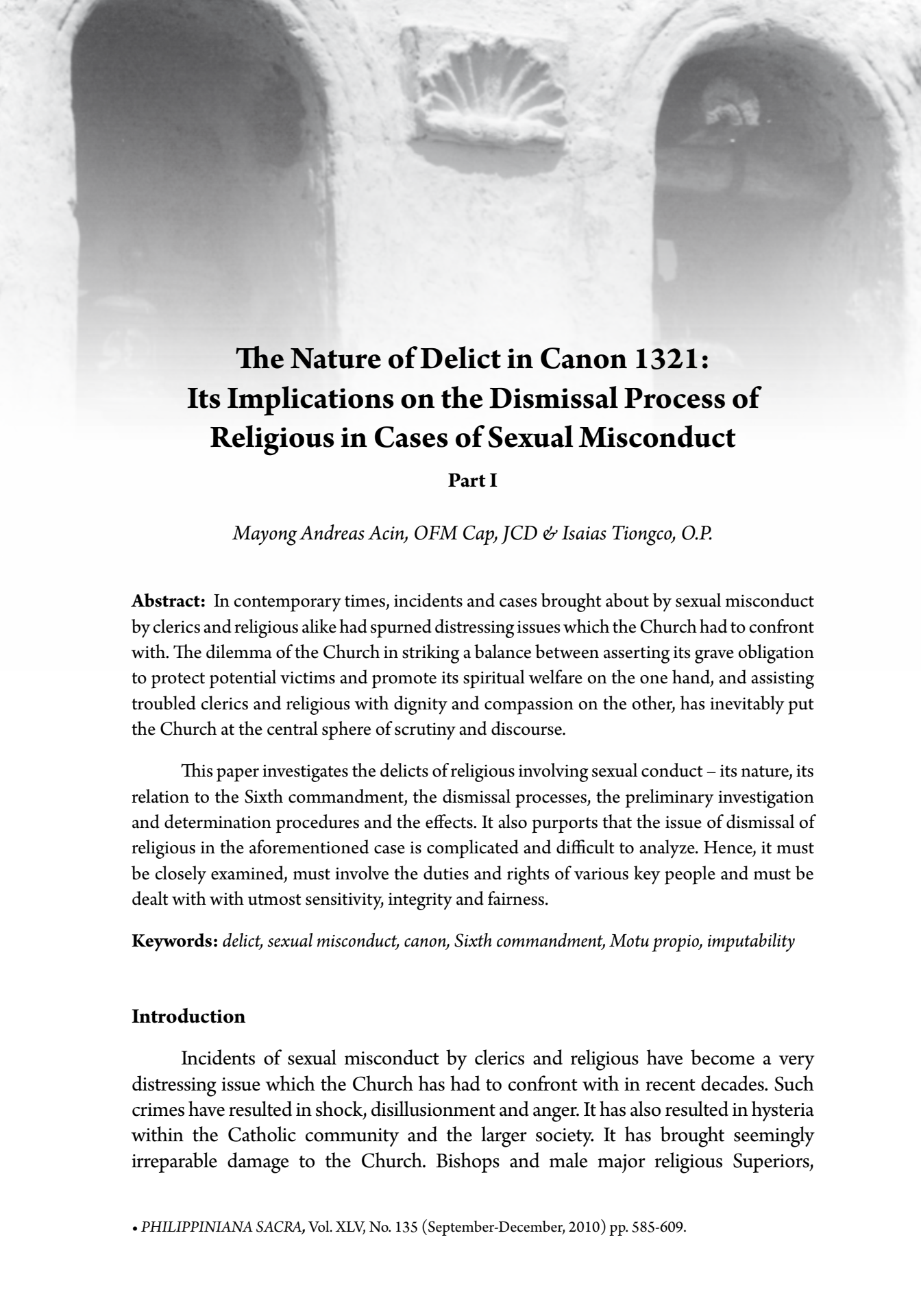




The Nature of Delict in Canon 1321: Its Implications on the Dismissal Process of Religious in Cases of Sexual Misconduct

Part I

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Abstract: In contemporary times, incidents and cases brought about by sexual misconduct by clerics and religious alike had spurned distressing issues which the Church had to confront with. The dilemma of the Church in striking a balance between asserting its grave obligation to protect potential victims and promote its spiritual welfare on the one hand, and assisting troubled clerics and religious with dignity and compassion on the other, has inevitably put the Church at the central sphere of scrutiny and discourse.

This paper investigates the delicts of religious involving sexual conduct – its nature, its relation to the Sixth commandment, the dismissal processes, the preliminary investigation and determination procedures and the effects. It also purports that the issue of dismissal of religious in the aforementioned case is complicated and difficult to analyze. Hence, it must be closely examined, must involve the duties and rights of various key people and must be dealt with with utmost sensitivity, integrity and fairness.

Keywords: *delict, sexual misconduct, canon, Sixth commandment, Motu proprio, imputability*

Introduction

Incidents of sexual misconduct by clerics and religious have become a very distressing issue which the Church has had to confront with in recent decades. Such crimes have resulted in shock, disillusionment and anger. It has also resulted in hysteria within the Catholic community and the larger society. It has brought seemingly irreparable damage to the Church. Bishops and male major religious Superiors,

especially in English-speaking countries, have suffered and are suffering greatly because of the crisis of the sexual misconduct by clerics and religious. They suffer because of the inordinate amount of time and energy taken by these cases. In their desperation, they have been prone to take unjust measures toward those who have been accused, even before the accusations have been proven.¹ The anger and despair which arise from violations of this area of sexual misconduct can cause reactions and responses which are not always appropriate and often lack any sense of justice and compassion.

How do Bishops and Major Superiors balance their grave obligation in protecting potential victims and promote the spiritual welfare of the Church, while at the same time assisting troubled clerics and religious with dignity and compassion? How do they act responsibly in preventing harm to the faithful while respecting the rights of clerics and religious accused of sexual misconduct?

Clerics and religious are subject to penalties in the area of sexual misconduct because they are obliged to observe perfect and perpetual continence. Because of this commitment, sexual misconduct on their part can be a source of great scandal to Catholics and non-Catholics alike. Clerics are bound to “observe perfect and perpetual continence for the sake of the kingdom of heaven and therefore are obliged to observe celibacy...”²

The 1983 Code of Canon Law sets standards for sexual conduct of religious and clerics, identifies those responsible to see that these standards are observed, and provides procedures to enforce these standards and certain infractions. Some general provisions of penal law have special application on them. Unfortunately, there is no perfect plan in dealing with these problems that will protect the Church from all liability claims, show compassion for victims, rehabilitate all offenders, and allow the faithful to live “happily ever after.”³

While the Church’s administrative and penal process cannot resolve every problem which arises from these crimes, it does provide a method and approach for investigating allegations, of addressing the damage and ruin which such actions have brought into people’s lives, and of punishing when appropriate, those who are responsible for these offenses. Without this process, the approach to this problem would sooner result to anarchy. In such cases, there is no justice; there are only victims.

¹ Cf. W. Woestman, “Sexual Abuse of A Minor as An Irregularity for Orders. A Magic Bullet?”, in *Studia Canonica*, Vol. 40, St. Paul University, Ottawa 2006, p. 41.

² *Codex Iuris Canonici, Auctoritate Ioannis Pauli PP. II Promulgatus*, Libreria Editrice Vaticana, 1983, Canon 277, §1. English Translation prepared by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society. Henceforth: *CIC/1983*.

³ Cf. J.Beal, “Doing What One Can: Canon Law and Clerical Sexual Misconduct”, in *The Jurist*, Vol. 52, The Catholic University of America, Washington 1992, p. 643.

