</sup> See JOHN PAUL II, Allocation to the Roman Rota, 17 February 1979, in *AAS*, 71 (1979), pp. 422-427; English trans. in WOESTMAN (ed.), *Papal Allocutions to the Roman Rota*, pp. 153-158.

<sup>53</sup> PAUL VI, Allocation to the Roman Rota, 29 January 1970, in *AAS*, 62 (1970), pp. 111-118; English trans. in WOESTMAN, *Papal Allocutions to the Roman Rota*, pp. 98-104, here at pp. 103-104.

<sup>54</sup> See E. MCDONOUGH, “A *novus habitus mentis* for Sanctions in the Church,” in *The Jurist*, 48 (1988), pp. 729-731.

the objective of a penalty is based on its pastoral and juridical nature. The pastoral nature of a penalty is oriented towards the salvation of the individual offender, while its juridical nature calls for the defence and protection of justice and order in the Church.<sup>55</sup>

The imposition of penalties has been an integral part of the life of the Church.<sup>56</sup> As to the competence to inflict penalties, after the Supreme Pontiff, bishops in their respective territories enjoy the power (c. 1315, §1; *CCEO* c. 1405, §1). However, as the 1917 Code explains that bishops and superiors are to exercise this power with great moderation, always keeping in mind that they are fathers rather than judges; exhortation is more effective than threats. They are reminded that they should have recourse to penal measures only when persuasion or reproach has failed. Even in such cases, the superior should proceed with mercy and kindness without undue rigour. This was also the teaching of the Council of Trent.<sup>57</sup>

### 2.3.2 – Canonical Principles Governing Penalties

The Code lays down some important principles with respect to penalties. First, the most important principle is *nulla poena sine lege*; this *regula iuris* implies that no penalty can be imposed for a violation unless the law or precept has attached a penalty to it (c.

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<sup>55</sup> See ARIAS, Commentary on c. 1312, in *Code of Canon Law Annotated*, pp. 1020-1021.

<sup>56</sup> For more information on the history of ecclesiastical punitive power and the imposition of penalties, see MICHIELS, *De delictis et poenis*, pp. 30-40; CALABRESE, *Diritto penale canonico*, pp. 90-93; O'CONNOR, "Trends in Canon Law," pp. 210-212.

<sup>57</sup> "Eadem Sancta Tridentina synodus, [...] illud primum eos admonendos censet, ut se pastores, non percussores, esse meminerint; atque ita praeesse sibi subditis oportere, ut non in eis dominantur, sed illos tanquam filios et fratres diligant: elaborentque, ut hortando et monendo ab illicitis deterreant, ne ubi delinquerint, debitis eos poenis coercere cogantur" (COUNCIL OF TRENT, Session XIII, Cap. 1, in J.D. MANSI, *Sacrorum Conciliorum nova et amplissima collectio*, Ann. 1545-1565, vol. 33, Paris, H. Welter, 1902, p. 86); see also c. 2214 §2 of *CIC/17*.

1320).<sup>58</sup> Second, the law that prescribes a penalty is subject to “strict” interpretation (c. 18). And, if a penal prescript is not clear and is subject to dispute, the milder, the more benign interpretation is to be followed (*CCEO* c. 1404, §1). This principle contained in c. 2219 of *CIC/17* is now reiterated in c. 18 of *CIC*. Only those delicts incur penalties that are prescribed in the Code; one is not to stretch the application of a penalty through particular law not indicated in the universal law, just to punish a fault (*CCEO* c. 1404, §2). Third, the application and remission of penalties should take place in the external forum, generally leaving the forum of conscience beyond the boundary of penal laws. In other words penalties are to be established, inflicted and remitted only in the external forum.<sup>59</sup> Fourth, the juridical-pastoral efforts of persuasion and rebuke should precede the imposition of penalties (c. 1321; *CCEO* c. 1407, §1). Greater importance should be given to Christian mercy than to the rigidity of law. And fifth, De Paolis says that a “penalty in the economy of the canon law system” should be used as *extrema ratio*, only as a last resort.<sup>60</sup>

### 2.3.3 – The 1983 Code of Canon Law on Penalties

The significant changes of penal law in the 1983 Code from the 1917 Code will be studied here under three headings, so as to identify the main thrust of the present Code. Two studies by T.J. Green,<sup>61</sup> one based on the English-speaking world’s critique of

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<sup>58</sup> T.J. GREEN, “The Future of Penal Law in the Church,” in *The Jurist*, 35 (1975), p. 228-229.

<sup>59</sup> GREEN, “Penal Law: A Review of Selected Themes,” p. 232.

<sup>60</sup> V. DE PAOLIS, “Penal Sanctions, Penal Remedies and Penances in Canon Law,” in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law* (Proceedings of a Conference held at the Pontifical University of the Holy Cross, Rome, March 25-26, 2004), Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2005, p. 160.

<sup>61</sup> GREEN, “The Future of Penal Law in the Church,” pp. 213-275; GREEN, “Penal Law: A Review of Selected Themes,” pp. 221-256.

the 1973 Schema on penal law,<sup>62</sup> and the other written after the promulgation of the 1983 Code, pointing out a paradigm shift in penal laws, will be our principal sources to identify the developments in the canonical penal order. This can be seen in three areas: 1) ecclesiological, 2) pastoral, and 3) juridical.

**Ecclesiological Development:** Founded on the theology of Vatican II (*GS* nn. 4 and 12), the penal laws in the Church are understood primarily as a means to defend and protect the fundamental human dignity and rights of the Christian faithful. A noteworthy development in *CIC* is the broader legislative and administrative options left to particular laws in the determination<sup>63</sup> and application of penalties.<sup>64</sup> Though the “rationale for penal laws”<sup>65</sup> is not expressed explicitly in the Code, the redeeming and healing character of penalties is stressed in c. 1311. As the penalty for “*delinquentes*” is justified, the fundamental dignity and relationship of the “*Christifideles*” to Christ and concretely to the Church (*LG* no. 8), are also recognized. This calls for the individual’s conversion and reintegration into the community.<sup>66</sup>

**Pastoral Development:** A significant canon (c. 1341), shaped by the third governing principle guiding the revision of the Code,<sup>67</sup> mandates (*tunc tantum*

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<sup>62</sup> See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema documenti quo disciplina sanctionum seu poenarum in Ecclesia Latina denuo ordinatur*, Vatican City, Typis polyglottis Vaticanis, 1973.

<sup>63</sup> Cf. cc. 1315, 1316, 1317, 1318, 1319 and 1327.

<sup>64</sup> Cf. cc. 1717-1728; *CCEO* cc. 1468-1482.

<sup>65</sup> A rationale for the penal law was to be spelled out in the eventual promulgation document *Humanum consortium*; but instead the *coetus* placed c. 1311 as an introductory canon to expound on the Church’s right to impose penalties (*ius puniendi*). See GREEN, “Penal Law: A Review of Selected Themes,” p. 226; GREEN, “The Future of Penal Law in the Church,” p. 240.

<sup>66</sup> GREEN, “Penal Law: A Review of Selected Themes,” p. 228.

<sup>67</sup> See *Communicationes*, 1 (1969), pp. 79-80.

*promovendam curet*) the pastoral approach of correction prior to the imposition of a penalty. This recognizes the dignity and rights of persons, as well as the salvific character of penal law (c. 1752). Another noteworthy pastoral change in this regard is the reduction of the number of penalties;<sup>68</sup> and the application, declaration and remission of penalties, in general, are restricted to the external forum.<sup>69</sup> In order to protect the internal communion of the offender with God and the Church, the confessor's role in the remission of penalties is duly recognised (c. 1357). The reservation of penalties to the Holy See is reduced<sup>70</sup> in order to enhance the application of the principle of subsidiarity by the local bishops and ordinaries with respect to penalties. The cumbersome categories of reserved penalties of the 1917 Code have been abolished.<sup>71</sup> Now cc. 1341-1353 on the application of penalties allow ecclesiastical authorities to use administrative discretion while applying penalties either to mitigate,<sup>72</sup> omit, exempt or increase penalties (cc. 1322-1330) that are optional. Based on principle no. 9 governing the revision of the Code, the limited *latae sententiae* penalties are applied only for very grave delicts where the application of *ferendae sententiae* would be inadequate to deal with the situation.

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<sup>68</sup> Part III, *De poenis in singula delicta* (cc. 2314-2414, *CIC/17*) in Book V (*De delictis et poenis*) of the 1917 Code dealt with the specific offences in one hundred and one canons; this number has been reduced in the 1983 Code to thirty-five, and the sanctions reduced from 230 to 89. See T.J. GREEN, "Introduction to Book VI," in *New Commentary*, pp. 1531-1532.

<sup>69</sup> See *Communicationes*, 2 (1970), p. 101.

<sup>70</sup> There are only five *latae sententiae* penalties in the present Code reserved to the Apostolic See. The delicts are: 1) Violation of sacred species (c. 1376); 2) Physical attack on Pope (c. 1370, §1); 3) Absolution of an accomplice (c. 1378, §1); 4) Unauthorized episcopal consecration (c. 1382); and 5) Direct Violation of the Sacramental Seal (c. 1388, §1).

<sup>71</sup> Certain penalties in the 1917 Code were *simpliciter*, *speciali modo* and *specialissimo modo* reserved to the Holy See.

<sup>72</sup> See *CCEO* c. 1415, §1.

Only the *ferendae sententiae* penalties allow discretion to local authorities on various modes of application of penalties.<sup>73</sup>

**Juridical Development:** In the new Code, the principle of subsidiarity recognizes the administrative discretion of local authorities in the application of penalties (cc. 1718-1728). The maxim *nulla poena sine lege* implicit in c. 1321 safeguards the right of persons in the Church against the arbitrary exercise of penal powers. Another notable juridical change in the 1983 Code is the “presumption” of *dolus*. Contrary to the 1917 Code’s presumption of *dolus* upon the commission of an external violation (c. 2200, §2), the present Code now presumes only imputability (c. 1321, §3 of *CIC*); this prescript requires only minimal evidence to raise a doubt on moral certitude over imputability.<sup>74</sup>

In the new Code, appeal or recourse against a penal sentence or decree suspends its effects unless the higher authority upholds it through a decree (c. 1353). Although there is a provision in the new Code for the imposition of a penalty through an administrative process (c. 1720), in general, the new Code prefers the imposition of penalties through the judicial process (c. 1342)<sup>75</sup> so that the rights of all persons involved in a trial are protected. In particular, dismissal from the clerical state can be imposed only through a judicial process (c. 1425, §1, 2<sup>o</sup>). In place of penalties, other pastoral and juridical measures of correction are emphasized.<sup>76</sup>

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<sup>73</sup> For more on the nature of the penalty, see DE PAOLIS, “De recognoscendo iure poenali canonico,” in *Periodica*, 63 (1974), p. 58; also see idem, “De legitimitate et opportunitate poenarum latae sententiae in iure poenali canonico,” in *Periodica*, 62 (1973), pp. 319-373.

<sup>74</sup> GREEN, “Penal Law: A Review of Selected Themes,” p. 243.

<sup>75</sup> See *CCEO* c. 1401, §1

<sup>76</sup> See cc. 1312, §3, 1340, 1341, 1343, 1345 and 1348; *CCEO* c. 1409

These innovations in the 1983 Code reflect the important pastoral concerns of the Church with regard to the *ius puniendi*.

### 2.3.4 – Types of Penalty: Medicinal and Expiatory Penalties

Penalties are differentiated as “medicinal” and “expiatory.” According to the traditional understanding, medicinal penalties are primarily intended to lead the offender to reform; for this reason they are not perpetual. They must be remitted after there has been sufficient reform of the offender and reparation of the harm caused by the delict (c. 1358, §1).<sup>77</sup> The expiatory penalty, previously known as “vindictive” in c. 2286 of *CIC/17*, is a penalty intended primarily to remedy the damage done by a delict and to deter others from doing likewise. Unlike medicinal penalties (e.g. excommunication), which are to be remitted after the reform of the offender, expiatory penalties (e.g. dismissal from the clerical state) can be inflicted perpetually, indefinitely, or for a particular period of time, whether or not the offender reforms.<sup>78</sup>

According to Marzoa, the traditional notion underlying the division of penalties needs to be understood correctly. Such a notion sometimes may lead one to think that there are two penal systems in the Church, exclusive of one another. In other words, those “medicinal” penalties are solely designed for correction and the “expiatory” ones are for punishment;<sup>79</sup> thus the expiatory penalties seem to overlook the supreme value of law, that is, *salus animarum* and the communion of the reformed. Such a notion of the division of medicinal and expiatory penalties becomes polemical and exclusive, and

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<sup>77</sup> ARIAS, Commentary on c. 1312, in *Code of Canon Law Annotated*, p. 1020.

<sup>78</sup> BORRAS, *Les sanctions dans l'Église*, pp. 87-89.

<sup>79</sup> NIGRO, Commentary on c. 1331, in *Commento al Codice di diritto canonico*, pp. 780-781.

therefore, it is not acceptable. It questions the very foundation and *raison d'être* of the canonical penal system in general.<sup>80</sup> Therefore, Marzoa concludes:

The fact that there are medicinal penalties and expiatory penalties in canon law does not mean that there are two radically different types of penalties. [...] Instead, there are two complementary modes of reaction to offences in which the stress falls more on medicinality or more on expiation. The stress determines different manners of imposition.<sup>81</sup>

### 2.3.5 – Penal Remedies and Penances

Penal remedies and penances are the intermediary institutes in the penal system of canon law. Historically they were used as juridical and pastoral instruments to prevent offences, to establish justice, and to protect both the community and the offender.<sup>82</sup> In the 1917 Code there were four kinds of penal remedies; they were: *monitio*, *correptio*, *praeceptum* and *vigilantia*. The present Code has two; they are *monitio* and *correptio*.<sup>83</sup> Canon 1339 says that when a person is in a proximate occasion of committing a crime, or when there is a serious suspicion that a crime has been committed, or when one is not certain about the imputability because of attenuating factors, the Ordinary can issue a penal (remedial) warning instead of a penalty. This warning is not merely a pastoral or paternal action; rather, it is a juridical action with juridical consequences.<sup>84</sup> Therefore a

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<sup>80</sup> MARZOA, "Introduction to Offences and Punishment in General (cc. 1311-1363)," in *Exegetical Commentary*, IV/1, p. 216.

<sup>81</sup> *Ibid.*, p. 217.

<sup>82</sup> Prior to the 1917 Code, the two curial documents issued for penal remedies were: 1) SACRED CONGREGATION FOR BISHOPS AND REGULARS, Instruction *Sacra haec*, 11 June 1880, in *Fontes*, no. 2005, 2) SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, Instruction *Cum magnopere*, a. 1883, in *Fontes*, no. 4900. See P.L. LOVE, *The Penal Remedies of the Code of Canon Law*, CLS no. 404, Washington, DC, Catholic University of America, 1960, pp. 5-29.

<sup>83</sup> DE PAOLIS, "Penal Sanctions, Penal Remedies and Penances in Canon Law," p. 172.

<sup>84</sup> LOVE, *The Penal Remedies of the Code of Canon Law*, p. 132. A warning containing a threat of penalty is equal to a penal precept; see *CCEO* c. 1406, § 2.

superior, usually the Ordinary (c. 134, §1; *CCEO* c. 984), who in his exercise of power of governance issues a penal remedy, should do so in writing and the act should be kept in the archives for administrative and judicial purposes.

The penal remedy of rebuke (*correptio*) (c. 1339, §2; *CCEO* c. 1427, §1) is a correction by the Ordinary for an action which causes continuous scandal, although there is no delict in a technical sense. The correction by the Ordinary should be done before a notary or two witnesses and should be put in writing.<sup>85</sup>

A penance (c. 1340) is an action imposed by the competent superior on a person for the offence he/she has committed but which cannot be punished by a full penalty due to exempting or mitigating factors. This juridical sanction is imposed by the Ordinary in the external forum (c. 1343). Since the imposition of a penance is an act of executive power, it should be issued in writing (c. 37), and a copy placed in the file of the person. One cannot impose public penance for an occult transgression. In the application of penalties, the judge, using discretion, can apply penances instead of a penalty (c. 1348) only when the penalty is “facultative.”<sup>86</sup> But if a serious offence is committed, then the judge must apply a “preceptive penalty,” if there is such a provision.<sup>87</sup>

### 2.3.6 – Modes of Imposition of Penalties

Based on the mode of imposition, penalties can be divided into *latae sententiae* and *ferendae sententiae*. The *latae sententiae* penalties are incurred automatically upon commission of a delict without the intervention of a judge or a superior. The *ferendae*

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<sup>85</sup> LOVE, *The Penal Remedies of the Code of Canon Law*, p. 130.

<sup>86</sup> A facultative or optional penalty is one in which the imposition of penalty is not obligatory (cc. 1343; 1384).

<sup>87</sup> A preceptive penalty is one which is expressly prescribed in law or in a precept to be applied for a particular delict (c. 1380).

*sententiae* penalties are imposed by the competent superior. Canon 2217 (*CIC/17*) says that a penalty is *latae sententiae* “if a determinate penalty is added to the law or precept such that it is incurred upon the fact of the delict being committed.” Once a person incurs a *latae sententiae* penalty, the guilt of the person should generally be established either in a judicial or administrative process and the authority must formally declare the penalty through a decree. This decree gives the penalty additional canonical consequences. On the other hand, *ferendae sententiae* penalties are incurred only through a judicial or an administrative process.

#### 2.4 – LEGISLATION ON DELICTS INVOLVING DISMISSAL FROM THE CLERICAL STATE PRIOR TO THE 1983 CODE OF CANON LAW

Having analysed the notion and elements of delicts and penalties, we will now study, in this section, how certain serious delicts that entail the penalty of degradation (in the Pio-Benedictine Code) or dismissal from the clerical state (in the 1983 Code) were addressed in prior canonical legislation. We prescind here from the documents which dealt with cases involving “dispensation from clerical obligations” published by the Roman curia,<sup>88</sup> and focus only on those documents which cover delicts that incur the penalty of dismissal from the clerical state.

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<sup>88</sup> Among these we could mention: 1) SACRA CONGREGATIO DE SACRAMENTIS, *Instructio ad R̄mos locorum ordinarios de scrutinio alumnorum peragendo antequam ad ordines promoveantur*, 27 December 1930, in *AAS*, 23 (1931), pp. 120-129; 2) The same Congregation issued in 1931 a set of Norms to deal with the nullity of sacred ordination cases. See SACRA CONGREGATIO DE SACRAMENTIS, *In processibus super nullitate sacrae ordinationis vel onerum sacris ordinibus inhaerentium a Sacra Congregatione de Disciplina Sacramentorum editae*, 9 June 1931, in *AAS*, 23 (1931), pp. 457-492; 3) SUPREMA SACRA CONGREGATIO SANCTI OFFICII, *Litterae circulares et normae ad causas parandas de sacra ordinatione eiusdemque oneribus*, 2 February 1964, in XAVERIUS OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, vol. III (Leges annis 1959–1968), Roma, Commentarium pro Religiosis, 1972, pp. 4463-4469; English trans. in *CLD*, vol. VII, pp. 1002-1015; 4) SACRA CONGREGATIO PRO DOCTRINA FIDEI, Circular Letter, *Per litteras [...] de modo procedendi in examine et resolutione petitionum quae dispensationem a caelibatu respiciunt*, 14 October 1980, in *AAS* 72 (1980), pp. 1132-1137; English trans. in *The Jurist*, 41 (1981), pp. 222-228.

The condemnation of clerical delicts by the Church is already found in the early Church. The right of expelling harmful members from religious institutes can be found in the Rule of St. Augustine and the Constitutions of St. Dominic and others.<sup>89</sup> Canon 3 of the first ecumenical Council of Nicea (325) condemned the sexual improprieties of clerics.<sup>90</sup> The Councils of Chalcedon<sup>91</sup> and Nicea II dealt with the clerical delict of concubinage and punished the offenders progressively with censure and deposition.<sup>92</sup> An admonition to clerics with the threat of sanctions was discussed at the following Councils: the Third (1179)<sup>93</sup> and Fourth Lateran Councils (1215),<sup>94</sup> the Council of Vienne (1311)<sup>95</sup> and the Council of Constance (1414).<sup>96</sup> The Decretals of Pope Gregory IX punished the crime of desecration with the penalty of suspension.<sup>97</sup>

After the twelfth century, when various laws of particular councils were compiled into the *Corpus iuris canonici*, penal laws relating to crimes were categorized. The Decree of Gratian identified the canonical delicts subject to degradation. One such

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<sup>89</sup> W.C. MICHALICKA, *Judicial Procedure in Dismissal of Clerical Exempt Religious*, CLS no. 19, Washington, DC, Catholic University of America, 1923, p. 6; HYLAND, *Excommunication: Its Nature, Historical Development and Effects*, pp. 11-34.

<sup>90</sup> See N.P. TANNER et al. (ed.), *Decrees of the Ecumenical Councils*, vol. I, London, Sheed and Ward, Washington, DC, Georgetown University Press, 1990, p. 7.

<sup>91</sup> See *ibid.*, p. 99.

<sup>92</sup> See *ibid.*, p. 152.

<sup>93</sup> See *ibid.*, p. 217.

<sup>94</sup> See *ibid.*, p. 242.

<sup>95</sup> Decree no. 8 of the Council of Vienne, in *ibid.*, p. 364.

<sup>96</sup> Session 43, cc. 15-35, of the Council of Constance, in *ibid.*, p. 449.

<sup>97</sup> See C.M. PADAZINSKI, *Loss of Clerical State: A Penalty or Rescript?*, Romae, Pontificia Studiorum Universitas a. S. Thoma aq. in Urbe, 1999, p. 58.

example is clerical disobedience to the bishop.<sup>98</sup> The Council of Trent (1545) stated that “those ecclesiastical persons who committed grave crimes have to be removed from sacred orders and should be tried in the tribunal.”<sup>99</sup> In this very brief overview one thing clearly stands out in the life of the Church, namely the clerical state was not immune from the penalty of its loss when very serious delicts were perpetrated by clerics.

#### 2.4.1 – Delicts in the 1917 Code of Canon Law

Among the individual delicts mentioned in *CIC/17*, the most serious ones against the unity of faith, the sanctity of sacraments and moral principles were punished with grave vindictive penalties, namely deposition (c. 2303, *CIC/17*) and degradation (c. 2305, *CIC/17*). “Deposition” was a vindictive penalty applicable to clerics, by which a delinquent cleric, while retaining the clerical privileges and obligations arising from the Orders, was deprived permanently of all offices, benefices, dignities, pensions, and functions in the Church, and was disqualified from acquiring them in the future. However, unlike in a case of degradation, the one deposed was not deprived of clerical privileges.<sup>100</sup>

The penalty of “degradation” signified a total “reduction to the lay state” according to the terminology of the time. It was inclusive of three other severe penalties:

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<sup>98</sup> “Si quis sacerdotum vel reliquorum clericorum suo episcopo inobediens fuerit, aut ei insidias parauerit, aut contumeliam, aut calumniam, vel conuincia intulerit, et conuinci potuerit, mox depositus curiae tradatur, et recipiat quod inique gessit” (*Decretum Gratiani emendatum et notationibus illustratum, una cum glossis*, Gregorii XIII Pont. Max. iussu editum; ad exemplar romanum diligenter recognitum, Lugduni, 1584, c. 18, C. IX, q. 1).

<sup>99</sup> TANNER, *Decrees of the Ecumenical Councils*, vol. II, p. 700.

<sup>100</sup> Four privileges were mentioned in cc. 118-123 of the *CIC/17*. They are *privilegium canonis* (c. 119): reverence to the clergy by all the faithful; *privilegium fori* (c. 120 §1): contentious or criminal trials against clerics to be tried by ecclesiastical judges; *privilegium immunitatis* (c. 121): clerical immunity from military services and public civil offices; and *privilegium competentiae* (c. 122): clerics compelled to pay their creditors may not be deprived of what is necessary for their decent maintenance.

deposition, perpetual deprivation of ecclesiastical garb, and reduction to the lay state. The cleric was degraded only after he had been deposed and deprived of the ecclesiastical garb and persisted in scandal for a year. Degradation was a *ferendae sententiae* penalty which was imposed by a tribunal of five judges (c. 1576, §1, 2° [CIC/17]). It caused the loss of the clerical state, but the obligation of celibacy remained (c. 213 §2, CIC/17).<sup>101</sup> Five delicts<sup>102</sup> meriting degradation in the 1917 Code were:

1) A cleric who joined a non-Catholic sect and did not amend after warning (c. 2314, §1, 3°); 2) a cleric who attacked the Roman Pontiff (c. 2343, §1); 3) a cleric who committed the crime of homicide (c. 2354, §2); 4) a more serious case of a cleric who committed the crime of solicitation (c. 2368, §1); and 5) a cleric or a religious, in a solemn vow of chastity, contracted a civil marriage and did not return even after warnings by the Ordinary (c. 2388, §1).

Since out of five delicts delineated in the 1917 Code, four are incorporated in the present Code, we will examine these individual delicts in detail when we analyse them in light of the 1983 Code. In its list, the present Code adds three additional clerical delicts meriting dismissal.<sup>103</sup> The penalty of degradation for the delict of homicide (c. 2354, §2 of CIC/17) is reduced to deprivation and prohibition in the 1983 Code (c.1336, §1). Pertinent to our study are the next two important documents from the Roman curia that

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<sup>101</sup> AYRINHAC, *Penal Legislation in the New Code of Canon Law*, p. 132; FINDLAY, *Canonical Norms Governing the Deposition and Degradation of Clerics*, pp. 204 - 213.

<sup>102</sup> Padazinski identifies six delicts meriting degradation, whereas according to Ayrinhac, there are only five. Padazinski seems wrongly to consider c. 2305 §2 (CIC/17), which is only a general norm on degradation, but not a prescript specifying a delict. See PADAZINSKI, *Loss of Clerical State: A Penalty or Rescript?*, p. 75; also see AYRINHAC, *Penal Legislation in the New Code of Canon Law*, p. 132.

<sup>103</sup> They are 1) desecration of the consecrated species (c.1367), 2) concubinage (c. 1395, §1), and 3) sexual abuse of a minor (c. 1395, § 2).

addressed the most serious delicts involving the penalty of degradation. They deal with solicitation – a clerical delict against the sanctity of the sacrament of Penance.

#### **2.4.2 – The 1922 Instruction of the Supreme Sacred Congregation of the Holy Office**

In 1922, the Supreme Sacred Congregation of the Holy Office issued *sub secreto* an Instruction on the procedure to be followed while dealing primarily with the crime of solicitation.<sup>104</sup> This was a major document to follow the 1917 Code that addressed the serious clerical delicts entailing the penalty of degradation. In its five parts, the document identifies two serious crimes, i.e., solicitation and sexual relationship with a minor. The greater part of the document deals mainly with procedural norms. Hence our analysis of the delicts will also be limited.

The most serious delict that the Instruction addresses is solicitation. Solicitation is a canonical delict in which a cleric and a penitent are involved in a sin against the sixth Commandment in the context of the sacrament of penance. The Instruction names different occasions/circumstances in which the delict of solicitation can occur.<sup>105</sup> It is deemed to have occurred either in the confession proper or after, or on the occasion of hearing a confession. The constituent factors of the delict pointed out in the Instruction range from improper words, gestures, nodding of the head, up to explicit signs of solicitation by the cleric to sin against the sixth precept of the Decalogue.

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<sup>104</sup> SUPREMA SACRA CONGREGATIO SANCTI OFFICII, *Instructio de modo procedendi in causis de crimine sollicitationis, Ad omnes patriarchas, archiepiscopos, episcopos aliosque locorum ordinarios 'etiam ritus orientalis'* (= *Crimen sollicitationis 1922*), 9 June 1922, Romae, Typis polyglotis Vaticanis, 1922.

<sup>105</sup> “1°: Crimen sollicitationis [...] vel in actu sacramentalis confessionis; vel ante aut immediate post confessionem; vel occasione aut praetextu confessionis; vel etiam extra occasionem confessionis in confessionali sive in alio loco ad confessiones audiendas destinato aut electo cum simulatione audiendi ibidem confessionem [...] habuerit” (ibid., p. 1; here the Instruction quotes directly from the Constitution *Sacramentorum poenitentiae*, 1 June 1741, of Benedict XIV).

The Instruction declares that all matters related to the penal procedure for determining the delict and the imposition of the penalty are secret and this secrecy is to be observed under the penalty of a *latae sententiae* excommunication reserved personally to the Supreme Pontiff even to the exclusion of the Sacred Penitentiary.<sup>106</sup> Quoting the Constitution of Benedict XIV, *Sacramentum poenitentiae*, 1 June 1741, article 16 says: “According to the norm [...] the penitent should denounce the priest guilty of the delict of solicitation in confession within one month to the local Ordinary or to the Sacred Congregation of the Holy Office, and the confessor, gravely bound by his conscience, should admonish the penitent to report it (c. 904).”<sup>107</sup> The three norms to be observed in accord with art. 16 are: first, the penitent within one month should denounce the crime to the local ordinary; second, when the penitent reports the crime in the internal forum of confession, the confessor should admonish the penitent to report it to the ecclesial authority; third, in failing this, the confessor should warn the penitent that he/she will incur a penalty of excommunication. However, the Instruction states in no. 20 that an anonymous denunciation should usually be rejected (*Denunciationes anonymae generatim spernendae sunt*).

The Instruction mandates a judicial procedure to deal with the serious delict of solicitation and with other sexual sins. The imputability of the delict is determined from the facts, the findings of the investigation, and from the interrogation of witnesses (nn.

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<sup>106</sup> “11°: Quoniam vero [...] secretum, quod *secretum Sancti officii* communiter audit, in omnibus et cum omnibus, sub poena excommunicationis latae sententiae, ipso facto et absque alia declaratione incurrendae atque uni personae Summi Pontificis, ad exclusionem etiam Sacrae Poenitentiariae, reservatae, inviolabiliter servare tenetur” (ibid., p. 6).

<sup>107</sup> “16°: Ad normam [...] debet poenitens sacerdotem reum delicti sollicitationis in confessione intra mensem denunciare loci Ordinario vel Sacrae Congregationi Sancti Officii; et confessorius debet, graviter onerata eius conscientia, de hoc onere poenitentem monere (Can. 904)” (ibid., p. 7).

29-41). Appropriate warnings, admonitions (nn. 42-46) and pastoral precautionary action (no. 51) should precede the imposition of a penalty. Number 61 of the Instruction notes that, as a penalty for the crime of solicitation, a cleric is suspended *a divinis* and is deprived of all benefices, dignities and active and passive voice. In a serious case where imputability, scandal and serious harm to the public order abound, the delict is punished with degradation.<sup>108</sup> In the last section *De crimine pessimo*, the document defines as the worst crimes a sin against the sixth precept of the Decalogue with a minor of either sex and the crime of bestiality.<sup>109</sup>

#### **2.4.3 – The 1962 Instruction of the Supreme Sacred Congregation of the Holy Office**

On 16 March 1962, the Supreme Sacred Congregation of the Holy Office issued a renewed Instruction, *Crimen sollicitationis*, on the manner of proceeding in cases of the crime of solicitation.<sup>110</sup> This document varies only slightly from the 1922 Instruction, in the sense that it is a bit more elaborate and contains an appendix with the forms to be used in the penal procedure.

Again, the canonical delict dealt with in this Instruction is solicitation. The first article defines the crime of solicitation as “an act in which a cleric tempts or provokes a penitent, either in the act of sacramental confession, before or immediately afterwards, or

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<sup>108</sup> “61º: Qui sollicitationis crimen [...] commiserit, suspendatur a celebratione Missae et ab audiendis sacramentalibus confessionibus vel etiam, pro delicti gravitate, inhabilis ad ipsas excipiendas declaretur, privetur omnibus beneficiis, dignitatibus, voce activa et passiva, et inhabilis ad ea omnia declaretur, et in casibus gravioribus degradationi quoque subiiciatur” (ibid., p. 17).

<sup>109</sup> See ibid., p. 20.

<sup>110</sup> SUPREMA SACRA CONGREGATIO SANCTI OFFICII, *Instructio de modo procedendi in causis de crimine sollicitationis* (= *Crimen sollicitationis 1962*), 16 March 1962, Roma, Typis polyglottis Vaticanis, 1962, pp. 1-61.

in a context or pretext of sacramental confession either by words or signs or nods of head, or by touch or by writing or by improper speech toward impure and obscene matters.”<sup>111</sup>

As was the case with the 1922 Instruction, the ultimate penalty established by this Instruction for solicitation is degradation by which the loss of the clerical state is effected. When the imputability of the crime is proven decisively the cleric is suspended *a divinis*. If the delict is grave, he is deprived of all benefices, dignities, active and passive voice; and, if the crime is so notorious as to cause scandal and is marked by grave imputability, the cleric is to be punished with degradation. According to art. 62, it should also be verified whether solicitation also involves minors or consecrated persons, making use of false doctrines, or false mysticism or obscene materials or a lengthy duration of a dishonest conversation, which situations become aggravating circumstances.<sup>112</sup>

The Instruction also provides for upholding the rights of the accused by stating that the accused cleric has a right to a proper penal trial and, in case of procedural violations, he could appeal to the Sacred Congregation of the Holy Office (no. 45°). Moreover, if the accused or the promoter of justice perceives the judgement to be unjust, either of them can appeal to the supreme tribunal of the Holy Office within ten days after the reception of the sentence (no. 58°).

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<sup>111</sup> “No. 1: Crimen sollicitationis habetur cum sacerdos aliquem poenitentem quaecumque persona illa sit, vel in actu sacramentalis confessionis: vel ante aut immediate post confessionem: vel occasione aut praetextu confessionis; vel etiam extra occasionem confessionis in confessionali sive in alio loco ad confessionis audiendas destinato aut electo cum simulatione audiendi ibidem confessionem, ad inhonesta et turpia sollicitare vel provocare sive verbis sive signis sive nutibus sive tactu sive per scripturam aut tunc aut post legendam tentaverit aut cum eo illicitos et inhonestos sermones vel tractatus temerario ausu habuerit” (ibid., p. 1).

<sup>112</sup> *Crimen sollicitationis* 1962, no. 62, p. 20: “Videlicet: personarum sollicitatarum numerus earumque conditio, ut ecce si aetate minores vel per vota religiosa Deo specialiter consecratae: sollicitationis forma, si forte, praesertim, cum falso dogmate aut falso misticismo coniuncta: actuum patrorum nedum formalis sed et materialis turpitude et speciatim sollicitationis cum aliis delictis connectio: diuturnitas inhonestae conversationis; criminis interactio [...] malicia.”

The Instruction, in the fifth part, notes other delicts that entail the penalty of degradation. The delicts mentioned in this section again entitled *De crimine pessimo* are the most serious ones (c. 2359 §2 [*CIC/17*]), namely a delict against the sixth precept of the Decalogue with a minor below the age of sixteen, and the delicts of sodomy, bestiality, incestuous relationships, etc.<sup>113</sup> This instruction was said to be in force until the promulgation of the Apostolic Letter *Sacramentorum sanctitatis tutela* (30 April 2007).

#### **2.5 – DELICTS INVOLVING DISMISSAL FROM THE CLERICAL STATE IN THE 1983 CODE OF CANON LAW AND IN *SACRAMENTORUM SANCTITATIS TUTELA***

According to the 1983 Code, dismissal from the clerical state is one of the most serious of all penalties which can be imposed for a canonical delict specified in law. With dismissal, the cleric loses all the rights and obligations that pertain to the clerical state, as well as any office, function, exercise of ministry or delegated authority.<sup>114</sup> He is no longer bound by the obligations connected with the clerical state except that of celibacy. Because dismissal has most serious consequences, it is absolutely necessary that all the essential canonical elements of a delict that merits the penalty are verified in a concrete case. The present Code mentions **seven** serious delicts that may be punished with dismissal from the clerical state; since expiatory penalties could affect persons forever (c. 1336, §1), dismissal cannot be imposed by particular law (c. 1317) nor by a decree of an Ordinary (c. 1342, §2), nor can this penalty be automatic (c. 1336, §2). Such a penalty is to be imposed with great caution and strict adherence to the law.

We will focus here on the **seven** specific delicts mentioned in the 1983 Code meriting dismissal from the clerical state. Since the penalty of dismissal from the clerical

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<sup>113</sup> See, *Crimen sollicitationis 1962*, nn. 71-73, p. 23.

<sup>114</sup> Canon 292; *CCEO* c. 1433, §2.

state can be inflicted in cases of three specific *graviora delicta* mentioned in *Sacramentorum sanctitatis tutela*, we will also analyse the prescripts and norms of SST related to those three delicts, namely desecration of the consecrated species, solicitation, and sexual abuse of a minor.

Prior to the study of individual delicts that merit dismissal, certain canonical norms in relation to dismissal are to be understood properly. First, the penalty of dismissal can be applied only to the following **seven** delicts (*odiosa sunt restringenda*).<sup>115</sup> A particular law cannot add another delict meriting the penalty of dismissal. Second, a diocesan bishop cannot impose dismissal on a cleric administratively by an extra judicial decree. Third, dismissal from the clerical state is to be imposed only through a collegiate tribunal. The common rule for dismissal cases is that it is imposed only by a sentence of a collegiate tribunal (c. 1425, §1, 2°) or administratively by the Holy See.<sup>116</sup> Fourth, not all the particular delicts studied here entail mandatory dismissal. The original Latin terms used in the specific relevant canons are sometimes imperative, directive or optional. The Code uses different terms like 1) “not excluding dismissal” (*non exempta*: c. 1364, §2; *non exclusa*: c. 1367; c.1370, §1; 1395, §2); 2) “is to be dismissed” (*dimittatur*: c. 1387); 3) “even by dismissal” (*etiam dimissione*: c. 1394, §1), and 4) “eventually he can be dismissed” (*usque ad dimissionem*: c. 1395, §1). The facultative or “undetermined” *ferendae sententiae* penalties mentioned in the Code are left to the discretion of the judge or competent superior. Only those prescripts of law which mandate dismissal for a particular delict are to be observed in a given case.

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<sup>115</sup> See GREEN, Commentary on c. 1317, in *New Commentary*, p. 1537; see CCEO c. 1404, §2.

