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

Part II

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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 propio, imputability*

III. PROCEDURES TO BE APPLIED REGARDING GRAVIORA DELICTA IN CASES OF SEXUAL MISCONDUCT PERPETRATED BY RELIGIOUS CLERICS

With reference to article 52 of the Apostolic Constitution *Pastor Bonus* of June 28, 1988, article 1 of the *Motu Proprio Sacramentorum sanctitatis tutela* of April 30, 2001 distinguishes between two types of *graviora delicta*: (1) *delicta in sacramentorum celebratione commissa* (delicts committed in the celebration of the sacraments); and (2) *delicta contra mores* (delict against morals).

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For the purpose of this article, the writer presents the delict against the sixth commandment committed by a cleric with a minor under the age of 18 years. The Law mentions only clerics but this obviously includes "religious who are in Holy Orders, whether they be deacons or priests."[1]

Delicta graviora are referred to the CDF by the Ordinary in virtue of article 13 of the *Motu Proprio* which speaks of *notitia saltem verisimilem* [...] *de delicto reservato* and of an *investigatio praevia*. The *Motu Proprio* states that it promulgates norms concerning more grave delicts reserved to the CDF (... *quibus Normae de gravioribus delictis Congregationi pro Doctrina Fidei reservatis promulgantur*). The term 'reserved' in the Code means that the remission of a penalty is reserved to the Apostolic See, not the judicial or administrative application. Canon 1354, §3 states: "If the Apostolic See has reserved the remission of a penalty to itself or to others, the reservation is to be strictly interpreted." However, in the Roman documents being analyzed, 'reservation' also means significant CDF discretion regarding handling delicts which violate basic Catholic values especially seriously. Hence, it presumably requires significant Roman intervention and commensurate restrictions on Episcopal or Provincial discretion in addressing those delicts.[2]

The CDF letter provides procedural norms dealing with various procedural issues. As regards religious, the following procedural *iter* is foreseen. Each time the competent Superior receives information about at least a probable *delictum gravius* committed by a religious cleric, he must carry out an *investigatio praevia* according to the norm of law.

A. Procedures

A.1.Preliminary Investigation and Determination

A.1.1. Preliminary Investigation

Information about sexual misconduct often comes to the Major Superior's attention through a complaint. There are several possible sources for complaints: the alleged victim; a third party (e.g., a parent or guardian); anonymous sources; the public sphere (e.g., media outlets). Should every complaint give rise to an investigation? In all cases, each complaint shall be treated promptly and seriously. The complaint should be made in writing. It should be signed by the complainant, dated, and then notarized by an ecclesiastical notary (normally the provincial secretary).

[1] C.J. Scicluna, "Sexual Abuse of Children...", p. 20.

[2] Cf. T. J. Green, "Clerical Sexual Abuse of Minors: Some Canonical Reflections," in *The Jurist* 63 (2003), p. 375.

The complaint should be as detailed as possible with regard to the identity of the accused, the nature of the acts, the time and place of the acts and special circumstances surrounding acts (e.g., use of drugs/alcohol, force/threats, gifts/promises, etc.). A complaint may be lodged orally if circumstances so require. In these cases, the complaint should still be put down in writing by an ecclesiastical official and duly notarized. If possible, it should then be reviewed and signed by the complainant.

Following the receipt of a complaint, the Superior must make a determination as to whether or not the complaint has the semblance of truth. The Superior may use the expertise of others to reach such a determination. This initial evaluation, however, is not a finding for or against guilt of the accused. It seeks only to establish whether or not the complaint itself at least seems true.

If the information is "at least the semblance of truth,"[3] the competent Superior is to issue a decree opening a "Preliminary Investigation." The purpose of the Preliminary Investigation is indicated in canon 1717, §1: "[the Ordinary] is to enquire carefully, either personally or through some suitable person, about the facts and circumstances, and about the imputability of the offence, unless this enquiry would appear to be entirely superfluous." The person chosen by the Superior to conduct the Preliminary Investigation should be appointed to the task by decree unless the appointment is contained within the decree opening the Preliminary Investigation. Every complaint that provides reasonable substance and sufficient facts to be pursued should be investigated. Even an anonymous complaint, if it seems reasonable and admits of some verification for or against, should be carefully followed up. Hence, the Preliminary Investigation is meant to give the Superior a sense of probability that a delict did or did not occur.