Canon 1321, §1 provides 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 of culpability.” Similarly, no one should be accused and exposed to the possibility of punishment unless he or she is a proper subject of ecclesiastical penalties and unless there is solid evidence both of the commission of a canonical delict and of the person’s culpability. The violation of the law must be external. Thus, a religious’ sexual misconduct cannot be considered a crime unless it results in some external action which violates a law or precept. As an external violation, it must be *permanens* or “persists” and *cum scandalo* or “with scandal.”

I. DELICTS OF RELIGIOUS INVOLVING SEXUAL MISCONDUCT

Delictum is taken from the word *delinquere* (*de* and *linquere*, to forsake, to leave, to omit). It means an offence in the general sense. However, by common usage the term is restricted to a public offence or crime against the juridical order or law.⁴ In ecclesiastical law, terminology referring to offenses is as varied as it was, for example, in Roman law. Terms such as *crimen*, *delictum*, *maleficium*, and *facinus* are frequent in classical law. *Delictum* is regularly used in the 1917 Code. Canon 2195, §1 of the 1917 Code defined *delictum* as an external and morally imputable violation of a law to which was attached at least an indeterminate canonical sanction. It means that an external and morally imputable violation of a law canonically sanctioned constitutes a delict. One may sin gravely by a merely internal violation of a law, but one does not commit a delict unless the violation is external or placed in such a way that the act could be perceived by another if present. Grave sin may be committed by the violation of a law, but a delict is committed only by the external violation of a law to which a penalty is attached.

The term *delictum* is also used but not defined as such in the 1983 Code. Inspired by canon 2195 of the 1917 Code and the terms used in canon 1321 of the 1983 Code, an offense may be defined as “an external and gravely imputable violation of a norm that carries a canonical penalty.”⁵ The definition includes the three elements considered to constitute an offense: objective, subjective, and legal elements. “An external violation of a law provided the objective element; moral imputability constituted the subjective element; and legal mention or recognition formed the legal element.”⁶ It is clear that no one is punished unless there is an external or perceivable violation of a law provable in the external forum. However, the violation need not be public, or known to many people. Certain legal violations

⁴ Cf. C. Augustine, *A Commentary on the New Code of Canon Law*, Vol. VIII, B. Herder Book Co., London 1931, p. 10.

⁵ Á. Marzoa, “Commentary to canon 1321”, in Á. Marzoa et al (ed), *Op. Cit.*, p. 263.

⁶ E. Donough, “A Gloss on Canon 1321”, in *Studia Canonica*, Vol. 21, St. Paul University, Ottawa 1987, p. 389.

may be occult, or known only to a few people. There must also be grave juridical imputability, rooted primarily in a free and deliberate intent to violate the law or secondarily in culpable negligence. The violation must normally be expressly sanctioned in universal or particular law.

A. Delicts of Religious Against the Sixth Commandment

A. 1 . Concubinage

The offense of a cleric living in concubinage involves “a stable, perduring and somewhat permanent relationship with a woman, single or married,”⁷ wherein sexual congress is a constitutive element, irrespective of whether this relationship is maintained in the residence of the cleric or somewhere else. The relationship may either be public or occult and therefore may or may not cause scandal. The offense of concubinage does not require that the cleric and woman live together under the same roof or their relationship be known publicly. “Maintaining a stable sexual relationship with the person of the opposite sex constitute concubinage.”⁸

Because canon 1395, §1 speaks of clerics, it is sometimes thought that it does not apply to religious. However, the inclusion of the delict in canon 695, clearly applies to all religious. As Velasio De Paolis observes, “one may say that the canon is poorly written, but this does not deny the fact that it applies to all.”⁹

In cases involving canon 1395, it is clear from the wording that not only concubinage, in the strict sense of actually living with another in violation of the vow of chastity, but also a consistent sexual relationship with another which causes scandal, requires the religious’ dismissal. It is a habitual, not a passing relationship; it is external and scandalous; it is a sexual relationship. 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. It could also be an on-going homosexual relationship. Whether heterosexual or homosexual, such a relationship is a violation not only of the sixth commandment, but also the religious vow of chastity.¹⁰

In the cases covered in canon 1395, §1, the appropriate penalty is preceptive *ferendae sententiae* suspension, which is a censure or medicinal penalty whose purpose is to correct such abuses and return the cleric to a life of celibate chastity. If, after warnings, however, the cleric persists in the offense without any indication of repentance, other penalties may be added at the discretion of the Superior, including

⁷ Catholic Bishops’ Conference of the Philippines (CBCP), *Pastoral Guidelines on Sexual Abuses and Misconduct by the Clergy*, CBCP, Manila 2005, p. 6.

⁸ *Ibid.*

⁹ V. De Paolis, *La Vita Consacrata...*, p. 387.

¹⁰ Cf. S. Holland, “Canonical Dismissal...”, p. 66.

dismissal from the clerical state. Members of religious institutes, secular institutes and societies of apostolic life are to be dismissed from their institutes if they are guilty of an offense of this kind by virtue of canon 695, §1, which contains an express reference to canon 1395.

A.2. Other External Sins against the Sixth Commandment

Canon 1395, §1 also considers external acts against the sixth commandment as crimes because of the enduring scandalous situation caused by the external sin. The delict is defined by the following words: “[...] who persists with scandal in another external sin against the sixth commandment of the Decalog [...]”. It is necessary to explain the expression *in alio peccato* (“in another sin”). This expression seems to imply those sins against the sixth commandment of the Decalogue, which are, however, not concubinage: compare, for example, incest, adultery, homosexuality. This would include a cleric or religious who openly cohabits with a homosexual partner or engages in an ongoing course of scandalous homosexual or heterosexual activities comparable to cohabitation.¹¹

A cleric guilty of these offenses is suspended according to the stipulations of canon 1333, §1. After having been admonished, he manifests contumacy, the competent authority may add penalties and if circumstances demand it, may impose dismissal from the clerical state. The latter penalty can be imposed only by the judgment of “a collegiate tribunal of three judges”¹² or administratively only by the Holy See. Those who belong to religious institutes, secular institutes and societies of apostolic life are to be dismissed from their respective institutes if they are found guilty of crimes of this kind. The procedure indicated in canon 695, §2 is to be observed. If they are clerics, canon 1395 is to be implemented.

A.3. Some Qualified Offenses against the Sixth Commandment

Canon 1395, §2 addresses some offenses against the sixth commandments committed by a cleric with some aggravating circumstances: a) a sexual offense against another perpetrated by the use of force or threats such as an act of rape against a woman or a man, even if the victim is not a minor; b) a sexual offense committed in some sort of public manner such as an act of exposure or lewd conduct in a public place, even if no minor is involved (e.g., between consenting adults); c) a sexual offense with a young man or young woman who is not yet

¹¹ Cf. Decision of the Apostolic Signatura, *coram Coccopalmerio*, 22 June 2002, Bogottá, Colombia, in Pio Vito Pinto, *Diritto amministrativo canonico*, EDB, Bologna 2006. English translation by A. Mendonça, in *Studies in Church Law*, Vol. 3, The Center of Canon Law Studies, St. Peter's Pontifical Institute, Bangalore 2007, p. 358.