<sup>116</sup> WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 147 and 148.

The seven delicts entailing dismissal from the clerical state may be divided into three groups: 1) offences against religious faith and ecclesial authority: a) apostasy, heresy and schism (c. 1364, §2); b) physical violence against the Roman Pontiff (c. 1370, §1); 2) offences against sacraments: a) profanation of consecrated species (c. 1367); b) solicitation (c. 1387); 3) offences against celibacy and chastity: a) attempted marriage (c. 1394, §1); b) concubinage (c. 1395, §1), and c) other offences against the sixth Commandment (c. 1395, §2).

### **2.5.1 – Delict of Apostasy, Heresy and Schism – c. 1364**

The delicts of apostasy, heresy and schism mentioned in c. 1364, §1 relate to offences against religion and the unity of the Church. The Church, from its early period, has been conscious of the divine mission to maintain the unity of faith and communion as desired by Christ. Any violation that hinders this objective is to be deemed serious.

In the 1917 Code, a cleric excommunicated for the crimes of apostasy, heresy or schism was finally punished with the penalty of degradation when the previous warnings proved futile (c. 2314, §1, 3<sup>o</sup>). The immediate cause for this penalty was the cleric's adherence to a non-Catholic sect (*si sectae acatholicae nomen dederint vel publice adhaeserint*), whereas, in the 1983 Code, the immediate cause is "the long standing contempt and the gravity of scandal" (*diuturna contumacia vel scandali gravitas*) of the excommunicated cleric. Because of the ecumenical sensitivities raised by Vatican II, the gravity of the delict no longer rests on the mere fact of heretical adhesion but on the contempt and the scandal caused by it.

The delicts of apostasy, heresy and schism can be ascribed only to the sins of baptized Catholics or those who have been received into the Church. According to c. 751,

apostasy is the total repudiation of the Christian faith. An example would be that of a baptised person who becomes a Hindu, a Buddhist, a Muslim or a Jew. It is more than a mere withdrawal, rejection or abandonment of one's faith. For it to be considered an offence, the apostate should have committed it with full knowledge, deliberate intent and persistence.<sup>117</sup> Heresy is the obstinate denial or doubt of a truth which is to be believed *fide divina et Catholica* (c. 750, §1; *CCEO* c. 1436, §1). It does not extend to the "secondary object of infallibility," namely those truths that are to be safeguarded reverently and expounded faithfully (c. 750, §2). An example of heresy would be a Catholic who becomes a Protestant after obstinately denying the Catholic faith.<sup>118</sup> Schism is the withdrawal of submission to the Roman Pontiff or from communion with the members of the Church subject to him (c. 751; *CCEO* c. 1437). Canons 205 and 209 point out the duty of all the Christian faithful to preserve and practice ecclesial communion according to their state, condition and office. A Catholic who becomes an Orthodox Christian or joins any non-Catholic Church or ecclesial community commits this offence of schism.<sup>119</sup>

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<sup>117</sup> See WOESTMAN, *Ecclesial Sanctions and Penal Process*, p. 100; CALABRESE, *Diritto penale canonico*, p. 199; DE PAOLIS, *De sanctionibus in Ecclesia*, p. 112.

<sup>118</sup> Confer the CDF's "Regulation on Doctrinal Examination" which was issued shortly after the declaration of a *latae sententiae* excommunication of a "Third World Theologian" Tissa Balasuriya. Cf. CONGREGATIO PRO DOCTRINA FIDEI, *Agendi ratio in doctrinarum examine*, 29 June 1997, in *AAS*, 89 (1997), pp. 830-835; English trans. in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 207-211.

<sup>119</sup> Archbishop Marcel Lefebvre and his followers incurred a *latae sententiae* excommunication for the offence of schism. See PONTIFICIO CONSIGLIO PER L'INTERPRETAZIONE DEI TESTI LEGISLATIVI, Nota, *Sulla scomunica per scisma in cui incorrono gli aderenti al movimento del Vescovo Marcel Lefebvre*, in *Communicationes*, 29 (1997), pp. 241-243; English trans. in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 201-203. The same Lefebvre and the other four bishops consecrated by him incurred a *latae sententiae* excommunication reserved to the Apostolic See for the offences mentioned in c. 1364, §1 and c. 1382, i.e. consecration of a bishop without the pontifical mandate. See CONGREGATION OF BISHOPS, Decree, *Dominus Marcellus Lefebvre*, in *AAS*, 80 (1988), p. 1498; English trans. in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 197.

For these sins to be considered delicts, they must not only be external but also be perceived as such by a third party. A mere internal thought or doubt about the revealed truth or the deposit of faith cannot be regarded as a canonical delict. It must be externally manifested either through words, actions, writings, teachings or preaching, etc., against the doctrine or the communion of the Church. A person committing any one of these three delicts incurs a censure, a *latae sententiae* excommunication.

If the delicts of apostasy, heresy and schism are committed by a cleric, the penalty may also include prohibition against residence, deprivation of power, office, function, right, title, faculty, privilege, etc. Paragraph 2 of c. 1364 says: “If a longstanding contempt or the gravity of scandal calls for it, other penalties may be added, not excluding dismissal from the clerical state.”<sup>120</sup>

As teachers of faith, the pastors of souls are commissioned to take care of the catechesis of the Christian people (c. 773). Moreover, a cleric, by virtue of his Sacred Order, participates, in an official manner, in the *munus docendi* (c. 757). Therefore, he has higher imputability if he apostatizes or totally denies or doubts the Catholic faith revealed in the Word of God and Tradition, or refuses adamantly to submit to papal supremacy. Moreover, as holder of public office in the Church, the cleric’s contempt for the divinely revealed truth and his adherence to false doctrines could lead astray the faithful community from the unity of faith and communion (c. 209). While intellectual freedom and research in sacred sciences is acknowledged in the Code as a right (c. 218), the exercise of such a right is contingent upon one’s “allegiance to the magisterium.”

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<sup>120</sup> “Si diuturna contumacia vel scandali gravitas postulet, aliae poenae addi possunt, non excepta dimissione e statu clericali (c. 1364, §2).”

The penalty prescribed in 1364, §2 is facultative in nature; the phrase “another penalty not excluding dismissal” (*aliae poenae non excepta dimissione*) and the subjunctive passive voice “*addi possunt*” give greater discretion to the judge to impose dismissal. It can be imposed either by the Holy See or by a collegiate tribunal only after the cleric has been duly warned, and only in cases of contumacy, scandal and obstinate persistence of the cleric in the above mentioned delicts.

### **2.5.2 – Desecration of the Consecrated Species – c. 1367**

The delict of desecration of the consecrated species is related to the “real presence” of Christ, one of the deposits of our faith and which demands an assent of faith and reverence (c. 750). “The faith in Christ’s real presence – body, blood and soul and divinity – under the Eucharistic Species, even after the Holy Sacrifice has been celebrated”<sup>121</sup> is ever safeguarded in the Catholic Church.

In the 1917 Code (c. 2320), one who perpetrated this delict, i.e., taking away and retaining the sacred species, was suspected of heresy (*qui [...] est suspectus de haeresi*), and by the fact of its commission, such a person in fact became “infamous”; and if the delinquent were a cleric he was to be deposed. The mandatory penalty, expressed in an indicative command (*clericus praeterea ‘est deponendus’*) in the 1917 Code, did not result in the loss of clerical state, whereas the 1983 Code prescribes the facultative penalty, dismissal from the clerical state for the crime of desecration of the sacred species (c. 1367).

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<sup>121</sup> PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, Authentic interpretation on canons 1367 *CIC* and *CCEO* 1442 (English trans.): “Safeguarding the Bread of Life Come Down from Heaven,” in *Communicationes*, 31 (1999), p. 43.

In his encyclical *Mysterium fidei*, Paul VI teaches that “the Catholic Church has always offered and still offers the worship of *latria* to the sacrament of Eucharist, not only during the mass but also outside of it.”<sup>122</sup> The Second Vatican Council proclaims that the Eucharist is “the summit and source of all worship and Christian life,” and that “in the most blessed Eucharist is contained the whole spiritual good of the Church, namely Christ himself” (*PO* no. 5). Therefore, desecration of the consecrated species is an offence against the core of the Christian faith, the Eucharist. Therefore, anyone who deliberately and freely desecrates the sacred species incurs a *latae sententiae* excommunication reserved to Holy See. This is stated in c. 1367, which reads:

One who throws away the consecrated species or, for a sacrilegious purpose, takes them away or keeps them, incurs a *latae sententiae* excommunication reserved to the Apostolic See; a cleric, moreover, may be punished with some other penalty, not excluding dismissal from the clerical state.<sup>123</sup>

The canonical delict of desecration is perpetrated by any of the following three acts: 1) throwing away the consecrated species (*abiecere*); 2) taking the consecrated species out of their proper place for a sacrilegious purpose (*in finem sacrilegum abducere*); and 3) keeping the consecrated species for a sacrilegious purpose (*in finem sacrilegum retinere*).<sup>124</sup>

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<sup>122</sup> PAUL VI, Encyclical, *Mysterium fidei*, 3 September 1965, in *AAS*, 57 (1965), pp. 753-754; English trans. in *Documents on the Liturgy 1963-1979: Conciliar, Papal, and Curial Texts* [published for the] International Commission on English in the Liturgy, A Joint Commission of Catholic Bishops' Conferences, Collegeville, Minnesota, The Liturgical Press, 1982, 176, no. 1200, p. 389.

<sup>123</sup> Canon 1367: “Qui species consecratas abicit aut in sacrilegum finem abducit vel retinet, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit; clericus praeterea alia poena, non exclusa dimissione e statu clericali, puniri potest.”

<sup>124</sup> See DE PAOLIS, *De sanctionibus in Ecclesia*, p. 113.

The delict consists in the intentional throwing away of the consecrated host or pouring out the precious blood on the floor or elsewhere with hatred, anger or contempt. The object of the delict is the species consecrated during the Eucharistic *synaxis* or preserved in the tabernacle. The motives of desecration can vary, from hatred for the Church or its teachings, or for participation in witchcraft or satanic cult.<sup>125</sup> According to the 1999 authentic interpretation, to arrive at moral certitude on imputability, the important element one needs to evaluate is the **scorn** with which one profanes the sacred species.<sup>126</sup>

Due to the real presence of Christ in the consecrated species, any free and deliberate act desecrating the sacred species, according to c. 1367 (*CCEO* c. 1442), is a heinous act. But it is important that the elements of imputability of the delict are clearly determined through careful investigation. A mentally ill person's act of throwing away the consecrated species cannot be motivated with hatred. Therefore, by the term '*abiecere*' (throwing away), the canon does not simply mean physical throwing away but it supposes "any voluntary and gravely disrespectful act."<sup>127</sup>

The penalty for the commission of this delict is *latae sententiae* excommunication reserved to the Apostolic See. If a cleric commits this crime more *ferendae sententiae* penalties can be added. A cleric who effects, *in persona Christi*, the eucharistic sacrifice (*LG* no. 10), in committing this crime with contempt can be punished also with a penalty

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<sup>125</sup> See WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 105.

<sup>126</sup> See *Communicationes*, 31 (1999), p. 44; A. BORRAS, Commentary on c. 1367, in *Exegetical Commentary*, vol. IV/1, p. 458.

<sup>127</sup> MENDONÇA, "An Analysis of the Principal Aspects of the Norms," p. 136.

of dismissal from the clerical state (*non exclusa dimissione [...] puniri potest*). This delict is reserved to the Apostolic See.

### **2.5.3 – Use of Physical Force Against the Roman Pontiff – c. 1370, §1**

The specific clerical delict entailing dismissal from the clerical state noted in c. 1370, §1 is a delict of using physical force against the Roman Pontiff. Use of physical force against a bishop and a cleric mentioned in the subsequent paragraphs of c. 1370 does not incur the penalty of dismissal from the clerical state.

According to W. Woestman, while c. 2343 of the 1917 Code used the term “laying violent hands” (*inicere violentas manus*), the 1983 Code widens the parameters of the delict by using the phrase, “use of physical force.” The physical force in the 1983 Code could even include retention, expulsion from a place, kidnapping of the Pope, etc. The delict mentioned in c. 1370, §1 is a serious offence against the Supreme Pontiff of the Church, the head of the college of bishops, and the Vicar of Christ (c. 331). This delict should be understood in light of §3 of the same canon. This paragraph points out the motive behind the violence against the Pope as “contempt for the faith, the ecclesial authorities and the ministry of the Church.” As is clear from Title II of part II of Book VI, this offence is “against Church authorities and the freedom of the Church.”<sup>128</sup> Since the Pope is the supreme authority in the Church, a physical assault on him harms the Church’s public good and its visible foundation.

Canon 212, §1 says that all the Christian faithful are bound by the obligation of Christian obedience to Church authorities. Therefore, the crime of hatred, disobedience, destruction of communion in the Church, expressed in the form of physical attack on the

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<sup>128</sup> WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 109-110.

Pope is punished with a penalty of *latae sententiae* excommunication reserved to the Apostolic See. Canon 1370, §1 reads:

A person who uses physical force against the Roman Pontiff incurs a *latae sententiae* excommunication reserved to the Apostolic See; if the offender is a cleric, another penalty, not excluding dismissal from the clerical state, may be added according to the gravity of the crime.<sup>129</sup>

A cleric who shares in the priesthood of Christ and in his threefold functions should all the more be bound to strive for the unity of the Church and to show reverence and obedience to the Roman Pontiff.<sup>130</sup> The clerical delict of physical violence against the Pope is considered to be so grave that by such an act he severs himself from the sacramental communion arising from Sacred Orders between himself and the supreme authority in the Church. Therefore, the cleric, upon the commission of this crime could be punished further by additional *ferendae sententiae* penalties not excluding (*non exclusae dimissione*) dismissal from the clerical state.<sup>131</sup> Once again a judge must verify the mental state of the cleric and his motive for attack prior to the imposition of the penalty.

#### 2.5.4 – Solicitation – c. 1387

The specific delict noted in c. 1387 is solicitation in confession, a delict against two major concerns of the Church, namely the sanctity of the sacrament and morals.

The Church reveres the Sacrament of Reconciliation because in it the communion of the penitent that was ruptured by sin is restored. The interior conversion offers the

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<sup>129</sup> Canon 1370, §1: “Qui vim physicam in Romanum Pontificem adhibet, in excommunicationem latae sententiae Sedi Apostolicae reservatam incurrit, cui, si clericus sit, alia poena, non exclusae dimissione e statu clericali, pro delicti gravitate addi potest.”

<sup>130</sup> See *Catechism of the Catholic Church*, With Modifications from the editio typica (2<sup>nd</sup> ed. revised in accordance with the official Latin text promulgated by Pope John Paul II), New York, Toronto, Doubleday, 2003, no. 1564, pp. 435-436; also see *PO* no. 15, in FLANNERY I, p. 891

<sup>131</sup> In *CCEO* the physical violence against the Pope is punished with major excommunication whose remission is reserved to the Roman Pontiff himself; see *CCEO* c. 1445, §1.

penitent God's forgiveness and communion with the Church. Such transformation and "intimate friendship with God" is effected in a person who approaches the sacrament of reconciliation with a "contrite heart."<sup>132</sup> Therefore, any act of the minister that blocks this interior transformation of a penitent and destroys the integrity of the priest-penitent relationship is a serious delict. Canon 1387 reads:

A priest who in confession, or on the occasion or under the pretext of confession, solicits a penitent to commit a sin against the sixth commandment of the Decalogue, is to be punished, according to the gravity of the offence, with suspension, prohibitions and deprivations; in the more serious cases he is to be dismissed from the clerical state.<sup>133</sup>

The important elements of the delict of solicitation were already identified in the Apostolic Constitution, *Sacramentum poenitentiae* of Benedict XIV.<sup>134</sup> Expounding on the canonical principles on the substantive norms of *SST* on solicitation, Mendonça says that this constitution defined solicitation as an invitation by a cleric to commit a serious sin against the sixth Commandment either with the penitent or with a third party, which invitation is expressed either in confession or on the occasion of confession or under the pretext of confession. The author of the delict is a priest irrespective of whether he has the faculty to hear confessions or not.<sup>135</sup> Solicitation may occur either in the confession

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<sup>132</sup> See *Catechism of the Catholic Church*, no. 1439, p. 401.

<sup>133</sup> Canon 1387: "Sacerdos, qui in actu vel occasione vel praetextu confessionis paenitentem ad peccatum contra sextum Decalogi praeceptum sollicitat, pro delicti gravitate, suspensione, prohibitionibus, privationibus puniatur, et in casibus gravioribus dimittatur e statu clericali."

<sup>134</sup> See BENEDICTUS XIV, Constitutio, *Sacramentum poenitentiae*, 1 June 1741, in *Codex iuris canonici*, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, Praefatione E.mi Petri Card. Gasparri, et indice analytico-alphabetico auctus, Romae, Typis polyglottis Vaticanis, 1918, *Documentum V*, pp. 998-1006; see *AAS*, 9 (1917), pp. 505-508.

<sup>135</sup> MENDONÇA, "An Analysis of the Principal Aspects of the Norms," p. 142.

proper or under the pretext of confession where the penitent expects that confession would be heard. Quoting *Sacramentum poenitentiae*, Arias says:

The offence consists in ‘inducing to commit impure things or *turpia*, with words, signs, gestures, fondling, or with written materials given to the penitent to read on the spot or later, or by holding conversations and making plans which are illicit or immoral’. The priest also commits an offence if he accepts positively provocation from the penitent. The offence exists even though the attempt made by the priest is unsuccessful: ‘whether the penitent gives his or her consent or definitely refuses’.<sup>136</sup>

Therefore, Mendonça concludes that the focus of the delict is neither on the act of solicitation nor on its efficacy; the focus is on the words, gestures and actions of the cleric only; in other words, the element of response of the penitent is irrelevant in considering the imputability.<sup>137</sup>

Unlike the 1917 Code (c. 2368, §2), the present canon on solicitation (c. 982) does not oblige the solicited person, by a norm of positive law, to denounce the confessor, nor does it bind by positive law another confessor who received the information of solicitation through sacramental confession to inform the penitent of the obligation to denounce the crime of solicitation. The 1983 Code, by omitting §2 of c. 2368 *CIC/17*, actually safeguards the inviolability of the sacramental seal. Woestman, however, says that the mind of the legislator is that anyone can denounce the crime to the ecclesial authorities, not because one is bound by an obligation of positive law, but by

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<sup>136</sup> See ARIAS, Commentary on c. 1387, in *Code of Canon Law Annotated*, p. 1077.

<sup>137</sup> MENDONÇA, “An Analysis of the Principal Aspects of the Norms,” p. 142; DE PAOLIS, Commentary on c. 1387, in *Exegetical Commentary*, vol. IV/1, p. 523. Applying the hermeneutical criterion of c. 17 to *Sacramentum poenitentiae* of Benedict XIV, c. 2368 *CIC/17*, c. 1387 *CIC*, and, art. 3, 2° of the *SST*, Llobell states, “approval in confession of contraceptive practices contrary to the doctrine of the Church, of premarital relationships, of masturbation, etc. enter into the crime of solicitation, although not reserved to the Congregation for the Doctrine of the Faith.” See J. LLOBELL, “The Balance of the Interests of Victims and the Rights of the Accused: the Right to Equal Process,” in DUGAN (ed.), *The Penal Process and the Protection of Rights*, p. 83.

natural law i.e., in order to protect the faithful, to prevent scandal and to protect the integrity of the sacrament.<sup>138</sup>

The crime of solicitation is punished, according to the gravity of the offence, with *ferendae sententiae* penalties, such as suspension, prohibitions and deprivations. In the most serious cases, the cleric is punished with dismissal from the clerical state (c. 1387; *CCEO* c. 1458). Among all the delicts meriting dismissal, only in c. 1387, does the Code use a strong positive, indicative command (*dimittatur*) saying that the guilty cleric *is to be dismissed* from the clerical state. However, while applying this penalty, the superiors must proceed cautiously because of the issues involved, such as false denunciation (c. 982), a possible disturbed mental state of the accuser, the seal of confession (c. 983), etc.

This is one of the delicts reserved to the Congregation for the Doctrine of the Faith. “It is important to note that the special reservation applies to sin with the confessor personally, while the general norm on solicitation applies to also third parties.”<sup>139</sup>

### **2.5.5 – Attempted Marriage – c. 1394, §1**

The delict mentioned in c. 1394, §1 is a violation against the law of celibacy by clerics, whether they are diocesan or perpetually professed in a religious institute (c.1088). Canon 1087 says “those who are in sacred Orders invalidly attempt marriage.” Pope John Paul II says that marriage and priesthood are two different sacraments ordered to the corporate life of the ecclesial community, and due to their distinct nature, there is a

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<sup>138</sup> WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 129.

<sup>139</sup> MORRISEY, “Penal Law in the Church Today: New Roman Documents Complementing the Code of Canon Law,” in P.M. DUGAN (ed.), *Advocacy vademecum*, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2006, p. 38.

certain incompatibility between them.<sup>140</sup> Although the incompatibility between Sacred Orders and marriage was recognized and sanctioned by the Latin Church for centuries, it was only at the Second Lateran Council that the marriage contracted by a cleric was formally declared as invalid.<sup>141</sup>

Canon 2388 of the 1917 Code, prescribed that if clerics *in sacris* (major Orders) or regulars or nuns after a solemn vow of chastity, and likewise all those who presume to contract even a civil marriage with any of the aforesaid persons incurred a *latae sententiae* excommunication reserved to the Holy See. In the 1917 Code, to be considered a punishable offence, the attempted marriage had to be directed and intended towards a matrimonial relation, and not merely a concubinage.<sup>142</sup> If, after having been duly warned, the clerics did not come back they were punished with the penalty of degradation. In the present Code, concerning this delict, c.1394, §1 reads:

Without prejudice to the provisions of can. 194, §1 n. 3, a cleric who attempts marriage, even if only civilly, incurs a *latae sententiae* suspension. If, after warning, he has not reformed and continues to give scandal, he can be progressively punished by deprivations, or even by dismissal from the clerical state.<sup>143</sup>

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<sup>140</sup> JOHN PAUL II (Ai vescovi statunitensi dell'Arizona, del Colorado, del New Mexico e del Wyoming in visita), "Il matrimonio e l'ordine sacro consacrano ad una missione speciale nella Chiesa," 8 June 1993, in *Insegnamenti di Giovanni Paolo II*, vol. XVI/1, Città del Vaticano, Libreria editrice Vaticana, 1995, p. 1452.

<sup>141</sup> "Ideo, in utraque Ecclesia, illis prohibetur matrimonium contrahendum; in Ecclesia latina, haec interdictio sanctionem habet nullitatem matrimonii" (A. PILLET, *Ius canonicum generale, distributum in articulos quos collegit et ordinavit*, Paris, Sumptibus P. Lethielleux, Editoris, 1890, p. 138).

<sup>142</sup> Cf. A. VERMEERSCH-CREUSEN, *Epitome iuris canonici cum commentariis*, vol. III, Mechliniae-Romae, H. Dessain, 1956, p. 383.

<sup>143</sup> Canon 1394, §1: "Firmo praescripto can. 194, §1, n. 3, clericus matrimonium etiam civiliter tantum, attentans, in suspensionem latae sententiae incurrit; quod si monitus non respuerit et scandalum dare praepererit, gradatim privationibus ac vel etiam dimissione e statu clericali puniri potest."

Since the obligation of celibacy assumed at ordination to the transient diaconate (c. 277, §1) impedes the cleric from marriage in the Latin Church (c. 1037),<sup>144</sup> the delict of attempted marriage is punished as per c. 1394, §1; this canon imposes a penalty of *latae sententiae* suspension on a cleric who attempts marriage, even if only civilly (*etiam civiliter tantum*).

To determine whether the attempted marriage of a cleric is a delict, Arias states that the consent (of both parties), an essential requirement for any valid marriage, should be proven in the external forum. A true and valid consent of the parties should have been manifested before the civil or ecclesiastical authority, although, in the latter case, it is juridically invalid or inefficacious because of the diriment impediment (c. 1087). Should the consent be absent and “if the consent is substantially invalidated by error, grave fear, or simulation, there will be no such ‘attempt to contract marriage’.”<sup>145</sup>

By attempting marriage, the cleric incurs a *latae sententiae* suspension. Consequently, the cleric is prohibited from all or some of the acts of the power of Order, and of jurisdiction; he is also prohibited from exercising the rights and functions attached to the office (c. 1333). As per c.194, §1, 3°, the cleric, by the commission of this delict, is removed *ipso iure* from the ecclesiastical office that he exercises. However, the *de facto* removal can be effected by the Ordinary only after a declaration of removal (c.194,

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<sup>144</sup> It also forbids married permanent deacons from remarrying once they are rendered free to marry, for the same reason of clerical celibacy. However, for pastoral and grave causes, the Congregation for Divine Worship and the Discipline of the Sacraments considers petitions of widowed permanent deacons for dispensations from celibacy. See CONGREGATION FOR DIVINE WORSHIP AND DISCIPLINE OF THE SACRAMENTS, *Circular letter*, no. 7, 6 June 1997, in *Origins*, 27 (1997-1998), p. 171.

<sup>145</sup> See ARIAS, Commentary on c. 1394, in *Code of Canon Law Annotated*, p. 1082; CALABRESE, *Diritto penale canonico*, p. 346.

§2).<sup>146</sup> Meanwhile, the ordinary has to warn the cleric of the possible *ferendae sententiae* penalty and order him to purge scandal; if after warning, the cleric has not reformed and continues to give scandal, he can be progressively punished with *ferendae sententiae* penalties such as deprivations, or even by dismissal (*vel etiam dimissione*) from the clerical state (CCEO c. 1453, §2). However, according to Di Mattia, appropriate warning, admonition and correction should precede the imposition of the penalty, lest an opportunity for purging contempt and repentance of the offence (c. 1347, §2) be denied.<sup>147</sup>

Although there is a no direct mention of the imposition of a penalty on the partner of the cleric, based on the general norm of accomplices provided in c. 1329, §2, the partner, without whose assistance there would have been no delict, is to be punished with a *ferendae sententiae* penalty, since she can not be suspended. However, an accomplice of a non clerical religious involved in this delict is to be punished with the same *latae sententiae* interdict, like that of the perpetrator. However, while a cleric who attempts marriage is irregular for the exercise of Orders (c. 1044, §1, 3<sup>o</sup>), the marriage constitutes an irregularity, for example, in the case of a deacon, for the reception of Orders (c.1041, 3<sup>o</sup>).<sup>148</sup>

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<sup>146</sup> F.O. BORGUETA, *Clerical Sexual Misconduct: Offences against Celibacy and Continence and a Canonical Analysis of the Pastoral Guidelines of the Catholic Bishop's Conference of the Philippines* (Doctoral Dissertation, partialiter edita), Roma, Pontificia Universitas Sanctae Crucis, Facultas Iuris Canonici, 2004, p. 112.

<sup>147</sup> See G. DI MATTIA, Commentary on c. 1394, in *Exegetical Commentary*, vol. IV/1, p. 543.

<sup>148</sup> GREEN, Commentary on c. 1394, in *New Commentary*, p. 1598.

### 2.5.6 – Persistence in a Sin Against the Sixth Commandment – c. 1395, §1

A violation of the obligation of continence-celibacy, according to c. 1395, §1, includes two situations: 1) concubinage of a cleric; 2) persistence in some other external sin against the sixth commandment of the Decalogue. Canon 2359, §1 of the 1917 Code mentioned only the delict of concubinage and the penalty of deprivation and prohibitions, after previous warnings were in vain. This canon (*CIC/17*) was more pastoral than punitive in nature. More emphasis was placed on the Ordinary's efforts of coercion, exhortation and pastoral solicitude. Canon 1395, §1 of the present Code, however, reads:

A cleric living in concubinage, other than in the case mentioned in can. 1394, and a cleric who continues in some other external sin against the sixth commandment of the Decalogue which causes scandal, is to be punished with suspension. To this, other penalties can progressively be added if after a warning he persists in the offence, until eventually he can be dismissed from the clerical state.<sup>149</sup>

In order to understand the sexual sins mentioned in this canon one needs to know three interrelated concepts; they are continence, chastity and celibacy. According to c. 277, §1, [non-married] clerics are to observe perfect and perpetual continence for the sake of the Kingdom of heaven, and are, therefore, bound to celibacy. It means that the clerics are to abstain completely from any sexual intercourse, or from any form of sexual relations, with anyone in their entire lives; they are to lead a non-married life. Celibacy is a social-legal status of not being married. Even a lay person is a celibate until he or she gets married. Continence describes the non-use of sexual faculties and it belongs to the

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<sup>149</sup> Canon 1395, §1: “Clericus concubinarius, praeter casum de quo in can. 1394, et clericus in alio peccato externo contra sextum Decalogi praeceptum cum scandalo permanens, suspensione puniantur, cui, persistente post monitionem delicto, aliae poenae gradatim addi possunt usque ad dimissionem e statu clericali.”

realm of physical behaviour, while chastity, which belongs to the moral order, is the virtue of correctly ordering one's sexual faculties and drives.

Continence in general, at different stages of life, must be observed by all. Continence can be absolute, relative, temporary or perpetual.<sup>150</sup> A cleric (except a married permanent deacon) in the Latin Church, according to the age-old tradition and the present Code, must observe perpetual and perfect continence and must be celibate. According to c. 277, what clerics primarily and juridically have to observe is (*obligatione tenetur*) perfect and perpetual continence. To uphold this perfect and perpetual continence, clerics must avoid any action, person or situation that may lead to the violation of continence and they are to behave with due prudence (c. 277, §2). Though any violation of continence is *per se* presumed to be sinful, it may be classified as a delict only when certain canonical elements, such as scandal, permanence, etc. can be proven in the external forum. Canon 1395, §1 mentions two such delicts committed against the clerical obligation of perfect and perpetual continence.

The first is concubinage, i.e., a stable or quasi-permanent sexual relationship of a cleric with a woman (or a man),<sup>151</sup> whether married or single, which involves their having sexual intercourse together.<sup>152</sup> This relationship may be public or occult and might not even cause scandal in an occult situation. The phrase, "*praeter casum de quo in can.*

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<sup>150</sup> For more on these topics, see J.H. PROVOST, "Offences Against the Sixth Commandment: Toward a Canonical Analysis of Canon 1395," in *The Jurist*, 55 (1995), p. 650; idem, "Some Canonical Considerations Relative to Clerical Sexual Misconduct," in *The Jurist*, 52 (1992), p. 630.

<sup>151</sup> According to Sr. Sharon Holland of the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, the definition of concubinage is inclusive of either sex: "While traditionally this has been understood to be a relationship with the 'opposite sex', in today's society it is necessary to realize the broader application of the law. Whether heterosexual or homosexual, such a relationship is a violation not only of the sixth commandment [...]." See S. HOLLAND, "Canonical Dismissal from Institutes of Consecrated Life and Societies of Apostolic Life," in *Studies in Church Law*, 2 (2006), p. 66.

<sup>152</sup> See J. MARTIN, Commentary on c. 1395, §1, in *The Canon Law – Letter & Spirit*, p. 804.

1394” excludes attempted marriage from the list of delicts noted in c. 1395, §1 because it is already provided for, and includes in it other scandalous and habitual sexual offences with persons of either sex.<sup>153</sup>

The second delict is “persistence in another external sin against the sixth commandment.” To grasp the real meaning of “the sin against the sixth commandment” (*peccato externo contra sextum Decalogi praeceptum*) we will refer to three studies published in *The Jurist*, 1995.<sup>154</sup>

In canon 1395, §1, the ecclesial legislator does not explicitly identify the external sins against the sixth commandment.<sup>155</sup> The parallel c. 2359, §2 (*CIC/17*) mentioned various delicts against the sixth commandment such as sexual abuse of a minor, adultery, rape, bestiality, sodomy, incest, etc. Canon 1395, §1, however, does not explicitly delineate what is the sin against the sixth commandment. According to Provost, the *Corpus iuris canonici*’s (the first collection and compilation of laws) main focus on sexual misconduct was on married persons who commit adultery. Although the *Corpus iuris canonici*, the source of c. 2359 (*CIC/17*), condemned various sins (mainly adultery and fornication), it did not identify exactly what the sin against the sixth commandment was.<sup>156</sup> Later the commentators tried to do so. Among these, Wernz stated that “carnal

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<sup>153</sup> GREEN, Commentary on c. 1370, in *New Commentary*, p. 1599; WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 148; CALABRESE, *Diritto penale canonico*, p. 279.

<sup>154</sup> PROVOST, “Offences Against the Sixth Commandment,” pp. 632-663; J.S. GRABOWSKI, “Clerical Sexual Misconduct and Early Tradition Regarding the Sixth Commandment,” in *The Jurist*, 55 (1995), pp. 527-591; J. TUOHEY, “The Correct Interpretation of Canon 1395: The Use of the Sixth Commandment in the Moral Tradition from Trent to the Present Day,” in *The Jurist*, 55 (1995), pp. 592-631.

<sup>155</sup> See NIGRO, Commentary on c. 1323, in *Commento al Codice di diritto canonico*, p. 827.

<sup>156</sup> See PROVOST, “Offences Against the Sixth Commandment,” pp. 635-638.

crimes globally understood” were to be interpreted as a “sin against the sixth commandment.”<sup>157</sup>

Concluding his analysis of the social, cultural and religious practices of ancient Israel, particularly with respect to the ninth commandment (You shall not covet your neighbour’s wife), in conjunction with the sixth commandment of the Decalogue (You shall not commit adultery), Grabowski states that the sixth commandment is focused only within the framework of marriage and therefore it does not include all other sexual sins. Therefore, adultery, which was understood as a sin against the sixth commandment, may not be a circumlocution for all other sins.<sup>158</sup>

A different conclusion has been drawn by Touhey on this issue. This author, after carefully examining the pre-1917 Code sources, the manualist period<sup>159</sup> and the teaching of John Paul II concludes that the sin against the sixth commandment of the Decalogue (Ex. 20, 14 and Deut. 5, 18) does not denote only adultery but it represents a blanket phrase in c. 1395, §1 for various kinds of other sexual sins outside marriage.<sup>160</sup> Saint Augustine had interpreted the sixth commandment as a general heading under which all other sins against chastity and continence are grouped in the Scriptures.<sup>161</sup> Therefore, it is reasonable to say that the sins against the sixth commandment mentioned in c. 1395, §1

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<sup>157</sup> See F.X. WERNZ, *Ius decretalium*, vol. VI, Prati, Ex Officina Libraria Giachetti, Filii et Soc., 1913, p. 383; PROVOST, “Offences Against the Sixth Commandment,” p. 641.

<sup>158</sup> See GRABOWSKI, “Clerical Sexual Misconduct and Early Tradition,” pp. 538-540, 589-591; BORGUETA, *Clerical Sexual Misconduct*, pp. 25-26.

<sup>159</sup> This period follows the Council of Trent (1545-1563) during which manuals were written to guide the people in upright and moral living. One such important text was *Catechismus Romanus*, which was promulgated by Pope Pius V in 1566.

<sup>160</sup> TUOHEY, “The Correct Interpretation of Canon 1395,” pp. 628-631.

<sup>161</sup> See S. AUGUSTINUS, “Quaestionum in Heptateuchum,” in J.P. MIGNE (ed.), *Patrologiae Latinae*, vol. 34, Parisiis apud Garnier Fratres, Editores et J.P. Migne Successores, 1887, p. 622.

encompass all other external sexual sins such as adultery, incest, fornication, homosexual relations, etc.<sup>162</sup>

Canon 1395, §1 (*CCEO* c. 1453, §1) prescribes against a cleric the *ferendae sententiae* penalty of suspension for both delicts, *i.e.*, concubinage and external sins against chastity. However, the penalty can be imposed only under strict conditions. These conditions are persistence in the act, external habitual violation of the obligation of continence, scandal, etc. If the cleric, even after warnings, persists in the commission of the delicts and causes scandal, other *ferendae sententiae* penalties, such as dismissal from the clerical state can eventually be added (*gradatim addi possunt usque ad dimissionem*).

#### **2.5.7 – Sexual Abuse of a Minor – c. 1395, §2**

Canon 1395, §2 deals with two kinds of sexual delicts of clerics, namely those 1) committed through the use of force or threat or in public places, or 2) with a minor under the age of sixteen years. The parallel canon (c. 2359, §2) in the 1917 Code mentioned various kinds of delicts against the sixth commandment; and one among them was the delict against the sixth commandment with a minor. The ultimate penalty prescribed in c. 2359, §2 of *CIC/17* was deposition (*deponantur*), and not the loss of clerical state. Canon 1395, §2 (*CIC*) reads:

A cleric who has offended in other ways against the sixth commandment of the Decalogue, if the crime was committed by force, or by threats, or in public, or with a minor under the age of sixteen years, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants.<sup>163</sup>

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<sup>162</sup> BORGUETA, *Clerical Sexual Misconduct*, p. 33; CALABRESE, *Diritto penale canonico*, p. 279.

<sup>163</sup> Canon 1395, §2 : “Clericus qui aliter contra sextum Decalogi praeceptum deliquerit, si quidem delictum vi vel minis vel publice vel cum minore infra aetatem sedecim annorum patratum sit, iustis poenis puniatur, non exclusa, si casus ferat, dimissione e statu clericali.”

Instead of naming all the delicts against celibate continence as in c. 2359 (*CIC/17*), the 1983 Code specifies the concrete circumstances that circumscribe those delicts 1) use of force, 2) use of threat, 3) commission in public, or 4) with a minor under the age of sixteen years. If any one of these circumstances, which circumscribe the delict mentioned in c.1395, §2 is verified in a given case, the cleric is to be punished with an appropriate *ferendae sententiae* penalty.<sup>164</sup> In assessing the imputability of the delict perpetrated in one of these instances, what is to be examined and focussed upon is the violation against the sixth commandment *vis-à-vis* the obligation of clerical celibacy (c. 277). How do we interpret the manner of violation of the sixth commandment? Some authors opine that it is not necessary that the sexual acts noted in this paragraph be complete in order for them to be considered a delict. In fact, lustful acts such as touching, kisses, contact of sexual organs, etc. are being regarded by these authors as violations of the sixth commandment of the Decalogue, and of course, they must be evaluated together with their either aggravating or mitigating circumstances.<sup>165</sup>

Since violations of the sixth commandment are attacks on the very dignity of a human person, and more so in case of minors, the Church has responded to this particular delict in recent decades with apt canonical sanctions.<sup>166</sup> The delict of clerical sexual

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<sup>164</sup> Surprisingly, *CCEO* does not mention sexual abuse of a minor as a particular delict. It mentions only the clerical delict of concubinage, external sin against chastity and attempted marriage. See *CCEO* c. 1453. However, sexual abuse of a minor is punishable in the Eastern Churches too in light of the *SST* Norms.