The determination made at this point concerns the nature of the allegation, not the guilt or innocence of the accused. However, at any point in the process if the Superior determines it necessary in order to prevent scandal, protect the freedom of witnesses, or to safeguard the course of justice, he shall impose temporary, non-punitive and precautionary measures prohibiting the accused cleric from the exercise of sacred ministry or of some ecclesiastical office, imposing or forbidding residence in a certain area, or even prohibiting public participation in the celebration of Eucharist. These measures shall be imposed on the accused cleric by means of a precept, and such precept may be imposed from the time the Preliminary Investigation is opened.[4]

It should be stated clearly that no Major Superior should initiate a judicial process for the imposition of a canonical penalty unless he is reasonably certain of two facts: 1) that the cleric is guilty of the canonical delict in question (even

[3] *Canon 1717, §1*

[4] Cf. *Canon 1722.*

though the establishment of such a fact in a judicial proceeding may be difficult and may not prove to be successful); 2) that (assuming, *arguendo*, that proof of guilt will be successful) the canonical imposition of a penalty that may include dismissal from the clerical state is the appropriate method of dealing with the overall pastoral situation.[5]

While considering those two facts, the most important factor is the question of the cleric's guilt in committing canonically punishable acts. The decision to initiate the process must turn on the objective truth of the commission of the prescribed acts. It should never be based on rumor, surmise, suspicion, personal propensities or even on known past acts that are no longer canonically prosecutable. Thus, the preliminary investigation and initiatory decree are extremely important steps. These steps should determine whether there is a factual basis for the imposition of a canonical penalty or merely a suspect situation that should be addressed, and whether the judicial process seeking dismissal from the religious institute and clerical state should be initiated or some other appropriate disciplinary or penal remedy should be used.

The investigation must be carefully done, from the start, to protect "anyone's good name."[6] The reputation of all persons involved must be guarded. This provision applies at every stage of any process, whether administrative or judicial.

The Superior or his delegated investigator must be discreet, sensitive in dealing with the alleged victim and the accused, endowed with a great deal of common sense and able to get to the truth of the matter. In the normal course, the Superior should not conduct the prior investigation personally in a case involving the alleged sexual abuse of a child by a priest. This recommendation is made on the basis of the principle found in canon 1717, §3, which prohibits the investigator from later acting as a judge in the case if a judicial action is later set in motion.

The reason for this prohibition is clear. The investigation of sexual criminal misconduct can be most difficult and often results in having to deal with the anger and emotions of persons who have been the victims of such misconduct. It is completely natural and appropriate to respond with great sympathy and pastoral solicitude to such victims. By its very nature, however, this response clearly jeopardizes the impartiality which is necessary in making decisions in the case. The Law governing penal process has recognized this by prohibiting investigators who are dealing directly and personally with victims and witnesses of criminal misconduct from serving as judges and being placed in the position of making a final determination or judgement. If an investigator gathers the proofs and deals with any problems that arise during this

[5] Cf. USCCB, *Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State,* Washington, D.C. 2002, p. 8. (document)

[6] *Canon 1717, §2.*

process, however, the Superior who is spared this level of involvement will clearly be better able to render a correct judgment.

The investigator is free to use any legitimate means to uncover the truth or falsity of the allegations and is to present all findings to the Superior. In this regard, it should be noted that the investigator "has the same powers and obligations as an auditor in a process,"[7] and should observe the procedural norms of canons 1558-1571 on The Examination of Witnesses in so far as applicable. In the Church's legal tradition, which is much more similar to a number of European traditions than the American common law system, it is the judge who has the responsibility of fully investigating any matter which has been placed before him. He does not represent the interests only of one side or the other; rather, he is bound by office with the duty of looking into all sides of an issue. Auditors by definition act on behalf of the judge in undertaking the instruction of a case. Their office entrusts them with the responsibility of deciding what proofs are to be gathered and how they are to be collected.[8]

The investigator must balance a healthy skepticism with respect for others. Clerics are in a position where they are subject to false accusations. Such an eventuality and the damage to the cleric's good reputation should not be dismissed but given appropriate consideration. On the other hand, it is also difficult to bring and maintain an accusation against a cleric, especially if the alleged victim is a child and the cleric makes a forceful denial of the accusation. The investigator must make it easy for the child and his or her parents to share the information needed to determine the truth of the matter and to assess the seriousness of the misconduct.

The investigator should review every document pertaining to the accused cleric, regardless of location, to determine whether there were ever any previous accusations against him. The investigation should determine accurately the credibility of the accuser and of the accusation itself. For doing this, knowledgeable and reliable witnesses (including other priests, deacons, religious, and lay persons) may be asked about the life, morals and reputation of both the accuser and the accused; whether the person who brought the complaint is credible, or is known for lying, calumny or other relevant traits, or is otherwise unreliable; whether there is any hatred, jealousy or enmity known to exist between the one bringing the complaint and the accused cleric.

[7] *Canon 1717, §3*.

[8] Cf. G. Ingels, "Dismissal from the Clerical State: An Examination of the Penal Process," in *Studia Canonica*, 33 (1999), p. 175. See *canon 1428, §3*: "The task of the auditor is solely to gather the evidence in accordance with the judge's commission and, when gathered, to submit it to the judge. Unless the judge determines otherwise, however, an auditor can in the meantime decide what evidence is to be collected and the manner of its collection, should any question arise about these matters while the auditor is carrying out his role."