¹² *Canon 1425, §1, 2º.*

sixteen years of age,¹³ even if committed secretly and without any physical force or threats.¹⁴

The offender of these sexual offenses may be punished by a censure such as suspension. The difference from paragraph 1 of canon 1395, however, is that, even without persistence, such acts are punishable by expiatory penalties, including dismissal from the clerical state if the circumstances warrant it. Of course, the individual facts must be carefully weighed to determine whether the delict in question rises to the level that calls for a permanent expiatory penalty.¹⁵

A religious or a member of a secular institute or a member of a society of apostolic life found guilty of the offences contained in canon 1395, §§ 1 and 2 will be dismissed from the institute unless “for the offenses mentioned in canon 1395, §2 the superior judges that dismissal is not definitively necessary and that sufficient provision can be made in some other way for the amendment of the member, the restoration of justice and the reparation of the scandal.”¹⁶

A.4. Delicts against Minors

Canon 1395, §2 speaks of a delict with a minor under 16: *cum minore infra aetatem sedecim annorum*. The *Motu Proprio Sacramentorum sanctitatis tutela* speaks of delict with a minor under 18: *delictum [...] cum minore infra aetatem duodeviginti annorum*. Therefore the classification of the delict becomes more complex. Some experts, in fact, speak not only of *pedophilia* (the sexual attraction to prepubescent children) but also of *ephebophilia* (the sexual attraction to adolescents), of homosexuality (the sexual attraction to adults of the same sex), and of heterosexuality (the sexual attraction to adults of the other sex). Between 16 and 18 years of age, some “minors” may indeed be perceived as objects of homosexual or heterosexual attraction. Some civil jurisdictions consider a person of 16 years as capable of giving consent for sexual activity (whether heterosexual or homosexual).¹⁷

The *Motu Proprio Sacramentorum sanctitatis tutela* however, stigmatizes as a delict every violation of the sixth commandment with a minor under 18 years of age whether based on *pedophilia*, *ephebophilia*, homosexuality or heterosexuality. The

¹³ “Below sixteen” has been raised to “below eighteen” for all acts committed on or after April 25, 1994.

¹⁴ Cf. J.A. Alesandro, “Dismissal from the Clerical State in Cases of Sexual Misconduct: Recent Derogations,” in *Proceedings of the Fifty-Sixth Annual Convention*, Canon Law Society of America, The Catholic University of America: Washington 1994, p. 41.

¹⁵ Cf. *Ibid.*, pp. 41-42.

¹⁶ Canon 695, §1

¹⁷ Cf. 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*, Wilson & Lafleur Ltée, Canada 2005, pp. 238-239.

following are some points elaborated by the jurisprudence of the Congregation for the Doctrine of the Faith¹⁸ on the matter:

a) The law refers to “a sin against the Sixth Commandment with a minor.” This does not mean that only physical contact falls under the scope of the law. Any external violation of the Sixth Commandment involving a minor is relevant, and this includes indirect or non-contact abuse (such as exposure of minors to pornography). The recent praxis of the Congregation has established that the downloading, as opposed to the simple browsing, of pedophile pornography from the internet falls under the *delictum gravius*.

b) Another matter concerns the age of the victim. The recent legislation puts this at “under 18 years.” This follows a number of civil laws. It has to be pointed out, however, that this innovation does complicate the question of discernment concerning the nature and gravity of the offense. It is easy to understand that there is a very important distinction between the case of a male cleric or religious who has intercourse with a girl of 12 and the case of a cleric or religious who has intercourse with a girl who is 17 years 10 months old and who was very much in love with him. Both cases fall under the letter of the law, since both are grave sins against the Sixth Commandment committed with a person under 18, but one understands that they will have to be tackled differently. In the second case it would be difficult to state in honesty that the cleric or religious concerned is a threat to minors.

c) The law mentions only clerics but this obviously includes religious who are in Holy Orders, whether they be deacons or priests. The question of including religious who are not clerics under the law is at the moment under discussion. According to Charles J. Scicluna, The Promoter of Justice, Congregation for the Doctrine of Faith, in such grave matters no distinction should be made.

d) Art. 5 of the Motu Proprio sets the statute of limitation for these crimes at 10 years which run from the 18th birthday of the victim. The constant tradition of Church law was to exclude *delicta graviora* from prescription or the statute of limitation. On November 7, 2002, Pope John Paul II granted the Congregation for the Doctrine of the Faith the faculty to derogate from prescription on a case by case basis. There is tendency supporting a return to the previous norm, which simply stated that *graviora delicta* were not subject to prescription.

This particular offense is reserved to the Congregation for the Doctrine of Faith. If the preliminary investigation establishes that the accusation against the cleric or religious has at least the semblance of truth (*notitiam saltem verisimilem*),

¹⁸ Cf. C. J. Scicluna, “Sexual Abuse of Children and Young People by Catholic Priests and Religious: Description of the Problem from a Church Perspective,” in Pontificia Academia Pro Vita, *Op. cit.*, pp. 19-20.

the acts of the preliminary investigation, together with the *votum* of the Bishop or Supreme Moderator will be forwarded to the Congregation for the Doctrine of Faith with a request for further directions. The Congregation for the Doctrine of Faith can instruct the Ordinary to process the case in his proper tribunal according to the appropriate norms, or due to certain circumstances, can opt to handle the case. The right of appeal on the part of the accused or of the Promoter of Justice may be exercised against the decision of first instance before the Supreme Tribunal of the same Congregation. All the acts then of the case are to be submitted *ex officio* to the Congregation for the Doctrine of Faith.¹⁹

B. Other Delicts of Religious which are Connected with Sexual Misconduct

B.1. Solicitation in Sacramental Confession

This offense was established in canon 2368 of the 1917 Code, which itself went back to the Constitution *Sacramentum Poenitentiae* of Benedict XIV, dated June 1, 1741, a document that the 1917 Code included as an appendix and admitted as an integral part of the Code. The 1983 Code does not refer to Benedict's constitution. Jurisdiction over the subject matter of canon 1387 falls to the Congregation for the Doctrine of the Faith.²⁰

The offense is designed to punish any solicitation to commit a sin against the sixth commandment during the sacrament of penance. In the context of penal law, the reservation of the delict of solicitation in sacramental confession to the Congregation for the Doctrine of the Faith has two meanings. On the one hand, what is reserved is the investigation and prosecution of certain delicts, most recently those referred to in *Sacramentorum sanctitatis tutela* and specified in the complementary norms subsequently issued by the Congregation for the Doctrine of the Faith, but previously those stipulated in the 1962 Instruction *Crimen sollicitationis* and elsewhere in the law. This reservation does not preclude lower level authorities such as diocesan bishops from investigating and prosecuting these "reserved" offenses, but, when they do so, they act not in their own names but by special delegation from and according to special norms issued by the Congregation.²¹

The reservation of these delicts to the Congregation also entails: 1) the right of the Congregation to receive complaints arising from these delicts directly

¹⁹ Cf. C.J. Scicluna, "The Procedure and Praxis . . . , pp. 241-242.