<sup>165</sup> “Non è necessario che gli atti di lussuria siano consummati, ma bastano anche atti non consummati, quali toccamenti o baci libidinosi, contatti di organi sessuali, etc.” (CALABRESE, *Diritto penale canonico*, p. 351).

<sup>166</sup> To mention but some of the numerous canonical responses on this delict, see T.J. GREEN, “Clerical Sexual Abuse of Minors: Some Canonical Reflections,” in *The Jurist*, 63 (2003), pp. 366-425; C. SCICLUNA, “Sexual Abuse of Children and Young People by Catholic Priests and Religious,” in *CLSGB & I Newsletter*, 139 (2004), pp. 12-19; F.G. MORRISSEY, “The Application of Penal Law in Cases of Sexual

abuse of a minor consists of an act against the sixth commandment of the Decalogue perpetrated on a minor of either sex, which includes sexual behaviour by which an adult uses a minor as an object of his sexual gratification.<sup>167</sup> Sexual abuse of a minor is considered serious because it violates the spiritual, emotional and the psychological well being of a young person. Because of the Church's heightened appreciation of the dignity of a human person, inspired by the teachings of Vatican II, even if the minor consents to the sexual act, the cleric would be considered to have committed the delict mentioned in c. 1395, §2. In accordance with the present jurisprudence and praxis of CDF, the delict (c. 1395, §2) includes not only physical contact of a sexual nature with a minor, but also any form of sexual abuse.<sup>168</sup>

This delict is reserved to the Congregation for the Doctrine of the Faith. While c. 1395, §2 speaks of a "minor" below the age of sixteen years,<sup>169</sup> article 4, §1 of *Normae substantiales* of *Sacramentorum sanctitatis tutela*, the current complementary norm on

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Abuse of Minors," in *Eastern Legal Thought*, 2 (2003), pp. 82-102; G. READ, "Clerical Sexual Abuse of Minors: Recent Developments," in *CLSGB & I Newsletter*, 139 (2004), pp. 20-28; G. INGELS, "Dismissal from the Clerical State: An Examination of Penal Issues," in *StC*, 33 (1999), pp. 169-212.

<sup>167</sup> See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*, rev. norms, Washington, DC, United States Conference of Catholic Bishops, 2002, pp. 1-2.

<sup>168</sup> It would include exposure of minors to pornography or lewd indecent acts, downloading of paedophilic pornography from the internet, etc. See C.J. SCICLUNA, "The Procedure and Praxis of the Congregation for the Doctrine of the Faith Regarding *Graviora delicta*," in P.M. DUGAN (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2005, p. 238.

<sup>169</sup> A few years before the promulgation of *SST*, the National Conference of Catholic Bishops of United States of America requested a derogation on the age limit mentioned in c. 1395, §2, to which the Secretary of State replied through the Rescript of 25 April 1994. Accordingly, the age of the minor mentioned in c. 1395, §2, was raised to eighteen. This was applicable only in the United States of America. See A. SODANO, Secretary of State, Rescript from audience for the United States Conference of Bishops, 25 April 2004, in *Roman Replies and CLSA Advisory Opinions*, 1994, pp. 20-21. On 30 November 1998, Pope John Paul II extended this derogation for another ten years until 25 April 2009. See A. SODANO, Letter, 4 December 1998, in *StC*, 33 (1999), pp. 211-212; GREEN, Commentary on c. 1395, in *New Commentary*, p. 1599.

*graviora delicta*, says, “a minor below the age of eighteen years.”<sup>170</sup> Therefore, according to *SST*, a “minor” mentioned in c. 1395 §2 is now to be understood as the one who has not completed the eighteenth year of age. Moreover, according to *SST*, the prescription period for the delict of sexual abuse of a minor (to all *graviora delicta* reserved to CDF) is raised from five years to ten years. Article 5, §1 of *SST* states: “Criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by a prescription of ten years.”<sup>171</sup> This prescription, in accord with article 4, §1 of *SST*, begins to run from the day when the minor has completed the eighteenth year of age. However, John Paul II granted to CDF, subsequent to the promulgation of the *SST*, the faculty to dispense from this time period of prescription on a case-by-case basis if an Ordinary requested it, in order to prosecute a serious case even after the lapse of prescription period.<sup>172</sup> However, Mendonça cautions “that this provision is subject to strict interpretation as it is likely to affect the fundamental rights of persons.”<sup>173</sup>

The sexual abuse of a minor by a cleric or *other* violations against the obligation of clerical celibacy (c. 277) are punished with *ferendae sententiae* penalties. In a serious case, however, the cleric can be punished with dismissal (*non exclusa dimissione*) from the clerical state, *if the case so warrants*.

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<sup>170</sup> “Reservatio Congregationi pro Doctrina Fidei extenditur quoque ad delictum contra sextum Decalogi praeceptum duodeviginti annorum a clerico commissum” (JOHN PAUL II, Motu proprio, Litterae Apostolicae quibus normae de gravioribus delictis Congregationi pro Doctrina Fidei reservatis promulgantur, *Sacramentorum sanctitatis tutela* (= *SST*), 30 April 2001, in *AAS*, 93 (2001), art. 4, pp. 737-739; English trans. in WOESTMAN, *Ecclesial Sanctions and the Penal Process*, pp. 300-309, here at 304-305).

<sup>171</sup> “Actio criminalis de delictis Congregationi pro Doctrina Fidei reservatis praescriptione extinguitur decennio” (*SST*, art. 5; English trans. in WOESTMAN, *Ecclesial Sanctions and the Penal Process*, p. 305).

<sup>172</sup> SCICLUNA, “The Procedure and the Praxis of the CDF,” p. 240.

<sup>173</sup> MENDONÇA, “An Analysis of the Principal Aspects of the Norms,” p. 149.

While dealing with this delict certain authors have raised some pertinent concerns on issues such as “punitive measures in the Church”, “proportionality principle”, “prescription”, “prompt action of a bishop aided with canonical wisdom”, “priests-bishop relationship,” etc., to deal with such cases justly. The right understanding of these canonical and pastoral issues will prevent the ecclesiastical authorities from slipping away from the prescript and spirit of the Code.<sup>174</sup> Finally, pastoral prudence and pastoral equity are to be applied in establishing justice in sexual abuse cases so as to address other issues such as the spiritual, public, relational, medical, civil law and canonical issues involved in it.<sup>175</sup>

#### **2.5.8 – *Sacramentorum sanctitatis tutela***

It is not our intention to present in this section a thorough study of all the delicts mentioned in *SST*, because, as noted earlier, not all delicts addressed by *SST* carry the penalty of dismissal from the clerical state; rather, the objective of the document is to identify certain *graviora delicta* reserved to CDF, and to provide appropriate substantive and procedural norms to deal with them. However, since *SST* also includes in its list of *graviora delicta* three delicts meriting dismissal from the clerical state, we made appropriate and current references to *SST*, to its substantive and procedural norms, in the previous section. Hence, the following study of *SST* will not include a comprehensive study on its delicts.

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<sup>174</sup> See GREEN, “Clerical Sexual Abuse of Minors,” pp. 366-425; K.E. BOCCAFOLA, “The Special Penal Norms of the United States and Their Application,” in DUGAN (ed.), *The Penal Process and the Protection of Rights*, pp. 260-285; S. MACDONALD, “Legality and Law: Some Reflections,” in DUGAN (ed.) *Advocacy Vademecum*, pp. 109-113.

<sup>175</sup> See F.G. MORRISEY, “Procedures to be Applied in Cases of Alleged Sexual Misconduct by a Priest,” in *StC*, 26 (1992), p. 43. See also G. DI MATTIA, “Processo penale canonico e animazione pastorale,” in *Apollinaris*, 62 (1989), pp. 477-512.

On 30 April 2001 Pope John Paul II issued the Apostolic Letter *motu proprio*, *Sacramentorum sanctitatis tutela* (=SST), promulgating the substantive and procedural norms for “*Graviora delicta*” reserved to the Congregation for the Doctrine of the Faith. As mentioned in its first paragraph, the main concern of the Apostolic Letter is, “to guard the holiness of the sacraments especially the Eucharist and penance and to preserve priestly observance of the sixth commandment of the Decalogue.”<sup>176</sup> Most of the eight paragraphs of *SST* refer to earlier papal or curial interventions on the delicts affecting the sanctity of sacraments and morals. The five substantive and twenty-one procedural norms appended to the *motu proprio* identify the “more grave delicts” (art. 1-5), determine the competence and constitution of the tribunal (art. 6-16), and delineate procedural norms to be followed (art. 17-26) in dealing with the *graviora delicta* cases. The *motu proprio SST* came into force on the very day it was promulgated, abrogating all the contrary norms in usage.<sup>177</sup>

On 18 May 2001, the Congregation for the Doctrine of the Faith issued its own letter on “More Grave Delicts” explaining the competence for such cases, and identifying the eight “*graviora delicta*.”<sup>178</sup> This was in response to a long standing need in both Codes for an appropriate law on the substantive and procedural aspects of the delicts

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<sup>176</sup> “Sacramentorum sanctitatis tutela, SS.mae Eucharistiae maxime et Paenitentiae, necnon fidelium in sortem Domini vocatorum praeservatio in observantia sexti Decalogi praecepti” (*SST*, in *AAS*, 93 [2001], p. 737).

<sup>177</sup> See *SST*, in *AAS*, 93 (2001), p. 739; English trans. in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 302.

<sup>178</sup> CONGREGATIO PRO DOCTRINA FIDEI, Epistula missa ad totius Catholicae Ecclesiae Episcopos aliosque Ordinarios et Hierarchas quorum interest: de delictis gravioribus eidem Congregationi pro Doctrina Fidei reservatis, 18 May 2001, in *AAS*, 93 (2001), pp. 785-788; English trans. in CONGREGATION FOR THE DOCTRINE OF THE FAITH, Letter Sent by the Congregation for the Doctrine of the Faith to Bishops of the Entire Catholic Church and to Other Interested Ordinaries and Hierarchs: On “More Grave Delicts” Reserved to the Same Congregation for the Doctrine of Faith, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 310-313.

against the sacraments and morals. The timely issuance of *SST* by the Pope seems to have filled this *lacuna*.<sup>179</sup>

The eight *graviora delicta* listed in three groups and reserved to the Congregation are the following:

A) Those related to the celebration of the Eucharist: 1) the desecration of the sacred species (*CIC*, c.1367; *CCEO* c. 1442); 2) the celebration of the Eucharist by a non-ordained minister (*CIC* c. 1378, §2, 1°; *CCEO* c. 1443); 3) the forbidden Eucharistic concelebration together with ministers of ecclesial communions, which do not have apostolic succession and do not acknowledge the sacramental dignity of priestly ordination (*CIC* cc. 908, 1365; *CCEO* cc. 702 and 1440); and 4) the consecration, for a sacrilegious purpose, of one element without the other in the celebration of the Eucharist, or even of both outside the eucharistic celebration ( *CIC* c. 927).

B) Those involving the celebration of the sacrament of penance: 1) the absolution of a partner in a sin against the sixth commandment of the decalogue (*CIC* c.1378, §1; *CCEO* c. 1457); 2) solicitation (*CIC* c. 1387; *CCEO* c. 1458), and 3) the direct violation of the sacramental seal (*CIC* c. 1388, §1; *CCEO* c. 1456, §1).

C) The delict affecting morals: the offence by a cleric against the sixth commandment of the Decalogue with a minor under the age of eighteen years (*CIC* c. 1395, §2).<sup>180</sup>

In accord with c. 18, only those offences mentioned in *SST* are to be interpreted as *graviora delicta*. The norms of *SST* must be supplemented with the procedural norms of

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<sup>179</sup> See MENDONÇA, “An Analysis of the Principal Aspects of the Norms,” p. 133.

<sup>180</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *More Grave Delicts*, pp. 310-312.

the Code; however, what is significantly new in *SST* is the question of prescription. D. Cito says, for the first time, the delicts reserved to CDF are submitted to a period of prescription, concerning both “the criminal action and penalty.” According to c.1362 §1, a criminal action is extinguished after three years except for the offences reserved to CDF. The delicts reserved to CDF were imprescriptible. But, now art. 5 of the *Normae substantiales* appended to *SST* introduces a substantial change to that prescription period for all the offences reserved to CDF, by raising it to ten years. With regard to the delict against the sixth commandment of the Decalogue committed with a minor (c. 1395, §2), article 5 of *SST* states that the prescription period begins at the completion of the eighteenth year of a minor.<sup>181</sup>

If the *graviora delicta* are reserved to CDF, are the local tribunals competent to judge penal cases involving those delicts? De Paolis says that when a delict is reserved to the Congregation for the Doctrine of the Faith it excludes the other dicasteries in the Roman curia, especially the Roman Rota and the tribunal of the Apostolic Signatura from initiating a penal process and imposing penalties.<sup>182</sup> Woestman concurs with De Paolis in maintaining that the local tribunals retain their competence to validly initiate the judicial trial for dismissing a cleric even for the delicts reserved to the Congregation of the Faith with proper directives from CDF.<sup>183</sup> But Scicluna and Morrissey are of the opinion that local tribunals no longer have the competence to deal with the *graviora delicta* beyond

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<sup>181</sup> D. CITO, “Prescription in Penal Matters,” in DUGAN (ed.), *The Penal Process and Protection of Rights*, p. 193.

<sup>182</sup> See V. DE PAOLIS, “Normae *De gravioribus delictis* riservati alla Congregazione per la Dottrina della Fede,” in *Periodica*, 91 (2002), pp. 297-298.

<sup>183</sup> See WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 69.

the preliminary investigation, whenever a “semblance of truth” is proved.<sup>184</sup> Both these opinions are to be understood in light of art. 13 of the *Normae processuales* of SST and paragraph no. 16 of the CDF’s document *Graviora delicta* which affirm the reservation of *graviora delicta* cases only to CDF; therefore, it is more reasonable to say that the authority of the diocesan bishops and major superiors has been curtailed by these norms; and those local authorities can initiate a penal trial only if they receive the necessary mandate from CDF.<sup>185</sup>

After the promulgation of SST, a number of derogations were made to the precepts contained in it. They are as follows: in substantive norms, the indirect violation of the sacramental seal is now added to the reserved delicts (7 February 2003) together with the “recording or transmission of the matters said in a sacramental confession.” In procedural norms, CDF is now authorised to derogate from the prescription period (7 November 2002); CDF has the faculty to dispense from the requirement of priesthood and a doctorate in canon law for the judicial personnel (Judges, Promoter of Justice, Notaries and Chancellors, Advocates and Procurators, and Patrons in other tribunals); an *ex officio* dismissal by decree (administrative) is possible in two situations. These are in *grave* and *clear* cases: i) the case can be referred directly to the Holy Father for an *ex officio* dismissal, ii) an Ordinary, after the completion of summary process (c.1720) can ask CDF to impose dismissal (7 February 2003); CDF has the faculty to sanate the nullity of acts of the lower courts arising from procedural violations; and finally any recourse

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<sup>184</sup> SCICLUNA, “The Procedure and Praxis of the CDF,” p. 240; F.G. MORRISSEY, “Penal Law in the Church Today: New Roman Documents,” in DUGAN (ed.), *Advocacy Vademecum*, p. 43.

<sup>185</sup> See CONGREGATION FOR THE DOCTRINE OF THE FAITH, *About More Serious Delicts*, p. 312; *Procedural Norms*, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 306.

against administrative acts of CDF can be made only to the *Feria quarta* of CDF itself and not to the Apostolic Signatura (14 February 2003).<sup>186</sup>

### CONCLUSION

The Church, in its inherent right to deal with offences and penalties (c. 1311), defines very clearly in c. 1321 what the elements of a delict are. From our study on offences and penalties in this chapter it is made clear that a particular act, in order to be considered a delict, needs three elements, which are 1) the external act, 2) imputability and 3) the prescript of law which defines a particular delict. As noted, not all unlawful acts are regarded as delicts. In order to determine whether an act is a delict, the following must be verified: whether a violation of a law has occurred; whether a physical person actually committed an act in the external forum; whether the particular act is carried out by a person with evil intent and sufficient knowledge; and whether a particular norm of law defines such an act to be a delict (c. 221, §2).

In determining an act to be a delict, one of the elements that an ecclesiastical judge needs to verify is imputability that is responsibility for the delict. The infliction of a penalty for a delict is fully justified when the presence of evil intent (*dolus*) and sufficient knowledge of the delict (*culpa*) are proved at the time the delict was committed. This act must, once again, be assessed in light of various circumstances, which may mitigate or aggravate imputability. Therefore, an ecclesiastical legislator identifies in cc. 1322-1330 certain circumstances that might be linked to a delict so that a judge/Ordinary may examine them in order to determine with moral certitude the imputability of a given

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<sup>186</sup> For more information on these derogations, see MORRISEY, "Penal Law in the Church Today: New Roman Documents," pp. 39-41; also see "Changes to Norms of SST (7 February 2003)," in *CLSG & I Newsletter*, 137 (March 2004), pp. 26-28.

delict. In the presence of such exempting or mitigating circumstances, the Code allows a judge to use his discretionary power to impose other penal remedies (cc. 1344-1349). At the same time, it urges the judge to inflict more severe penalties if aggravating circumstances are verified in a concrete case. Infliction of penal remedies and penances are not to be considered intermediary procedures. They are penal in nature, though they are light. They must be issued through decree and be notarised (cc. 124-128).

*Dolus* (evil intent) and *culpa* (lack of due diligence/ignorance) are the two sources of imputability in a given act of violation. For a violation of a law to be punishable it must be culpable. Although c. 1321, §2 seems to remove lack of due diligence from imputability, many authors argue that the absence of due diligence and ignorance could still be culpable. Therefore, even if one has acted out of ignorance, or without exercising due diligence in the violation of a law or a precept, such an act is still punishable under the law. However, the violation cannot be considered as equivalent to an act committed deliberately and with full knowledge (*dolus*). The above mentioned canon clearly indicates: “that person is not punished, if the violation was due to the omission of due diligence”. Therefore, a violation of law committed with less culpability, due to the lack of due diligence, implies less imputability.

The Church imposes penalties only as a final resort that means only after it has used other pastoral remedies such as rebuke and warning. In the case of malicious and wilful commission of a delict perpetrated by an offender, he or she must be punished with appropriate penalties. Even here, the ultimate motives are reparation of scandal, restitution of justice, and reformation of the offender (c. 1341; *CCEO* c. 1407, §1).

Whenever and wherever the well-being of a human person, or the sanctity of the sacraments, or the common good are at stake, the Church has the inherent right to impose penalties. Clerical delicts are not exempt from this. The fundamental principles that govern the imposition of penalties are based on the dignity of human person, justice, sanctity of the sacraments and the common good. All clerical delicts meriting the eventual dismissal from the clerical state threaten these key ecclesial concerns.

In the 1983 Code, those clerical delicts that endanger human dignity, sanctity of the sacraments and morals, are punished with a most severe penalty, that is, dismissal from the clerical state. The law makes it very clear that dismissal from the clerical state, is to be applied only for specific delicts (c. 18), prescribed in law, and is to be imposed through a collegiate tribunal (c. 1425, §1, 2°), strictly following the penal prescripts (cc. 1717-1731). Only after a clear verification of the various factors (cc. 1322-1330) that constitute a delict and imputability, can an ecclesiastical judge impose penalties in accord with law (c. 221, §1). The judicial discretion of the judge either to impose lighter penalties or penal remedies is very much desired in both Codes upon the verification of various attenuating circumstances (c. 1343; *CCEO* c. 1409). In this ministry of justice, one cannot ignore the unique role of ecclesial penal law, *i.e.*, the salvation of souls (c.1752).

By the lawfully imposed penalty of dismissal from the clerical state, the cleric loses the clerical state which, in effect, results in the deprivation and prohibition of all the rights and obligations pertaining to the state (cc. 273-289) and some other specific rights mentioned in the Code. This loss does not carry with it a dispensation from the obligation of celibacy which is granted solely by the Holy Father (c. 291).

After the promulgation of *Sacramentorum sanctitatis tutela*, some penal norms have been derogated from the Code; and penal laws are in *de iure contendo*, that is, they are evolving as cases are judged by the Roman dicasteries. The norm contained in c. 1425, §1, 2° is changed since administrative dismissal is possible now. As penal procedures are evolving by the established jurisprudence of dicasteries, a lot more discussion too emerges on the protection of right of defence, right to due process and conducting a fair trial. Issues on retroactivity of law need particular consideration as there is a tendency to judge the delicts that were committed before the *ius vigen*s of particular law. Laws govern the future, and do not include the condition of the past and therefore delicts committed prior to the promulgation of particular and complementary laws are to be properly interpreted (c. 9). Where certain delicts such as sexual abuse of minors involve civil law procedures there need to be a careful distinction between canonical and civil law in regard to delicts and imposition of penalties. In this regard, the principle *ne bis in idem* calls for special attention.

In the following chapter we will trace step-by-step the process involved in the imposition of the penalty of dismissal from the clerical state in light of the 1983 Code of Canon Law.

## CHAPTER THREE

### JUDICIAL PROCEDURE FOR DISMISSAL FROM THE CLERICAL STATE

#### INTRODUCTION

The penal procedure (*De processu poenali*) spelled out in cc. 1717-1731 of Book VII (*De processibus*) of the 1983 Code outlines a procedure for both judicial and administrative procedures whereby penalties for delicts can be imposed. Rightly named ‘penal’ rather than ‘criminal’ procedure, its immediate objective is not the *ius puniendi*,<sup>1</sup> but rather the *ius procedendi*, that is, the duty of ecclesiastical authorities to verify the fact of the violation of law, to determine imputability and, finally, to impose a suitable penalty for a delict. This objective of penal procedural law is to administer natural justice as well as ecclesiastical discipline. This objective is quite different from the direct objectives of the various moral, sacramental and disciplinary paths addressing violations in the Church.<sup>2</sup>

In this chapter we will study the penal procedure as outlined in the Code (cc. 1717-1731). The ecclesiastical penal system has its own procedural norms which are meant to protect, among other things, the rights of the accused, *favor rei* (c. 1313). The penal procedural law presented in the 1983 Code, when duly applied, safeguards justice and the rights of all parties involved (c. 221, §3) in a trial. Therefore, it deserves to be

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<sup>1</sup> *Communicationes*, 12 (1980), pp. 188-189.

<sup>2</sup> DE PAOLIS, “Penal Sanctions, Penal Remedies and Penances,” in DUGAN (ed.), *The Penal Process and the Protection of Rights*, pp. 146-152.

called an equitable process.<sup>3</sup> The penal procedural norms for the imposition of certain penalties (cc. 1717-1731; *CCEO* cc. 1468-1475 and 1481-1486) must be applied, keeping in mind the general procedural norms on ordinary contentious trials (cc. 1400-1655; *CCEO* cc. 1055-1356). The jurisprudence on penal procedures and the complementary norms promulgated by Pope John Paul II in his Apostolic Letter, *Sacramentorum sanctitatis tutela* (=SST) must also be observed lest the whole procedure suffer, from *violatio in decernendo* or *in procedendo* which could derail the administration of justice and the defence of rights.

In our study, therefore, we intend to integrate the special procedural norms for delicts reserved to CDF contained in *SST*. However, the Code always remains the basic reference for our project. It spells out in cc. 1717-1731 the procedure to be followed in a penal process, whether it be administrative (c. 1720) or judicial. Although c. 1342, §1 provides for the use of administrative procedure<sup>4</sup> in certain instances, it is not the object of our study. Among the other methods for the imposition of penalties, the formal judicial procedure<sup>5</sup> is the one most apt for the application of the penalty of dismissal from the clerical state, which is a serious expiatory penalty. Indeed, this formal process is specially designed to collect the appropriate proofs, to assess the level of imputability, to evaluate the social harm caused, and, finally, to administer justice in a pastoral and equitable

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<sup>3</sup> J. LLOBELL, "The Balance of the Interests of the Victims and the Rights of the Accused: The Right to Equal Process," in DUGAN (ed.), *The Penal Process and the Protection of Rights*, pp. 97-100.

<sup>4</sup> *CCEO* c. 1402 expresses the preference for the judicial procedure in the application of penalties in the very first introductory canon of the title, "Penal Sanctions in the Church."

<sup>5</sup> In comparison with the canons of the 1917 Code (cc. 1934-1959) that did not assign specific norms for a judicial penal trial (e.g., prescription, penal competence of the tribunal, right to have an advocate, etc.), the 1983 Code contains certain specific norms on judicial procedure throughout the Code. See E.N. PETERS, *Penal Procedural Law in the 1983 Code of Canon Law*, CLS no. 537, Washington, DC, The Catholic University of America, 1991, pp. 144-148.

manner.<sup>6</sup> The gradual unfolding of the judicial penal procedure for dismissal from the clerical state that we propose to study in this chapter will be explained according to the *iter* of the ordinary process (cc. 1501-1670) combining it with the norms specific to the penal process (cc. 1717-1731).

### 3.1 – PRELIMINARY INVESTIGATION

The preliminary investigation is the first step<sup>7</sup> that an Ordinary undertakes personally or through his delegate in any penal process, “whenever (*quoties*) he receives information about a delict that has a semblance of truth (*saltem veri similem*)”. This step highlights the “prosecutorial” aspect of procedural law, rather than the “inquisitorial” dimension.<sup>8</sup> Its primary purpose is to determine whether there are reasonable and probable grounds to suspect that an alleged delict has been committed. Certain evidence in the form of testimonies and relevant documents are gathered which can be used later in the instructional process, if the Ordinary subsequently determines to initiate a penal trial.<sup>9</sup> The Code requires of the Ordinary to proceed cautiously (*caute inquirat*) not to damage illegitimately the good name of the cleric.<sup>10</sup> This step would open up the possibility of initiating a penal trial or of issuing a penal remedy. The investigation is not as such part of a formal trial but it is an ‘autonomous juridic institution’ common to both judicial and

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<sup>6</sup> J. SANCHIS, “Introduction to Penal Process,” in *Exegetical Commentary*, vol. IV/2, pp. 1989-1990.

<sup>7</sup> F.G. MORRISEY, “The Pastoral and Judicial Dimensions of Dismissal from the Clerical State and of Other Penalties for Acts of Sexual Misconduct,” in *CLSA Proceedings*, 53 (1991), p. 228.

<sup>8</sup> For a discussion of these terms, see LLOBELL, “The Balance of the Interests of the Victims,” pp. 103-104.

<sup>9</sup> See G. INGELS, “Dismissal from the Clerical State: An Examination of the Penal Process,” in *StC*, 33 (1999), p. 171.

<sup>10</sup> P. LAGGES, “The Penal Process: The Preliminary Investigation in Light of the Essential Norms of the United States,” in *StC*, 38 (2004), p. 403.

administrative procedures. By its nature, it is administrative as it arises from the executive power of governance of the Ordinary, and therefore it should not be confused with the formal instruction of the judicial penal process (c. 1428).<sup>11</sup>

### 3.1.1 – Accusation and Referral

Canon 1717 §1: Whenever the Ordinary receives information, which has at least the semblance of truth, about an offence, he is to enquire carefully, either personally or through another suitable person, about the facts and circumstances, and about the imputability of the offence, unless this enquiry would appear to be entirely superfluous.<sup>12</sup>

Canon 1717, §1 explains succinctly that the Ordinary should investigate the facts and circumstances of an accusation and the imputability of the act. But the previous Code offered valuable information on the components of an accusation. Based on the 1917 Code canons, we could say, first of all that any person can report an offence (c. 1935, §1, *CIC/17*) out of a moral and juridical obligation arising from natural law (c. 1935, §2, *CIC/17*); the report should be in writing (c. 1936, *CIC/17*); if reported orally, it should be transcribed in writing.<sup>13</sup> The accusation itself is of informative character, and does not deal with the guilt of the accused. Canon 1942 §2 of the 1917 Code said that no action should be taken (*in nihilis faciendae sunt*) on an accusation made out of malice, jealousy or political animosity; an anonymous one or one that lacks the necessary information

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<sup>11</sup> SANCHIS, “Introduction to the Penal Process,” p. 1988.

<sup>12</sup> Canon 1717, §1: “Quoties Ordinarius notitiam, saltem veri similem, habet de delicto, caute inquirat, per se vel per aliam idoneam personam, circa facta et circumstantias et circa imputabilitatem, nisi haec inquisitio omnino superflua videatur.”

<sup>13</sup> Allegations may also come to ecclesiastical authorities without a formal complaint, such as through the media. See UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *A Handbook for Canonical Processes for the Resolution of Complaints of Clerical Sexual Abuse of Minors*, Washington, DC, United States Catholic Conference, Inc, 2004, p. 7.

required for a petition should not be considered.<sup>14</sup>

This is the first step the Ordinary must take in the process. After receiving the allegation, he must determine whether the accusation has a semblance of truth (*saltem veri similem*). If he finds “at least the semblance of truth” in his initial investigation into the facts and the credibility of the complaint, he must set up the enquiry, no matter its source. Canon 1717 adds: “*nisi haec inquisitio omnino superflua videatur*,” which means that if the Ordinary is presented with convincing proofs of imputability, or the delict has been admitted by the accused or the commission of the delict is notorious, the Ordinary need not set in motion the preliminary investigation.<sup>15</sup> He can proceed further. However, he must obtain objective knowledge of the commission of a canonical offence, and see to the protection of the good name of the accused (c. 220).<sup>16</sup> If he is convinced that a *gravior delictum* has been committed, he must then refer the matter to the Congregation for the Doctrine of the Faith once the preliminary investigation has been completed.<sup>17</sup> He cannot proceed with the trial until he is instructed by CDF. On the contrary, if the report does not have at least a semblance of truth, or if the investigation turns out negative, no

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<sup>14</sup> PETERS, *Penal Procedural Law*, pp. 248 - 250.

<sup>15</sup> One of the *coetus* members suggested that a fourth paragraph could be added to c. 1717 as: “whenever one is dealing with an offence that is in every way certain, this investigation can be omitted.” In lieu of this, another member suggested the phrase: “*nisi haec inquisitio omnino superflua videatur*” (unless this investigation seems entirely superfluous), which is seen in the present canon. See *Communicationes*, 12 (1980), p. 190; PETERS, *Penal Procedural Law*, p. 188. Also see SANCHIS, *Commentary on c. 1717*, in *Exegetical Commentary*, p. 1995.

<sup>16</sup> G. DI MATTIA, “Processo penale canonico e animazione pastorale,” in *Apollinaris*, 62 (1989), p. 488.

<sup>17</sup> See *SST*, artt. 13; 22 §1, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 306 and 308.

penal action should be taken (c. 1321),<sup>18</sup> and no referral (of the reserved delict) to CDF is warranted.

### 3.1.2 – Competent Ordinary

M. Maccarelli says that if other persons having executive or judicial power receive the complaint, they must refer it to the diocesan bishop who possesses the responsibility to conduct a preliminary investigation.<sup>19</sup> Yet, since the Code speaks of ‘Ordinary’ (c. 134, §1), and not of the diocesan bishop, even vicars general, episcopal vicars and the major superiors of pontifical clerical institutes and societies of apostolic life are competent to begin the preliminary investigation.<sup>20</sup>

The competence to deal with offences is determined in terms of territory, subject matter and persons.<sup>21</sup> As per cc. 1408-1409, the Ordinary of the place in which the accused has a domicile or quasi-domicile, or where the accused actually lives has competence in virtue of territory.<sup>22</sup> In accord with c. 1412, the Ordinary in whose territory the delict was perpetrated also has competence to initiate a process.

An accused cleric can be brought before the competent authority of any of these three jurisdictions. Different authors prefer different *fora*. For instance, Lega prefers the

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<sup>18</sup> See V. DE PAOLIS, “Il processo penale nel nuovo codice,” in Z. GROCHOLEWSKI & V. CARCEL ORTI (eds.), *Dilexit iustitiam: studia in honorem Aurelii Card. Sabattani*, Città del Vaticano, Libreria editrice Vaticana, 1984, p. 481.

<sup>19</sup> See M. MACCARELLI, Commentary on c. 1717, in *Commento al Codice di diritto canonico*, p. 993.

<sup>20</sup> See GREEN, Commentary on c. 1717, in *New Commentary*, p. 1807; PETERS, *Penal Procedural Law*, p. 188.

<sup>21</sup> SANCHIS, “Introduction to the Penal Process,” p. 1992.

<sup>22</sup> See J. LLOBELL, E. DE LEÓN and J. NAVARRETE, *Il libro “De processibus” nella codificazione del 1917: studi e documenti*, vol. 1, Milano, Giuffrè Editore, 1999, p. 383.

tribunal of the place where the delict was committed.<sup>23</sup> Wernz-Vidal prefer the tribunal of the place where the cleric has a domicile or quasi-domicile,<sup>24</sup> in view of the mobility of the accused. E. Peters raises the undesirability of the place where the delict was committed for the above mentioned reason, and prefers the forum of the place where the cleric has a domicile or quasi domicile. He says that this serves better the pastoral approaches of *correctio* and *correptio*.<sup>25</sup> However, one should note that “due to prevention, the right to judge belongs to the Ordinary who was the first to cite the accused legitimately (c. 1415)”<sup>26</sup> where there are multiple equally competent fora.

### 3.1.3 – Appointment of an Investigator

Upon receipt of an allegation, the Ordinary must decide<sup>27</sup> whether to investigate the matter personally or through another suitable person.<sup>28</sup> De Paolis recommends that the investigation be entrusted to a competent and trustworthy person, rather than be done personally by the Ordinary so that he might be free to make the decision at the end of the

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<sup>23</sup> See MICHAËLE CARD. LEGA, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, curante V. BARTOCETTI, vol. I, Romae, Anonima Libreria Cattolica Italiana, 1938, pp. 8-9; see also idem, *Commentarius in iudicia ecclesiastica iuxta Codicem iuris canonici*, curante V. BARTOCETTI, vol. III, Romae, Editiones Comm. A. Arnodo, 1941, pp. 152-156.

<sup>24</sup> See F.X. WERNZ, *Ius canonicum ad Codicis normam exactum*, opera P. PETRI VIDAL, *De processibus*, Tomus VI, Romae, Apud Aedes Universitatis Gregorianae, 1937, p. 59.

<sup>25</sup> PETERS, *Penal Procedural Law*, pp. 270-271.

<sup>26</sup> A. CALABRESE, Commentary on c. 1720, in *Exegetical Commentary*, vol. IV/2, p. 2007.

<sup>27</sup> In light of *CCEO* c. 1469 §3, it is advisable that the Ordinary at this stage of the preliminary investigation consults two *periti* and hears the accused before making any serious determination. See INGELS, “Dismissal from the Clerical State,” p. 176.

<sup>28</sup> Morrisey suggests a team of canon lawyers, civil lawyers and psychologists for the investigation of clerical sexual misconduct who would assist the investigator during the preliminary investigation. See MORRISEY, “The Pastoral and Juridical Dimensions,” p. 228. One may wonder how realistic this suggestion is in a case like this and at this stage of the inquiry.

preliminary investigation (c. 1717, §3).<sup>29</sup> This approach would better safeguard the rights of the accused cleric and avert hostility in priest-bishop relationships at this stage of the process.

Since the initiation of the preliminary investigation is a decision of the Ordinary, he must issue a decree<sup>30</sup> appointing the investigator.<sup>31</sup> This investigator can be a cleric or a lay person, male or female.<sup>32</sup> The Code does not specify what makes a person suitable (*idoneum*) for the role. Since he/she has the “same powers and obligations as an auditor” (c. 1717, §3), the basic qualities outlined in c. 1428 would have to be met. The investigator’s role is to gather information and basic proofs concerning the facts, circumstances and imputability, for the Ordinary’s consideration in making his decision on the allegation.

Canon 1717, §3 reads: “The one who performs this investigation has the same powers and obligations as an auditor in a process. If, later, a judicial process is initiated, this person may not take part in it as a judge.”<sup>33</sup> The incompatibility between the office of a judge and the function of the investigator implied in this canon is meant to safeguard

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<sup>29</sup> DE PAOLIS, “Il processo penale nel nuovo Codice,” p. 481.

<sup>30</sup> This decree issued by the Ordinary is a singular administrative act (c. 48). Before issuing it, the Ordinary is, *as far as possible*, to hear [*audiat*] the accused cleric whose rights could be injured due to such decision (c. 50). See INGELS, “Dismissal from the Clerical State,” p. 176.

<sup>31</sup> The preliminary investigation calls for two decrees, one on the appointment of the investigator by which the preliminary investigation is opened and the other on the closing of the investigation. However, “care should be exercised not to word the (first) decree in such a fashion that it amounts to an indictment or decision against an individual [...] it would be well not to place any names in the decree but to state that probable information has been received concerning the commission of an offence” (*ibid.*, p. 179). See also F.G. MORRISEY, “Penal Law in the Church Today: Recent Jurisprudence and Instructions,” in P.M. DUGAN (ed.), *Advocacy Vademecum*, Gratianus Series, Montréal, Wilson & Lafleur Ltée, 2006, p. 58.

<sup>32</sup> Cf. *Communicationes*, 12 (1980), p. 189.

<sup>33</sup> Canon 1717 § 3: “Qui investigationem agit, easdem habet, quas auditor in processu, potestates et obligationes; idemque nequit, si postea iudicialis processus promoveatur, in eo iudicem agere.”

justice and equity in the judgement to be made in a penal case. Therefore, Morrissey suggests that normally the judicial vicar of the diocese should not be an investigator, in case there is going to be a judicial trial at a later period.<sup>34</sup> According to J. Sanchís, nothing prevents a promoter of justice from functioning as an investigator, and it would even be advisable.<sup>35</sup> However, the different distinct canonical roles of a promoter of justice and an investigator may cause, in such a situation, conflict of interests.