²⁰ Cf. *Sacramentorum sanctitatis tutela*, Substantive Norms, Art. 3, 2°

²¹ Sacred Congregation of the Holy Office, *Instructio: De Modo Procedendi in Causis de Crimine Sollicitationis*, §2, Vatican City 1962, p. 5.

and to prosecute them itself; 2) the obligation of local authorities to inform the Congregation of their receipt of a denunciation for one of these reserved delicts and to keep is apprised of the development of the case until its conclusion; 3) the exclusive competence of the Congregation to hear appeals and recourses against decisions of the lower tribunals in these cases; and 4) all officials involved in investigating and prosecuting these delicts are bound by the “pontifical secret.”²²

On the other hand, what is also reserved to the Congregation is the authority to remit the penalties imposed or incurred as a result of the commission of one of these reserved delicts. For example, according to both the 1917 and 1983 Codes, confessors who directly violate the sacramental seal incur *latae sententiae* the censure of excommunication, whose remission is of the Faith,²³ and, even if they are imposed by authorities below the level of the Holy See, *ferendae sententiae* penalties for reserved delicts can be remitted only by the Congregation.²⁴

It is important to note that the *Motu Proprio Sacramentorum sanctitatis tutela* limits the *delictum gravius* to solicitation which is directed to sinning with the confessor himself (*quae ad peccandum cum ipso confessario dirigitur*), while the classic definition of *sollicitatio* in the Code includes also the solicitation to sin against the sixth commandment with a third person. The jurisprudence concerning this delict has evolved substantially, in part because in the 1917 Code an obligation existed, under pain of excommunication, to denounce the soliciting confessor. Solicitation also includes the explicit encouragement to commit impure acts. Some cases of abusive behavior show that some priests have used the sacrament of penance to identify their victims and to make their first contact with them. This behavior could easily be included under *sollicitatio inchoata* in which the confessor begins an apparently innocent conversation leading to a meeting with the penitent outside of confession where sexual or indecent behavior occurs.²⁵

The penalties provided are all *ferendae sententiae*, ranging from suspension to dismissal from the clerical state. Depending upon its gravity, the offense may also be punished with other prohibitions and deprivations. Except for suspension, the other penalties are expiatory. Expulsion from the clerical state requires a judicial trial with a collegiate tribunal of three judges (canon 1425, §1, 2^o) because it is a perpetual penalty (canon 1342, §2).²⁶

²² Cf. J.P. Beal, “The 1962 Instruction *Crimen sollicitationis*: Caught Red-Handed or Handed A Red Herring?,” in *Studia Canonica*, Vol. 41, St. Paul University, Ottawa 2007, p. 203.

²³ Canon 1388, §1 of the 1983 Code and canon 2369, §1 of 1917 Code, where the remission of the penalty is reserved to the Holy Office “specialissimo modo.”

²⁴ *Crimen Sollicitationis*, §65, p. 21.

²⁵ Cf. *Sacramentorum sanctitatis tutela*, art. 3, 2^o.

²⁶ Cf. V.D. Paolis, “Commentary to canon 1387,” in Á. Marzoa et al (ed), *Op. cit.*, p. 524.

In this general connection, canon 982 binds one making a false denunciation of solicitation in confession to a sin against the sixth commandment of the Decalogue “is not to be absolved unless that person has first formally withdrawn the false denunciation and is prepared to make good whatever harm may have been done.” The sin that the canon contemplates is: a) false denunciation: lacking a true basis, slanderous; b) of “solicitation:” in accordance with canon 1387; c) “before the ecclesiastical authority:” Ordinaries, ecclesiastical tribunals, Holy See. It has to be a strict denunciation, not a mere consultation with such authorities about a possible our doubtful solicitation; nor defamation or slander before other people - even ecclesiastical authorities - that did not constitute a formal denunciation; d) against a priest who is innocent of such solicitation.²⁷

B.2. Sacramental Absolution of an Accomplice

Canon 977 states: “The absolution of a partner in a sin against the sixth commandment of the Decalogue is invalid, except in danger of death.” The legislator restrictively sanctions that except in danger of death, the absolution of a partner in a sin against the sixth commandment of the Decalogue is invalid.

The *ratio legis* is multiple: a) the sacrosanct respect and the peculiar juridical protection that this sacrament requires; b) the common ecclesiastical good; c) the spiritual good of the very subjects (priest-penitent). Therefore, the law invalidates such absolution, and in the case of such an absolution, incapacitates the priest. If such an absolution were valid, this sacrament of salvation and sincere conversion could result in an opportunity to and danger of reiterating or prolonging certain situations of sin, which would be entirely despicable, and an abominable profanation of this sacrament.²⁸

Canon 1378, §1 sanctions anyone who – except in danger of death – attempts absolution of such partner “incurs a *latae sententiae* excommunication reserved to the Apostolic See.” The dicastery of jurisdiction is the Congregation for the Doctrine of the Faith. In keeping with canon 1321, §§1-2, there must be malice or culpability on the part of the priest before any penalty can be incurred.²⁹

Absolution of a partner “*in periculo mortis*” is not only valid and lawful, but in virtue of canon 986, §2 it may be classified as obligatory because there is no other priest who may impart it, or because the penitent clearly requested it of the priest.³⁰

²⁷ Cf. F. Loza, “Commentary to canon 982,” in Á. Marzoa et al (ed), *Op. cit.*, p. 813.

²⁸ Cf. F. Loza, “Commentary to canon 977,” in Á. Marzoa et al (ed), *Op. cit.*, p. 798.

²⁹ Cf. V.D. Paolis, “Commentary to canon 1378,” in Á. Marzoa et al (ed), *Op. cit.*, p. 499.

³⁰ Cf. F. Loza, “Commentary to canon 977,” in Á. Marzoa et al (ed), *Op. cit.*, p. 799.

B.3. Procured Abortion

A violation by a religious man or woman of the sixth commandment may result in pregnancy. But to cover up this fault and to maintain his or her good standing before the community, he or she might resort to procured abortion.

In commenting canon 1398 of the 1983 Code, Green defines the delict of abortion as “to eject a non-viable fetus from the mother’s womb.”³¹ De Paolis defines abortion as “the ejection of a living but non-viable fetus.”³² On 19 January 1988 the Pontifical Council for the Interpretation of Legislative Texts issued an authentic interpretation, published with pontifical approval on 23 May 1988, authoritatively stating that abortion is to be not only as the ejection of an immature fetus, but also as the killing of the same fetus in any manner and at any time from the moment of conception.³³

Canon 1398 states: “A person who actually procures an abortion incurs a *latae sententiae* excommunication.” The penalty provided by the canon is *latae sententiae* excommunication. Therefore, the penalty is incurred automatically when the act that constitutes the offense is committed. When an individual intentionally violates the law which prohibits the procurement of an abortion, she is excommunicated *latae sententiae* according to the norm of canon 1398.

It is necessary to recall that a procured abortion involves not only a woman, but the medical personnel performing the abortion, and may extend also to one who arranges, finances and/or pressures the woman to have an abortion.

Canon 1329, §2 states:

“In the case of a *latae sententiae* penalty attached to an offence, accomplices, even though not mentioned in the law or precept, incur the same penalty if, without their assistance, the crime would not have been committed, and if the penalty is of such a nature as to be able to affect them; otherwise, they can be punished with *ferendae sententiae* penalties.”

³¹ T. Green, “Commentary to Canon 1398,” in J.P. Beal et al (ed.), *Op. cit.*, p. 1603.

³² V. De Paolis, *De Sanctionibus...*, p. 119. It says that “Abortus autem generatim definitur: ejection foetus vivi sed non vitalis.”

³³ AAS 80 (1988), p. 1818: “Patres Pontificiae Commissionis Codici Iuris Canonici Authentice Interpretando propositis in plenario coetu diei 19 Ianuarii 1988 dubiis, quae sequuntur, respondendum esse censuerunt ut infra:

D. Utrum abortus, de quo in can. 1398, intellegatur tantum de eiectione fetus immaturi, an etiam de eiusdem fetus occisione quocumque modo et quocumque tempore a momento conceptionis procuretur.

R. Negative ad primam partem; affirmative ad secundam.”

According to this canon, such accomplices are equal to those principal agents who have successfully procured an abortion. Huser describes that effective co-operators in abortion may be those who “by counsel, material assistance, or by any other means induce or concur in the commission of the crime, provided however that their cooperation was necessary for the commission of the abortion in question.”³⁴ In the procurement of an abortion, all principal agents and all those necessary cooperators and only those persons, incur the automatic excommunication of canon 1398. Others involved before or after the abortion may be subject to otherwise unspecified *ferendae sententiae* penalties. In assessing such penalties, the penal authority must consider various factors affecting imputability, e.g., age, ignorance, fear, etc.³⁵

The words of canon 695 “must be dismissed”³⁶ and “the delict of canon 1398” would only apply when the strict meaning and interpretation of these words are fulfilled. The canon contains two essential elements. In this particular procedure, the Major Superior must prove 1) the fact that a procured abortion has indeed successfully been accomplished and 2) the imputability of the member as a principal or necessary accomplice.

In considering the guilt of a member of a religious institute, the principle holds that those canons that effect imputability and excommunication (canons 1322-1326) apply to the imputability of a member who has procured an abortion and is threatened with dismissal. Particular attention should be drawn to the concepts of force and fear, grave inconvenience and necessity. It should also be remembered that the offense cannot have been committed over “five years”³⁷ ago.

B.4. Paternity

The matter of clerical or religious paternity is usually a result of situations mentioned in canon 1395, i.e. living in concubinage, remaining in an external sin against the sixth commandment or sexual offense against minor below 18 years of age. It is important to know that the crime of concubinage does not require that the priest or religious and the woman live together under the same roof or that their relation is public; what is needed is the stable sexual relation with a person of the opposite sex. They can live together or not (for instance the priest or religious meets regularly with the woman in another town). It may be public or not (is known or not by the parishioners) and may or may not provoke outrage (some people could accept that situation). The matter of clerical or religious paternity is “the most concrete

³⁴ R. J. Huser, *Op. cit.*, p. 145.

³⁵ Cf. J. Coriden, “Canonical Penalty for Abortion...,” pp. 652-658.

³⁶ This is taken from the English translation of the Code of Canon Law prepared by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society.

³⁷ *Canon 1362, §1, 2º.*

and forceful evidence of incontinence – even without the least violating the law of celibacy.”³⁸

The presence of a child born of a cleric or religious and a woman is the strongest proof of his violation of the sixth commandment. In fact, among the acts against the sixth commandment, the law considers as a crime only those in which the following is present: a) a certain stability in sexual relations with a person or persons of the opposite sex; a permanent scandalous situation caused by external sins against the sixth commandment; or b) any qualified external sin against the sixth commandment, with the elements described in canon 1395, §2. The attitude of the law is to punish only the permanent violation of continence; or a qualified violation in which the victim has been forced, etc. Connected to this, there is the scandal that the situation can produce, or the scandal deriving when the crime is not punished. The concern of the law through its sanctions is to prevent the clergy or religious from becoming involved in some specific violations of continence or in stable scandalous relationships.³⁹

The situations which lead to the generation of a child can be very different among them. Having a child can be a manifestation of a moment of weakness of the cleric or religious, or the result of a long relationship with a woman, or a manifestation that the cleric or religious is a womanizer. In these cases the meaning of having a child is really different. The more number of children are sired by a cleric or religious, the assumption of concubinage becomes a practical certainty. Multiple clerical or religious paternity is not only a distinct evidence of the flagrant violation of clerical or religious continence but also a “strong argument of a certain continuum of the sexual relationship of the cleric or religious with the woman”⁴⁰ in line with the notion of concubinage. Much worse than this – perhaps even without practical cohabitation – is clerical or religious paternity by two or more women.

Canon 1395 imposes penalties that range from a mere suspension to dismissal from the clerical state. Dismissal from the clerical state is a last resort. When having had a child has led the priest to abandon the ministry and to attempt “marriage, even if only civilly,”⁴¹ the dismissal from the clerical state may be applied, if he has not reformed and continues to give scandal. If religious in perpetual vows who are not clerics attempt marriage, even if only civilly, they are subject to the *latae sententiae* penalty of interdict, a censure regulated by canon 1332.⁴²

³⁸ O.V. Cruz, *Op. cit.*, p. 102.

³⁹ Cf. L. Navarro, “A Canonical Answer to Priest-Fathers,” in *Philippine Canonical Forum*, Vol. IV (2002), pp. 208-209.

⁴⁰ O.V. Cruz, *Op. cit.*, p. 103.

⁴¹ *Canon 1394*, §1.

⁴² One who is under interdict is obliged by the prohibition of can. 1331 §1 nn. 1 and 2; if the interdict was imposed or declared, the provision of can. 1331 § 2 n. 1 is to be observed.

II . THE DISMISSAL PROCESS OF RELIGIOUS IN CASES OF SEXUAL MISCONDUCT

Dismissal is a last resort; an extraordinary sanction intended for the protection of the institute itself against the actions of religious whose behavior is directly and publicly contrary to the nature of consecrated life, especially consecrated celibacy. It is a serious action taken by competent ecclesiastical authority through which permanent departure is imposed on the erring religious.

Canon 695, §2 states:

“the Superior judges that dismissal is not absolutely necessary and that the facts and the imputability of the offence. The accusation and the evidence are then to be presented to the member, who shall be given the opportunity for defence. All the acts, signed by the major Superior and the notary, are to be forwarded, together with the written and signed replies of the member, to the supreme Moderator.”

Accordingly, the procedure in cases of obligatory dismissal of religious in cases of sexual misconduct comprises the following steps:

A. Collection of Sufficient Documentary and/ or Testimonial Evidence

The first step of the process provided in canon 695, §2, is to collect proofs of the facts and to determine imputability. It is the responsibility of the Major Superior to gather proofs regarding the facts of the offense. There must be proof of the actual fact. Without such proof, the Superior cannot move further with the process. The proofs could include deposition of the religious, witness testimony, documents, if any, and appropriate inquiries with respect to the fact of perpetration of the alleged delict.

In collecting the proofs of the facts and of imputability, the Major Superior must examine several aspects:

A.1. *Actus Reus* or External Violation (canon 1321, §1)

The violation of the law must be external. Violations of canon 1395, as with all delicts, are committed solely by external acts. No one commits a delict nor can anyone be punished canonically for an interior act, a tendency to criminal behavior, or a sin of thought or desire, no matter how serious. Thus, a religious' sexual misconduct cannot be considered a crime unless it results in some external action which violates a law or precept. Similarly, a religious' thoughts or wishes would not be considered an external violation of a law; nor would a religious' psychological condition. This

is because a delict, by its very nature, is something which disturbs Church order. As Regatillo points out, “an internal violation of law does not disturb the social order, which leaves it up to the Legislator to define what disturbs the ecclesial society, and hence what is subject to sanction.”⁴³

The action must involve the violation of a law or precept. This is the application of the principle *nullum crimen, nulla poena sine lege*, which has also been written into the civil codes of various countries. Again, this would preclude a penalty being imposed for an attitude, intention, personality disorder, etc. Thus there might be something which is seriously sinful, but if it does not violate a law, it cannot be considered to be a delict.

As an external violation, the delict of sexual misconduct must be “*permanens*” or “persists” and “*cum scandalo*” or “with scandal.” Persistence requires repetition of an act. It is a continuity of the sanctionable behavior. One single act is not sufficient, nor two; it is necessary to have a series of acts. It is *per se* not required that the person or persons with whom the act is committed be the same. It is necessary, however, that the acts themselves be in fact of the same kind, that is, precisely against the sixth commandment of the Decalogue. It is also necessary that many people, who know the person and his or her function and activity, have a negative impression, that is, they, in some way suffer harm.