### 3.1.4 – Collection of Proofs

Canon 1717, §3 does not determine the method of collecting proofs. However, c. 1428, §3 empowers the investigator to decide on the type (*quae*) of proof and the manner (*quomodo*) of collecting them. He is bound by office to investigate both sides of the issue, i.e., to collect not only the evidence which proves the crime but also those proofs which defend the suspect, such as mitigating and exempting circumstances (cc. 1321-1330) related to the alleged crime.<sup>36</sup>

The investigator should keep in mind that the preliminary investigation is not a trial. Therefore, it would not be appropriate for him to attempt to prove the commission of the delict at this stage.<sup>37</sup> His job is to collect proofs about the allegation and imputability. The proofs could include private or public documents (c. 1539) such as letters, written complaints (cc. 1387, 1367), private documents that have probative value, civil documentary evidence (c. 1394, §1), the person's writings in magazines and books

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<sup>34</sup> F.G. MORRISSEY, "Procedures to be Applied in Cases of Alleged Sexual Misconduct by a Priest," in *StC*, 26 (1992), p. 49.

<sup>35</sup> SANCHIS, Commentary on c. 1717, in *Exegetical Commentary*, vol. IV/2, p. 1996.

<sup>36</sup> INGELS, "Dismissal from the Clerical State," p. 175.

<sup>37</sup> LAGGES, "The Penal Process: The Preliminary Investigation, p. 400.

(if contempt and heresy are expressly published [c. 1364]), etc. The names and domicile of any witness are to be indicated in this phase (c. 1552).<sup>38</sup>

The investigator should inform the witnesses that their names and the content of their testimony will be revealed to the accused, and they may be asked to give testimony once again, should a penal trial be necessary (cc. 1552-1554). If the witnesses do not wish to comply with these conditions, they should not be interrogated and any information given by them should be removed from the acts.<sup>39</sup> The witnesses are to take an oath before and after giving the testimony and they are to keep secrecy (c. 1455, §3).<sup>40</sup> Although the 1983 Code does not require of the investigator to submit a report of the investigation to the Ordinary, Peters opines it should be done.<sup>41</sup>

### 3.1.5 - Protection of the Good Name of the Accused

The second paragraph of c. 1717 states: “Care is to be taken that this investigation does not call into question anyone’s good name.”<sup>42</sup> The Church is very much concerned about the protection of the good name of its members, especially in the application of penalties (c. 220). One’s good reputation is presumed by law until proven otherwise, that

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<sup>38</sup> WERNZ, *Ius canonicum*, vol. VI, pp. 406-407.

<sup>39</sup> J.P. BEAL, “To Be or Not to Be: That is the Question – The Rights of the Accused in the Canonical Penal Process,” in *CLSA Proceedings*, 53 (1991), pp. 84-85.

<sup>40</sup> Canon 1944 of the 1917 Code explicitly mentioned that the person interrogated should keep absolute secrecy, which provision is omitted in c. 1717, §3 of the present Code. See LEGA, *Iudicia ecclesiastica*, vol. III, p. 235; PETERS, *Penal Procedural Law*, p. 188.

<sup>41</sup> PETERS, *Penal Procedural Law*, p. 258; LEGA, *Iudicia ecclesiastica*, vol. III, pp. 241-244; MORRISEY, “Proposed Procedure to be Applied in Cases of Child Sexual Abuse by a Cleric,” in *StC*, 22 (1988), p. 123.

<sup>42</sup> Canon 1717, §2: “Cavendum est ne ex hac investigatione bonum cuiusquam nomen in discrimen vocetur.”

is, “one is innocent until proven guilty.”<sup>43</sup> Until the contrary is established by law or fact, the good name of the accused should be protected (*cavendum est*), and as the legal maxim says, “*accusatore non probante, reus absolvitur.*”<sup>44</sup> Due to the special state and dignity of the sacrament of order, the right to a cleric’s good name must be protected even during the preliminary investigation. The information gathered through the investigation must be kept secret (cc. 471, 2°; 1455, §3) lest it destroy the reputation of persons, or give rise to quarrels or cause scandal.<sup>45</sup> A right correlative to one’s good name is the right of the defendant to be informed of the outcome of the investigation once it is complete. If a report of the preliminary investigation is not given to the defendant, it could constitute an indirect violation of one’s good name and could jeopardize the right of defence.<sup>46</sup>

Another right related to the investigation is subjecting a cleric to psychological and medical testing. Ingels says that it is well established in the Church’s jurisprudence that a cleric cannot be compelled under obedience to submit to a psychological assessment (c. 220).<sup>47</sup> Ordering a cleric to undergo psychological assessment against his

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<sup>43</sup> This legal maxim was considered for the first time as one of the rights of the defendant by a French canonist, Cardinal Johannes Monachus (a. 1313), in these words: “*item quilibet presumitur innocens nisi probetur nocens.*” See K. PENNINGTON, “Innocent Until Proven Guilty: The Origins of a Legal Maxim,” in DUGAN (ed.), *The Penal Process and the Protection of Rights*, p. 56.

<sup>44</sup> R.E. JENKINS, “Defamation of Character in Canonical Doctrine and Jurisprudence,” in *StC*, 36 (2002), pp. 419-424.

<sup>45</sup> MORRISEY, “Procedures to be Applied,” p. 58; SANCHIS, Commentary on c. 1717, in *Exegetical Commentary*, vol. IV/2, p. 1996.

<sup>46</sup> While acknowledging the right of an accused to know such information at this stage, Peters, however, recommends against informing the accused of the fact of investigation. See PETERS, *Penal Procedural Law*, p. 260; C. GULLO, “Reasons for Legal Protection in a Penal Environment,” in DUGAN (ed.), *The Penal Process and the Protection of Rights*, p. 134.

<sup>47</sup> G. INGELS, “Protecting the Right to Privacy when Examining Issues Affecting the Life and Ministry of Clerics and Religious,” in *StC*, 34 (2000), pp. 444-446. Here Ingels quotes the response of the Congregation for the Clergy, 8 October 1988.

will is a violation of the right to privacy (c. 1717, §2).<sup>48</sup> Ingels also says that “a further release of these confidential materials by the bishop to any third party” without the explicit permission of the accused cleric would constitute violation not only of the ecclesiastical law (c. 220) but also of the natural and civil law.<sup>49</sup>

### 3.1.6 – Confidentiality in Penal Matters

At the conclusion of the preliminary inquiry and later when the trial is concluded, all the acts must be deposited in the secret archives, and kept under lock and key. According to c. 379, §1 of the 1917 Code, the documents related to criminal cases involving morality were to be kept secret and, after ten years, or after the death of the defendant, were to be burnt and destroyed, retaining a summary together with the text of the definitive judgement. Canon 489, §2 of the 1983 Code has a similar provision: “Each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since a condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgement.”<sup>50</sup> This defends the rights of the defendant to his/her good name, and prevents others from interfering.<sup>51</sup>

The documents containing personal records, psychological reports, etc., should

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<sup>48</sup> See S. MACDONALD, “The Use of Psychological Testing in Light of *graviora delicta* Cases,” in DUGAN (ed.), *Advocacy vademecum*, pp. 27-28.

<sup>49</sup> G. INGELS, “The Safeguarding of Rights when Investigating Allegations of Misconduct by Clergy and Religious,” in *CLSGB & I Newsletter*, 137 (2004), pp. 54-55.

<sup>50</sup> Canon 489, §2: “Singulis annis destruantur documenta causarum criminalium in materia morum, quarum rei vita cesserunt aut quae a decennio sententia condemnatoria absolutae sunt, retento facti brevi summario cum textu sententiae definitivae.”

<sup>51</sup> See C.A. KEKUMANO, *The Secret Archives of the Diocesan Curia*, CLS no. 350, Washington, DC, The Catholic University of America Press, 1954, p. 51.

not be released to public and civil law officials.<sup>52</sup> It has been reported that some bishops who initiated penal procedures against accused clerics have shared the records with the civil authorities, which corrodes the priests–bishop relationship.<sup>53</sup> Although in this issue, certain concerns of civil law and ecclesiastical law would be intermingled, the ecclesiastical authority should not disregard the juridical principle of confidentiality (c. 1455, §1) in penal matters.

Once the Ordinary has decided to initiate a penal process based on the report of the preliminary investigation, the Code allows him to restrict the cleric from exercising public ministry. However, the Code does not allow an ecclesiastical authority arbitrarily to make the penal matters in question public either to the faithful or to the media, before the issuance of a sentence.<sup>54</sup> Any admonition or correction of the cleric must be made confidentially and all related documents must be kept in the secret curial archives (c. 1719) in order to track the cleric’s recidivistic behaviour and to protect the rights of persons and the autonomy of ecclesiastical law.<sup>55</sup> Based on c. 1548, §2, 1°, Ingels says that confidentiality also exempts the cleric from answering questions posed during the interrogation about matters revealed to him by reason of his ministry.<sup>56</sup>

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<sup>52</sup> See INGELS, “The Safeguarding of Rights,” p. 52; K. MCKENNA, “Confidential Clergy Matters and the Secret Archives,” in *StC*, 26 (1992), p. 204.

<sup>53</sup> A. DULLES, “Rights of Accused Priests: Towards a Revision of the Dallas Charter and the ‘Essential Norms’,” in *America*, 190/ 20, June 21-28, 2004, pp. 19-23.

<sup>54</sup> For a decision on a recourse given by the Apostolic Signatura on confidentiality matters involving priests, see SUPREMUM SIGNATURAE APOSTOLICAE TRIBUNAL, c. Palazzini, 17 December 1988, Prot. No. 18190 CA (unpublished), reported in A. MENDONÇA, “Justice and Equity in Decisions Involving Priests,” in *Philippine Canonical Forum*, 3 (2001), p. 67.

<sup>55</sup> See D.K. LOPPOLO et al., *Confidentiality in the United States: A Legal and Canonical Study*, Washington, DC, Canon Law Society of America, 1988, p. 39.

<sup>56</sup> INGELS, “Dismissal from the Clerical State,” p. 187.

### 3.1.7 – Decision to Inflict or to Declare a Penalty

After receiving the report of the investigation, the Ordinary must render a decision on its conclusion by means of a decree. He has to decide whether to declare a penalty administratively or to put a trial in motion. To determine this, c. 1718, §3 requires him to consult two judges (*iudices*) or legal experts (*iuris periti*).<sup>57</sup> In order to arrive at such a decision, c. 1718, §1 says, he must make three determinations. They are:

- 1° whether a penal process to impose or declare a penalty can be initiated;
- 2° whether this would be expedient, bearing in mind can. 1341;
- 3° whether a judicial process is to be used or, unless the law forbids it, whether the matter is to proceed by means of an extra-judicial decree.<sup>58</sup>

These determinations encompass three issues: 1) the legal possibility of initiating a formal process, 2) the expediency of doing so, and 3) the type of process to be used, judicial or administrative.<sup>59</sup> First, the Ordinary must determine whether there is sufficient evidence warranting a penal action (1°). If this were lacking, the process may not be warranted. If so, penal remedies such as a “fraternal evangelical correction,”<sup>60</sup> a

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<sup>57</sup> He is not bound to consult as he has to at c. 1720, 2°. See DE PAOLIS, “Il processo penale nel nuovo codice,” p. 482; GREEN, Commentary on c. 1718, in *New Commentary*, p. 1809. However, Huels says that the consultation is a necessity as per the mind of the legislator. See J. HUELS, “The Correction and Punishment of the Diocesan Bishop,” in *The Jurist*, 49 (1989), p. 538. According to Peters, the Ordinary needs to undertake two consultations at this stage, namely, a canonical consultation regarding the sufficiency of the accusation and a prudential one with another diocesan bishop on the expediency of initiating a penal process. See PETERS, *Penal Procedural Law*, p. 263.

<sup>58</sup> Canon 1718, §3: “1° num processus ad poenam irrogandam vel declarandam promoveri possit;

2° num id, attento can. 1341, expediat;

3° utrum processus iudicialis sit adhibendus an, nisi lex vetet, sit procedendum per decretum extra iudicium.”

<sup>59</sup> PETERS, *Penal Procedural Law*, p. 265.

<sup>60</sup> See Mt. 18: 15-17; SANCHIS, Commentary on c. 1718, in *Exegetical Commentary*, vol. IV/2, p. 2000.

reprimand (c. 1339, §2) or a penance could be imposed for the spiritual well-being of the accused and of the ecclesial community (c. 1348).

Second, in certain instances, even though a process may be warranted, it might not be expedient (2°). The Church's well-being and the good of the community may be better served through a pastoral approach of *fraterna correctio et correptio* by which scandal can be sufficiently repaired, justice restored, and the offender reformed (c. 1341).<sup>61</sup>

Third, if the sufficiency of evidence and the expediency of a trial urge him to initiate a penal action, how then, should the Ordinary proceed, administratively or through a judicial process (3°)? The Code stipulates that the imposition of dismissal from the clerical state, which is a perpetual penalty, can be imposed only through a judicial process (c. 1342, §2).<sup>62</sup> Moreover, c. 1425 states that dismissal cases can be entrusted only to a collegial tribunal of three judges, and five judges in more difficult cases or those of greater importance.<sup>63</sup> While addressing these three determinations, De Paolis states that the Ordinary has to understand properly the nature of determinate penalties (c. 1349), optional penalties (c. 1347) and obligatory penalties (c. 1344).<sup>64</sup>

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<sup>61</sup> DE PAOLIS, "Il processo penale nel nuovo Codice," p. 485.

<sup>62</sup> Most of the consultors of the Code commission opted for the judicial process. See *Communicationes*, 1 (1977), p. 161; V. DE PAOLIS, "L'applicazione della pena canonica," in *ME*, 114 (1989), p. 93; according to the derogation granted to CDF on article 17 of *Normae processuales*, on 7 February 2003, in grave and clear cases, the delicts reserved to CDF may be resolved administratively either by the Holy Father or by CDF. See MORRISEY, "Penal Law in the Church Today: New Roman Documents Complementing the *Code of Canon Law*," in DUGAN (ed.), *Advocacy Vademecum*, p. 40.

<sup>63</sup> M.F. POMPEDDA, Commentary on c. 1425, in *Commento al Codice di diritto canonico*, p. 845.

<sup>64</sup> See DE PAOLIS, "L'applicazione della pena canonica," pp. 77-83.

Moreover, the Ordinary must consider several other issues. The first issue concerns the strict interpretation of a delict (c.18). Among the seven delicts involving eventual dismissal from the clerical state, four are related to sexual offences (cc. 1387; 1394, §1; 1395, §1; and 1395, §2). Each of these must be understood within the semantic boundary of the canon and related jurisprudence. An isolated individual sexual act cannot be equated with a habitual and continuous offence.<sup>65</sup>

The second issue involves prescription. Prescription is a prohibition against pursuing a criminal action after the lapse of a certain period of time.<sup>66</sup> This prescription period starts to run from the day the offence was committed or, if it is habitual, from the day it ceased (c. 1362, §2). The Ordinary has to verify whether a penal action is possible due to the limitation of prescription. According to c. 1362, §1, the time limit<sup>67</sup> for initiating a penal action is extinguished after three years. But there are three exceptions: 1) The delicts which are reserved to the Congregation for the Doctrine of the Faith have no period of prescription specified in the Code (1°); 2) The delicts mentioned in cc. 1397, 1398 have a five-year period of prescription; and those mentioned in cc. 1367; 1378, §2; 1365; 927; 1378; 1387; 1388 & 1395, §2 have a ten-year period, which means that penal

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<sup>65</sup> See DULLES, "Rights of Accused Priests," pp. 19-23; BOCCAFOLA, "The Special Penal Norms of the United States and Their Application," in DUGAN (ed.), *The Penal Process and the Protection of Rights*, p. 274.

<sup>66</sup> GREEN, Commentary on c. 1362, p. 1573.

<sup>67</sup> The "*tempus utile*" – available time mentioned in the 1917 Code (c. 1703) – is not found in the 1983 Code. It is "continuous time" that marks the prescription period, which is to be interpreted strictly, (c. 18). The prescription period to initiate a penal process does not take into account the preliminary investigation; it counts only from the formal citation of the accused. See PETERS, *Penal Procedural Law*, pp. 274-278.

action beyond this period is not possible (2°); 3) Particular law may prescribe a different period of prescription for delicts not punishable by the universal law.<sup>68</sup>

The third issue relates to imputability. Although a mere probability of commission of a delict enables the Ordinary to initiate a penal action, he must investigate whether 1) the offender violated the law with malice (*dolus*), that is, with a deliberate intent, and 2) whether the delict was committed with full knowledge and will (*culpa*). If there are serious objections against this presumption of law (c. 1321, §3), then the Ordinary may discreetly decide on alternative penal remedies.<sup>69</sup>

The fourth issue is “penalty as a last resort,” as *extrema ratio* (c. 1341).<sup>70</sup> Prior to any penal process, “the superior has to carry out this evangelical correction; he has to correct the offender as a brother would do and not as a superior.”<sup>71</sup> In the canonical tradition, the penal process is warranted absolutely only when the offender is incorrigible and continues to harm communion in the Church and good order in the society. Moreover, at least one warning to purge the contempt (cc. 1347, 1348) must precede the infliction of certain penalties.<sup>72</sup>

The fifth issue is “an equitable decision” with regard to damages. In order to avoid needless processes and litigation among believers (c. 1446), if the Ordinary or the investigator can, with the consent of the parties, arrive at a “good and equitable decision”

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<sup>68</sup> WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 93-94.

<sup>69</sup> INGELS, “Dismissal from the Clerical State,” pp. 185-188.

<sup>70</sup> DE PAOLIS, “Penal Sanctions, Penal Remedies and Penances,” p. 160.

<sup>71</sup> “Fraterna correctio est correctio informalis evangelica; superior corrigit tamquam frater, potius quam tamquam superior” (DE PAOLIS, *De sanctionibus*, p. 84).

<sup>72</sup> INGELS, “Dismissal from the Clerical State,” pp. 189-190; DE PAOLIS, “Il processo penale nel nuovo Codice,” pp. 483-484.

to resolve a claim for damages, the initiation of a penal action for damages may not subsequently be warranted (c. 1717, §4).<sup>73</sup>

In addition to this, when deciding to conclude the preliminary investigation, the Ordinary has to follow the general norms on administrative decrees (cc. 35-58). If his examination proves the probability of a violation of law and imputability and the case is not one reserved to the CDF, then he issues a decree (c. 50) to initiate the penal process. This decree should contain, at least in summary, the reasons for his conclusion; the proofs collected are then to be entrusted to the promoter of justice who will present a *libellus* to the tribunal by which the introductory phase of a trial begins. The second paragraph of c. 1718 says if new facts emerge which are capable of altering the earlier decision of initiating the penal process, the Ordinary should revoke or change his decree, and absolve the accused cleric (cc. 1348, 1358), and bring the case to a conclusion. In either case, he has to listen to the accused cleric as per c. 51.<sup>74</sup>

### 3.1.8 – Competence

In case of *graviora delicta* (the reserved delicts), if the Ordinary through his “*investigatio praevia*” finds credible the “*notitia saltem verisimilem ... de delicto reservato*,” he must refer the case to CDF (*SST* art. 13). If no such evidence is found, he has no obligation to report and he can close the investigation with a decree kept in the secret archives. With regard to the reserved delicts, Scicluna says that “the Ordinary no longer has power or competence to treat the material in conformity with canon 1718.”<sup>75</sup>

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<sup>73</sup> GREEN, Commentary on c. 1718, *CLSA New Commentary*, p. 1809.

<sup>74</sup> DE PAOLIS, “Il processo penale nel nuovo Codice,” pp. 485-486.

<sup>75</sup> See SCICLUNA, “The Procedure and Praxis,” p. 240.

The local tribunals retain their competence only over non-reserved delicts such as attempted marriage (c. 1394, §1) concubinage and some “other” sins against the sixth commandment of the decalogue (c. 1395, §1) that also merit dismissal from the clerical state.

When the case is referred to CDF, the CDF has five options: 1) it may decide that the case does not require any further penal action, and therefore, propose or confirm certain non-penal provisions against which action there is no hierarchic recourse except to the *Feria quarta* meeting of CDF; 2) it may, in grave and serious cases, decide to present the case to the Holy Father for an *ex officio* dismissal, from which action there is no appeal nor recourse; 3) it may decide to authorize a penal administrative procedure in the diocese or religious institute (c. 1720), or may, taking account of the opinion of the Ordinary on the necessity of dismissal, decide to impose it administratively, against which action a recourse can be made to the *Feria quarta*; 4) CDF may authorize the local tribunal to conduct the judicial process with the provision that an appeal in every case is exclusively reserved to the tribunal of CDF; and, finally, 5) it may reserve the case to itself for a formal penal trial. The second instance decision of the tribunal of CDF becomes *res iudicata*; therefore there is no appeal against it.<sup>76</sup>

### 3.2 – INTRODUCTORY PHASE

A formal trial consists of three phases: the introductory phase, the instructional phase and the concluding phase. The introductory phase begins with the lodging of the petition with the competent judge who is competent to receive and act upon it. In penal

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<sup>76</sup> F.G. MORRISEY, “Procedures for Loss of Clerical State,” in DUGAN (ed.), *Advocacy Vademecum*, pp. 97-98; SCICLUNA, “The Procedure and Praxis,” pp. 240-241; LAGGES, “The Penal Process: The Preliminary Investigation,” p. 407.

matters, it is the promoter of justice who presents the *libellus* and sets in motion the introductory phase. The establishment of the tribunal, the citation of the accused and the joinder of issues, then, follow. Once the accused has been cited, the penal trial commences juridically. Cancellation of the trial, then, will be called a renunciation.<sup>77</sup>

### 3.2.1 – Appointment of the Promoter of Justice

If the ordinary decrees that a judicial penal process is to be opened, he must appoint a promoter of justice and give him the acts of the investigation (c.1721). The promoter of justice, whose ministry is to see to the proper protection of the public good, initiates the penal judicial process at the request of the Ordinary.<sup>78</sup> His function is that of a petitioner in the ordinary contentious process and he enjoys the same rights and obligations of a petitioner. Other duties of the promoter of justice are to present the *libellus* (cc. 1502; 1504), to present evidence in support of his allegation and to appeal the case whenever it is required by law (c. 1721).<sup>79</sup>

In penal cases involving the reputation of clerics, the promoter is to be a cleric with at least a licentiate in canon law, and of proven prudence and zeal for justice (c. 1435); but *SST*'s *Normae processuales* art. 9 says that he is to “be a priest, possessing a

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<sup>77</sup> L. WRENN, Commentary on Book VII – Processes, in *1985 Commentary*, p. 970.

<sup>78</sup> See LEGA, *Judicia ecclesiastica*, vol. III, p. 276.

<sup>79</sup> The office of promoter of justice dates from the IV Lateran Council (1215), and his role consists in safeguarding the public good. Pointing out a Rotal decision of 28 April 1993 (c. PALESTRO in *ME*, 121 [1996], pp. 352-363) and a decision given by the *Apostolic Signatura* on 16 November 1971 (see *Apollinaris*, 45 [1972] pp. 381-383), Morrisey explains the role and responsibilities of the office of the Promoter of Justice. See F.G. MORRISEY, “The Promoter of Justice in a Penal Trial and the Public Good,” a Paper presented at a Symposium on Clergy Misconduct and Related Issues, Canadian Canon Law Society, 14-16 June 2004, p. 4; R. COPPOLA, Commentary on c. 1721, in *Exegetical Commentary*, vol. IV/2, p. 2014.

doctorate in canon law, outstanding in good morals, prudence and expertise in the law”<sup>80</sup> in the cases reserved to CDF. The same person functions as promoter in any subsequent instance reserved to CDF. He can be removed by the bishop for a just cause (c.1436, §2). He cannot, however, in another instance, validly decide the same case as a judge or exercise the role of an assessor.<sup>81</sup>

### 3.2.2 – Precautionary Measures

Canon 1722 states:

At any stage of the process, in order to prevent scandal, protect the freedom of the witnesses and safeguard the course of justice, the Ordinary can, after consulting the promoter of justice and summoning the accused person to appear, prohibit the accused from the exercise of the sacred ministry or of some ecclesiastical office and position, or impose or forbid residence in a certain place or territory, or even prohibit public participation in the blessed Eucharist. If, however, the reason ceases, all these restrictions are to be revoked; they cease by virtue of the law itself as soon as the penal process ceases.<sup>82</sup>

In virtue of this canon, the Ordinary is allowed, for serious reasons specified therein, to adopt certain measures against the accused priest. Accordingly, after consulting the promoter of justice, the Ordinary can restrict, at any stage of the trial, the public ministry, or a particular office, or an ecclesial assignment of the accused cleric; he

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<sup>80</sup> Art. 9: “Ad [...] qui sit sacerdos, laurea doctorali in iure canonico praeditus, bonis moribus, prudentia et iuris peritia praeclarus [...] expleat.” See JOHN PAUL II, *SST*, no. 9, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 306. However, these norms (nn. 9 and 12) were derogated on 7 February 2003 and a diocese can appoint a qualified lay person as per c. 1435. See MORRISEY, “The Promoter of Justice,” p. 6. Also see Appendix no. XXII: “John Paul II, Decisions Subsequent to Promulgation of *Sacramentorum sanctitatis tutela*,” in WOESTMAN, *Ecclesiastical Sacntions and the Penal Process*, pp. 314-315.

<sup>81</sup> MORRISEY, “The Promoter of Justice,” p. 6.

<sup>82</sup> Canon 1722: “Ad scandala praevenienda, ad testium libertatem protegendam et ad iustitiae cursum tutandum, potest Ordinarius, audito promotore iustitiae et citato ipso accusato, in quolibet processus stadio accusatum a sacro ministerio vel ab aliquo officio et munere ecclesiastico arcere, ei imponere vel interdicere commorationem in aliquo loco vel territorio, vel etiam publicam sanctissimae Eucharistiae participationem prohibere; quae omnia, causa cessante, sunt revocanda, eaque ipso iure finem habent, cessante processu poenali.”

can also prohibit the cleric from residing in a particular place or territory, or even (*etiam*) his public participation in the most Holy Eucharist.<sup>83</sup> These precautionary measures have to be issued through a decree. At this juncture of the trial, the precautionary measures neither presume guilt nor are to be construed as a penalty; they are not penal but preventive and prudential.<sup>84</sup>

The purpose of the precautionary measures is to guarantee the protection of justice, to prevent scandal and to safeguard the freedom of the witnesses. If these reasons are not present in a case, it would not be legitimate to invoke the norm in view of c. 220. The phrase "*in quolibet processus stadio*" (c. 1722) should not be understood as if the precautionary measures could be undertaken during the preliminary investigation. They should be taken only after the citation of the accused.<sup>85</sup>

Once the reasons for the precautionary measures cease (*causa cessante*), they must be revoked through a decree of the Ordinary (c. 1722). Likewise, they cease *ipso iure cessante processu poenali*.<sup>86</sup> In the case of an acquittal of the cleric, the revocation also includes the reparation of any damage done to the accused cleric by a faulty and deceitful juridic act (c. 128). It is disputed among authors whether there is a possibility of a hierarchical recourse, either by the accused or by the promoter himself, against the

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<sup>83</sup> These precautionary measures are reiterated in UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Essential Norms*, Art. 6. See WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 351. Also see GREEN, Commentary on c. 1722, in *New Commentary*, p. 1813.

<sup>84</sup> See W.H. WOESTMAN, "Restricting the Right to Celebrate Eucharist," in *StC*, 29 (1995), p. 173.

<sup>85</sup> See WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 175; GREEN, Commentary on c. 1722, in *New Commentary*, p. 1813.

<sup>86</sup> For a decision on this point, see APOSTOLIC SIGNATURA, Decree, 22 April 1997, Prot. No. 25896/96 CA, reported in F. DANEELS, "The Administrative Imposition of Penalties and the Judicial Review of Their Legitimacy," in DUGAN (ed.), *The Penal Process and the Protection of Rights*, p. 254.

decrees of precautionary measures! One opinion maintains that there is no possibility of a hierarchic recourse in this situation because the decrees involved are not issued in the external forum outside a judicial trial (c.1732),<sup>87</sup> while another view argues that there is the possibility for recourse.<sup>88</sup>

### 3.2.3 – Constitution of a Tribunal

In order to instruct a case, a diocesan bishop has to constitute the tribunal comprising of judges, promoter of justice, and notary. Although the diocesan bishop has the primary judicial power in his diocese to judge cases, he should not act as a trial judge in a particular case (c. 391). In penal cases, which concern the reputation of a priest, the notary must be a cleric (c. 483, §2). Extending this principle to other tribunal personnel involved in a penal process related to clerical delicts, one can say that judges, promoters, procurators and advocates should also be clerics. However, qualified lay persons can be appointed as advocates for the accused when the right of defence so requires.<sup>89</sup> The cases which involve dismissal from the clerical state are reserved to a collegiate tribunal of three or five judges chosen preferably from outside the diocese (c. 1425, §1, 2°).<sup>90</sup> The

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<sup>87</sup> See FERNANDO LOZA, Commentary on c. 1722, in *Code of Canon Law Annotated 2004*, p. 1351.

<sup>88</sup> See COPPOLA, Commentary on c. 1722, in *Exegetical Commentary*, vol. IV/2, p. 2019. Arguing on the same point as Loza, Green says that, unlike c. 1958 of 1917/CIC, which explicitly denied such recourse (*non datur iuris remedium*), the present Code permits an administrative recourse against decrees by its omission of the phrase, "*non datur iuris remedium*." However, this recourse does not have suspensive effect unlike the recourse against administratively imposed or declared penalties (c.1353). See GREEN, Commentary on c. 1722, in *New Commentary*, p. 1813.

<sup>89</sup> INGELS, "Dismissal from the Clerical State," pp. 196-197. With regard to the cases reserved to CDF, the judge, promoter of justice, notary, procurator and advocate should all be clerics. See the procedural norms in JOHN PAUL II, *SST*, artt. 8, 9, 10, 11 and 12; in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 306. With a dispensation from the Holy See, qualified lay persons can now be appointed for those offices. See MORRISEY, "Recent Roman Documents," p. 5. Also see Appendix no. XXII: "John Paul II - Decisions Subsequent to Promulgation of *Sacramentorum sanctitatis tutela*," in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, pp. 314-315.

<sup>90</sup> See USCCB, *A Handbook for Canonical Processes*, p. 17.

president of the college is to establish the tribunal's competence and also the standing of the promoter of justice. Once the tribunal is constituted, the promoter of justice presents the petition.

### 3.2.4 – Presentation of the Petition by the Promoter of Justice

The *libellus* to be presented by the promoter of justice must contain the following information (cc. 1502, 1504): 1) the name of the judge to whom the case is presented;<sup>91</sup> 2) the matter which is presented; 3) the petitioner's address; 4) the basis for the petitioner (promoter of justice) to present the *libellus*, and 5) eventual proofs supporting the allegations (c. 1504).

In his petition the promoter of justice asks the judge to verify the allegations, to confirm the imputability of the accused, and to specify the penalty, such as dismissal from the clerical state, for the alleged delict. In presenting the *libellus*, he also indicates what type of proofs he will present, and also includes the granting of possible damages for the loss of the good name of the accused if such were the case. He indicates in the *libellus* that those acts (of the preliminary investigation) entrusted to him by the Ordinary will be presented before the tribunal once the *contestatio litis* has been determined. Finally, the *libellus* of the promoter should be signed and dated, and indicate the postal address of the promoter for further notification.<sup>92</sup>

### 3.2.5 – The Citation of the Accused

After determining the tribunal's competence and the standing of the promoter, the

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<sup>91</sup> If the Ordinary did not explicitly mention in the decree the judge before whom the case is to be presented, it is the judge of the place in which the promoter performs his office. See LEGA, *Judicia ecclesiastica*, vol. III, p. 281.

<sup>92</sup> INGELS, "Dismissal from the Clerical State," p. 193; COPPOLA, Commentary on c. 1721, in *Exegetical Commentary*, vol. IV/2, p. 2015.

presiding judge can either accept the petition or reject it (c. 1505, §2). If the petition is rejected, the promoter can place recourse against the rejection within thirty days from receipt of the decree of rejection.

The accused is to be cited after the acceptance of the *libellus*. The accused should be informed of the charges lodged against him (c. 1720, §1). He should be invited to appear before the tribunal. If the accused refuses to appear or does not provide a legitimate reason for the absence, he is considered to have renounced the exercise of his right to defence in the process initiated by the Ordinary.<sup>93</sup> The judge should indicate in the decree of citation the time, date and the place for interrogation. The decree of the citation should be duly signed by the judge and sealed with the seal of the tribunal. A copy of the *libellus* should be attached to the citation. Only for a grave cause can the *libellus* be not attached to the citation (c. 1508, §2). It is only with the decree of citation that the judicial process in the proper sense of the term is initiated. If the decree is not legitimately communicated to the accused, the acts of the process are considered null (c. 1511).<sup>94</sup>

### 3.2.6 – The Right of the Accused to Counsel

Canon 1723 reads:

§1: When the judge summons the accused, he must invite the latter to engage an advocate, in accordance with can. 1481 §1, but within the time laid down by the judge.

§2: If the accused does not do this, the judge himself is to appoint an advocate before the joinder of the issue, and this advocate will remain in

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<sup>93</sup> USCCB, *A Handbook for Canonical Processes*, p. 19.

<sup>94</sup> INGELS, "Dismissal from the Clerical State," p. 195; LEGA, *Iudicia ecclesiastica*, vol. III, p. 288.

office for as long as the accused has not engaged an advocate.<sup>95</sup>

The participation of an advocate in a penal trial derives from natural law and the principles of justice and equity. Pope John Paul II in his 1989 Rotal allocution says that “there must always be a *de facto* defense, indeed a technical defense” in a trial.<sup>96</sup> As per c. 1723, §1, the judge must invite (*invitare*) the accused to engage one or more advocates.<sup>97</sup> If, however, he fails to do so, the judge must appoint one before the *contestatio litis* (c. 1481).<sup>98</sup> It is the responsibility of the judge to ascertain that an advocate is representing the accused. The denial of the right of defence will result in irremediable nullity of an eventual decision (c. 1620, 7°).

The functions of the advocate in a penal trial are the following: enlightening, defending, directing and protecting the accused. The principal tasks of advocacy lie in identifying a specific crime with a pertinent ground; in acquiring knowledge of imputability of the accused; and in complying faithfully with the norms of the penal process. It also involves proposing good arguments, not clever ones to win the case, but rather to arrive at the truth; informing the party of his or her natural and fundamental

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<sup>95</sup> Canon 1723, §1: “Iudex reum citans debet eum invitare ad advocatum, ad normam can. 1481, §1, intra terminum ab ipso iudice praefinitum, sibi constituendum.

§2: Quod si reus non providerit, iudex ante litis contestationem advocatum ipse nominet, tamdiu in munere mansurum quamdiu reus sibi advocatum non constituerit.”

<sup>96</sup> JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 (1989), p. 923; English trans. in WOESTMAN, *Papal Allocations to the Roman Rota*, p. 205.

<sup>97</sup> According to c. 1483, the advocate should be a Catholic of good reputation possessing a doctorate in canon law or otherwise an expert approved by the diocesan bishop. He may be from outside of the diocese. See PETERS, *Penal Procedural Law*, p. 342; J. B. HESCH, “The Right of the Accused Person to an Advocate in a Penal Trial,” in *The Jurist*, 52 (1992), p. 730.

<sup>98</sup> Though the Code requires the judge to appoint an advocate before the joinder of issue, the legal counsel should be offered to the accused at the citation itself. See PETERS, *Penal Procedural Law*, p. 341.

rights;<sup>99</sup> raising exceptions; assisting in gathering proofs, etc.<sup>100</sup> Concretely, an advocate should carefully study the procedure followed in the preliminary investigation and lodge any exception or objection against perceived defects.<sup>101</sup> He may assist at the examination of the witnesses unless otherwise prohibited (c. 1559); he can propose questions to be asked of the witnesses (c.1561); he has the right to inspect the acts when they are published (c. 1598, §1); he may speak last on behalf of the accused (c.1725); and he may initiate recourse against an administrative decree (c. 1738).<sup>102</sup>

### 3.2.7 – Joinder of the Issue

The joinder of the issue is the formulation of a controversy which is derived from the pleas and the responses of the parties to their citation (c. 1513, §1) in a trial. The Code says that the pleas and the replies are expressed not only in a petition but also either in the written responses of the parties to the summons or in statements made orally before the judge. In more difficult cases, the judge is to call the parties together for an oral discussion in order to decide the formula of doubt (§2). If the parties disagree with the judge's decree of joinder of the issue, they have ten canonical days to place recourse against it. This recourse must be decided by the judge with maximum expedition (§3).

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<sup>99</sup> Such rights are: right to know the ground (1508, §2), right to appoint advocate or (and) procurator (cc. 1477; 1481, §2), to present witness (c. 1551), to know the names of the witnesses (c. 1554), to examine the acts (c. 1598, §1), to propose further proofs (c. 1598, §2), to reply to the observations and the pleadings (c. 1603), to know the decision (c. 1614) and to challenge the decision (c. 1628). See MORRISEY, "The Advocate for the Accused and the Right of Defence," p. 16

<sup>100</sup> *Ibid.*, pp. 16-17.

<sup>101</sup> BEAL, "To Be or Not to Be," p. 91.

<sup>102</sup> HESCH, "The Right of the Accused," p. 730.