A.2. Mens Rea or Human Act

Conversely, the external act alone does not suffice. It must be an action that has been committed. This is an important point to keep in mind concerning matters of sexual misconduct. In most cases, the action does not take place in isolation. There is a process that psychologists often refer to as “grooming,” by which the religious selects a victim, befriends him or her, begins isolating the person from others, establishes a “special friendship” with the person, and gains the person’s confidence. This culminates in the actual sexual relationship.

The external act must be a human act, posited with sufficient internal deliberation and freedom to be gravely imputable insofar as it results from personal malice or culpability. As a human act, the act of commission of a delict must be the product of sufficient knowledge of the nature of the delict, sufficient deliberation and sufficient internal freedom. Malice is defined in canon 2200 of the 1917 Code as the “deliberate will to violate a law, and it is countered on the part of the intellect by a lack of knowledge and on the part of the will by a lack of freedom.” It does not require an intention to harm, just an intention to violate a law. Negligence is concerned with not applying due diligence to a situation.

⁴³ P. Lagges, “The Penal Process: The Preliminary Investigation in light of the Essential Norms of the United States,” in *Studia Canonica* (2004), p. 373.

Unless a specific law determines otherwise, one may not be punished canonically for an act of negligence since negligence is, by definition, non-deliberate. Furthermore, when the accused has committed a delict with sufficiently grave imputability but is shown to have lacked full imputability, the diminution in imputability represents a basis for mitigation of the penalty.

A.3. Imputability

Canon 1321, §3 notes that when the external violation has, in fact, occurred, “imputability is presumed, unless it appears otherwise.” This means not simply that the person performed this action, but that he or she was responsible for what he or she did. The only one whose serious imputability has been proven may be punished according to the law.

De Paolis speaks of imputability in terms of the individual’s responsibility for the act, morally and legally. This requires both the understanding and the will which enable a free and human act.⁴⁴ The Major Superior is to ascertain the imputability of the religious bearing in mind the mitigating circumstances of canons 1322-1326.

Canons 1322 and 1323 indicate what sort of situations lessen imputability or remove it altogether. Canon 1322 deals with those who are incapable of committing a delict. It states, “Those who habitually lack the use of reason are considered to be incapable of a delict, even if they violated a law or precept while seemingly sane.” This canon is based upon the prescription of canon 99 which states that those who habitually lack the use of reason are considered *non sui compos* (not responsible for oneself) and is equated with infants. Since such a person cannot place a juridic act, he or she cannot violate an ecclesiastical law specifying a delict.

It should be noted that canon 1322 refers to those who “habitually lack the use of reason,” not those who have a psychological disorder which is considered habitual or enduring over time. The disorder must be of such a magnitude that it habitually prevents the person from acting with reason. In the case of religious, if he or she is found habitually to lack the use of reason after temporary vows, cannot be dismissed from the institute. The Code states: “If, however, a religious becomes insane during the period of temporary vows, even though unable to make a new profession, the religious cannot be dismissed from the institute.”⁴⁵

Canon 1323 established certain situations in which a person is capable of committing a delict, but who cannot be punished at all. These are: a) a person under the age of sixteen; b) a person who, without negligence, was ignorant of violating a

⁴⁴ Cf. V. De Paolis, *La Vita Consacrata ...*, p. 392.

⁴⁵ Canon 698, §3.

law or precept; c) a person who, without negligence, inadvertently violated a law or precept; d) a person who, without negligence, was in error about violating a law or precept; e) a person who acted due to physical force; (f) a person whose act was a chance occurrence that the person could not foresee; (g) a person whose act was a chance occurrence that was foreseen, but could not have been avoided; (h) a person who acted coerced by grave fear, even if only relatively grave; (i) a person who acted due to necessity, unless the act was intrinsically evil or tended to the harm of souls; (j) a person who acted due to grave inconvenience, unless the act was intrinsically evil or tended to the harm of souls; (k) a person who acted against an unjust aggressor with due moderation in self-defense or defense of another; (l) a person who at the moment lacked the use of reason, outside the case of intentional drunkenness or other disturbance; (m) a person who, without negligence, thought this was a case of grave fear; (n) a person who, without negligence, thought that this was a matter of due necessity; (o) a person who, without negligence, thought this was a matter of grave inconvenience; and (p) a person thought he or she was acting with due moderation against an unjust aggressor.

In cases of religious sexual misconduct, it is clear that some of these conditions could not apply. For example, since it deals with a religious, it always deals with a person who has already completed the sixteenth year of age. There are other provisions in canon 1323 that are obviously not applicable to the matter of sexual misconduct. For example, it could not be said that the religious acted out of fear, necessity, or grave inconvenience, especially since the action is intrinsically evil and tends toward the harm of souls. Likewise, it could not be claimed that the religious acted in self-defense or in the defense of another or felt that he or she was acting out of fear, necessity, grave inconvenience, in self-defense or in the defense of another.

There are several sections of canon 1323, however, that might possibly enter into the picture. For example, since canon 1323, 2^o exempts a person from a penalty who was ignorant of violating a law or precept, some accused religious have maintained that since their victims were older than minors, they did not believe they were in violation of the law. At other times, accused religious have maintained that their actions could not have violated the law since they were not contrary to the sixth commandment of the Decalogue. Such religious maintain that the relationship was consensual between them, was not intended to be sexual, or was simply educational for the minor.

On the other hand, an action which involved genital touching may have occurred in virtue of “a chance occurrence which the person could not foresee, or if foreseen could not avoid.”⁴⁶ In some cases, religious have been accused of touching minors improperly in pulling them out of deep water or out of the way of danger,

⁴⁶ *Canon 1323, 3^o*

lifting them up after a fall, or restraining them from injuring themselves. Canon 1323, 3° foresees such chance occurrences happening and provides that no penalty can be imposed for actions which are mere accidents, since they lack the essential element of intentionality.

Canon 1324 indicates situations in which a penalty must be tempered or a penance substituted. A penalty must be tempered or a penance substituted if the delict was committed by: (a) person who had only the imperfect use of reason; (b) a person who lacked the use of reason at the time because of culpable drunkenness; (c) a person who lacked the use of reason at the time because of some other culpable mental disturbance; (d) a person whose heat of passion hindered the ability to deliberate and will, provided that the passion had not been stimulated or fostered voluntarily; (e) a person between the ages of sixteen or eighteen; (f) a person coerced by even relatively grave fear, even if the action itself was intrinsically evil or tended to the harm of souls; (g) a person who acted due to necessity, even if the action itself was intrinsically evil or tended to the harm of souls; (h) a person who acted out of grave convenience, even if the action itself was intrinsically evil or tended to the harm of souls; (i) a person who acted without due moderation against an unjust aggressor in self-defense or defense of another; (j) a person who acted when unjustly and gravely provoked by someone; (k) a person who due to culpable error thought he or she was being coerced by fear; (l) a person who due to culpable error thought he or she was acting due to necessity; (m) a person who due to culpable error thought he or she was acting due to grave inconvenience; (n) a person who without negligence did not know a penalty was attached to a law or precept; (o) a person who acted with grave, but not full, imputability.

The accused religious bears the burden of proof to overturn the presumption of malice or imputability. In dealing with persons who have sexual contact with children, for example, it follows that input from medical experts is necessary to determine if their disorder was such that it affected the will to the extent that imputability is either removed or diminished. Those who wish to impose penalties have to listen to medical science in this regard. The older presumptions, that any sexual act is a matter of the will have generally given way to evidence to the contrary. This evidence has shown that in situations involving a disorder, the person has a seriously diminished ability to control his or her actions.

When considering the question of imputability in the context of a penal process, an important starting point must be the presumption of law found in canon 1321, §3, which states, “where there has been an external violation, imputability is presumed, unless it appears otherwise.” This presumption of law places the entire issue of diminished imputability directly in the hands of the defense. It is not necessary nor is it appropriate for the ordinary to seek a psychological assessment as a means of

demonstrating that the accused acted with grave imputability: the presumption of law absolves the ordinary from the burden of proof regarding this question.

If the accused intends to argue that he or she was lacking grave imputability due to the presence of a mental disorder or other difficulty, the burden of proof falls to the defense. Moreover, even if the accused were to have freely submitted to a psychological assessment apart from the penal process and released the report to the ordinary, it appears that no information from this assessment could be used by the ordinary in a penal process, a conclusion which appears to be consistent with the protection afforded an accused against self-incrimination in canon 1728, §2.⁴⁷

As with canon 1323, there are certain situations which cannot apply to clerical or religious sexual abuse of a minor. Since the law refers to the delict by a religious cleric, it can be presumed that someone is not talking about a person between the ages of sixteen and eighteen. Similarly, it would not be possible to argue that the religious or the cleric was forced through grave fear, necessity, or serious inconvenience to commit the offense; or that it was committed against an aggressor out of self-defense or in defense of another, although there are some who might argue that the victim actually forced the religious or cleric to commit the action of provoked the action. Similarly, it would be difficult to imagine that someone did not know of the existence of a law prohibiting clerical or religious sexual abuse of a minor.

Canon 1325 indicates things that cannot be used in arguing against penalties that are prescribed in the law: (a) ignorance (crass, supine, or affected); (b) drunkenness or similar mental disturbances that are deliberately induced in order to commit or excuse the offense; and (c) passion which is deliberately aroused or fostered. This canon holds the person who commits an action to a high degree of responsibility for his actions, and does not allow for excusing causes which are more along the line of rationalizations.

Canon 1326, §1, 1° allows a more severe penalty to be imposed on a person who continues offensive behavior even after being penalized. In this case, the offender is seen to be acting in bad faith. The scope of this canon does not require that the person has committed the same delict over again, although this would be within the scope of the canon. All that is required for a more severe penalty to be applied is that the person's behavior continues to offend the fabric of the community. The focus of the canon is rather on the person, not the offense. The purpose of penalties in the Church is to reform the offender, repair scandal, and restore justice. If the offender continues behavior which causes disharmony in the community or which works against reconciliation, it prevents the penalty from having its proper effect. Therefore,

⁴⁷ Canon 1728, §2 states: "The accused person is not bound to admit to an offense, nor may the oath be administered to the accused."

a more severe penalty can be applied in a further attempt to reform the offender, repair the scandal, and restore justice.

Canon 1326, §1, 2° allows for more severe penalty in cases involving a person who abuses a position of dignity, authority or office in order to commit a delict. These canonical figures represent a trust that the Church has placed in a person. The violation of that trust has more serious consequences for the Church' community, because of the actions of a person the Church said could be trusted. It weakens the faith of the community and becomes a source of scandal. Therefore, the law provides that offenses by those in a position of dignity, authority, or office can be punished beyond what is determined in a law or precept.

With regard to the meaning of each of these canonical figures, Marzoa describes a dignity in the juridical sense as “the external characteristic of a person that proceeds from a position or office held or even from honorific rights granted by the public authority and causing others to give that person special respect or reverence.”⁴⁸ An office would be considered as it is defined in the law as “any post which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose.”⁴⁹ Between dignity (which relates to the person) and office (which relates to the person's established function) would be those who are simply placed in authority over someone or something. This encompasses a wider meaning than the term “office,” since the person would not necessarily have to be appointed to an office in order to exercise some authority over others.

In many cases involving religious sexual misconduct, there is an abuse of a position of authority, since the religious comes to know the victim precisely through his or her office or through his or her public position in the community. That is, he or she is a public person who is placed before the community as one who can be trusted. He or she takes the victim into his or her confidence because he or she appears to be a kindly person who treats the victim as his or her “special friend.” The victim feels honored that someone in such a position would take cognizance of him or her. This would establish the connection between the position and the action.

Canon 1326, §1, 3° provides for situations in which a penalty has been established due to negligence (*ex culpa*), but the person who commits the delict had foreseen the situation and should have taken precautions to avoid it. In these cases, the negligence approximates malice and can be punished more severely.

⁴⁸ Á. Marzoa, “Commentary to canon 1326,” in Á. Marzoa et al (ed), *Op. cit.*, p. 299.

⁴⁹ *Canon 145, §1*. This definition of an office has three components: (1) it must be a function (*munus*); (2) it must be established in a stable manner; and (3) it must be established by an ordinance. There are many functions exercised for a spiritual purpose in the Church. Not all of them can be considered offices, however, since not all have been constituted as such by an ecclesiastical authority.

The judge may also apply a more severe penalty if particular law requires it. According to canon 1315, §3, a particular law can add other penalties to those established by universal law for some delict; however this not to be done except for very grave necessity. If universal law threatens an indeterminate or facultative penalty, particular law can also establish a determinate or obligatory one in its place. Particular law can also provide for other exempting, mitigating, or aggravating circumstances besides those in the general law, according to canon 1327,⁵⁰ although canon 1317 cautions that particular law can never establish the penalty of dismissal from the clerical state.⁵¹

A.4. *Ex Dolo or Ex Culpa*

The violation of the law must be by reason either of malice (*ex dolo*) or of negligence (*ex culpa*). The 1917 Code defined *dolus* as “the deliberate will to violate a law, and it is countered on the part of the intellect by a lack of knowledge and on the part of the will by a lack of freedom.”⁵² This means that it is not simply enough to state that a law has been violated. For something to be malicious, there also has to be the necessary knowledge and freedom. The 1917 Code is careful, though, not to speak of an “intention to harm” when it speaks of the violation of a law. This is reflected in the definition found in *Black’s Law Dictionary*, which qualifies the concept of malice by stating, “Malice in law is not necessarily personal hate or ill will, but it is that state of mind which is reckless of law and of the legal rights of the citizen.”⁵³

With regard to malice, Woestman concludes, “For malice to exist, the delinquent must know all three factors of the objective element for an offense, i.e., (1) that the action is seriously wrong; (2) that it is a transgression of the law; (3) and that it is punishable by a sanction. In addition to this required knowledge, the offender must have acted freely.”⁵⁴

While malice involves a deliberate intent to violate a law, negligence (*culpa*) is concerned with not applying due diligence to a situation. The 1917 Code

⁵⁰ Canon 1327: “A particular law may, either as a general rule or for individual offenses, determine excusing, attenuating or aggravating circumstances, over and above the cases mentioned in cann. 1323-1326. Likewise, circumstances may be determined in a precept which excuse from, attenuate or aggravate the penalty constituted in the precept.”

⁵¹ Canon 1317: “Penalties are to be established on in so far as they are really necessary for the better maintenance of ecclesiastical discipline. Dismissal from the clerical state, however, cannot be laid down by particular law.”

⁵² Canon 2200, §1 of the 1917 Code: “Dolus heic est deliberate voluntas violandi legem, eique opponitur ex parte intellectus defectus cognitionis et ex parte voluntatis defectus libertatis.”

⁵³ H.C. Black, *Black’s Law Dictionary*, 6th ed., St. Paul, West Publishing Co., MN 1990, pp. 956-957.