The decision on the recourse is not subject to appeal (c. 1629, 5°).<sup>103</sup> The joinder of the issue must address three important points: 1) whether the accused committed the delict; 2) whether there was imputability and malice on his part; and 3) whether, based on the outcome of the trial, dismissal from the clerical state is an appropriate penalty.<sup>104</sup>

With regard to the second issue, if the accused decides to challenge the presumption of imputability as part of his defence, this issue must be specifically formulated in the joinder of the issue. In addition the promoter must address the issue of possible damages and compensation. The accused can raise the question of damages as an incidental action within the penal trial before the sentence is pronounced by the first instance tribunal (c. 1729). Likewise, the promoter of justice also can raise the issue of damages related to the public good at any time of the trial, as per the direction of the Ordinary. During the trial the judge has to address the incidental action and answer it before the conclusion of the case.<sup>105</sup> Both the advocate and the accused can raise as many exceptions as possible before the judge after the formulation of the *contestatio litis*.<sup>106</sup>

### 3.2.8 – Renunciation of the Trial

Unlike in the contentious process, the accused cannot renounce a trial in a penal case (c.1524), but the promoter of justice can. However, if the promoter of justice wishes to renounce a case, the accused must, for validity, give his consent to it. Canon 1724

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<sup>103</sup> “Le parti, a meno che non siano già dichiarate consenzienti, hanno il diritto di ricorrere entro dieci giorni contro il decreto allo stesso giudice che lo aveva emanato. La questione deve essere risolta con la massima celerità (*expeditissime*) con altro decreto che diventa inappellabile (can. 1629, n.5)” (A. STANKIEWICZ, Commentary on c. 1513, in *Commento al Codice di diritto canonico*, p. 887).

<sup>104</sup> INGELS, “Dismissal from the Clerical State,” p. 196.

<sup>105</sup> See LEGA, *Iudicia ecclesiastica*, vol. III, pp. 309-310.

<sup>106</sup> Ibid.

reads:

§1: At any grade of the trial the promoter of justice can renounce the trial at the command of or with the consent of the Ordinary whose deliberation initiated the process.

§2: For validity, the accused must accept the renunciation unless the accused was declared absent from the trial.<sup>107</sup>

At the mandate of or in consultation with the Ordinary, the promoter of justice could decide to renounce the action and decide not to continue with the trial. The renunciation can be presented at any stage of the trial, either in the first instance or in the court of appeal.<sup>108</sup> The judge must accept it (c. 1524, §3). The reason could be that the accused is found innocent (c. 1323); that more harm would be caused by continuing the trial; or that proofs for the penalty of dismissal are lacking. In these instances, the accused must give consent to the renunciation before it can take effect. Moreover, a formal declaration of innocence is warranted in accord with law (c. 1726).<sup>109</sup> The accused, on the other hand, may insist on continuing with the trial and on a definitive sentence from the tribunal, so that he may not be in constant fear of facing a new trial.<sup>110</sup> By this penal prescript (c. 1724, §2) the accused must be given an opportunity to clear the suspicion and to seek reparation for any harm to his reputation possibly arising from the

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<sup>107</sup> Canon 1724, §1: “In quolibet iudicii gradu renuntiatio instantiae fieri potest a promotore iustitiae, mandante vel consentiente Ordinario, ex cuius deliberatione processus promotus est.

§2: Renuntiatio, ut valeat, debet a reo acceptari, nisi ipse sit a iudicio absens declaratus.”

<sup>108</sup> COPPOLA, Commentary on c. 1724, in *Exegetical Commentary*, vol. IV/2, p. 2026.

<sup>109</sup> PETERS, *Penal Procedural Law*, p. 326; DE PAOLIS, “Il processo penale nel nuovo Codice,” p. 492.

<sup>110</sup> INGELS, “Dismissal from the Clerical State,” p. 203.

trial; and he should be declared not guilty by the court, if the contrary is not proven.<sup>111</sup>

### **3.3 – INSTRUCTIONAL PHASE**

The Instructional phase (cc. 1517-1597) is the most sensitive part of the penal trial as far as providing for the rights of all the parties is concerned. In this phase, the facts are assembled, the acts are generated, and the proofs are evaluated in order to arrive at moral certitude on the commission and imputability of a delict. Up to now, except for a personal declaration made against the information in the *libellus*, the accused has not had any opportunity to present proofs of innocence or to prove non-imputability or challenge any of the witnesses who have been interrogated during the preliminary investigation. This phase provides for the defence of the rights of the accused person. It also verifies the promoter's plea and the declarations and the statements of witnesses.

#### **3.3.1 – Collection of Further Evidence**

The information collected during the preliminary investigation is usually not sufficient to reach moral certitude on the offence or innocence. It was not received, moreover, juridically. Therefore such facts, data and proofs should be collected and juridically accepted during this instructional phase. The formal interrogation of parties and witnesses provides the maximum facts and evidence in order to arrive at moral certitude about imputability or innocence of the accused. To arrive at moral certitude, the following types of proofs are to be evaluated.

##### **3.3.1.1 – The Declarations of the Accused**

According to the juridical principle, no one can be punished except in accord with law (c. 221); therefore, the judge should first hear the accused. In a penal case, the

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<sup>111</sup> WOESTMAN, *Ecclesiastical Sanction and Penal Process*, p. 178.

respondent is given an opportunity to present the truth from his perspective (c. 1531). This “confession in criminal matters is intended to obtain the facts through an examination of the accused.”<sup>112</sup> While in those contentious processes where the public good is at stake, the discretion of a judge to elicit an oath from the parties is recognized (c. 1532); it is not so, however, in a penal process; the accused cannot be placed under oath. Canon 1728, §2 reads: “The accused person is not bound to admit to an offence, nor may the oath be administered to the accused.”<sup>113</sup>

As R. Coppola says, a dual right is affirmed in this canon: a juridical right and a moral one. The juridical right is well accepted in canonical doctrine as *nemo turpitudinem suam revelare tenetur*, that is, the accused is not bound to admit an offence, because the duty to arrive at a moral certitude on the commission of a delict is the *onus* of the judge who, after having heard the parties and witnesses, and having examined the evidence determines innocence or guilt. The moral right is defined as “*tortura moralis seu spiritualis*.”<sup>114</sup> Such an acquired right cannot be rescinded, “not even in the form of a spontaneous oath, which might be offered to win the good will of the judge.”<sup>115</sup>

A judicial confession in a trial should not be identified with a declaration of the accused. According to c. 1535, a judicial confession, queen of all proofs (*regina probationum*), is a statement given by either party that consists in factual matters pertinent to the issues being investigated. It is made before the judge either orally or in a

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<sup>112</sup> “Confessio in criminalibus intenditur obtineri per examen rei seu constitutum per interrogatoria et inde data opera de hoc agemus” (LEGA, *Iudicia ecclesiastica*, vol. III, p. 312).

<sup>113</sup> Canon 1728, §2: “Accusatus ad confitendum delictum non tenetur, nec ipsi iusiurandum deferri potest.”

<sup>114</sup> See LEGA, *Iudicia ecclesiastica*, vol. II, p. 611.

<sup>115</sup> COPPOLA, Commentary on c. 1728, in *Exegetical Commentary*, vol. IV/2, pp. 2034-2035.

written form in a judicial trial. In order to be recognized juridically, the judicial confession must not have been exerted under force (c. 1538) or grave fear (c. 125, §2). Unlike in a contentious process (c. 1536, §1), a judicial confession in a penal process does not free the tribunal from the burden of proof. This judicial confession has only a limited probative force, and this is to be determined by the judge (c. 1536, §2) and corroborated by other elements gathered during the trial (c. 1537).<sup>116</sup>

### 3.3.1.2 – Documents

The second source of evidence is documents which a judge receives in a trial (cc. 1539-1546). Documentary evidence is of two kinds: public and private (c. 1539). A public ecclesiastical document is one that is drawn up by a public person in the exercise of his or her office in the Church (c. 1540), and a private document is one written or signed by private persons. The private document includes diaries, letters, articles found in various social communication media.<sup>117</sup> It has the same probative force as an extrajudicial confession (c. 1542). It is the duty of the judge to examine the documentary proofs and admit them in court after verifying their authenticity and credibility (c. 1544). In case there is evidence of any tampering with the documents, the judge is to ascertain this before admitting them as proofs (c. 1543).<sup>118</sup>

The collection of public and private documents related to a delict is crucial in a trial. For example, certificates of the administration of sacraments, especially of ordination, reports of rectors of major seminary, dimissorial letters, certificates of

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<sup>116</sup> LAGGES, "The Penal Process: The Preliminary Investigation," p. 400.

<sup>117</sup> See LEGA, *Iudicia ecclesiastica*, vol. III, pp. 311-312.

<sup>118</sup> I. ALTUNA, Commentary on cc. 1540-1543, in *Exegetical Commentary*, vol. IV/2, pp. 1226-1236.

domicile and incardination, decrees of appointment and assignments by the Ordinary, articles published in journals or magazines that contain heretical or schismatic statements, medical reports, etc., can be considered documentary proofs. The promoter of justice, the accused or his advocates or the witnesses can submit such documentary proofs in the instructional phase within a stipulated time (c.1544).

### 3.3.1.3 – Witnesses and Testimonies

The third source of proof is the testimony of the witnesses (cc. 1547-1573). Wernz says that “a witness in general is a suitable person [...] who is used to attest to the truth of some matter, and attestations, that is testification or testimonies, are depositions or statements of a person suitable to attest to a certain fact.”<sup>119</sup>

While the Code provides for the gathering of all kinds of proofs, special importance is given to interrogation. The judicial personnel must keep in mind the general norms prescribed for the interrogation of parties and witnesses in a process (cc. 1547-1573). While the parties may not be present at the interrogation, their advocates and procurators may be unless the judge decides otherwise (c. 1559). The judge has to interrogate discreetly, i.e., only those persons whom he believes to have sufficient knowledge about the crime and its imputability. In interrogating a minor, it is important that either a professional or the parent put forward the questions to the minor. The parents should always be present during the interrogation of a minor unless the minor, under fourteen years, decides to testify directly (c. 1550). A notary, who, in a case involving the

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<sup>119</sup> “Testis in genere est persona idonea [...], quae ad fidem alicuius rei faciendam adhibetur; et attestaciones seu testificationes vel testimonia sunt depositiones sive asserveraciones personae idoneae ad fidem faciendam de aliquo facto” (WERNZ, *Ius canonicum*, vol. VI, pp. 394-395).

reputation of a priest must be a cleric (c. 483, §2), should be present during the interrogation and would notarise the documents.<sup>120</sup>

The procedure for the interrogation of the witnesses is as follows: in a penal case, everyone who has sufficient knowledge about the crime can be a witness unless forbidden by law. Summons to witnesses must be sent through a decree. The witnesses are to tell the truth and nothing but the truth (cc. 1548, 1562), and must respond to the questions of the judge except in specific instances. In order to be impartial, there should be witnesses who have knowledge favourable to the accused also.<sup>121</sup>

At the beginning, the judge should make it clear to the witnesses that their names will be disclosed to the accused; if the witnesses do not wish to have their names revealed to the accused, they are not to be heard (c. 1554). The judge must first establish the identity of the witnesses and their relationship to the parties (c. 1563). The witnesses are to be interrogated individually and separately (c. 1560, §1) by the judge, or by his delegate or by an auditor, who is to be attended by a notary (c. 1561). The questions to be asked are to be chosen discretely by the judge (c. 1563); they should be brief and appropriate to the understanding of the person interrogated; they are not to be communicated to the persons in advance (c. 1565, §1); the questions should not be deceptive or leading (c. 1564). The statements of individuals must always be given under oath and should be recorded and put to writing (c. 1567, §1), duly signed by the witnesses and the notary (c. 1569, §1).<sup>122</sup>

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<sup>120</sup> INGELS, "Dismissal from the Clerical State," p. 178.

<sup>121</sup> *Ibid.*, p. 198.

<sup>122</sup> See F. G. DE LAS HERAS, Commentary on c. 1564, in *Exegetical Commentary*, vol. IV/2, p. 1293.

Because of the gravity of a penal trial, the response of the witnesses to questions by mail cannot be admitted. The judge should avoid repetitions of the testimonies and, if necessary, he must confront the witnesses, according to the norm of law, especially if he suspects fabrication of the facts by any of them.<sup>123</sup> Testimonies must be recorded and written down immediately by a notary; and the notary must record in the acts everything that has significance to the merit of the case (c. 1568). The judge has the discretion to order the re-examination of a witness either *ex officio*, or at the request of the accused or his advocate (c. 1570). Witnesses are to keep secrecy.<sup>124</sup>

#### 3.3.1.4 – Experts

An expert report or opinion constitutes another source of evidence. An expert (*peritus*) is a specialist “who is learned, experienced and skilled in his or her profession and whose scientific report is required either to prove some fact or to diagnose the true nature of something.”<sup>125</sup> A judge is required to make use of the help and opinion of experts whenever, in his prudent judgement, it will help him arrive at moral certitude and whenever the law prescribes so (c. 1574). An expert can be appointed by the judge (c. 1575), suggested by the parties (c. 1581), or accepted by the judge (c. 1581).

An expert can be official or private. An official expert is the one who is appointed by the judge by decree, after having consulted the promoter of justice on the usefulness and necessity of an expert (c. 1575). A private expert is the one chosen by one of the parties who submits his/her opinion on a given matter. Such an opinion is not to be

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<sup>123</sup> See WERNZ, *Ius canonicum*, vol. VI, pp. 413-414; LEGA, *Judicia ecclesiastica*, vol. III, p. 323.

<sup>124</sup> See c. 1455, §3.

<sup>125</sup> WRENN, Commentary on c. 1574, in *1985 Commentary*, pp. 985-986.

considered official, but nevertheless, by using the phrase ‘*ab aliis peritis iam factas assumere*’, the Code recognizes it as proof, and the judge must admit it so as to guarantee the right of defence of the accused. The experts proposed by the parties and approved by the judge are not to be considered as private experts; their opinion has juridical value in a given case.<sup>126</sup>

The appointment of experts should be based on a person’s knowledge of the subject matter, reputation, personal integrity and honesty. In his decree, the judge should indicate the specific task expected of an expert to be submitted within a determined period of time. The judge should formulate questions in categories related to canonical issues, and should avoid the confusion of roles by mixing different categories, for example, psychological and canonical. The expert’s opinion should indicate the particular theory or principle through which a particular conclusion is arrived at, or upon which the arguments are built.<sup>127</sup> If the opinions of experts differ, it belongs to the judge to evaluate them accurately in order to find whether they are based on objective and clinical criteria (c. 1579).<sup>128</sup> Since an expert’s opinion has juridical value, the right of defence of the accused is also to be kept intact, in the sense, that the accused should be given access to the reports of experts. Finally, when the judge pronounces the decision he should explain on what grounds he either accepts or rejects the conclusions of the experts (c. 1579, §2). An expert’s opinion cannot be considered a final judgement of a case.

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<sup>126</sup> K.E. BOCCAFOLA, Commentary on c. 1581, in *Exegetical Commentary*, vol. IV/2, p. 1345.

<sup>127</sup> G.T. JORGENSEN, “The Role of the Expert in Tribunal Proceedings,” in *CLSA Proceedings*, 66 (2004), p. 150.

<sup>128</sup> JOHN PAUL II, Allocation to the Roman Rota, 5 February 1987, in *AAS*, 79 (1987), pp. 1453-1459; English trans. in WOESTMAN, *Papal Allocations to the Roman Rota*, pp. 191-196.

### 3.3.1.5 – Access and Judicial Recognizance

The “judicial access and inspection” (cc. 1582-1583) is another source of evidence in a trial. It is a kind of proof recognized in the Code as useful in penal cases in order to identify the place of controversy and to determine certain elements of a delict.<sup>129</sup> The new Code allows the judge (*iudex opportunum duxerit*) to inspect a location or site. It is an inspection made by the judge where his own senses of sight/hearing or others are involved. For a judicial recognizance, the judge has to define in a decree what needs to be inspected indicating the place, date and time, and must summon all the persons involved in the controversy. When all the persons are present, he must ask the person who petitioned for the inquiry to speak, to be followed by the opposing party, the witnesses and experts.<sup>130</sup>

“A notary should record who was present, and summarize the comments made or arguments presented. At the end, this summary should be read so that clarifications or corrections may be made; then the summary should be signed by those present. The evaluation of the inspection is left to the judge,”<sup>131</sup> who is to consider the relevance of the proofs inspected, with other reports that may strengthen or weaken a conclusion.

### 3.3.1.6 – Presumptions

Canon 1584 reads: “A presumption is a probable conjecture about something which is uncertain. Presumptions of law are those stated in the law; human presumptions

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<sup>129</sup> LAGGES, “The Penal Process: The Preliminary Investigation,” p. 401.

<sup>130</sup> C. DE DIEGO-LORA, Commentary on c. 1582, in *Code of Canon Law Annotated 2004*, p. 1239.

<sup>131</sup> BOCCAFOLA, Commentary on c. 1583, in *Exegetical Commentary*, vol. IV/2, p. 1347.

are those made by a judge.”<sup>132</sup> A presumption is thus a conjecture made in light of law or personal experience by a judge about the possible existence of a disputed or unknown fact. A presumption stated in law is called a presumption of law (*praesumptio iuris*), and one made in view of one’s experience is known as a human presumption (*praesumptio hominis*). One who has a legal presumption in his or her favour need not prove the controversial fact, for the law itself proves the unknown fact; it is for the other party to prove the contrary (c. 1585).

A human presumption is not as forceful as a legal one. It does not free the party in whose favour it is made from demonstrating an unknown fact. As it is based on reason and the experience of a person and operates on a level of probability, it does not provide full certainty about a controversial fact. However, as Boccafola states, if such a presumption is greatly probable (*praesumptio violenta vel vehemens*), then the judge can pronounce his decision based on the presumption. Before determining a presumption, the judge should first know all the facts on which a presumption is to be made.<sup>133</sup>

### 3.3.2 – Publication of the Acts

The last stage of the Instruction is the publication of the Acts. Canon 1598, §1 reads:

When the evidence has been assembled, the judge must, under pain of nullity, by a decree permit the parties and their advocates to inspect at the tribunal office those acts which are not yet known to them. Indeed if the advocates so request, a copy of the acts can be given to them. In cases which concern the public good, however, the judge can decide that, in order to avoid very serious dangers, a given act is not to be shown to

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<sup>132</sup> Canon 1584: “Praesumptio est rei incertae probabilis coniectura; eaque alia est iuris, quae ab ipsa lege statuitur; alia hominis, quae a iudice conicitur.”

<sup>133</sup> BOCCAFOLA, Commentary on cc. 1584, 1585, in *Exegetical Commentary*, vol. IV/2, pp. 1349-1351.

anyone. He must take care, however, that the right of defence always remains intact.<sup>134</sup>

When all the evidence, such as declarations of the parties, testimony of witnesses, documentary proofs, and experts' opinions, have been collected, the judge must, under pain of nullity, publish the acts. Through a decree, he has to allow the "accused and the advocate(s)"<sup>135</sup> to inspect the acts which are not yet known to them. When the legislator says 'acts', the term includes both the *acta causae* and the *acta processus*, relating to the merit and the procedures of the trial (c. 1472). By the expression, '*sub poena nullitatis debet*', the legislator warns the judge to respect the right of defence enshrined in the new Code (c. 1620, 7°). Should the judge conclude the case without the publication of the acts, the judgement will be irremediably null in accord with the norm of c. 1620, 7°. According to Mendonça, there are two kinds of invalidity involved in the action of a judge who does not publish the acts. One is the invalidity of the decree itself in light of c. 1598, §1, which is remediable, and the second is the irremediable nullity of the sentence due to denial of right of defence.<sup>136</sup> Here a distinction is to be made as to what nullifies the judgement. What is stressed is not the simple juridical act of issuing a decree of publication of the acts, but the actual opportunity offered to the accused to inspect those

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<sup>134</sup> Canon 1598, §1: "Acquisitis probationibus, iudex decreto partibus et earum advocatis permittere debet, sub poena nullitatis, ut acta nondum eis nota apud tribunalis cancellariam inspiciant; quin etiam advocatis id petentibus dari potest actorum exemplar; in causis vero ad bonum publicum spectantibus iudex ad gravissima pericula evitanda aliquod actum nemini manifestandum esse decernere potest, cauto tamen ut ius defensionis semper integrum maneat."

<sup>135</sup> See A. MENDONÇA, "The Right of the Parties to Inspect the Acts and Its Relation to the Validity of a Definitive Sentence in a Marriage Nullity Process," in *StC*, 33 (1999), pp. 303-305.

<sup>136</sup> See A. MENDONÇA, "Consequences of Using 'A Specific Act' 'Not shown to Anyone' on the Sentence," in *CLSA Advisory Opinions* 2000, p. 151; also see decision *coram* Stankiewicz, 28 July 1994, in *Periodica*, pp. 556-557; decision *coram* Funghini, 11 May 1994, in *ME*, 119 (1994), pp. 526-534.

acts which are not yet known to him.<sup>137</sup> However, according to Mendonça, the right to a *contradictorium* is not absolute; it is to be weighed against possible danger to the public good. The phrase ‘*aliquod actum nemini manifestandum esse*’ (an act not to be shown to anyone) equally calls for discretion of the judge in keeping an act away from the accused.<sup>138</sup>

Another right related to the publication of the acts is the right of the accused’s advocate to have a copy of the acts. The Code says it is left to the discretion of the judge who may choose to offer a copy or who may retain a part or the whole of it for the cases that concern the public good or in order to avoid serious dangers (c. 1598, §1). However, it emphasizes that the right of defence of the accused should remain integral. In his 1989 allocution to the Roman Rota, Pope John Paul II said that the publication of acts in a canonical trial is necessary in order to keep the right of defence always intact in all cases, including penal trials.<sup>139</sup>

Once the publication is done, the accused and their advocates may submit new supplementary proofs and evidence which the judge, considering their importance and value, if he deems it appropriate, can publish (c. 1598, §2). However, the gathering or submission of supplementary proofs should not delay the case unnecessarily (c. 1600).<sup>140</sup>

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<sup>137</sup> R. OCAÑA, Commentary on c. 1598, in *Exegetical Commentary*, vol. IV/2, pp. 1400-1401.

<sup>138</sup> MENDONÇA, “The Consequences of Using ‘A Specific Act’,” p. 154.

<sup>139</sup> JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 (1989), p. 924; English trans. in WOESTMAN, *Papal Allocutions to the Roman Rota*, p. 206.

<sup>140</sup> OCAÑA, Commentary on c. 1598, in *Exegetical Commentary*, vol. IV/2, p. 1405.

### 3.4 – CONCLUDING PHASE

“When everything concerned with the production of proofs has been completed, the conclusion of the case is reached” (c. 1599, §1). Once the case is sufficiently instructed as per law, the case enters the discussion phase, which allows discussion between the judge, the promoter of justice and the accused’s advocate. At this point, the promoter of justice, the accused and the advocates, if satisfied with the trial so far, cease submitting further evidence and allow the judge to proceed to a decision. The conclusion of the case may occur in three different ways: the parties themselves can renounce submission of further proofs, and declare that they have nothing to add; second, it can occur by the lapse of the time-limit stipulated by the judge for submission of proofs; and finally, by the declaration of the judge that the case has been sufficiently instructed (c. 1599, §2).

#### 3.4.1 – Decree of Conclusion of the Case

“By whichever way the case comes to its conclusion, the judge is to issue a decree declaring that it is concluded” (c.1599, §3).<sup>141</sup> With regard to the second mode, the judge must respect the canonical time allotted for the submission of proofs. Sometimes, when there exists a just cause, after hearing both the promoter and the accused, a judge can extend this time limit (c. 1465), agreed upon by both parties, either to present more allegations or more defence. In any case, the judge is to avoid unnecessary delay in the

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<sup>141</sup> Canon 1599, §3: “De peracta conclusione in causa, quocumque modo ea acciderit, iudex decretum ferat.”

trial. The decree of conclusion merely states that the case has moved forward to its conclusion and it explains how the decision for concluding the case was arrived at.<sup>142</sup>

### 3.4.2 – Promoter’s and Advocate’s Submissions

Canon 1601 reads: “When the case has been concluded, the judge is to determine a suitable period of time for the presentation of pleadings and observations.”<sup>143</sup> The judge must determine a reasonable amount of time for the submission of observations by the promoter of justice (*votum pro rei veritate*) and defence briefs by the accused and his advocate(s) (*defensiones*) in writing (c. 1601). He could also decide to have an oral discussion in place of a written submission (c. 1602, §1); whatever the case, the intent of such a decision is to protect the right of defence (*ius defensionis*) of the accused throughout the process. The submissions are technically meant to recapitulate arguments, to offer additional evidence, and to refute the charges against the accused. The time limit mentioned in c.1601 is extendable either *ex officio* or at the request of the advocate or the promoter. Before deciding on a request to extend, the judge has to hear the other party on this matter (c. 1465, §2).<sup>144</sup>

### 3.4.3 – Discussion of the Case

Canon 1603, §1 reads: “When the pleadings and observations have been exchanged, each party can make reply within a brief period of time determined by the

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<sup>142</sup> OCAÑA, Commentary on c. 1598, in *Exegetical Commentary*, pp. 1408-1409. Ocaña uses a particular term ‘procedural economy’ to explain this extension of instruction, saying that it is justified in comparison to the likely delay of time and justice in case of lodging an appeal. In order to avoid at a later period of the procedure a *restitutio in integrum* (c. 1645, §2) based on false proofs or fraudulent hiding of proofs by one party, the judge, at this stage, must allow submission of new proofs that guarantees fairness and moral certitude. He can also order the extension of time limits, *ex officio*, if he believes that his judgement based on the present instruction would be gravely unjust.

<sup>143</sup> Canon 1601: “Facta conclusione in causa, iudex congruum temporis spatium praestituat ad defensiones vel animadversiones exhibendas.”

<sup>144</sup> J.M. SERRANO, Commentary on c. 1601, in *Commento al Codice di diritto canonico*, p. 922.

judge.”<sup>145</sup> The principle behind the discussion is to offer an opportunity to the parties to put forth their final arguments on raised issues.

Whether to have the discussion in writing or orally is left to the discretion of the judge. The mind of the legislator is that it should be held in writing.<sup>146</sup> If an oral discussion is to be held, the prior consent of the parties is necessary (c. 1602, §1). If the consent of the accused is not procured for an oral discussion, according to c. 127, §2, 2°, the discussion is invalid. At an oral discussion, a notary should be present, the pleadings discussed should be written down (c. 1605); the conclusions arising out of the oral discussion should be signed by all (c. 1667).<sup>147</sup>

In their written discussion, the promoter and the advocate must include the facts of the case, the law pertaining to the delict and, finally, arguments for and against, either to prove or to refute allegations. An opportunity for rebuttal is to be offered to both the accused and the promoter equally (c. 1603, §2). The Code, in order to protect justice from unjust and unnecessary delays, permits only one rejoinder for the parties, although, in his discretion, a judge can allow a second time for rebuttal if there exists a grave cause (c. 1603, §2). However, in penal cases it is the accused who always speaks last (c. 1725). Furthermore strict secrecy is to be imposed by the judge in penal matters.<sup>148</sup>

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<sup>145</sup> Canon 1603, §1: “Communicatis vicissim defensionibus atque animadversionibus, utrique parti responsiones exhibere licet, intra breve tempus a iudice praestitutum.”

<sup>146</sup> See *Communicationes*, 11 (1979), p. 137.

<sup>147</sup> SERRANO, Commentary on c. 1601, in *Commento al Codice di diritto canonico*, p. 922.

<sup>148</sup> C. COX, Commentary on cc. 1600-1603, in *New Commentary*, pp. 1713-1714.

### 3.4.4 – Moral Certitude

Canon 1608, §1 states: “For the pronouncement of any sentence, the judge must have moral certitude about the matter to be decided by the sentence.”<sup>149</sup> In his allocution to the Roman Rota, Pope Pius XII explained that moral certitude is different from absolute certitude, which excludes the possibility of any error. In the ministry of justice, what is required is not absolute certitude but moral certitude.<sup>150</sup>

How does a judge arrive at a moral certitude? According to c. 1608, §2, the judge must derive this certainty from the acts and from the proofs (*ex actis et probatis*). Moral certainty can be obtained from what is brought forward and what is proven in a case. C. Diego-Lora cautions against including any source of personal knowledge that the judge may acquire into the source of moral certitude. Hence, moral certitude depends upon the objective evaluation by the judge of the evidence supported by experts’ opinions and his own judicial experience.<sup>151</sup>

The manner of arriving at moral certitude is not through the principles of physical or metaphysical sciences or through psychological conviction, but as c. 1608, §3 says, “the judge must consciously weigh the evidence, with due regard for the provisions of law about the efficacy of certain evidence.”<sup>152</sup> What the Code urges the judge to do, when

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<sup>149</sup> Canon 1608: “Ad pronuntiationem cuiuslibet sententiae requiritur in iudicis animo moralis certitudo circa rem sententia definiendam.”

<sup>150</sup> PIUS XII, Allocution to the Roman Rota, 10 January 1942, in *AAS*, 34 (1942), p. 339; English trans. in WOESTMAN, *Papal Allocutions to the Roman Rota*, p. 18.

<sup>151</sup> DE DIEGO-LORA, Commentary on c. 1608, in *Exegetical Commentary*, vol. IV/2, p. 1460.

<sup>152</sup> Canon 1608, §3: “Probationes autem aestimare iudex debet ex sua conscientia, firmis praescriptis legis de quarundam probationum efficacia.”

arriving at moral certitude, is to test, by using established principles of logic and ethics, the efficacy, authenticity and relevance of the corroborated proofs.

It is the duty of a judge to evaluate the proofs “according to his own conscience.” The ‘subjective’ mental attitude of the judge corroborated by the objective evaluation of facts, evidence, declarations, testimonies, experts’ opinion, etc., is the surest way to arrive at moral certainty. Therefore, this subjective element also plays a crucial role in arriving at moral certitude: the informed conscience, an ability to assess imputability on a given penal matter, and the experiential assessment of *culpa* or *dolus* come under the domain of his ‘own conscience’. However, he should guard against excessive subjectivity that is ignoring the strength of the evidence, in arriving at moral certainty. In short, a judge arrives at moral certitude, that excludes all reasonable doubt, when he commits himself to truth and justice with prayerful conviction (c. 1612, §1).<sup>153</sup>

The objective evaluation that helps a judge arrive at moral certitude does not exclude him from pronouncing a sentence favourable to the accused.<sup>154</sup> For, c. 1608, §4 says: “A judge who cannot arrive at such certainty is to pronounce that the right of the plaintiff is not established and is to find for the respondent, except in a case which enjoys the favor of law, when he is to pronounce in its favor.”<sup>155</sup> When a judge is unable to arrive at moral certitude that the claim of the promoter of justice is established, the law requires the judge to pronounce a sentence in the negative which dismisses the claim and

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<sup>153</sup> COX, Commentary on c. 1604, in *New Commentary*, p. 1717.

<sup>154</sup> DE DIEGO-LORA, Commentary on c. 1608, in *Exegetical Commentary*, Vol. IV/2, pp. 1461-1463. For a Rotal sentence which explains how to acquire moral certitude in matrimonial cases, see decision c. SERRANO, 16 December 1983, in *RRT Dec*, 75 (1983), pp. 707-726; here at pp. 723-726.

<sup>155</sup> Canon 1608, §4: “Iudex qui eam certitudinem adipisci non potuit, pronuntiet non constare de iure actoris et conventum absolutum dimittat, nisi agatur de causa iuris favore fruente, quo in casu pro ipsa pronuntiandum est.”

absolves the defendant of the accusation. Hence, in any grade or stage of trial, if it becomes quite evident that a crime has not been perpetrated, the judge is obliged to declare it in a sentence and acquit the accused (c. 1726).

### 3.4.5 – Pronouncements of the Judge

The collegiate panel must have it in their minds moral certitude in responding to the question posed in the *contestatio litis*. On the date established by the presiding judge, the judges meet together in the tribunal office (c. 1609, §1). The president of the college leads the discussion to determine what must be declared in the dispositive part of the sentence (c. 1609, §3). The collegiate judges, beginning with the presiding judge, must submit their written conclusions on the merits of the case with reasons in law and in fact. These conclusions become part of the acts and are to be kept secret (c. 1609, §2). This discussion should help the judges in determining what is to be stated in the dispositive part of a judgement (c. 1609, §3). If they are unwilling or unable to arrive at a sentence during the first session, the presiding judge can defer the sentence to another meeting (c. 1609, §5), which should take place within a week unless the tribunal holidays intervene.<sup>156</sup> The definitive judgement should be issued ‘not later than one month from the day on which the case was decided’ (c. 1610, §3). No further evidence can be added or requested during the discussion, since to do so would delay the process unnecessarily. The merit of the case is determined by the absolute majority vote of the college (c. 1426,

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<sup>156</sup> See *Norms of the Tribunal of the Roman Rota*, no. 93, in *Exegetical Commentary*, vol. V, pp. 257-288; here at p. 282.

§1), and the dissenting judge can request that his own conclusions be sent to the higher tribunal in case of an appeal (c. 1609, §4).<sup>157</sup>

The *ponens* writes the judgement; he should compose it in light of the *vota* of the other judges.<sup>158</sup> In the absence of the *vota*, he has to write the sentence using the reasons that emerged during the discussion. The sentence written by the *ponens* must be approved by all the judges constituting the panel (c. 1610, §2). Once approved, all the judges should sign; in the absence of these signatures the sentence would be null (c. 1612, 3°).

The sentence should be formulated as per c. 1612. Invoking the Divine Name “it must express the name of the Supreme Pontiff, and indicate the day, month, year, and place in which it is rendered.”<sup>159</sup> It should expressly state in order the names of the judges, promoter of justice, the accused, notary and procurators and their domiciles duly indicated (c. 1612, §1). Next, it should relate the alleged facts with the conclusions of the parties and the formulation of the *dubium* (c. 1612, §2); in its dispositive part, the decision preceded by the reasons supporting it must be expressed (c. 1612, §3); and finally it should conclude with the signatures of the judges and notary, indicating the date and the place. Failure to motivate the sentence with law and facts will result in the nullity of the sentence (c. 1622, 2°).

The sentence also should decide the controversy raised before the tribunal, giving appropriate response to the questions posed in the *contestatio litis* (c. 1611, 1°). If the response to the first question, “whether it is proved with moral certitude that the accused

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<sup>157</sup> SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction, *Provida mater*, 15 August 1936, in *AAS*, 28 (1936), no. 198, p. 351.

<sup>158</sup> No. 96, §3, *Norms of the Tribunal of the Roman Rota*, in *Exegetical commentary*, vol. V, p. 283.

<sup>159</sup> *Ibid.*, no. 97, p. 283.

committed the crime” is affirmative, then the sentence must address the second question concerning “imputability, malice and culpability.” When these issues are determined, then the next question to be considered concerns “the imposition of the penalty of dismissal from the clerical state.” The indeterminate penalties, which are also progressive in nature, have to be handled differently. The tribunal cannot directly and immediately inflict a perpetual penalty on the accused before inflicting other recommended penalties and remedies.<sup>160</sup> If the college finds no grave evidence for imposing dismissal, or the accused did not commit the offence, the judge is under obligation to declare this in his judgement and to acquit the accused (c. 1726). However, if there is lesser guilt, he must impose certain lesser penalties such as the restriction and privation of certain rights pertaining to the clerical state.<sup>161</sup>

### 3.4.6 – Publication of the Sentence

Canon 1615 states:

The publication or notification of the judgement can be effected by giving a copy of the judgement to the parties or to their procurators, or by sending them a copy of it in accordance with can. 1509.<sup>162</sup>

After writing the definitive sentence, the notification of it is to be sent to the promoter and the accused cleric. The dispositive part of the judgement may be notified to them beforehand (c. 1614). The notification should be done by certified mail with acknowledgement of the receipt. It should also indicate the date *a quo* for an appeal. A

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<sup>160</sup> INGELS, “Dismissal from the Clerical State,” p. 200.

<sup>161</sup> BEAL, “To Be Or Not To Be,” p. 95; INGELS, “Dismissal from the Clerical State,” p. 201; J.A. ALESANDRO, “Dismissal from the Clerical State in Cases of Sexual Misconduct: Recent Derogations,” in *CLSA Proceedings*, 56 (1994), pp. 47-50; LOZA, Commentary on c. 1726, in *Code of Canon Law Annotated 2004*, p. 1352.

<sup>162</sup> “Publicatio seu intimatio sententiae fieri potest vel tradendo exemplar sententiae partibus aut earum procuratoribus, vel eisdem transmittendo idem exemplar ad normam can. 1509.”

valid, conforming appeal definitive sentence in penal trial becomes *res iudicata*, which means it is final, and the definitive sentence cannot be challenged again except by means of a petition for *restitutio in integrum*.<sup>163</sup> Any material error or error in calculation must be corrected by the judge *ex officio* or at the request of the procurator or the accused, which is to be done prudently after consulting both of them, and a decree to this effect should be appended to the judgement (c.1616).<sup>164</sup>

### 3.4.7 – The Appeal

Both the accused and the promoter of justice can appeal against the sentence within fifteen useful days (c. 201, §2) from the notification of the publication of the sentence (c. 1630, §1). The accused can lodge an appeal not only against an affirmative sentence, but also against a sentence which has exonerated him (c. 1727, §1).<sup>165</sup> If an appeal has not been lodged within the prescribed time limit, then the right to appeal is considered extinguished. However, if the person is legitimately impeded from lodging the appeal, the useful time is calculated from the time he is freed of the impediment. The appeal must be placed before the judge who rendered the definitive judgement.<sup>166</sup> It enables the judge (*a quo*) to transmit the entire acts of the case along with the appeal to

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<sup>163</sup> Canon 1642, §1.

<sup>164</sup> DE DIEGO-LORA, Commentary on c. 1616, in *Exegetical Commentary*, vol. IV/2, pp. 1516-1517.

<sup>165</sup> According to c. 1727, §2, the promoter of justice also can appeal against a sentence that discharged the accused, “whenever he considers that the reparation of scandal or the restitution of justice has not been sufficiently provided for.”