⁵⁴ W. Woestman, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, Faculty of Canon Law, St. Paul University, Ottawa 2003, p. 26.

described negligence in two ways: ignorance of the violation of a law or failure with regard to due diligence.⁵⁵ Black's Law Dictionary contains several definitions of negligence: "The omission to do something which a reasonable person, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent person would not do." It goes on to state, "Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances." Further, it states that negligence "is characterized chiefly by inadvertence, thoughtlessness, inattention, and the like ... The law of negligence is founded on reasonable conduct or reasonable care under all circumstances of every person to exercise due care in his conduct toward others from which injury may result."⁵⁶

B. Communication to the Accused Religious

The next step in the process is to make known to the religious the accusation against him or her and the proofs which have been gathered. Canon 695, §2 states: "[...] The accusation and the evidence are then to be presented to the member, who shall be given the opportunity for defence [...]."⁵⁷

The competent Superior should keep in mind that a religious has inviolable natural and canonical acquired rights and these give rise to corresponding obligations on the part of the Superior. Thus, a particular obligation the competent Superior has is to duly notify the religious of the accusation and the proofs, and give him or her sufficient time and opportunity to present his or her defense. Although it is not expressly stated in the canon, one cannot doubt that the religious has the right to seek proper assistance from a qualified advocate to defend his or her rights.⁵⁸

The right of defense is one of the basic principles of justice. The religious must be given the opportunity for self-defense. If a Superior does not allow the accused religious to be heard, to present his or her side of the picture, and respond to accusations, natural justice is seriously offended.

⁵⁵ Canon 2199 of the 1917 Code: "Imputabilitas delicti pendet...ex eiusdem culpa in ignorantia violatae aut in ommissione debitae diligentiae."

⁵⁶ H. C. Black, *Op. cit.*, p. 1032.

⁵⁷ "Hisce in casibus, Superior maior, collectis probationibus circa facta et imputabilitatem, sodali dimittendo accusationem atque probationes significet, data eidem facultate sese defendendi. Acta omnia a Superiore maiore et a notario subscripta, una cum responsionibus sodalist scripto redactis et ab ipso sodale subscriptis, Supremo Moderatori transmittantur."

⁵⁸ Cf. *Communicationes*, 15 (1983), p. 78.

The opportunity for self-defense is the possibility of presenting the elements which are considered *per se* apt for opposing the moral certitude that the religious had committed the delict. If the elements, which are regarded as *per se* apt to generate the moral certitude that the religious had committed the delict, are affirmations of witnesses, then it is clearly deduced that the opportunity for self-defense is the possibility of presenting the elements which are able to demonstrate that the affirmations of witnesses are false. For example, a certain witness affirms that a religious committed the delict because the witness saw the religious near the place of delict. On the other hand, the religious can demonstrate that he or she was elsewhere at the time.

The accused religious must be given sufficient time to respond to the arguments and proofs presented to him or her. If the religious fails to respond within the time stipulated by the Major Superior, it would be prudent to offer him or her another opportunity to do so. If this second effort also should fail to elicit proper response from the accused in his/her self-defense, the Major Superior should continue with the process. But the Superior should be aware of the fact that the accused religious has the right of communicating directly with the Supreme Moderator throughout the process. It is possible that the accused religious wants to submit his/her defense in person. In this case, it should be done before two witnesses and the deposition should be committed to writing; it should then be signed by the religious. Should the religious refuse to sign the deposition, this should be noted in the document and signed by those present. The law does not provide a second formal communication to the accused as in the case of facultative dismissal. Therefore, if there is proof of the fact of the delict and of grave imputability, the Major Superior proceeds to the next step.

C. Transmission of the Acts to the Supreme Moderator

The Major Superior does not make any decision on the matter. Therefore, the law does not require of him/her to seek the consent or counsel of his council. If he/she chooses to discuss the matter with his/her council, a copy of the minutes of the meeting might prove helpful to the Supreme Moderator and his/her council in making the final decision.⁵⁹

When the time limit provided for self-defense has passed, the Major Superior and the notary (usually the provincial notary or the general secretary, and not an external civil notary) together sign the acts. Therefore, the acts to be transmitted consist of the following: the proof of the fact of the delict and of imputability, the letter communicating this to the religious and other communication between the Major Superior and the religious concerning the matter. All these acts are transmitted

⁵⁹ Cf. S. Holland, "Canonical Dismissal ...", p. 68.

together with the written and signed responses of the religious to the Supreme Moderator.

D. Decree of Dismissal

The actual decision on the dismissal of the religious for the delict of sexual misconduct in question is made collegially by the Supreme Moderator and his council in accord with the norms of law. At this point, the legislator takes the greatest care with these measures and subjects the procedure to a series of controls of its validity, with the aim of safeguarding the rights of religious more fully in a matter that will influence their whole lives.

The validity of the expulsion decree of dismissal depends on the following requisites:

1) The Supreme Moderator must act with his/her council. They are to evaluate very attentively the three elements of the case: the proofs, the arguments, and any defense presented. The facts brought forward must be verifiable and verified. Rumors do not constitute proof.⁶⁰ If the religious admits to the accusations, supplementary proofs are not required. A canonist could be invited to help put the file in order, indicating clearly those canons or elements of law on which the decision is to be based. The defense consists of the responses and explanations given by the religious to be dismissed.

2) The council must be composed of at least four members, because their acts must be collegial. This means that the proposal receiving the majority of votes of those present has the force of law, provided there was a quorum for the meeting. An absolute majority means more than one-half of the votes of those present and voting. Since the Supreme Moderator is ordinarily not a member of the council, this means at least five persons will vote.

3) Both the discussion and the final decision should be made collegially and by secret ballot. The religious to be dismissed should not be informed that the vote in favor of dismissal was unanimous. It suffices to state that the majority vote was in favor of the dismissal. The purpose of the obligation of secrecy is to protect and safeguard the following person regarding their intimacy, freedom, discretion, fraternity and perhaps friendship: a) first of all, the voters themselves; b) the one who is dismissed; c) finally, any other person who may be involved in the question because of his eventual relationship with either the voters or the one dismissed.

4) The decree of dismissal must contain its motivating reasons in law and in fact, at least summarily. The decision of the Supreme Moderator and his or her

⁶⁰ Cf. *Canon 1526*, §2.

council must describe, at least in summary fashion, the reasons in law and in fact upon which it is based. The reasons in law are drawn from the prescriptions of canons. The reasons in fact are built up from the facts and arguments presented.

5) The right of the dismissed religious to have recourse to the competent authority should be indicated in the decree. For validity, the decree must indicate the right of the member who is dismissed “to have recourse to the competent authority within ten days of receiving the notification of the decree.”⁶¹

6) The decree of dismissal is not effective until it has been confirmed by the Holy See or by the diocesan Bishop, depending on the nature of the institute.

E. Confirmation and Notification

The decree of dismissal should not be notified to the religious before being confirmed by the competent ecclesiastical authority. The decree of dismissal must be confirmed by the Holy See, in the case of religious belonging to an institute of pontifical right, and the diocesan Bishop in the case of religious belonging to an institute of diocesan right.⁶²

The decree of dismissal is notified formally to the religious. For the validity, the decree must indicate the right which the dismissed religious enjoys to have recourse to the competent authority within ten days from receiving the notification. It is the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life (CICLSAL), not the Supreme Tribunal of the Apostolic Signatura that recourse against the decree must be addressed. The Apostolic Signatura has competence for the violation of procedure and not the merit of the case itself.⁶³

The recourse has a suspensive effect. It means that the member still belongs to the institute in the meantime. While the case is progressing, the member retains all rights in the institute and remains subject to all obligations.⁶⁴

⁶¹ *Canon 700.*

⁶² Cf. J. Gallen, *Op. cit.*, p. 143.

⁶³ Cf. AAS, Vol. LXXVII (1986), p. 1323.

⁶⁴ Cf. *Canon 700.*