<sup>166</sup> Canon 1444, §1, 1° says that the affected persons have the right of appeal directly to the Tribunal of the Roman Rota. This norm is not applicable to cases involving *graviora delicta*. The appeal must be made only to CDF within one month. See *SST* art. 23, 2°; even if the decision is not appealed, *SST* art. 22, §2 states that the acts of the first instance of the local tribunal are to be sent to CDF *ex officio*. The promoter of justice of the first or the second instance can also appeal against a negative sentence. See USCCB, *A Handbook for Canonical Process*, p. 21.

the appellate tribunal (c. 1634). The appeal must be pursued before the tribunal within one month of its being forwarded (c. 1633). If an appeal has not been lodged within the peremptory time limit of fifteen days (c. 1630), the judge can either *ex officio* or at the request of the party (promoter of justice or the accused) can execute the judgement through a decree. This is only a provisional execution until the diocesan bishop formally executes the sentence. After the formal execution of the sentence by the diocesan bishop no appeal is possible.<sup>167</sup> According to Ingels, “Should an appeal be lodged against the definitive sentence, the law itself suspends the execution (c. 1638). Once the appellate tribunal has resolved the issue of the appeal with a decision that either confirms or overturns the decision from the first sentence, this definitive sentence rendered by the appellate tribunal is usually then executed by the bishop of the diocese in which the case was heard in first instance.”<sup>168</sup>

### **3.4.8 – Complaint of Nullity and Total Reinstatement**

Against an adjudged matter which is not subject to appeal, the accused can lodge a plaint of nullity for reasons mentioned in c. 1620: if the sentence was rendered by an absolutely incompetent judge (1°) or it was given by one who was coerced by force or fear (3°); or if it was rendered without any plea (4°), or if the promoter acted without a proper mandate from the Ordinary (nn. 5°, 6°); or if the right of defence, especially the acquired penal rights (cc. 1481, §1; 1723; 1725) were denied to the accused (7°), or if the sentence itself did not decide the controversy (8°). The complaint of irremediable nullity can be proposed by means of an exception within three months from the publication of

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<sup>167</sup> See D. ROCCA, Commentary on cc. 1630-1636, in *Commento al Codice di diritto canonico*, pp. 938-941.

<sup>168</sup> See INGELS, “Dismissal from the Clerical State,” p. 202.

the sentence before the judge who rendered it (c. 1623) or within ten years by means of an action against the judgement (c. 1621). It can also be proposed together with an appeal (c. 1625). In the *libellus* of complaint, the accused can also demand that a different judge be substituted to deal with the complaint of nullity for fear of prejudice (c. 1624). The complaint of nullity, however, does not have a suspensive effect with respect to an executed sentence.<sup>169</sup> As to the consequences of finding in favor of a complaint of nullity, Ingels says: "If a complaint of nullity is sustained by the judge, the definitive sentence which he has rendered is without force or effect; any penalty inflicted by the sentence would cease *ipso facto*; and it would be necessary to correct the errors which have vitiated the sentence. Once these errors have been corrected, a new definitive sentence can then be pronounced."<sup>170</sup>

Another legal remedy available to the accused against an unjust sentence is *restitutio in integrum*.<sup>171</sup> Total reinstatement is a "legal remedy by which a person who has been seriously injured by a judicial sentence that was manifestly unjust can, for reasons of natural equity, be restored by a competent judge to the status quo *ante*, i.e., before the injurious sentence."<sup>172</sup> This recourse is lodged against a judgement that has become an adjudged matter (c. 1645, §1). Since the definitive sentence at the appeal level in penal matters becomes an adjudged matter,<sup>173</sup> the accused can apply for total

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<sup>169</sup> ROCCA, Commentary on cc. 1620, in *Commento al Codice di diritto Canonico*, p. 932.

<sup>170</sup> INGELS, "Dismissal from the Clerical State," p. 206.

<sup>171</sup> See *Communicationes*, 11 (1979), p. 158.

<sup>172</sup> WRENN, Commentary on cc. 1645-1648, in *1985 Commentary*, p. 1004.

<sup>173</sup> With regard to *graviora delicta*, a valid definitive sentence at the appeal level renders the sentence *res iudicata* (artt. 16, 23, SST) "whether or not it conforms to the decision of the first instance,

reinstatement to the judge who rendered the sentence, within three months of becoming aware of any flaw or, if there is a clear and verified proof of injustice in the sentence.<sup>174</sup> One such injustice is the neglect of a provision of law which is not merely procedural.<sup>175</sup>

The reasons for seeking a *restitutio in integrum* can be the following: if the evidence which led the judge to a particular decision is found to be false (c. 1645, §2, 1°); if, after the judgement, new facts capable of changing the decision are found (2°); if the sentence was pronounced due to fraud of the promoter or of the Ordinary that caused harm to the accused cleric (3°); if a precept of substantive law had been omitted or neglected (4°); and if a sentence which is challenged is contrary to an earlier sentence which has become a *res iudicata*. If *restitutio in integrum* is sought for the last two reasons, the petition should be placed before the appellate tribunal within the same time limit (c. 1646, §2).

The petition for a total reinstatement, however, suspends the execution of a sentence, that has not yet been executed (c. 1647, §1). But if the judge suspects the petition for total reinstatement as a ploy to delay the execution, he can order the execution of the sentence (c. 1647, §2). Should the judge grant *restitutio in integrum*, he must then pronounce a new sentence on the merits of the case (c. 1648).

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thereby overcoming finally the principle of the necessity of two conforming sentences." See LLOBELL, "The Balance of the Interests of Victims and the Rights of the Accused," p. 123.

<sup>174</sup> INGELS, "Dismissal from the Clerical State," p. 201.

<sup>175</sup> If a penal process is set in motion after the extinction of the prescription period, this grievance can be redressed through *restitutio in integrum*. See C.G. RENATI, "Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases," in DUGAN (ed.), *Advocacy Vademecum*, p. 75.

### 3.4.9 – Execution of the Sentence

Execution of the sentence takes place when the judge issues a decree directing that the judgement be executed. This decree can be either included in the judgement or issued separately (c. 1651). The diocesan bishop executes the sentence of the tribunal through a decree of execution unless the particular law provides otherwise (c. 1653, §1). In case of appeal, the definitive sentence of the appeal tribunal must be executed by the bishop in whose territory the first instance case was heard. If that bishop does not execute the sentence the regional appellate tribunal or the metropolitan tribunal can execute it (c. 1653, §2). With regard to the single first instance tribunal for several dioceses established as per law (c. 1423, §1), the Bishop's Conference or the bishop designated for the second instance can execute the sentence (c. 1439, §3).

### 3.5 – CONSEQUENCES OF DISMISSAL FROM THE CLERICAL STATE

The primary consequence of the penalty of dismissal from the clerical state is that the cleric loses the clerical state, and is no longer bound by the obligations and rights of clerics (cc. 273-289), with the exception to the obligation of celibacy.<sup>176</sup> Canon 292 reads:

A cleric who loses the clerical state in accordance with the law, loses thereby the rights that are proper to the clerical state and is no longer bound by any obligations of the clerical state, without prejudice to can. 291. He is prohibited from exercising the power of order, without prejudice to can. 976. He is automatically deprived of all offices and roles and of any delegated power.<sup>177</sup>

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<sup>176</sup> He can be freed from this obligation only by a rescript of the Holy See (c. 290, 3°). See CONGREGATION FOR THE DOCTRINE OF THE FAITH, Circular Letter *Normae ad apparandas*, 13 January 1971, in *AAS*, 63 (1971), pp. 303-312.

<sup>177</sup> Canon 292: "Clericus qui statum clericalem ad normam iuris amittit, cum eo amittit iura statui clericali propria, nec ullis iam adstringitur obligationibus status clericalis, firmo praescripto can. 291; potestatem ordinis exercere prohibetur, salvo praescripto can. 976; eo ipso privatur omnibus officiis, muneribus et potestate qualibet delegata."

The penalty of dismissal from the clerical state results in two sets of consequences: deprivations and prohibitions. The most important deprivation is the loss of clerical state itself and, in particular, the deprivation of the rights and obligations entailed in it. The deprivation includes any power (*potestas*), office (*munus*), function, right (*ius*), privilege, faculty, favor and title or insignia (c. 1336, §1, 2°). The prohibitions include residence in a certain place and the exercise of power of order with the exception of c. 976, that is, at a danger of death situation even the dismissed cleric can validly hear confessions of any penitent and absolve sins.

### **3.5.1 – Effects of Dismissal from the Clerical State**

The deprivations and prohibitions arising out of dismissal from the clerical state take effect in the following ways.

- The one dismissed loses the right to exercise the sacred ministry, namely to celebrate the Eucharist, the other sacraments and sacramentals, and the governance of ecclesiastical offices (c. 274).
- However, he can validly and licitly absolve any penitent in danger of death from sins and censures (c. 976).
- He is prohibited from preaching a homily (c. 767).
- He loses any delegated power that he had exercised up to the present time. He can fulfil only those duties allowed to the lay people in certain extraordinary situations such as assisting at marriages (c. 1112).
- He is no longer able to wear the clerical dress (c. 284).
- He is prevented to fulfil the ecclesiastical tasks commissioned to him in terms of office (cc. 275, 278, 279, 280).

- The negative obligations (cc. 285-289) that bound him are now removed.<sup>178</sup>
- He also loses the rights he acquired through his incardination (c. 266).
- Because of loss of ecclesiastical office and of the power of governance attached to it (c. 274), he cannot reside in a presbytery, or in other institutions such as ecclesiastical schools, seminaries, etc., in order to safeguard against scandal and confusion caused by the dismissal.
- He can no longer teach officially. He loses any canonical mission he might have received.<sup>179</sup>
- He cannot teach religion in ecclesiastical institutions.<sup>180</sup>
- The one dismissed from the clerical state forfeits the right to remuneration (c. 281) and to the social security (c. 1274). But according to the principle of equity and Christian charity, the bishop could take care of at least some of the dismissed cleric's medical and other basic expenses (cc. 195, 281, §2, 384).<sup>181</sup>

Though the dismissed cleric loses all the rights and obligations (cc. 273-289) proper to the clerical state, the dismissal does not and can not take away the cleric's indelible character of the sacred Order (c. 1008), and there can be no deprivation of

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<sup>178</sup> P. COMPOSTA, Introduction to "De amissione status clericalis", in *Commento al Codice di diritto canonico*, pp. 172-173; OTADUY, Commentary on c. 292, in *Exegetical Commentary*, vol. II/1, pp. 406-407.

<sup>179</sup> R.C. TRONQUED, *Procedures: Loss of the Clerical State*, Doctoral dissertation, Romae, Pontificia Studiorum Universitas a S. Thomas Aq. in Urbe, 1994, pp. 155-156.

<sup>180</sup> CONGREGATION FOR DIVINE WORSHIP AND DISCIPLINE OF THE SACRAMENTS, Circular letter concerning ex officio penal dismissal from the clerical state, 6 June 1997; English trans. in WOESTMAN, *The Sacrament of Orders and the Clerical State*, pp. 340-341.

<sup>181</sup> The Code itself (c. 1350) exhorts the bishop to provide in the best way possible for the basic needs of food and residence for such dismissed clerics. See MORRISEY, "Addressing the Issue of Clergy Abuse," in *StC*, 35 (2001), p. 415; PROVOST, "Some Canonical Considerations: Relative to Clerical Sexual Misconduct," p. 632.

academic degrees (c. 1338, §2). Since the sacrament of Order imprints an indelible mark on the soul of a cleric, he is metaphysically transformed into another person, and is specially configured to Christ by a sacramental character.<sup>182</sup>

### 3.5.2 – Social Security and Sustenance

Although the dismissed cleric is no longer a member of the *presbyterium* and the Ordinary has no legal obligations towards him, nevertheless the Ordinary is urged by law to ‘provide in the best way possible’ for the material needs of the cleric. This is what we read in c. 1350:

§2. If a person is truly in need because he has been dismissed from the clerical state, the Ordinary is to provide in the best way possible.<sup>183</sup>

By incardination a cleric enters into a juridical bond with a diocese or a religious institute; the right to financial support is the one of the acquired rights of a cleric (c. 281). Although incardination (c. 266, §1) does not automatically grant a cleric the right to life-long sustenance, one is not to overlook the right of clerics to appropriate remuneration<sup>184</sup> even when penalties are applied, except in cases of dismissal. It is evident that a cleric loses clerical rights and obligations on the imposition of dismissal (c. 292); yet, Christian charity should urge the Ordinary to extend his helping hand towards the dismissed cleric

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<sup>182</sup> *Catechism of the Catholic Church*, nn. 1581-1582, p. 295; also see JOHN PAUL II, Post Synodal Apostolic Exhortation, *Christifideles laici*, 30 December 1998, in *AAS*, 81 (1989), p. 22.

<sup>183</sup> Canon 1350, §2: “Dimissio autem e statu clericali, qui propter poenam vere indigeat, Ordinarius meliore quo fieri potest modo providere curet.”

<sup>184</sup> In a response to a *dubium* based on c. 281, the Pontifical Council for Legislative Texts has answered that since c. 281 is placed under the section, “Obligations and rights of clerics”, it “leads to the logical conclusion that remuneration is a right.” See PONTIFICAL COUNCIL FOR THE INTERPRETATION OF LEGISLATIVE TEXTS, 29 April 2000, Decretum de recursu super congruentia inter legem particularem et normam codiciale, in *Communicationes*, 32 (2000), p. 164; also in *Newsletter of the Canon Law Society of Australia and New Zealand*, 2 (2000), p. 42.

by providing for his worthy sustenance.<sup>185</sup> Green states that while charity is a motivating factor, the Ordinary is juridically obliged to provide (*providere curet*)<sup>186</sup> for the decent support<sup>187</sup> of the dismissed cleric (c. 1350, §2).

### 3.5.3 – The Role of Justice and Equity in Dismissal Cases

Canon 221 explains the nature of rights every member of the Christian faithful enjoys in the Church by virtue of baptism *vis-à-vis* the application of penalties. The right to vindicate and defend one's rights before a competent ecclesiastical forum in accord with the norms of law (c. 221, §1), to be judged according to the provisions of law, applied with equity (c. 221, §2), and not to be punished except in accord with the law (c. 221, §3) are important concerns of the ecclesiastical justice system.<sup>188</sup> While the Church has the inherent right and duty to impose penalties for the violation of law (c. 1400), cases involving dismissal must be approached with a spirit of justice, equity and charity.

While justice consists in imposing a penalty for a proven delict, one must also carefully consider the protection of a person's inherent and acquired rights against the imposition of an arbitrary and disproportionate penalties (c. 1343). In other words, justice must be faithful to the prescripts of procedural law established by the legislator.<sup>189</sup>

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<sup>185</sup> J. ARIAS, Commentary on c. 1350, in *Code of Canon Law Annotated 2004*, p. 1051. For a reply from CDF instructing a bishop to take care of the sustenance of a priest to be released of the obligations *ex officio*, see MORRISEY, "Penal Law in the Church Today," p. 55.

<sup>186</sup> GREEN, Commentary on c. 1350, in *New Commentary*, pp. 1564-1565.

<sup>187</sup> Donlon distinguishes between "remuneration" and "decent support". Remuneration is a payment provided to the clergy for their service to sacred ministry, whereas a decent support is provided for the cleric's sustenance. See J.I. DONLON, "Remuneration, Decent Support and Clerics Removed From the Ministry of the Church," in *CLSA Proceedings*, 66 (2004), p. 98.

<sup>188</sup> MENDONÇA, "Justice and Equity in Decisions Involving Priests," p. 53.

<sup>189</sup> To name a few of such rights: the right to be assisted by legal council in a penal trial (c. 1723), the right of the accused to speak last through his advocate or the procurator (c. 1725), the right not to incriminate oneself (c. 1728, §2), the right not to take an oath (c.1728, §2) and the right to be tried always

In his analysis of a case judged before the Apostolic Signatura, Mendonça identifies certain issues of justice and equity in dismissal cases.

First, while dealing with dismissal cases, the finality of penal law should be taken into consideration. Although differing from medicinal ones, the expiatory penalties have as their goal the restitution of justice and reparation of scandal, irrespective of the delinquent's conversion; these penalties have the ultimate aim of *salus animarum* (c. 1752). Only when pastoral warnings and fraternal correction fail to produce results in the accused can the Ordinary resort to penalties (c. 1341). In evaluating imputability (c. 1321, §1), the mitigating (c. 1324), exempting (c. 1323) and special circumstances (c. 1345) must be weighed against the facts brought out during the trial. If such circumstances are found to have been influential in the commission of a delict, imposition of other penalties should be considered. It is only when all proofs, testimonies, experts' opinion, declarations, etc., enable the judge to arrive at moral certitude on imputability, can he objectively and equitably impose the sentence. Moreover, a perpetual penalty such as dismissal from the clerical state cannot be imposed or declared through an 'extra-judicial decree' (c. 1342, §2).<sup>190</sup>

Second, any psychological illness of the person should be considered when weighing imputability for certain delicts (c. 1395, §2).

Third, in delicts involving sexual abuse of minors by clerics who suffer from paedophilia, one needs to consider the predisposing factors in determining imputability. The recidivistic tendency of a delinquent with tendencies of paedophilia certainly calls

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by a collegial tribunal (c. 1425). See A.G. URRU, "Considerations on Imposing Penalties in Specific Cases," in DUGAN (ed.), *The Penal Process and the Protection of Rights*, pp. 291-301.

<sup>190</sup> MENDONÇA, "Justice and Equity in Decisions Involving Priests," pp. 82-83.

for dismissal. Therefore, while the penal law safeguards the common good and restores justice, the procedural norms also require of judges' exercise of equity and options of other penalties.<sup>191</sup>

Canons 221, §2 and 1752 specifically refer to the principle of equity when applying penalties. Canonical equity is the legal tool to be used in realizing the supreme law of the Church, *salus animarum*. Both the extremes, that is, rigid severity and harmful laxity must be avoided, while remaining faithful to the application of penal prescripts with justice tempered with mercy.<sup>192</sup> The combination of the salvation of souls and equity requires the application of common sense, patient forbearance and Christian charity.<sup>193</sup> While determined to administer justice and to promote the common good in the Church, the judge must use also the principle of equity in imposing the perpetual penalty of dismissal from the clerical state.

### CONCLUSION

In order to punish certain canonical delicts of clerics meriting dismissal from the clerical state, the Ordinary has to follow very strictly the canons on procedural law (cc. 1717-1731) outlined in the Code. In addition to this, canons on "Penalties for Particular Offences" (cc. 1364-1399) and ordinary contentious process (cc. 1501-1670) are to be applied properly in processing a penal case. In regard to the reserved delicts that merit the penalty of dismissal from the clerical state, the complementary norms of *Sacramentorum*

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<sup>191</sup> MENDONÇA, "Justice and Equity in Decisions Involving Priests," pp. 84-86.

<sup>192</sup> See VICENTE R. UY, "The Principle of Equity in the Code of Canon Law," in *Philippine Canonical Forum*, 8 (2006), pp. 105- 106.

<sup>193</sup> C. J. HETTINGER, "Life Under Law With Equity," in *ME*, 125 (2000), p. 740.

*sanctitatis tutela* are to be followed aided by the jurisprudence and the praxis of Congregation for the Doctrine of the Faith.

As soon as an Ordinary is in receipt of an accusation which has at least a semblance of truth he must determine the facts, the circumstances and the imputability of the offence to find out the truth (c. 1717, §1). However, in doing so, the Code requires him to proceed with utmost care in this task so that the good name of the accused is not in any way tarnished. Matters concerning legality, right to good name (c. 220) and confidentiality are the three important concerns that an Ordinary or the persons involved in the investigation need to preserve at this stage. Legality at the preliminary investigation level would include issuance of decrees on its commencement, the appointment of the promoter of justice and the conclusion of preliminary investigation (c. 1718, § 2). Failure of issuance of such decrees may result in invalidity of the sentence pronounced due to procedural violation. Matters of confidentiality would include keeping the documents and decrees of the preliminary investigation in the secret curial archive in order to avail them for the formal judicial penal procedure, should such a situation arise (c. 1719).

Once the semblance of truth of the allegation is established, the Ordinary has to make three important determinations on i) whether to initiate a penal process, ii) whether other pastoral remedies such as warning, rebuke and pastoral correction could be sufficient to address the delict committed (c. 1341), or iii) whether a penalty is to be imposed through an administrative decree or through a judicial process.

The responsibility of initiating a penal process pertains to the promoter of justice who is appointed by the Ordinary through a decree. The imposition of dismissal from the

clerical state is reserved to the collegiate tribunal (c. 1425). At the introductory phase of the trial, in order to prevent scandal, to safeguard the course of justice and to prevent possible subornation of witnesses, the Ordinary can impose on the accused cleric certain prohibitions on residence and celebration of sacraments (c. 1722). Though the phrase in c. 1722, “*in quolibet processus stadio*,” could lead to the interpretation that the precautionary measures may be imposed at any stage of the trial, the aim of such measures, namely the protection of the integrity of the penal process and of the ecclesial community, would generally preclude the Ordinary from imposing them during the preliminary investigation. It can be done only after the formal commencement of the judicial penal process (c. 1721). Such precautionary measures imposed on a cleric must be notified to the concerned.

Once the certainty and imputability of the reserved delict is established through the preliminary investigation, the Ordinary has to report it to the Congregation for the Doctrine of the Faith (*SST* no. 13), and then must abide by the direction of the Congregation towards the initiation of judicial penal process. If the delict is so grave and clear, imputable and the scandal caused is irreparable, the Ordinary can request the Holy Father to impose by decree the penalty of dismissal from the clerical state on the delinquent cleric for reserved delicts; or he may request CDF to impose the penalty by a decree.<sup>194</sup> The non-reserved delicts that merit the penalty of dismissal from the clerical state can be judged only through a judicial penal process at the local level.

The introductory and instructional phases of the penal trial must be conducted in accord with the general norms of the ordinary contentious process outlined in the Code

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<sup>194</sup> See JOHN PAUL II, Decision, Subsequent to the Promulgation of *SST*, 7 February 2003, in WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, p. 315.

(cc. 1400-1655), the specific penal norms on penal trial and the complementary norms applicable to reserved delicts. In general, all those involved in a penal trial where the reputation of clerics is at stake, are to be clerics with due respect to the current complementary norms for reserved delicts to which the CDF grants dispensation over a particular request.

There are certain fundamental rights of the accused which must be diligently safeguarded in a penal trial. They are the following: the accused has the right to be informed of the alleged delict (c. 1508, §2); he has the right to be summoned to trial (c. 1476); he has the right to be assisted by an advocate even if he fails to appoint one for himself (c. 1481, §2); he and his advocate have the right to inspect all the acts of the case (c. 1598, §1); the accused and his advocate have the right to *contradictorium* and to submit defence briefs (c. 1603); the accused has the right to be informed if the prohibitory measures are initiated (c. 1722); he always speaks last (c. 1725); he is not obliged to incriminate himself (c. 1728, §2); he is not to be obliged to depose under oath (c. 1728, §2); he has the right not to have his good name violated (SST no. 25, §2). In a penal trial, the right of defence must be respected most diligently because penalties by their very nature restrict the rights of persons in the Church. If the promoter of justice desires to renounce from the case for lack of proofs, the accused has the right to proceed the case to its completion lest the principle of *ne bis in idem* is violated (c. 1724, §2).

Once the judge arrives at moral certitude through a close examination of depositions, testimonies, proofs, expert opinions, etc. (cc. 1501-1606), he has to pronounce a sentence on the commission of a delict and on the degree of imputability. Since the ecclesiastical penal system and its goal are not strictly comparable to that of the

civil penal system, while applying penalties the judge must keep in mind the ultimate goal of any ecclesiastical process, that is, the salvation of the delinquent and the good of the ecclesial community.

If at any stage of the trial, the judge becomes aware of any mitigating circumstances with respect to imputability, *dolus* or *culpa*, the Code allows him to mitigate the penalty. But, if a cleric is incorrigible and shows no repentance, and the community of faith is affected by the scandal, the judge has the right and duty to impose the penalty of dismissal from the clerical state as per law. In this case, the cleric loses all the rights and is relieved from all obligations pertaining to the clerical state except the obligation of celibacy.

In a penal trial of delicts reserved to CDF, the sentence of the appeal tribunal renders the case an adjudged matter (*SST* no. 23, 1°) and the proper norms of *SST* must be followed for further action. For other delicts that have become *res iudicata*, the two avenues to repair the perceived damages caused by the sentence are “complaint of nullity” and “total reinstatement.”

In the following chapter we will study three concrete penal cases judged by the Rotal judges in which we will examine closely the fundamental penal principles that we studied throughout this project. This Praxis of the Roman tribunals on dismissal cases will help us to understand the importance of various penal principles to be upheld with regard to the imposition of the penalty of dismissal from the clerical state.

## CHAPTER FOUR

### JURISPRUDENCE ON DISMISSAL FROM THE CLERICAL STATE

#### INTRODUCTION

As is well-known in canonical ministry, ecclesiastical tribunals, for the most part, deal with marriage nullity cases. For this reason, the jurisprudence on penal laws has been rather scant. Since the promulgation of *SST* in 2001, the reserved delicts have been handled mostly by CDF, which does not publish its decisions. This inaccessibility of dicasterial jurisprudence or praxis certainly deprives local tribunals of appropriate knowledge of important juridic principles applicable to, for example, prescription of action, age limit, the tribunal's competence, the right of defence of the accused, application of justice with equity, legitimate protection of the good name of persons, the principle of proportionality between crime and punishment, etc. The contentious aspects of any trial, and this includes also a penal trial, have received wide consideration in jurisprudence on marriage nullity cases. Therefore, where and when applicable, this jurisprudence can be applied *mutatis mutandis* also to penal cases.

Whether dealing with penal or contentious cases, the concern of the Church, in exercising its right to resolve disputed issues, is to provide for effective vindication of subjective rights and to declare or impose penalties in a just and equitable manner (c. 1400). Protecting the rights of persons, imposing or declaring penalties, declaring juridical facts and safeguarding the common good are the principal tasks of an ecclesiastical judge. This task calls for, on the judge's part, adequate knowledge of the essential principles governing trials in general (cc. 1400-1670) to be applied to concrete

cases with justice, equity and evangelical charity.

In the preceding chapter we traced the development of the judicial penal process involving dismissal from the clerical state. In this chapter we will analyse three sentences issued by the Roman Rota on dismissal of clerics from the clerical state as a penalty for serious delicts, especially the delict mentioned in c. 1395, §2. Our analysis of these sentences will review how the juridic penal principles have been applied to concrete cases. We will also highlight how important it is to follow diligently all provisions of penal procedural law and to determine the merit of a given case. Finally, we will emphasize the importance of the discretionary power a judge has in adjudicating a case and the pastoral approaches adopted by the Rotal judges in their decisions.

Our study of these three sentences will adopt the basic structure of a sentence, namely *the facts, the law and the argument*. After outlining the basic facts of the case, we will examine the key juridic principles explained in the sentence. This will be followed by an analysis of the evidence supporting the definitive sentence. Because of genuine concern for confidentiality, actual names of persons or places are either omitted or changed.

#### 4.1 – DECISION *CORAM* COLAGIOVANNI, 14 JUNE 1994<sup>1</sup>

The sentence issued by Colagiovanni deals with the canonical delict of sexual abuse of minors by a cleric and the issues related to the crime (c. 1395, §2). This second instance sentence draws out certain penal principles. The *turnus* confirmed the affirmative sentence of the local tribunal, but it imposed the penalties on the guilty cleric

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<sup>1</sup> Decision *c. Colagiovanni*, 14 June 1994, in *ME*, 122 (1997), pp. 90-95. The English translation of this sentence is taken almost verbatim from A. MENDONÇA, *Jurisprudence: Dismissal from the Clerical State, Decision coram Colagiovanni, 14 June 1994* (Class notes), Ottawa, Faculty of Canon Law, Saint Paul University, 2004, pp. 1-6.

*iuxta modum*, taking into consideration certain factors.

#### 4.1.1 – The Facts

Rev. X was ordained in 1978. From July 1978 to 1986 he did parish pastoral ministry. Later, from 1988 to 1990, he was assigned to hospital ministry during which period all his faculties were withdrawn and he was prohibited from celebrating mass.<sup>2</sup>

Several accusations against him were received from the very beginning of his ministry; these included serious violations of the prescript of c. 1395, §2. All warnings and penal remedies exercised by the Ordinary proved futile. Finally, following the preliminary inquiry outlined in cc. 1717, 1718 and 1721, the Ordinary decided to initiate a penal procedure and the action was instituted by the promoter of justice. A collegial tribunal was constituted by the Ordinary; on 18 February 1990 the tribunal accepted the petition from the promoter of justice.

The first instance terms of controversy determined on 2 April 1992 were the following:

- “a – *Whether R. X. offended against the sixth commandment of the Decalogue with (a) minor(s) under the age of sixteen;*
- b – *If he is found to have committed such an offense or offences what penalties, if any, should be imposed?”*<sup>3</sup>

After instructing the case, the first instance tribunal pronounced its decision on 26 August 1993 as follows:

“To the first: Affirmative

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<sup>2</sup> Decision c. Colagiovanni, 14 June 1994, no. 1, p. 90.

<sup>3</sup> Ibid.

To the second: R. X is dismissed from the clerical state.”<sup>4</sup>

On 2 September 1993, the respondent appealed through his advocate to the Apostolic Signatura against this decision. The Signatura remanded the case to the Roman Rota. The Rotal *turnus coram* Colagiovanni defined the controversy in these terms: “Whether the respondent had violated the prescript of c. 1395, §2 and indeed had perpetrated the crime mentioned in the canon with a minor below the age of sixteen, and if the response is affirmative, what penalty should be imposed, that is whether the sentence of first instance should be confirmed or overturned.”<sup>5</sup>

#### 4.1.2 – Legal principles

This Rotal sentence highlights three important juridical principles to be considered in adjudicating penal cases. They are: a) the concept and finality of penal law; b) imputability of the crime; c) predisposing factors.

##### a) The Concept and Finality of Penal Law

In his exposition, Colagiovanni acknowledges the existing controversy over the proper understanding of the concept, nature and finality of penal law in the Church.<sup>6</sup> In order to define the finality of law he identifies three key principles pursued in the application of penalties in the Church. They are: i) reparation of scandal; ii) restoration of justice; iii) conversion of the guilty (c. 1341). These goals are the principal aim of

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<sup>4</sup> “Ad primum: *Affirmative*. Ad secundum: *R. X. is dismissed from clerical state*” (decision c. Colagiovanni, 14 June 1994, no. 3, p. 90).

<sup>5</sup> “*Utrum pars conventa violaverit can 1395, par. 2 et quidem cum minore sexdecim annorum delictum de quo in canone patruerit et quatenus affirmative, qua poena multanctus erit, seu utrum sententia primae instantiae confirmanda vel infirmanda erit*” (decision c. Colagiovanni, 14 June 1994, no. 4, pp. 90-91; English trans. in MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 2).

<sup>6</sup> Here Colagiovanni quotes G. MICHIELS, *De delictis et poenis – Commentarius Libri V Codicis iuris canonici*, vol. II, Parisiis – Romae, Typis Societatis S. Joannis Evangelistae Desclée, 1961, p. 16.

*medicinal* penalties (cf. c. 1312, §1,1<sup>o</sup>; cc. 1331-1333).<sup>7</sup>

Colagiovanni first explains the nature of expiatory penalties as follows: “While through *expiatory penalties* (cf. cc. 1312, §1,2<sup>o</sup>; 1336) the demands of justice and good of the Church are restored through the reparation of scandal, in *medicinal penalties* the reparation of scandal is in some way included in the penitent’s will, and therefore, in the willing disposition of the penitent, restitution of justice is also achieved. In *expiatory penalties*, however, the penalty has a significance autonomous from the will of the delinquent.”<sup>8</sup>

The specific nature i.e., the punitive character of expiatory penalties was expressed well in the 1917 Code by the term “vindictive penalties” which is omitted in the present Code. However, the ultimate goal of all penalties in the Church is “the salvation of souls.”

Secondly, Colagiovanni speaks of the provisions of the law governing the imposition of the serious penalty of dismissal from the clerical state. In general, the desired channel for the imposition of penalties is the judicial process. However, c. 1342, §1 offers a general norm regarding the imposition and declaration of penalties through an extra-judicial decree when there are just reasons against conducting a judicial process. But, in its second paragraph, the same canon declares that a perpetual penalty (such as

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<sup>7</sup> According to c. 1341, the intermediary goals of the punitive power in the Church are reparation of scandal, restitution of justice and reform of the offender (while the finality of all ecclesiastical laws including the penal law is *salus animarum*). It is to be understood that the three goals mentioned in c. 1341 are applicable not only to medicinal penalties but also to expiatory ones. These are common principles governing sanctions imposed by ecclesiastical authorities.

<sup>8</sup> “Dum per poenas *expiatorias* (can. 1312, §1, n. 2; cfr., can. 1336) praeminent exigentiae iustitiae necnon bonum ecclesiale reconstituendum per scandalum reparationem, in poenis medicinalibus reparatio scandalum aliquo modo includitur in voluntate poenitentiali et ideo in actuosa voluntate poenitentis actuatur etiam restitutio iustitiae. In poenis expiatoriis vero poenam significationem autonomam habet a voluntate delinquentis” (decision *c. Colagiovanni*, 14 June 1994, no. 5, p. 91; English trans. in MENDONÇA, *Jurisprudence: Decision coram Colagiovanni*, 14 June 1994, pp. 2-3).

dismissal from the clerical state) cannot be imposed or declared through a decree. Therefore, the perpetual penalty of dismissal from the clerical state mentioned in c. 1395, §2 could be imposed only through a judicial process.<sup>9</sup>

Thirdly, only when *fraternal correction* or reproof or other pastoral approaches have proved futile in achieving the goals mentioned in c. 1341 can the Ordinary or the superior have recourse to penalties. Moreover, in observing the juridical order of application of penalties, if the offence was committed by persons under the extenuating circumstances mentioned in c. 1324, §1, the penalty described in law or by precept must be diminished, or a penance substituted in its place. In such circumstances the judges can invoke “equitable pastoral economy” in imposing penalties that are suitable to the condition of the delinquent.<sup>10</sup>

The application of these principles was evident in this case. The respondent had been given ample opportunity for reform and repentance. But the Ordinary considered the adequacy of reform *vis-à-vis* the gravity of the perpetrated crimes not satisfactory. The report states that all the spiritual and fraternal remedies initiated by the Ordinary had been futile. Moreover, the accused cleric’s sexual offences against minors had been constant and numerous in the course of time. Therefore it is no surprise that the first instance court imposed the most severe penalty of dismissal from the clerical state only after the failure of achieving the desired goals - restitution, reparation and rehabilitation - through

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<sup>9</sup> Decision *coram* Colagiovanni, 14 June 1994, no. 5, p. 92; English trans. in MENDONÇA, *Decision coram Colagiovanni, 14 June 1994*, p. 3.

<sup>10</sup> “At etiam in poenis applicandis ordine juridico servato, illae poenae irrogandae erunt quas sufficere iudices tenent quin ad graviores applicandas procedant, in aequa oeconomia pastoralis continendas, prae oculis habitis circumstantiis ipsam personam attingentibus eiusque libertatem et responsabilitatem imminuentibus recensitis in canone 1324 §1” (decision *c.* Colagiovanni, 14 June 1994, no. 6, p. 92; English trans. in MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 3).

intermediary pastoral means.

Fourthly, the Rotal *turnus* recalls that the judge, when imposing a penalty for a delict committed, must arrive at moral certitude (c. 1608, §1) derived *ex actis et probatis* of the case (§2); and it also belongs to the judge to evaluate conscientiously the proofs and their efficacy in law (§3).

Fifthly, the judicial confession against oneself before a competent judge (c. 1535), where the public good is not at stake, relieves the other party of the onus of proof (*ceteras relevat ab onere probandi*), whereas it has only a probative value in cases where the public good is at stake; the judge must consider and weigh the testimonies, documents, experts' opinion, etc., in determining the objective gravity of the delict and imputability, that is, the level of freedom exercised in the violation of the law.<sup>11</sup>

#### **b) Imputability of the Crime**

In the analysis of sexual crimes against minors (c. 1395, §2), Colagiovanni refers to paedophilia, which is considered, according to *DSM-III-R*, as one among the more serious deviations or disturbances of personality.<sup>12</sup> According to *DSM-IV*, such an attraction of instinct is one of the "Sexual Disorders,"<sup>13</sup> which "is recurrent," and in which there are "intense sexual urges and sexually arousing fantasies of at least six months' duration involving sexual activity with a prepubescent child. The age of the child

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<sup>11</sup> Ibid.; MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 3.

<sup>12</sup> *Diagnostic and Statistical Manual of Mental Disorders* (Third Edition Revised) [*DSM-III-R*], Washington, DC, American Psychiatric Association, 1987, pp. 279-296. Our reference to this source will be the fourth edition which includes substantial changes. See *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition [*DSM-IV*], Washington, DC, American Psychiatric Association, 1994, pp. 493-538.

<sup>13</sup> In *DSM-IV*, this group of sexual disorders are under the general diagnostic title: "Sexual and Gender Identity Disorders."

is generally 13 or younger ... same sex, opposite sex or same and opposite.”<sup>14</sup>

The canonical crimes involved in this case were not simply the result of homosexuality, because the accused had committed serious violations against the sixth commandment with boys as well as girls. Added to this, “his sexual disorder was accompanied with fetishism.”<sup>15</sup> Colagiovanni argues that without doubt “such ‘intense sexual urges’, because they constitute a true psychic pathology, diminish one’s freedom and lessen the responsibility.”<sup>16</sup>

Colagiovanni states further that this deviant behaviour is a progressive disorder. Citing *DSM-III-R*, he says “the course is generally chronic, especially in those attracted to boys. The frequency of paedophilic behaviour often fluctuates with psychological stress. The recidivism for people with paedophilia involving preference for the same sex is roughly twice that of those who prefer the opposite sex.”<sup>17</sup>

### **c) Predisposing Factors**

Quoting *DSM-III-R*, Colagiovanni explains that many of those who suffer from

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<sup>14</sup> *DSM-III-R*, p. 284; *DSM-IV*, pp. 527-528.

<sup>15</sup> “Imo, tale vitium coniunctum fuisse cum feticismo” (decision *c.* Colagiovanni, 14 June 1994, no. 8, p. 93). Fetishism is a deviation which involves “recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving the use of nonliving objects” over a period of at least six months. See *DSM-IV*, p. 526.

<sup>16</sup> “Quod talia ‘intense sexual urges’ in libertate imminuenda et relaxanda responsabilitate neque est ambigendum, cum de vera pathologia psychica agatur” (decision *c.* Colagiovanni, 14 June 1994, no. 9, p. 93). Judging a similar case Davino says “Nor does a diagnosis of some infirmity, such as the so called ‘ephebophilia’ or sexual impulse towards adolescents, suffice; one has to consider the gravity of the infirmity, its effect on the priest and on his ministry, the outcome of therapy, the means used to limit the effects of the illness, and so on.” See decision *c.* Davino, 4 May 1996, in *Forum*, 7 (1996) 2, pp. 382-383. This decision *c.* Davino does not deal with dismissal from the clerical state but the impediment to the exercise of priestly ministry.

<sup>17</sup> See *DSM-III-R*, p. 285; also see *DSM-IV*, p. 528.

this disorder were themselves victims of sexual abuse in childhood.<sup>18</sup> In this case, the respondent admitted “to have been sexually abused ... between the age of 10 and 12. The abuser used to bring him and other boys to his desk in the classroom and he would feel their genitals.”<sup>19</sup>

Colagiovanni continues: “Whatever might have been the nature of such an abuse, the structural factors and the habit protracted well over ten years, certainly intensified the impulses which, even if they did not destroy his freedom, they certainly diminished it.”<sup>20</sup>

#### 4.1.3 – The Argument

This section of the sentence is very important to our study. The penal principles discussed in the previous section find their concrete application here. The exercise of judicial discretion encouraged by the Code (cc. 1321-1330) is evident. Important juridical elements of a penal trial such as mandatory penalties, imputability, recidivism, protection of justice, establishment of the common good, strict interpretation of odious law, the need of spiritual-psychological remedies, etc., are considered in this part of the sentence.

What is specifically to be noted in Colagiovanni’s sentence is that, after weighing the objective evidence against the defendant for imposing the penalty, it considers equitably the *subjective circumstances* of the respondent relating to his psychological illness (cc. 1324-1325). The second instance decision was different from the first one

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<sup>18</sup> See *DSM-III-R*, p. 285. This information has not been reproduced in *DSM-IV*. See MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 4.

<sup>19</sup> Decision *c. Colagiovanni*, 14 June 1994, no. 9, pp. 93-94; MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 4.

<sup>20</sup> “Quidquid sit de tali abusu, certo certius factores structurales et habitus per ultra decenium protractus, auxerunt illas pulsiones quae, si libertatem minime abstulerunt, certo imminuerunt” (decision *c. Colagiovanni*, 14 June 1994, no. 9, p. 94; English trans. in MENDONÇA, *Jurisprudence: decision Coram Colagiovanni, 14 June 1994*, p. 4).

precisely because of this consideration. The following is the factual argumentation of the Rotal *turnus* in this case.

First, the sentence states that it is of primary importance to prove that the alleged crime was in fact committed by the respondent and that it was imputable to him, to which the decision of the *turnus* was in the affirmative. Below are the three important elements of the evidence in support of the affirmative sentence:

1) There was an admission of the crime. The respondent admitted in court that he had violated c. 1395, §2, that is, the crime against the sixth commandment of the Decalogue with a minor under the age of sixteen years. Thus, there was no doubt that the respondent had committed the alleged sexual crimes with minors.<sup>21</sup>

2) Recidivism was proved in this case. His abnormal behavior was constant: all warnings, admonitions, threats of sanctions were in vain. Also, the spiritual and psychological treatments of the consulting psychiatrist, residential treatment, counselling with a psychotherapist and a psychologist, a psychologist specializing in psychosexual problems, etc., - all proved futile.<sup>22</sup>

3) For the serious penalty of dismissal from the clerical state to be imposed, his serious psychological infirmity must be taken into account.

The Rotal *turnus*, unlike the local court, felt that, in view of the complex *subjective circumstances* of the accused, the necessary imputability of the crime was not

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<sup>21</sup> "Praeprimis vir conventus confitetur coram iudice suas violationes canonis 1592, §2: delictum contra sextum Decalogi praeceptum 'cum minore sexdecim annorum'. Ambigendum non est virum conventum confessum esse sua crimina sexualia cum minoribus" (decision c. Colagiovanni, 14 June 1994, no. 10, p. 94; English trans. in MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 4).

<sup>22</sup> Decision c. Colagiovanni, 14 June 1994, no. 10, p. 94; English trans. in MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 5.

established enough to impose the serious and perpetual penalty of dismissal from the clerical state. Therefore, it declared that such a serious penalty was not to be imposed at this stage of life of the accused.

Here we have an example of interplay of justice and equity in a Rotal decision. Nevertheless, the *turnus* made it clear that clerics involved in a sexual crime against minors must be punished as per the law (c. 1395, §2). Accordingly, dismissal from the clerical state is an eventual penalty imposed only when all the other intermediary penalties do not bring about the restoration of justice, reparation of scandal and reform of the offender (*non exclusa, si casus ferat, dimissione e statu clericali*).

The decision reads: The *turnus* acknowledged that “according to the norm of c. 1395, §2, the priest must be punished with a just, serious and long penalty, which, together with prayer, meditation and divine grace, might heal his wounded personality, so that he might be able to regain full freedom, human and priestly dignity with the hope that he would not commit again the same crimes.”<sup>23</sup> Should the defendant commit again the crime mentioned in c. 1395, §2, the *turnus* sternly warned, then he must be dismissed from the clerical state.

The *turnus* also noted that there is a possibility for the respondent to seek from the Supreme Pontiff the favour of dispensation from the law of celibacy, which carries with it the return to the lay state. This is particularly advisable in view of the fact that the deviant sexual impulses rooted in his personality long before his ordination to priesthood became

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<sup>23</sup> “Uti canon 1395 §2 praevidet, iusta, gravi et diuturna poena puniendum esse, quae una cum oratione, meditatione et superna gratia possit sauciata personalitas mederi et ita plenam libertatem, dignitatem humanam et sacerdotalem recuperare queat” (decision *c. Colagiovanni*, 14 June 1994, no. 11, pp. 94-95; English trans. in MENDONÇA, *Jurisprudence: Decision coram Colagiovanni, 14 June 1994*, p. 5).

manifest both before and after his priestly ordination, namely during his diaconate and immediately thereafter.<sup>24</sup> Therefore, the decision of the Rotal court was as follows:

There was proof of the crime mentioned in c. 1395, §2. However, as far as the penalty was concerned, the court's decision was *iuxta modum*, that is, to say:

The priest was barred from all ministries for ten years. However, he would be allowed to celebrate Mass during this time in the monastery mentioned in ii);

The priest must spend the ten years mentioned above in a monastery under the supervision of its Superior;

The ordinary was charged with the task of executing this sentence.<sup>25</sup>

This case is another example which proves that the right of defence can be exercised through an appeal to the higher instance. Sometimes decisions made at the local level may reflect strict justice but may not take into consideration the extenuating circumstances of a concrete case and evangelical charity. It may not be incorrect to say that a tribunal of higher instance, distant from the place where the alleged delict might have been committed, could render proper justice applied with equity and pastoral charity.

Though the evidence against the respondent and the recurrence of the delict called for the penalty that was imposed by the local tribunal, the Rotal panel taking into consideration the *subjective circumstances* of the accused, such as age and diminished imputability, rendered an equitable decision *iuxta modum*.

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<sup>24</sup> Decision *c. Colagiovanni*, 14 June 1994, no. 11, p. 95; MENDONÇA, *Jurisprudence: Decision coram Colagiovanni*, 14 June 1994, p. 5.

<sup>25</sup> Decision *c. Colagiovanni*, 14 June 1994, no. 12, p. 95; MENDONÇA, *Jurisprudence: Decision coram Colagiovanni*, pp. 5-6.

#### 4.2 – DECISION *CORAM PINTO*, 26 NOVEMBER 1999<sup>26</sup>

This case judged *coram* Pinto on 26 November 1999 deals with multiple delicts and this factor makes the sentence very complex. We will try to be brief in its analysis. Although this sentence does not involve the penalty of dismissal from the clerical state, we consider it in our study because of the penal principles dealt in it. Two of the delicts mentioned in the *contestatio litis* were delicts against the sixth commandment of the Decalogue which were subject to an eventual imposition of dismissal from the clerical state.

##### 4.2.1 – The Facts

Rev. Giorgio, born on 20 January 1941, was ordained on 18 March 1965. After his ordination he pursued doctoral studies in theology in Rome after which he taught theology at the diocesan seminary.

In his pastoral ministry, he became quite involved in an association called “Renewal of the Holy Spirit,” and then founded his own sodality named “Filadelfia,” a mixture of human and evangelical fraternity meant for discernment of the Christian vocation.<sup>27</sup>

The Archbishop of the diocese, acknowledging the merit of Rev. Giorgio’s decision to found such an association, visited the sodality, thus giving it his tacit approval. He was also moved by Rev. Giorgio’s pastoral zeal, who formulated his own ascetical system based on eschatological elements together with a unique and partly

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<sup>26</sup> Decision *c. Pinto*, 26 November 1999, Prot. no. 16, 854 (unpublished). Most of the information in English translation used here is from MENDONÇA, *Jurisprudence: coram Pinto, 26 November 1999* (Class notes), Ottawa, Faculty of Canon Law, Saint Paul University, 2005, pp. 1-8.

<sup>27</sup> Decision *c. Pinto*, 26 November 1999, no. 1; MENDONÇA, *Jurisprudence: coram Pinto, 26 November 1999*, p. 1.

ingenuous orthopraxis in moral matters.<sup>28</sup>

All was not well; shortly after 1987, rivalries and dissensions within the sodality erupted and were intensified. Rev. Giorgio was accused by the dissenters before the Archbishop of several delicts, among which were the more serious ones against faith and against the sixth commandment of the Decalogue. As an administrative response to this issue, on 18 April 1987, the auxiliary Bishop and vicar general of the diocese formally dissolved the sodality “Filadelfia,” to which the priest responded saying that this had already happened.<sup>29</sup>

As anger and animosity of young people toward the priest intensified, there was loss of peace between them and him. There arose a serious conflict instigated by jealousy, suspicion and hatred toward the priest, who had to appear before the civil Magistrate because of alleged cruelty toward the daughters of Peter and of Paul. On 2 March 1989, Rev. Giorgio was jailed, but on 30 January 1991 he was released when he was acquitted of the crime at the appeal level “because the fact could not be sustained.” During this process a new Archbishop was appointed and there was a call for a judicial inquiry and reports of the situation appeared in daily newspapers.<sup>30</sup>

First, the Archbishop prevented the priest from exercising some ministries *ad cautelam* and then constituted a commission to investigate the matter. After receiving the commission’s conclusions, on 7 June 1989, the same Archbishop served a formal precept on the priest: “I order you, in virtue of holy obedience, to leave the diocese for an

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<sup>28</sup> Decision *c. Pinto*, 26 November 1999, no. 2; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 1.

<sup>29</sup> *Ibid.*

<sup>30</sup> Decision *c. Pinto*, 26 November 1999, no. 3; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 1.

indeterminate period of time and to cease all contact with the same persons (namely those ‘who were part of the community ‘Filadelfia’).”<sup>31</sup>

Rev. Giorgio requested the same Ordinary to revoke the precept, but in vain. He placed recourse before the Congregation for the Clergy. After being informed of the mind of the Ordinary, who was about to initiate a penal process against the priest, “on 8 November 1989, the Congregation for the Clergy rejected the recourse, stating that it was not competent ‘to intervene in a matter which has been removed from its competence’; and added, it ‘suspends all further involvement in the case until conclusion of the penal process’.”<sup>32</sup> Rev. Giorgio placed recourse against this decision of the Dicastery before the Second Section of the Apostolic Signatura. This tribunal admitted the recourse and, on 14 November 1992, declared invalid the act of the Congregation for the Clergy because of violation of law both in procedure and decision.<sup>33</sup>

In the meantime, the Archbishop had decided on 27 April 1990 to proceed with a penal trial on the grounds of the following violations:

- a) teaching of theological truths (distorted) concerning:
  - i) eschatology;
  - ii) prophecy;
  - iii) the devil;
- b) distortion in matters of sexual morality, whether on the level of principles or behaviour;
- c) forceful detention (kidnapping);

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<sup>31</sup> “Ti ordino, in virtù di santa obbedienza, di allontanarti dalla diocesi per un tempo indeterminato e di interrompere senza indugio ogni contatto con le stesse persone’ (illae nempe ‘che facevano parte della comunità ‘Filadelfia’)” (decision c. Pinto, 26 November 1999, no. 3; MENDONÇA, *Jurisprudence: coram Pinto, 26 November 1999*, p. 1).

<sup>32</sup> “Die 8 Novembris 1989 recursum reiecit cum nequiverit ‘intervenire in una materia che è stata sottratta alla sua competenza’; addens ‘sospende ogni ulteriore interessamento al caso fin quando non sarà concluso il procedimento penale ecclesiastico’” (decision c. Pinto, 26 November 1999, no. 4; MENDONÇA, *Jurisprudence: coram Pinto, 26 November 1999*, p. 1).

<sup>33</sup> *Ibid.*; MENDONÇA, *Jurisprudence: coram Pinto, 26 November 1999*, pp. 1-2.

- d) abuse inflicted on children;
- e) disobedience toward the bishop ... despite initiative of these persons (through the letter of 15 April 1988) to establish any contact, even through letters or telephone, with those who formed part of this group.<sup>34</sup>

The Promoter of Justice in first instance presented the *libellus* of accusation against Rev. Giorgio containing five different delicts.

After accepting the *libellus*, the accused was cited by the judge but he refused to appear before the court. Therefore, the judge appointed an *ex officio* advocate and joined the issues on 28 May 1990, with the doubt formulated under the following formula:

According to the norm of c. 1481 §2, and taking into consideration the circumstances relative to the failure on the part of the accused to be present and to the declaration of the same absent from trial, as stated in the acts, admitted with the decree of 1 May 1990, notifies Rev. Giorgio of the violation of the following canons:

- A: cc. 279, §1, and 752 and 633, 1371;
- B: cc. 277, §§1 and 2, and 752 with cc. 1371, 1<sup>o</sup> and 1395;
- C: c. 1397;
- D: c. 1397;
- E: cc. 273 with 1371, 2<sup>o</sup>

Also taking into account c. 1399.<sup>35</sup>

After fulfilling all requirements of law, the tribunal pronounced its sentence on 30 January 1991, stating: "There is no proof of delicts of which Rev. Giorgio has been accused." However, the judge advised the Ordinary, as a precaution, to supervise the priest more closely by using pastoral means and to the extent necessary even by using compulsion, in order to avoid eventual disturbance among the faithful and for the good of the priest himself.<sup>36</sup>

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<sup>34</sup> Ibid., no. 5; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 2.

<sup>35</sup> Ibid., no. 6; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 2.

<sup>36</sup> Ibid., no. 7; MENDONÇA, *Jurisprudence: Coram Pinto*, 26 November 1999, pp. 2-3.

The Promoter of Justice appealed against this sentence to the Roman Rota, which appointed *ex officio* an advocate for the accused, because he again refused to appoint one. On 22 January 1992, in the presence of the Promoter of Justice and the *ex officio* advocate of the accused, the *Ponens* joined the issue under the following formula: “Whether the sentence of 30 January 1991 should be confirmed or overturned in the case.” Again Rev. Giorgio steadfastly refused to present himself before the judge, but wrote numerous letters to the Rota. Without any supplementary instruction, on 29 March 1994 the Rotal panel *coram Civili* pronounced the sentence stating:

The sentence should be confirmed to the extent it refers to the matter under letter A, B only in relation to c. 1395 §1, C and D. But it should be overturned in regard to delicts treated under B, only in relation to c. 1395 §2, and E, that is to say, there is proof of delicts against the sixth precept of the decalogue and against obedience and reverence to the Ordinary. Therefore, the *turnus* imposed the following penalties on Rev. Giorgio:

- 1) according to the norm of c. 1336 §1,1<sup>o</sup>, prohibition to reside in the territory of the Archdiocese;
- 2) prohibition to exercise the office of teaching in accord with the norm of c. 1336 §1,3<sup>o</sup>;
- 3) prohibition to exercise the function of preaching and to offer Mass publicly according to the norm of c. 1336 §1,3<sup>o</sup>.

These penalties were imposed for an indeterminate period of time, that is, until such time as the circumstances surrounding the facts suggest lifting them.<sup>37</sup>

Against this Rotal sentence of 29 March 1994 *coram Civili*, Rev. Giorgio lodged a plaint of nullity before the Apostolic Signatura, claiming, “among other things, absolute incompetence of the Roman Rota and denial of the right of defence.”<sup>38</sup> The Signatura *in Congresso* rejected the recourse. In its decision of 21 February 1996, the Signatura

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<sup>37</sup> Ibid., no. 8; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 3.

<sup>38</sup> “Inter alia ob absolutam incompetentiam Romanae Rotae in casu et ob denegatum ius defensionis” (decision *c. Pinto*, 26 November 1999, no. 9; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 3).

confirmed the rejection of the recourse *in Congresso*. Then the appeal was pursued *c. Burke*, who was replaced by Pinto.

On 21 February 1997, Pinto determined the doubt under the following formula: “Whether the Rotal sentence of 29 March 1994 should be confirmed or overturned in the case.”

Finally on 18 April 1997, Rev. Giorgio agreed to appear before the court and was interviewed for the first time. Then on 23 June 1997, the accused presented to the *ponens* a written report together with several documents, which were new. Seven more witnesses on the part of the accused and five *ex officio* were heard in this instance.

After the instruction of the case was completed, the advocate of the accused submitted his brief, and the promoter of justice presented his opinion *pro rei veritate*. After completing everything required by law, the *turnus coram* Pinto responded to its proposed doubt.

#### **4.2.2 – The Law**

In this section, Pinto first discusses some important penal principles pertinent to the nature of grave delicts *vis-à-vis* the possible harm to the reputation of one’s legitimate good name. Since we are concerned more about the merits of the case and the procedural law applied in this particular case, we will omit the law section (which we have discussed at length in chapter two) except to point out specific elements that support the decision of the judges.

Pinto quotes from Pope John Paul II’s 1979 allocution to point out that penal discipline in the Church is directed primarily toward the protection of rights of persons and the common good. According to the Pope, it is a “means of repairing those

deficiencies in the individual good and the common good that have come to light in the anti-ecclesial, criminal, and scandalous behavior of the members of the People of God.”<sup>39</sup>

Then, in his exposition on the inherent right of the Church to impose penalties (c. 1311), Pinto quotes a decision *coram Lega*,<sup>40</sup> who in turn cites the decree of Pope Innocent III. Lega affirms the inherent right of the Church to impose sanctions on persons who violate the law: “For, we do not intend to judge a dispute ... but a sin; and it pertains to us by virtue of censure which we can and must inflict on anyone’. Because a censure is a penalty in the external forum, it is clear that the Pontiff speaks of sin which has the nature of a crime, to the extent it disturbs social order [...]”<sup>41</sup>

Connected with the condemnation of crime (sin) in the external forum is the right protected in the Code, the “right to a good name” (c. 220). Lega says that “it is in the interest of public peace and order that occult crimes are not revealed without a just and grave cause; and more so that false crimes are not attributed to an innocent citizen. It is in the interest of public good that offenders are not prevented from reforming themselves by the publication of an occult crime which might make them lose hope of having their good name restored.”<sup>42</sup>

Applying these two principles (the inherent right of the Church to impose penalties and the protection of one’s good name) in light of the 1912 decision *coram Lega*, Pinto analyses the delict, a sin against the sixth commandment of the Decalogue. According to Capello, whom Pinto cites here: “All clerics should safeguard their chastity

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<sup>39</sup> See JOHN PAUL II, Allocution to the Roman Rota, 17 February 1979, in *AAS*, 71 (1979), p. 425.

<sup>40</sup> Decision *coram Lega*, 30 December 1912, in *RRT Dec.*, 4 (1912), pp. 482-483.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, no. 5, p. 484.

scrupulously and religiously; and it has a twofold obligation, *negative*, of abstaining from marriage, and *positive*, maintaining moral purity [...].”<sup>43</sup> The harshness of c. 133 of CIC 17 has been somewhat modified by the present Code in §2 of c. 277. To illustrate this point, Pinto quotes F. Nigro, who says: “There is some nuance in the new Code with regard to discretion which a priest ought to maintain in safeguarding his chastity; in the 1917 Code [...] there was express mention of a priest’s relationships with women and they pointed out not only the dangers but also the canonical penalties in case of violation of the respective norms. The new Code limits itself to the prudence of the priest [...].”<sup>44</sup>

Citing Calabrese, Pinto says that the delict included in the phrases of c. 1395, §1, “the other sins against the sixth precept of the Decalogue”

will refer to all the sins against the commandment except concubinage [...], in which there is persistent repetition of the act and in a manner provocative of scandal. According to Calabrese and Nigro, the scandalous persistence in such a sin consists of: a) continuance in sin, that is, repetition of acts, but without cohabitation if those acts are performed with opposite sex; b) the same sin committed, with different persons, though against the same precept of the Decalogue; c) external sin; d) sin completed with intercourse in acts according to nature; (for this reason) kisses, touching, mutual masturbation, etc., are not sufficient; e) and sin which causes scandal, intended in a theological sense to induce others to evil or in a common sense of strong astonishment among people; the scandal requires that the sin is public, known within the neighborhood and not by a few persons.<sup>45</sup>

The delict of disobedience is based on c. 276 which reads: “Clerics are bound by a

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<sup>43</sup> F.M. CAPPELLO, *Summa iuris canonici in usum scholarum concinnata*, vol. I, Romae, Apud aedes universitatis Gregoriana, 1928, no. 234, p. 227.

<sup>44</sup> See F. NIGRO, commentary on c. 277, in P.V. PINTO (ed.), *Commento al Codice di diritto canonico*, Roma, Università Pontificia Urbaniana, 1985, p. 163; P. COMPOSTA, Commentary on c. 277, in *Commento al Codice di diritto canonico* (Second Edition, 2001), p. 166; decision c. Pinto, 26 November 1999, no. 14; MENDONÇA, *Jurisprudence: Coram Pinto*, 26 November 1999, p. 6.

<sup>45</sup> CALABRESE, Commentary on c. 1395, §1, in *Diritto penale canonico*, pp. 351-352; decision c. Pinto, 26 November 1999, no. 14; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, pp. 6-7.

special obligation to show reverence and obedience to the Supreme Pontiff and their own ordinary.” An act contrary to this prescript is mentioned in c. 1371. Nigro comments on this canon as follows:

The content of this canon is taken from cc. 2317 and 2331 of CIC 17 and is intended to safeguard the acts placed either by the supreme authority of the Church ... or by the Ordinaries or other ecclesiastical Superiors. Here we are not dealing with apostasy, heresy or schism mentioned in c. 1364, §1 ... but with different delicts: a) teaching a condemned doctrine ...; b) rejecting a doctrine ...; c) disobeying a precept from the Holy See in other matters or of the Ordinary or Superior, who legitimately command or prohibit. In order to constitute a delict, it is necessary that ... the Ordinary or the Superior has warned the offender and she/he does not reform or persists in disobedience.<sup>46</sup>

A difference between the 1917 Code and the 1983 Code regarding the penalty prescribed for the commission of the delict of disobedience mentioned in c. 1371 is to be noted. The 1917 Code punished the delict of disobedience with “determinate penalties, not excluding censures.” Because the present Code is distinguished for its peculiar pastoral discretion,<sup>47</sup> the legislator leaves the determination of the penalty to the Superior, considering any penalty as the last resort after all other pastoral means, such as penances, have been used, but in vain. According to Pinto, prior to the application of penalties, the norm of c. 1347, §1 should be observed, which states: “A censure cannot be imposed validly unless the offender has been warned at least once beforehand to withdraw from contumacy and has been given a suitable time for repentance.” And the judicial discretion mentioned in c. 1343 is to be followed also so as to temper the rigour of a penalty in

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<sup>46</sup> NIGRO, Commentary on c. 1371, 2°, in *Commento al Codice di diritto canonico*, p. 803; decision c. Pinto, 26 November 1999, no. 15; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 7.

<sup>47</sup> See *Communicationes*, 9 (1977), p. 162.

cases of non-grave imputability and mitigating circumstances.<sup>48</sup>

#### 4.2.3 – The Argument

As a general observation, Pinto states that Rev. Giorgio lacked prudence in view of the political situation of Italy of the time in exercising his ministry (no. 16). Perhaps, Pinto remarks, “instead of ministering with a faithful heart in the vineyard of Christ, the cleric relied on his exaggerated qualities.”<sup>49</sup> Though the accused cleric pioneered into a ministry which combined his “own ascetical system with an ingenuous orthopraxis in moral matters” to meet the needs and challenges of that time, which is praiseworthy, consideration should also have been given to the socio-political circumstances.

Pinto, in his comprehensive analysis of the witness testimonies and the acts of the case (nn. 16-44), responds to the allegations of two principal delicts, that is, disobedience and sin against the sixth commandment of the Decalogue. He also points out how the proofs gathered through rogatories and the *ex officio* witnesses enabled his *turnus* to arrive at moral certitude.<sup>50</sup> The following are some important observations of the *turnus*.

The *turnus* observed that although the civil court found the cleric guilty, the decision of the first instance single judge tribunal was closer to the truth and was realistic.<sup>51</sup> The decision of the first instance tribunal issued on 30 January 1991 was negative on all five allegations against the cleric. It said that there was no proof in support of the delicts against obedience (c. 279, §1), or abduction (c. 1397), or serious sin

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<sup>48</sup> Decision *c. Pinto*, 26 November 1999, no. 15; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 7.

<sup>49</sup> “Fidenti animo adlaboravit in Christi vinea, sed certo certius exaggerate suis viribus confidens” (decision *c. Pinto*, 26 November 1999, no. 42).

<sup>50</sup> Decision *c. Pinto*, 26 November 1999, no. 16.

<sup>51</sup> *Ibid.*, no. 17 a.

against the sixth commandment of the Decalogue (c. 1395), or teachings involving apostasy, or schism and heresy (c. 1371).

With regard to the second instance Rotal decision *coram* Civili, although the third grade tribunal did not point out any flaw *in procedendo*, it felt it had to highlight the flaws *in decernendo*. The key penal principles highlighted by the *turnus* are as follows:

First, as explained in the previous chapter on witnesses, the principle of *favor veritatis* requires an ecclesiastical judge to evaluate the authenticity and the credibility of witnesses and their testimonies. The judge must determine whether a witness testifies from his/her own knowledge or from hearsay. He must also verify the motivation behind the testimony and establish whether it was inspired by anger, jealousy, or political antagonism. Moreover, in penal cases there should also be witnesses to disprove the claim of the promoter in order to establish the balance of evidence in arriving at moral certitude. Based on these principles governing witnesses and their testimonies, the panel *coram* Pinto stated that the credibility of the witnesses in the present case could not be sustained due to their proven jealousy and animosity.<sup>52</sup>

Second, the *turnus* could not find any evidence to prove the delict of disobedience towards his legitimate superiors (nn. 16-19). Some witnesses, including priests, testified that Rev. Giorgio was obedient to the bishop.<sup>53</sup> This conclusion was supported by proofs and documents, such as the letter of the Vicar General (no. 18, a), deposition of Cardinal C. (no. 18, b), and the administrative acts of the Archbishop (no. 18, c, d, e). On the basis

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<sup>52</sup> Decision *c. Pinto*, 26 November 1999, no. 41.

<sup>53</sup> Decision *c. Pinto*, 26 November 1999, nn. 17, 2 and 18, g ; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 8.

of this argument the panel concluded that there was no delict of disobedience.<sup>54</sup>

Third, the absence of the accused at the trial, according to Pinto's *turnus*, could not be construed as non-co-operation with the ecclesiastical courts. Pinto observes that the accused cleric was concerned about protecting his good name (c. 220). It is evident from the acts that even though the accused did not present himself before the ecclesiastical judges, he wrote several letters to the Rotal court explaining his behaviour. This proved that he did not forfeit his right to appear before the court.

Fourth, after evaluating the depositions of seven accusers (no. 21), the *ex officio* witnesses and the rogatory evidence (nn. 22-37), Pinto concludes that the allegation of a serious delict against the sixth commandment of the Decalogue was not proved as per law. For there was no proof of habitation, or of paternity, or of external sins against the sixth commandment of the Decalogue.<sup>55</sup> In light of the testimony of several witnesses introduced *ex officio*, especially of some priests, the *turnus* concluded that there was no evidence of criminal acts as alleged.<sup>56</sup> Therefore, the Rotal *turnus* declared that there was no proof of any of the alleged delicts.<sup>57</sup>

The following are some of the penal principles that we studied in the previous chapters having been exemplified concretely in the present case. First is the protection of the right to have an advocate in a penal trial. Although the accused cleric failed to appoint an advocate in all the instances of the trial, the respective judges upheld dutifully the

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<sup>54</sup> Decision c. Pinto, 26 November 1999, no. 19.

<sup>55</sup> Decision c. Pinto, 26 November 1999, no. 20.

<sup>56</sup> Ibid., no. 32: "Ceteri testes, ac praesertim sacerdotes, de Rev.di probitate fidem faciunt, vel saltem nihil criminale testantur."

<sup>57</sup> Ibid., no. 44; MENDONÇA, *Jurisprudence: coram Pinto*, 26 November 1999, p. 8.

principle of guaranteeing the accused in a penal trial with the legal counsel (cc. 1723; 1481, §1). Secondly, the discretion of the judge in collecting evidence and testing its efficacy is exemplified. After verifying the credibility of the witnesses and the efficacy of their testimonies, the panel *c. Pinto* came to a conclusion that the testimonies of the witnesses are motivated by hatred, jealousy and anger, and therefore, did not prove the claim. Thirdly, although the Code, in regard to private good, may not require the judge to collect the proofs *ex officio*, it does in penal process and when the case involves the public good (cc. 1452, §2; 1600). In the present case, Pinto overturned the Rotal decision *coram Civili* precisely because of the strength of the *ex officio* evidence collected and the rogatory inspection conducted.

#### 4.3 – DECISION *CORAM MONIER*, 21 JUNE 2002<sup>58</sup>

The sentence by Monier highlights some important penal norms to be observed in imposing the penalty of dismissal from the clerical state.

##### 4.3.1 – The Facts

Rev. Xavier, a member of a religious institute was accused of the sexual abuse of several minors below the age of sixteen years during a period of forty five years, which had caused public scandal.

On 10 January 2000, the promoter of justice of the diocesan tribunal initiated a penal action against Rev. Xavier whereby he sought the priest's dismissal from the clerical state because of these delicts. The priest had already been tried in civil courts and

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<sup>58</sup> Decision *c. Monier*, 21 June 2002, Prot. no. 18.456 (unpublished). For English translation, see A. MENDONÇA, *Jurisprudence: Decision coram Monier, 21 June 2002* (Class notes), Ottawa, Faculty of Canon Law, Saint Paul University, 2005, pp. 6-14.

was incarcerated for six years.<sup>59</sup>

On 14 January 2000, the bishop of the diocese, in light of cc. 681, §1; 678, §3, decreed the constitution of a tribunal and appointed an *ex officio* advocate for the accused. The tribunal accepted the petition and the acts of the preliminary investigation submitted by the promoter of justice. Since, for the most part, the case was determined on the basis of this evidence, the instruction of the case began with a hearing of the accused and witnesses and through acquisition of proofs gathered during the preliminary investigation. A definitive sentence was pronounced on 20 September 2000, which concluded that the accused had, in fact, perpetrated the crime against the sixth commandment of the Decalogue involving minors below the age of sixteen years. And for these crimes, the first instance tribunal imposed the most serious penalty of dismissal from the clerical state in accord with c. 1395, §2.<sup>60</sup>

The *ex officio* advocate of the accused appealed against this sentence to the Roman Rota mainly attacking the validity of the sentence, among other things, on the basis of denial of the right of defence. At the Rota, the *turnus coram* Monier joined the issue as follows: “Whether the first instance sentence pronounced on 20 September 2000, by which the perpetual penalty of dismissal from the clerical state was imposed on the defendant, should be confirmed or overturned.”<sup>61</sup>

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<sup>59</sup> Decision *c. Monier*, 21 June 2002, no. 1; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 6.

<sup>60</sup> Decision *c. Monier*, 21 June 2002, no. 3; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 6.

<sup>61</sup> “An confirmanda vel infirmanda sit sententia primi gradus Tribunalis D., die 20 septembris 2000 prolata, qua reus damnatus est ad poenam perpetuam dimissionis e statu clericali” (decision *c. Monier*, 21 June 2002, no. 4; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, pp. 6-7).

### 4.3.2 – The Law

The sentence discusses in this section two key issues related to the case, namely 1) imputability, and 2) the sin against the sixth commandment of the Decalogue based on cc. 1321 and 1395, §2.

First, the penal principles contained in c. 1321 are to be understood in relation to c. 221, §3. One cannot be punished in contravention of the provisions of law. Moreover, according to the *Regula iuris*, one cannot be punished if no crime has been committed (*nulla poena sine lege*). In penal cases, the imposition of sanctions is justified only after the essential elements of an external violation of a law or precept have been verified.<sup>62</sup> *Dolus* (malice) and *culpa* (negligence) are the foundation of imputability. As per c. 1321, §2 of the present Code, malice consists in a deliberate violation of a law or a precept, which presupposes that the subject has previous knowledge of the law and the intention to violate it. Negligence, though it may be caused by ignorance, is still punishable under the law.<sup>63</sup>

It is necessary, in evaluating the imputability of an act, to prove the subjective elements, such as knowledge of the object, and the actual intention to place an act contrary to a law or precept. Monier states that “in fact, the mere presence of the objective element, that is, the causal link between the act and its agent, is not at all sufficient, rather the subjective element, that is, a connection between the act and the

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<sup>62</sup> Decision *c. Monier*, 21 June 2002, no. 5; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 7.

<sup>63</sup> See NIGRO, Commentary on c. 1321, in *Commento al Codice di diritto canonico* (2001), p. 767.

intention, is also necessary.”<sup>64</sup>

Second, in relation to the delict mentioned in c. 1395, §2, Monier states that clerics, in virtue of their special status, must safeguard chastity “which includes a twofold obligation, one negative, that is, to abstain from marriage, and the other positive, namely to preserve the purity of conduct.”<sup>65</sup>

In his address of 23 April 2002 to Cardinals of North America, Pope John Paul II condemned the crime of sexual abuse of minors by clerics, saying, “it is a deep-seated crisis of sexual morality, even of human relationships, and its prime victims are the family and the young ... People need to know that there is no place in the priesthood and religious life for those who would harm the young.”<sup>66</sup> Moreover, the inclusion of the delict of sexual abuse of minors by clerics among *graviora delicta* reveals the gravity of such a crime.

If subjective imputability is proved by the objective commission of a delict of sexual abuse of minors by clerics, the violation deserves punishment as per c. 1395, §2 which says “not excluding dismissal from the clerical state.” This norm clearly implies that in cases of sexual abuse of minors the penalty of dismissal from the clerical state is facultative and not preceptive. Among the penalties listed for the crime of sexual abuse of minors, dismissal is the most severe penalty. Taking into consideration the fact that the defendant had already been punished by the civil court, the ecclesiastical judge, in accord

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<sup>64</sup> Decision *c. Monier*, 21 June 2002, no. 6; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 7.

<sup>65</sup> Ibid. This quotation is from F.M. Cappello, *Summa iuris canonici*, vol. 1, ad usum scholarum concinnata, ed. 4a accurate recognita, Romae, Apud Aedes Universitatis Gregoriana, 1945, n. 234, p. 204.

<sup>66</sup> See John Paul II, Address to Cardinals of the United States, 23 April 2002, in *L'Osservatore romano*, Weekly ed. in English, 24 April 2002, p. 12; decision *c. Monier*, 21 June 2002, no. 7; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 8.

with the prescript of c. 1344, 2<sup>o</sup>, can use his discretionary power either to abstain from imposing a penalty *stricto sensu* or substitute it with one suitable to the concrete case. However, Monier states that “in making the decision, one must carefully examine the mind of the canonical legislator, according to which, the application of penalties is not obligatory as in the civil forum, but it must be understood in light of the carefully weighed general and complex considerations of the pastoral, moral and spiritual order.”<sup>67</sup>

Finally, in judging a penal case, while an ecclesiastical superior has the discretionary power granted by law itself, he also bears the responsibility to supervise the clerics subject to him. Any serious failure in his supervisory role, that is, omission of due diligence, could result in objective responsibility on his part, which is totally different from the subjective imputability of the accused.<sup>68</sup>

#### 4.3.3 – The Argument

In his brief, the advocate of the accused had raised objections on two issues: first, denial of the right of defence and second, the imputability of a criminal act in the case of a person suffering from the disorder of paedophilia. These objections touch also on the merit of the case. We will examine each of these objections in what follows.

The first issue raised by the advocate of the accused includes six objections. We will examine them here individually. First, the advocate pointed out that in accord with c. 1721, §1, there was no decree of the Ordinary constituting the tribunal for judging this case. Monier responded to this objection saying that the decree in question was

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<sup>67</sup> Decision c. Monier, 21 June 2002, no. 7; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 8.

<sup>68</sup> Ibid.

“connected strictly with the decree of transmission of the acts of the preliminary investigation to the public office of the promoter of justice.”<sup>69</sup>

Second, the advocate alleged that the *libellus* by the promoter of justice was not constituted properly. The *turnus* said that the petition contained “the right upon which the petitioner bases the case and the facts and evidence in support of the allegations (c. 1504, 2º).” It felt that the petition presented by the promoter of justice clearly indicated the fact that Rev. Xavier had engaged in a recurrent pattern of child sexual abuse, and it had also identified the basis in law for the punishment mentioned in c. 1395, §2 namely, that Rev. Xavier must be punished for the delict against the sixth commandment of the Decalogue involving minors under the age of sixteen years.

Third, the advocate contended that the *libellus* reported matters that did not correspond to the computation of the period of time for prescription. It was stated in the petition: “The crime had been committed for at least forty-five years.” Monier responded that such an error in a petition would not amount to the denial of defence, because the defendant would have ample opportunity during the trial to prove that the time for prescription had already passed.

Fourth, the advocate argued that the right of defence was denied because the advocate was not cited at the judicial examination of Rev. Xavier during the first instance trial. To this, Monier’s response was that the law nowhere prescribes that a judge instructor is bound to admit the advocate during the deposition of an accused in penal cases. Moreover, Monier said that by the fact of his *ex officio* appointment, the advocate was permitted to submit questions to the tribunal; but neither he nor the defendant

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<sup>69</sup> Decision *c. Monier*, 21 June 2002, no. 8, B; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 9.

expressly requested the presence of the advocate at the examination. Therefore, Monier stated that this fact did not amount to a denial of the right of defence.<sup>70</sup>

But, the prescript of c. 1561 supposes the presence of the parties, the promoter of justice or defender of the bond at a judicial examination, for if they so choose, they can propose to the judge further questions. In light of cc. 1561, 1603, §1 and 1725, it is reasonable to argue that both the promoter of justice and the accused or his advocate should be provided an opportunity of participating in these examinations.

Fifth, the advocate pointed out that the notary was not present during the defendant's deposition. But Monier noted that the fact of signing by the defendant in the presence of the notary disproved the claim. In other words, the notary was considered present at the deposition of the accused. However, one may question if the absence of the notary at the judicial examination of the parties and witnesses would constitute a serious violation of procedural law. De las Heras is of the opinion that the absence of the notary (in this case) would make the examination illicit and would amount to a violation of law unless the particular law provided otherwise (c. 1561).<sup>71</sup>

Sixth, the advocate maintained that he did not have an opportunity to rebut the argument of the promoter of justice. This, he claimed, is a violation of the prescript of c. 1725 which states that "in the discussion of the case, whether done in written or oral form, the accused, either personally or through the advocate or procurator, always has the

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<sup>70</sup> Decision *c. Monier*, 21 June 2002, no. 8, C; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, pp. 9-10.

<sup>71</sup> During the revision of the Code one of the consultors suggested the express mention of the notary's presence during the examination, the absence of which would make a judicial examination null and void. See *Communicationes*, 10 (1978), p. 115. DE LAS HERAS, Commentary on c. 1561, in *Exegetical Commentary*, vol. IV/2, p. 1282.

right to write or speak last.”<sup>72</sup> This claim was discounted by the *turnus* saying that “during the first grade trial, the advocate had presented his brief on 17 July and 11 August 2000. The *turnus*, however, had fixed the resolution of the question for 25 August 2000. As a matter of fact, the advocate certainly had the opportunity to present other defences.”<sup>73</sup> Monier said that “this (the right to speak last) is certainly a matter of a faculty but not of an obligation.”<sup>74</sup> This view of Monier is debatable. Some authors hold that in a penal trial the “right of the accused to speak last” is a unique right.<sup>75</sup> It is evident from the prescript of the canon that the denial of such a right (c. 1725), in addition to the denial of the accused to have access to evidence and testimonies, could seriously violate the accused’s right of defence in a penal trial, and cause irremediable nullity of the sentence (c. 1620, 7°).<sup>76</sup> For the phrase *semper ius habeat* of c. 1725 indicates an obligation born out of a right (*ius*). Moreover, a juridical faculty granted by law creates an obligation that should be observed.

The second issue included the following: first, the advocate objected to the use of psychological reports in the decisions made by ecclesiastical tribunals, especially in cases involving sexual abuse of minors. One of the questions addressed by the judges was:

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<sup>72</sup> During the revision it was proposed by some consultative bodies that c. 1725 be divided into two paragraphs clearly indicating the two rights of the accused: discussion in written form (*in causae discussione scripto facta*) and discussion in oral form. This suggestion was not accepted and the consultors accepted the present canon. See *Communicationes*, 12 (1980), p. 195.

<sup>73</sup> Decision *c. Monier*, 21 June 2002, no. 8, F; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 11.

<sup>74</sup> *Ibid.*

<sup>75</sup> DE PAOLIS, “Il processo penale nel nuovo Codice,” p. 492; DI MATTIA, “Processo penale canonico e animazione pastorale,” p. 499; INGELS, “Dismissal from the Clerical State,” p. 203.

<sup>76</sup> Peters considers that c. 1725 simply emphasizes the general provisions on trials, which has already guaranteed the defendant access to the evidence used against him. See PETERS, *Penal Procedural Law*, p. 343.

“Can a psychological report of the accused be used against the accused in a penal trial?” The defendant’s advocate said that the excessive accumulation of psychological reports and examinations carried out “in order to determine the nature and gravity of the sexual disorder [...] and to find appropriate therapy [...] should not have been admitted in the penal case, not only because of the special relationship between the client and the psychologist, which imposes on the latter the obligation of secrecy, but also because the defendant was not given the benefit of a defender at those occasions, as, on the contrary, one was expressly appointed in this case by the bishop of the diocese immediately after the promoter of justice had presented the accusation.”<sup>77</sup>

In responding to this observation, Monier’s *turnus* suggested that it was just and necessary to punish the recurrent serious sexual delicts with serious penalties.

Second, the Rotal sentence speaks of grooming and the computation of time for prescription. The defendant vehemently denied the accusation of so called “grooming” from the year 1984 and thereafter; also in the appeal it was stated that neither the defendant nor his advocate were given an opportunity to examine any evidence in the matter of grooming. Moreover, the defendant denied that he had physically abused a child since 1984.<sup>78</sup>

The judges confirmed the grooming in the following statement: “[...] as is evident, other clear and serious delicts are demonstrated from the acts. The appealed sentence indeed proves that Rev. Xavier had made a false deposition and concludes:

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<sup>77</sup> Decision *c. Monier*, 21 June 2002, no. 8, D; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 10.

<sup>78</sup> Decision *c. Monier*, 21 June 2002, no. 8, E; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 11.

‘That statement was not true, as is manifest from the list of his child-sexual offences which he specifically admitted in the course of his assessment at the X Mental Health Foundation. The report from that Foundation, dated 29 January 1997 ... states, among other things, that: To date, *Rev. Xavier* has acknowledged the following offence history: in 1984-89 Abused 2 boys at beginning of therapy, groomed 1 boy and family; in 1989-91 Groomed 3 boys and families over a two-year period; in 1992-94 Abusive sexual behaviour with a 21 year old male; and in 1996 Groomed a boy who came on holidays.’<sup>79</sup>

Third, the advocate alleged that the sentence of first instance had “not considered equitably” the question of imputability, although he admitted that the accused suffered from paedophilia. But the judges felt that they no longer had any reasonable doubt about the material existence of the delict, of which the defendant was accused, and of its repetitive character.<sup>80</sup>

In this case, the moral certitude on the “material existence of delicts” was based on proofs and the reports of experts. The Rotal sentence reports the psychological expertise submitted by Dr. X, on 21 August 1992, which reads:

Xavier does not seem to have fully accepted the serious nature of his behaviour ... neither does he seem to accept the fact that he was responsible for bringing about the situations where the abuse could occur. He seems to prefer to see himself as a helpless child rather than a responsible adult, despite his having undertaken many hours of analytical therapy over a number of years. I formed the impression that he tended to use what he had learned through therapy, to excuse himself for what he did. He understood the effects of his early experiences, but was somehow not using this knowledge in a positive way. [...] I feel that at present, Xavier poses a danger to any child he comes into close contact with and I

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<sup>79</sup> Ibid.

<sup>80</sup> Decision *c. Monier*, 21 June 2002, no. 9; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 12.

strongly recommend that he is not employed in any work that brings him into contact with children or any vulnerable young adult.<sup>81</sup>

The sentence continues:

In another psychological report of 4 June 1988, prepared by Dr. Y, the expert excludes that the sexual problem of the defendant is a mental disease. He describes the form of this disorder as follows: ‘Sexual offending ... is a compulsive addictive behaviour, which cannot be cured, only controlled (provided the offender is motivated to do so). Like other compulsive or addictive behaviours, there is an identifiable cycle of behaviour ... In my view, Mr. Xavier needs to complete the work he has undertaken thus far, in order to reduce the risk of re-offending. It is difficult to see how this work can be completed whilst Mr. Xavier remains reluctant to engage fully in the treatment process. Whenever the criminal proceedings and their consequent outcomes are resolved, it may be possible to re-engage in the completion of the treatment process. Until such time it is my opinion that Mr. Xavier will remain a significant risk of re-offending’.<sup>82</sup>

Considering the experts’ reports, the judges concluded with moral certitude on rational and conscious behaviour on the part of the defendant.

Having established with moral certitude the material existence of the delict, the key aspect discussed by the *turnus* is the influence of a psychological illness in determining imputability. Recent studies reveal that more often paedophiles are driven by uncontrollable impulses, which they are not able to overcome psychologically. According to Thomas P. Doyle, a canonist, “the true paedophile finds it quite difficult and often impossible to resist the urge to seek sexual satisfaction [...]. A paedophile’s experience is a much higher and more intense level of compulsion for sex, than one who is not afflicted with a disorder.”<sup>83</sup> Doyle thinks that the reduced ability for self-control would diminish

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<sup>81</sup> Ibid., no. 10; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 12.

<sup>82</sup> Ibid.

<sup>83</sup> DOYLE, “The Canonical Rights of Priests Accused,” in *StC*, 24 (1990), pp. 353-354.

imputability for a canonical crime.

In this case, “the manner in which the promoter of justice of this Apostolic Tribunal invokes the application of c. 1321, §1 smacks of determinism and automatism.”<sup>84</sup> The Code indeed speaks of grave imputability, which is certainly rendered explicit through malice and negligence (c. 1321, §§1 and 2). In applying this prescript of law (c. 1321), the promoter states that “the defendant is certainly culpable either because of certainty of the delict he had perpetrated, or because of his obstinacy in despising the right of children to their innocence and the Church’s responsibility to provide justice to individuals and community.”<sup>85</sup>

Third, the use of discretionary power on the part of an ecclesiastical judge in rendering a decision equitably (c. 1344) is exemplified in the sentence of Monier. Although the *turnus* concluded that Rev. Xavier was certainly guilty and was to be punished with an appropriate penalty, it seriously considered two elements, which seemed to have influenced the determination of the penalty. They are: 1) the lack of supervision on the part of the superior of the institute of the consecrated life, and 2) the punishment of six years of imprisonment in the civil forum.

The *turnus* stated, “as far as the lack of supervision is concerned, it is evident to all that some mark of injustice cannot be excluded in the Church’s way of acting, since the superiors had allowed violation of innocence of children, and that, too, for over forty years. It is public knowledge that, when he was committing the crime, Rev. Xavier was

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<sup>84</sup> “Modus igitur quo Promotor Iustitiae H.A.T. invocat applicationem can 1321 §1 in casu alicuius sentit determinismi vel automatismi” (decision c. Monier, 21 June 2002, no. 11; MENDONÇA, *Jurisprudence: Decision coram Monier, 21 June 2002*, p. 13).

<sup>85</sup> *Ibid.*

left unsupervised by the superior general, although one may correctly acknowledge that the superiors had treated the accused humanely with a hope of his reform.”<sup>86</sup>

The sentence concludes: “therefore, after weighing everything with utmost seriousness and care, after studying the mind of the Legislator, according to which, unlike in the civil forum, a criminal action is not obligatory but left to the discretion of the superior (cf. cc. 1717-1720), whose responsibility it is to strike a balance between the public good and the private good, and after taking into account the fact that the accused has already been condemned in the civil forum to prison for a period of six years, the Fathers of the *turnus* decided that, in conformity with the principles of canonical equity and justice, appropriate medicinal and expiatory penalties should be imposed on Rev. Xavier.

The decision of the *turnus coram* Monier was affirmative and *ad mentem*. “**The mind is:** the penalty of censure of suspension from all public acts involving exercise of the power of order and of jurisdiction (c. 1333, §1) is imposed for nine years. The expiatory penalty of residing in a certain house of the religious institute under the direction and supervision of the superior for an indeterminate period of time (c. 1337).”<sup>87</sup>

One can see the concrete application of three key penal principles in this decision. They are the inherent ecclesial right to punish delicts with appropriate penalties (c. 1311), respect for the right of defence (c. 1620, 7°), and use of discretionary power in the application of penalties (c. 1344).

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<sup>86</sup> Ibid., no 12; MENDONÇA, *Jurisprudence: Decision coram Monier*, 21 June 2002, p. 13.

<sup>87</sup> Ibid. no. 14, pp. 13-14.

Penal law in the Church is designed, in part, to impose or declare penalties for offences (c. 1400, §1, 2°) not so much because the offences violate a norm or prescript of law, but chiefly because they constitute a danger to ecclesiastical discipline. According to De Paolis, what matters in punishing offences is not so much the seriousness of the delict but the social repercussions caused by the violation of law. These repercussions are not absolute and constant; rather they are susceptible to change in relation to time, culture, place, human growth, etc. De Paolis says that what is considered a serious offence now may not be considered so in the future, although it may still remain a violation of the moral order. The canonical legal system may not consider all acts that are prohibited as offences. Not all immoral acts are punishable, and neither are all legal acts moral. Even though the *ius puniendi* of the Church is related to the moral, juridical levels of offences, for the most part it is aimed at the juridico-penal level. Therefore, even though the moral and juridical repercussions of an offence play a role in the imposition of penalties, it is the juridical-penal consequences that determine the punitive right of the Church.<sup>88</sup> This ecclesial right to punish canonical offences irrespective of civil judging of a case involving criminal matters, is well affirmed in this case.

Since ecclesial punitive power concerns only the juridical-penal consequences of offences, the juridical-penal principles governing the *ius puniendi* are to be observed. One such judicial principle is respect for the right of defence.<sup>89</sup>

The exercise of discretionary power in the application of penalties is clearly emphasised in this case. The discretionary power related to penal judicial proceedings is

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<sup>88</sup> See DE PAOLIS, "Penal Sanctions, Penal Remedies and Penances," p. 151.

<sup>89</sup> See LLOBELL, "The Balance of the Interests of Victims and the Rights of the Accused," p. 89.

to be exercised in two areas. First, at the level of pastoral and fraternal rebuke of the accused prior to the initiation of a penal trial. Second, at the level of rendering a sentence. In light of c. 1344, the Rotal *turnus* decided not to impose the most serious penalty of dismissal from the clerical state at the age of sixty, especially since the defendant had been sufficiently punished by civil law (c. 1344, 2°). Therefore, the judges imposed certain expiatory penalties which are severe, preventive, and prohibitive (c. 1336). This decision reflects what John Paul II said of the judge's ministry of justice (*ministerium iustitiae*): "You have a special responsibility in this regard – to 'love righteousness and justice' [...]. The ecclesiastical judge, therefore, will not only bear in mind that 'the primary requirement of justice is to respect persons', but will also look beyond justice and strive for equity and, beyond this, for charity."<sup>90</sup>

Finally, this case emphasizes the supervisory role of an ecclesiastical superior with regard to penal cases. It is the pastoral as well as the juridical obligation of a superior to prevent clerics from committing offences of the kind dealt with in the present case. The Ordinary can impose certain administrative measures in order to arrest recurrent canonical offences, scandal and the consequent damage to the common ecclesial good.<sup>91</sup>

Can a diocesan bishop initiate a penal action involving dismissal from the clerical state against a religious working in his diocese without seeking the consent of the respective superior? According to the prescript of c. 392, §1, the diocesan bishop has an

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<sup>90</sup> JOHN PAUL II, Allocation to the Roman Rota, 17 February 1979, in WOESTMAN, *Papal Allocutions to the Roman Rota*, p. 154.

<sup>91</sup> See J. A. ALESANDRO, "A Study of Canon Law: Dismissal from the Clerical State in Cases of Sexual Misconduct," in *Catholic Lawyer*, 36 (1996), pp. 287-288.

obligation to protect the ecclesiastical discipline in his diocese, and therefore, he has the right/obligation to impose penalties when the ecclesiastical laws are violated. In light of cc. 695-696, the Supreme Moderator of a religious institute, together with his/her counsel, can process the case for dismissal from the religious institute of a member accused of certain serious delicts. However in accord with c. 681, §1, a religious who works in a diocese is under the authority of a diocesan bishop; and the bishop can initiate a penal action on the religious cleric for committing prescribed delicts, but after consulting the major superior of that institute (c. 678, §3). The diocesan bishop can also refer the matter to the major superior for action in such a situation.

### CONCLUSION

The purpose of ecclesiastical penalties is threefold: the reparation of scandal, restitution of justice and reformation of the offender (c. 1341). The nature and the finality of canonical penal law consist chiefly in the protection of justice, without neglecting the human dignity, inherent in a person, even if guilty, and who is in need of forgiveness and healing. The purpose of imposing canonical penalties on persons guilty of delicts that are “anti-ecclesial, criminal and scandalous,” according to Pope John Paul II, is to repair deficiencies caused in the individual good and in the ecclesial community. The *missio Ecclesiae* at the present time in protecting the rights and dignity of human persons is better established in the fact that the Church itself functions on the juridical penal level as *speculum iustitiae* when faced with canonical delicts perpetrated by its own members, lay or cleric.<sup>92</sup> In the ministry of justice, the focus of canonical penal law is not on the moral

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<sup>92</sup> JOHN PAUL II, Allocation to the Roman Rota, 17 February 1979, in WOESTMAN, *Papal Allocations to the Roman Rota*, pp. 153-154.

and sacramental law but strictly on juridical-penal law as expressed in the sixth book of the Code. That is to say canonical delicts in the Church are identified strictly by the parameter of the prescript of law and by the penalties imposed (c. 221). Therefore in dealing with serious clerical delicts in the external forum the Ordinary or the judge strictly operates in the penal path not on the pastoral or sacramental paths. However, punishment for violations of law, i.e., proven delicts, is not excluded from the supreme good of the Church's ministry, the *salus animarum*.

The special clerical obligation to seek holiness in life, in ministry and in relationship with the faithful (cc. 276-277) has its negative juridical consequences in its violation, and in particular by the violation of the sixth commandment of the Decalogue. Since these offences against the moral order seriously violate the dignity of persons in the Church and in society, the canonical penal law deals with such offences with utmost seriousness. Incurable and recurrent clerical delicts against the sixth commandment of the Decalogue involving minors under the age of eighteen, as we studied above in the three cases, are to be progressively punished with, as last resort, the serious expiatory penalty of dismissal from the clerical state, if so warranted. The decisions of the lower courts in the cases we studied in this chapter considered it appropriate to impose the penalty of dismissal from the clerical state when all other pastoral and therapeutic approaches had failed to achieve reformation of the offending clerics.<sup>93</sup>

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<sup>93</sup> The recent jurisprudence of Roman Congregations on imposing the penalty of dismissal from the clerical state brings out certain important penal principles. They are the following: 1) A recent case decided by the Apostolic *Signatura* (28 April 2007, Prot. no. 37937/05 CA, no. 12) points out that when clerical delicts cause such liabilities in the temporal and social administration of the Church, the ecclesiastical judge must take into consideration the principle of "*Ecclesia vivit in mundo*." As the Church lives in the world it is necessary for it to protect the temporal goods of the Church. See F. G. MORRISEY, "Current Penal Legislation," A paper presented at the symposium on *The Practice of Penal Law*, 26-29 November 2007, Ottawa, Faculty of Canon Law, Saint Paul University, 2007, p. 16; 2) In a particular case, though it does not warrant imposition of any serious penalty in instances of less-imputable situations, CDF

Canonical crimes which involve a psychological disorder are to be judged in accord with the principles that govern *dolus* and *culpa* (c. 1321). The recent jurisprudence on penal matters confirms that the report of psychological testing meant for the rehabilitation of an accused cleric cannot be used against him in a penal trial. Also since the subjective circumstances in which a crime was committed, as explained in the Rotal sentence *coram* Colagiovanni, affect imputability, they must be considered in imposing appropriate penalties. Imputability is a juridical tool to measure the deliberate intent and negligence of a perpetrator of a canonical crime. A judge must have, *ex actis et*

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has advised the Ordinaries to impose even certain penal precepts on accused clerics enjoining a warning that they would incur serious penalties not excluding dismissal from the clerical state for future violations of the law (CDF reply to USA, August 2004). See Morrisey, "Recent Jurisprudence and Instructions," in DUGAN (ed.), *Advocacy vademecum*, p. 54.

3) In a number of cases it has even suggested that c. 223 be invoked to protect the common good; 4) Removal of faculties and the privation of exercising the sacred ministry publicly are some of the instant and important penal measures that the recent jurisprudence advocates in response to serious clerical delicts. However, in a private reply (18 September 2003) CDF has *requested* a diocesan bishop to allow the priest to continue his priestly ministry since the commission of a delict was an isolated event after which no relapse occurred and since the priest, except for this isolated event, enjoys a *bona fama* among the faithful (c. 220). See *ibid.*, p. 51.

5) Sometimes the removal of faculties may arise from the disciplinary action of a diocesan bishop, and it may not be considered a penal action. Therefore, according to the recent jurisprudence based on the Apostolic Signatura (28 April 2007), a diocesan bishop can remove the faculties of a priest as a disciplinary action in order to protect the common good. See MORRISEY, "Current Penal Legislation," p. 16; 6) A rescript issued by the Apostolic Penitentiary (16 July 2003) in a case of a priest incurring excommunication for the delict of absolution of the accomplice (c. 1378, §1) points out that it is less imputable since the cleric was not taught penal law and that he had never been taught in the Seminary about the penalty attached to the delict. See MORRISEY, "Recent Jurisprudence and Instructions," in DUGAN (ed.), *Advocacy vademecum*, p. 65.

7) In a private reply the Congregation for Divine Worship and the Discipline of the Sacraments has spelled out certain important rights to be upheld in the penal process. They are the accused's right to have an advocate and to prepare an explanation, the right to a due and equitable process, the right of the priest to be aware of the proceedings and to know the grounds, the right of the promoter of justice, the right to *contradictorium*, the right to protect one's good name and the right to appeal or to seek recourse against arbitrary and unjust decisions of ecclesiastical superiors. See *ibid.*, p. 61; 8) The same Congregation has also suggested in a private reply to a diocesan bishop that he, in view of reducing liabilities, may call upon the conscience of the accused priest to request voluntarily dispensation from the obligations of priesthood. "However, in the most exceptional of cases, recourse may be made by a particular bishop to this Dicastery to request application of the process *ex officio et in poenam* (i.e., dismissal from the clerical state involuntarily)". See *ibid.*, p. 62.

*probatis*, sufficient moral certitude concerning imputability in order to attribute criminal responsibility to an alleged delinquent.

Since the penalty of dismissal from the clerical state is very serious, all penal procedural norms must be sedulously observed. In all trials, but especially in a penal trial, the right of defence stands supreme. The right of defence is unique not only to a canonical penal trial but also to civil criminal trials. Even the protection of the ecclesial communion and social order may not jeopardize the fundamental right of defence.

These penal principles are to be observed by an ecclesiastical judge in his *ministerium iustitiae*, for in “pronouncing judgement he will be a priest and pastor of souls with his eyes fixed on no one but God.”<sup>94</sup>

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<sup>94</sup> JOHN PAUL II, Allocation to the Roman Rota, 17 February 1979, in WOESTMAN, *Papal Allocutions to the Roman Rota*, p. 155.

## GENERAL CONCLUSION

The basic questions that we raised at the outset of this study are as follows: whether there are rights in the Church; whether those rights are real and the faithful can lay claim to them, even an offending member; whether such rights are guaranteed by means of effective canonical procedures; whether delicts in the life of the Church are punished within the framework of law; and whether the imposition of the penalty of dismissal of a cleric from the clerical state through a judicial process guarantees the rights affirmed in the Code.

A careful examination of various issues related to these questions on delicts and penalties, and in particular of the application of the judicial penal process outlined in Books of VI and VII of the 1983 Code, leads us to the conclusion that the protection and promotion of rights of all persons in the Church are real, and are guaranteed in the Code. They are real in as much as the right of coercive power of the Church is real (c. 1311). The law clearly identifies the following rights to be protected in a penal process: the right of self-defence (c. 1598), the right to a just and equitable process (c. 221, §2), and the right not to be punished except in accord with the law (c. 221, §3). A cleric who is accused of a delict which merits the penalty of dismissal from the clerical state is assured of these rights when subjected to a judicial penal process which is the norm (c. 1425, §1, 2°).

The four chapters of our study have dealt at length with issues related to ecclesiastical penal laws in terms of delicts and penalties, specifically the delicts involving dismissal from the clerical state, highlighting the penal principles while

applying penalties. The study of each step of the judicial penal procedure has brought out certain salient principles, carefully drafted by the ecclesiastical legislator in order to determine truth and justice in a concrete case. The important principles and conclusions derived from our study are the following:

To the question, whether one needs sanctions at all in the life of the Church, which is a communion of believers animated by the Spirit, one answer is that coercive power is intrinsic to the life and mission of the Church. It is necessary to prevent offences, and to redress the harm caused by the delinquent behaviour of the faithful. Based on the Biblical foundation on sanctions (Deut. 19, 15; Mt. 18: 15-18; 1 Cor. 5:1-13), the Church has enacted appropriate substantive and procedural norms in Books VI and VII of the 1983 Code to deal with delicts perpetrated by its members. These norms are necessary for the better maintenance of ecclesiastical discipline and order (c. 1317). Though sanctions are not necessary for the law-abiding members of the Church, to the ones who harm individuals and the community they are necessary (Gal. 3, 19).

Should the law be attached with penalties in order to achieve its force? In other words, is penal sanction constitutive of law? De Paolis responds to this question with an emphatic 'no'. He maintains that law itself has the force which imposes the obligations necessary for its observance, and therefore, it is not necessary to attach sanctions to the law.<sup>1</sup> However, certain prescripts of law in the Code are explicitly laden with specific sanctions which are to be strictly interpreted (c. 18). The goal of sanctions are reparation of scandal, restoration of justice and reformation of the offender (c. 1341), and the

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<sup>1</sup> DE PAOLIS, "Penal Sanctions, Penal Remedies and Penances," p. 151.

supreme goal of the entire legal system of the Church is the salvation of souls (c. 1752). Therefore, the penal laws exist in the Church to establish justice and to safeguard and promote the common good, damaged by the harmful behaviour of its members.

At the time of the revision process of the 1983 Code, some basic principles governing penal laws were incorporated into the Code, and these were: law not only must provide for justice but there should also be a place for the exercise of charity, temperance, humanness and moderation in the application of law (principle 3); the right of the Christian faithful to legitimately defend and vindicate their rights is to be affirmed (principle 6); there should be in the Code appropriate procedures for the protection of subjective rights of the Christian faithful (principle 7); and finally, the imposition of penalties is to be carried out through a legitimate process and not *via the latae sententiae* provisions (principle 9).

On the basis of these principles, the ecclesiastical legislator has introduced important changes in Book VI of the 1983 Code. These changes include a significant reduction in individual penalties (35 from 101) and in *latae sententiae* penalties (only 5) reserved to the Apostolic See. The most notable reform one finds in the present Code is the limitation of the establishment, imposition and remission of penalties to the external forum, although the internal forum is recognised for the remission of penalties with appropriate conditions (c. 976). The conciliar emphasis on human freedom (cc. 221, 223) and subjective rights (c. 1598) is given proper recognition in the procedural law. The setting of c. 1341 as an introductory canon for the title "Application of Penalties" reveals the pastoral approach to be adopted in imposing penalties. Local superiors are given much discretion in determining and imposing penalties (cc. 1342-1353). Though *dolus*

and *culpa* are recognised as two sources of imputability, *culpa, i.e.*, ignorance of law, alone does not determine imputability (c. 1321, §2). And, the *latae sententiae* penalties lose their force in the presence of certain circumstances listed in c. 1324, §1.

Some other changes included in penal procedure (cc. 1717- 1731) are the following: the complex procedural steps on denunciations and *correptio* (cc. 1934-1938; 1947-1953) of the 1917 Code are simplified in the present Code. In contradistinction to cc. 1933, §4 and 2225 (*CIC/17*), canon 1717 clearly indicates to an Ordinary the process involved in determining how a penalty is to be imposed, whether administratively or judicially. Thus, for example, the penalty of dismissal from the clerical state is to be imposed only through a judicial penal procedure (c. 1425, §1, § 2); and this is also the process preferred by the Code for imposing or declaring excommunication (c. 1342, §1).

The basic principles based on the objective and subjective elements of penalties that are to be upheld in the imposition of penalties are the following: **first**, imposition of a penalty must always be the last resort, that is to say, all other pastoral means of appropriate warning and correction are exhausted before the process for imposing penalty is undertaken (c. 1341); **second**, the presumption of imputability is to be challenged juridically in court when contrary proofs oppose this presumption (c. 1321, 3); **third**, various exempting and attenuating circumstances indicated in the Code must be appropriately determined in establishing imputability for the delict (cc. 1322-1326); **fourth**, prior to the initiation of a process, the competence of the authority and the period of prescription must be determined when reserved delicts are involved; **fifth**, the application of common law should take into consideration the particular law and the supplementary norms governing *graviora delicta*; **sixth**, the right of defence must

always be upheld in a penal process; **seventh**, the rights that are identified as specific to penal process are: the right to have an advocate (c. 1723, §1), the right to speak last (c. 1725), the right not to incriminate oneself (c. 1728), etc. These must be duly respected.

It is not uncommon in the life of the Church that clerics are punished with appropriate penalties for the commission of certain offences. The history of the Church bears ample examples of condemnation of clerics; we see this in the ecumenical council of Nicea (325), in the *Corpus iuris canonici*, etc. Among them the serious penalties were "deposition" and "degradation" of clerics (cc. 2303, 2305, *CIC/17*), imposed after sufficient admonition, *monitio* and *correptio* (cc. 1339, §1; 1339, §2, *CIC/17*). By deposition in the 1917 Code, deprivation of ecclesiastical offices, benefices, dignity, pension, etc., was imposed on a guilty cleric, while not affecting the privileges that he enjoyed in accord with the existing legislation; by degradation, the cleric also was deposed; he lost the clerical state together with the deprivation of clerical garb.

Five grave clerical delicts were identified in the 1917 Code which merited degradation (c. 2314, §1, 3°; c. 2343, §1; 2354, §2; 2368, §1; and 2388, §1). Among these five delicts, the delict of homicide has not been included in the present Code as one meriting dismissal. What is noticeable is the inclusion of sins against the sixth commandment of the Decalogue in the present Code as serious delicts meriting the expiatory penalty of dismissal from the clerical state are: concubinage and *other* sexual sins against the sixth commandment of the Decalogue (c. 1395, §1 and §2). The present Code includes, together with the delict of desecration of the consecrated species, also three new delicts as meriting dismissal from the clerical state. The penalty of *latae*

*sententiae* excommunication (c. 2388, §1, *CIC/17*) imposed on a cleric who attempted marriage has been mitigated to *latae sententiae* suspension (c. 1394, §1).

Among the seven delicts involving dismissal from the clerical state in the 1983 Code (c. 1364, §2; c. 1367; c. 1370, §1; c. 1387; c. 1394, §1; c. 1395, §1; and c. 1395, §2), three are now identified, as per *SST*, as *graviora delicta* and are reserved to the Congregation for the Doctrine of the Faith: the delicts of desecration of the consecrated species, certain forms of solicitation and sexual abuse of a minor. Of these seven delicts, three incur also *latae sententiae* excommunication (c. 1364; c. 1367; c. 1370).

In comparison to the terminology used for other delicts, the Code uses a strong indicative command, "*dimittatur*" only for solicitation (c. 1387). The prescription period for the *graviora delicta* reserved to CDF is now fixed as ten years, and for the delict of sexual abuse of minor the period starts from the completion of the eighteenth year of age of a minor. Though *CCEO* does not have parallel canons on two of the *graviora delicta*, i.e., consecration of one Eucharistic element without the other (c. 927) and sexual abuse of a minor (c. 1395, §2), by virtue of *SST*, these delicts and their penalties are applicable also to members of Eastern Churches from April 30, 2001. It seems that the most serious delicts identified in penal legislation are those perpetrated against the unity of faith, the sanctity of sacraments and moral principles. The heightened awareness of the Church on the protection of human dignity, holiness, rights and freedom is now translated into a penal norm in c. 1395, §2.

A cleric found guilty of any of the **seven** delicts meriting the penalty of dismissal from the clerical state must be progressively punished with that penalty, keeping in mind however the principles of justice, equity and Christian charity.

Since dismissal from the clerical state is a very serious penalty which deprives the cleric of the clerical state, that is, deprives him of all obligations and rights pertaining to clerics (cc. 273-289), including others mentioned throughout the Code (c. 266; c. 767; c. 1274, except for the obligation of celibacy), the delicts identified here are subject to strict interpretation (c. 18). Furthermore, the penalty of dismissal from the clerical state cannot be legislated by particular law (c. 1317), neither can it be imposed administratively (c. 1342, §2) without the intervention of CDF which can, in some absolutely certain cases, ask the local tribunal to impose dismissal through administrative process. Based on the current penal legislation, dismissal can be imposed either by a collegiate tribunal (c. 1425, §1, 2<sup>o</sup>) or administratively by the Supreme Pontiff, or by the concerned Congregations of Roman Curia, as the supplementary penal norms and instructions seem to suggest.<sup>2</sup>

The judicial penal process for dismissing a guilty cleric from the clerical state is governed by the following set of laws: a) the prescripts of Book VI of the Code which identify and define a particular delict; b) the procedural norms for the penal process in Book VII (cc. 1717-1731); c) laws on the ordinary contentious process found in Book VII (cc. 1501-1670); and d) the complementary substantive and procedural norms contained in *Sacramentorum sanctitatis tutela*. What is important in all this is to apply penal laws firmly but fairly in order to safeguard the integrity of the penal process.

For the validity of the judicial penal process the Ordinary must begin the preliminary investigation and close it with two separate decrees (c. 1719). In order to determine the appropriate process, that is, whether or not to initiate the process for

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<sup>2</sup> See MORRISEY, "Recent Jurisprudence and Instructions," p. 60.

dismissal, and, whether to follow the judicial or administrative process, the Code *exhorts* the Ordinary to discuss the matter with two experts of law (c. 1718, §3). Then, in order to protect the integrity of the process, he can prohibit the accused cleric from acts of priestly ministry (*a divinis*) and from residing in a particular place (1722). If the cleric is found guilty in the process, the judge should impose the penalty of dismissal from the clerical state having only God before his eyes, and if proved not guilty, it is his duty to acquit the accused cleric and to make good the harm caused that might have been caused by the process (c. 128). This can be addressed in a contentious action in the same penal trial (c. 1729).

The three cases we have analysed in this study highlight some important juridic principles. These may be summarized as follows: 1) In imposing the penalty of dismissal from the clerical state, the judge must have moral certitude concerning grave imputability for the delictual act perpetrated by the cleric concerned; 2) The imposition of the penalty of dismissal from the clerical state must be considered only when all warnings, admonitions, and precepts have proved futile; 3) It is always desirable to remove the faculties and impose certain other penalties before imposing the penalty of dismissal from the clerical state; 4) The subjective circumstances of a delict (cc. 1324-1325), such as the mental disorder of an offender could mitigate the penalty of dismissal from the clerical state; 5) One's long period of ministry, isolated incidents and the old age of the accused cleric are factors to be considered when imposing the penalty of dismissal from the clerical state. In such cases, appropriate penal remedies and penances can be imposed; 6) Psychological testing conducted without the explicit consent of the person and the use of reports produced out of such testing against the will of the accused cleric

could constitute violation of the right of defence; 7) The rights of the accused cleric, such as the right to know the charges against him (c. 1720, 1°), to have legal counsel (c. 1723), to offer counter proofs (c. 1725), to enjoy one's legitimate good name (c. 220), etc., are to be diligently respected. The basic right in a penal case that governs all the above mentioned rights is the right of defence (cc. 221, §1; 1620, 7°);<sup>3</sup> 8) Prior to the imposition of any penalty, at least one juridical warning (giving at least one month period for efficacious response) should be issued by the competent authority (c. 1347, §1).

At this point, it is possible for us to suggest the following scientific projects as complementary to our study:

1. First, our study is obviously limited to the judicial penal process for imposing the penalty of dismissal from the clerical state. Even though the use of administrative procedure for dismissal of a cleric from the clerical state is excluded from the scope of our study, a major study on the administrative procedure for the dismissal from the clerical state could prove helpful.
2. Second, the current situation involving sexual abuse of minors by clerics certainly calls for major research on the application of c. 1395, §2 and the canonical process for the imposition of legitimate penalty for the delict, because the present penal norms have already been subjected to derogations and integral reordering on prescription, age limit, reservation, etc.

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<sup>3</sup> See JOHN PAUL II, Allocution to the Roman Rota, 26 January 1989, in *AAS*, 81 (1989), p. 922; English trans. in WOESTMAN (ed.), *Papal Allocutions to the Roman Rota*, p. 204.

3. Third, there is a distinct possibility for major research on each of the eight specific reserved delicts identified in *Sacramentorum sanctitatis tutela* and on the appropriate penal process applicable to them.
4. Fourth, another major study could concentrate specifically on the scientific analysis of the jurisprudence and praxis of the Congregation for the Doctrine of the Faith on this subject matter.
5. Fifth, a major historical study on the nature, meaning and purpose of reserving particular delicts to the Apostolic See could shed more light on the evolving substantive and procedural penal norms governing specific reserved delicts.
6. Sixth, another study could focus on the practice prevalent in some countries of "administrative leave" being imposed on a cleric accused of serious delicts against the sixth commandment of the decalogue. This practice involves important penal principles and serious pastoral concerns. Therefore, we feel that a major scientific project on this issue alone could be most helpful to diocesan bishops around the world.
7. Seventh, another major scientific study could be pursued with regard to the penal issues related to violations of the sacredness and dignity of human beings.

It is our hope that this study will provide some helpful assistance to all those, particularly the diocesan bishops and tribunals around the world, involved in applying the Church's law with justice, equity and Christian charity to cases which entail the most serious penalty of dismissal of a priest from the clerical state. This is mandated by the ultimate goal of the Church's mission, that is, the *salus animarum* (c. 1752).

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