The investigator is called on to gather proofs which address fully all sides of the issue: not only those which point to the commission of a crime and the possible guilt of the person who is suspected of being responsible for the offense, but also those issues which address questions touching on the defense of the accused such as mitigating circumstances surrounding the alleged crime and conditions which might call into question the grave imputability of the one who appears to be responsible for the crime. It must be remembered that the purpose of the initial investigation is not to "indict"[9] the accused religious formally with a crime, but rather to investigate the crime in three distinct areas, namely, 1) the facts of the alleged complaint, 2) the circumstances surrounding the offense and 3) the imputability of the accused if a person has, in fact, been named as a probable perpetrator of the crime.

Much of the evidence that will be gathered will be in the form of statements offered by individuals. Such statements must always be done formally, that is, under oath, recorded verbatim and signed by the individual making the statement. It is not inappropriate and may well be advisable for the investigator to talk informally with a witness prior to taking the person's statement.

It would be important to follow the canonical rules for taking evidence. This would include: a) a set of questions prepared beforehand by the Promoter of Justice that would be relevant for a canonical investigation. The Promoter of Justice can be a lay person or a religious who is a cleric, of unimpaired reputation who holds a doctorate or a licentiate in canon law, and of proven prudence and zeal for justice.[10] It is especially important to establish the date of birth of the one bringing the allegation and the date when the alleged incident occurred, since this is critical in establishing whether a delict has been committed; b) a notary who can record what was said during the interview with the one bringing the accusation. The answers should be written down, reviewed by the person bringing the accusation, and signed by the investigatior, the one giving testimony, and the notary. In cases which could involve "the reputation of a priest, the notary must be a priest."[11]

Special care and sensitivity must be exercised in dealing with the testimony of children or minors. It may well be advisable for a parent or other professional to pose the relevant questions to a young child.[12] Certainly parents should be present at the examination unless the child or minor himself or herself would rather speak alone with the investigator. While it is appropriate and within the principles of law to

[9] The formal "indictment" of the accused occurs at that point when the judge (or the ordinary in an administrative process) cites the party during the penalty phase (canons 1720, 1º and 1723, §1).

[10] Cf. *Canon 1435*.

[11] *Canon 483, §2*.

[12] Canon 1550, §1 states that "Minors under the age of fourteen years and those who are of feeble mind are not admitted to give evidence. They can, however, be heard if the judge declares by a decree that it would be appropriate to do so."

exercise special sensitivity in questioning a child or minor, the investigator is also to insure that the examination is conducted properly and with due regard for the right of defense of the accused.

The notary assigned to the case should always be present during the formal deposition to serve as the official witness of the deposition. It is also the notary's responsibility to transcribe the statement, to provide the witness with the opportunity of examining and possibly correcting the statement and to obtain the witness' signature on the final transcript.

It would be well to note some canonical formalities associated with the initial investigation which involve, in addition to the transcription of the testimony of the witnesses who are interviewed, the preparation of written documents and the care of the acts which are gathered. Two decrees are issued by the Superior by which he opens the initial investigation and names the investigator, if one is to be appointed, and concludes the investigation by expressing his findings, that is, the determinations which have been reached and the decision whether the matter is to be remanded to the penal process.[13]

With regard to the decree which opens the initial investigation, care should be exercised not to word the decree in such 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 simply to state that probable information has been received concerning the commission of an offense, and that an investigation is being undertaken to examine this allegation and identify the person responsible for the offense. It is for the final decree to make determinations regarding the truth of the offense and the imputability of the one accused.

It is also appropriate at this point to address the question of the custody of the acts which are gathered and the proofs which are gathered. This responsibility is to be entrusted to a notary who "must be a priest"[14] in cases which the reputation of a priest is called into question. These acts will include the decrees by which a initial investigation is initiated, all proofs which are assembled during the course of the initial investigation, both the testimony which is taken and any other documents which are gathered, and any proofs which are gathered or acts generated during the penal process. When the case is finally concluded, all decrees and acts associated with the initial investigation and the penal process, if it is later employed, "are to be kept in the secret curial archive."[15]

[13] Cf. *Canon 1719*.

[14] *Canon 483, §2*.

[15] *Canon 1719*. In this regard, note canon 489, §2, which provides that annually documents of criminal cases are to be destroyed in matters of morals in which the criminal has died or in which ten years have passed since the condemnatory sentence.

A.1.2. Determination

Once all of the proofs have been gathered by the investigator, it then falls to the Superior himself to determine whether he has arrived at moral certitude concerning the sufficiency of the evidence in order to conclude the initial investigation. The Superior is to determine whether the accused cleric was in the clerical state at the time of the alleged incident, whether he was assigned to the parish or place where the incident was alleged to have occurred, and whether the one bringing the accusation appears to be telling the truth.

If the Superior perceives that neither by fraternal correction or reproof, nor by any methods of pastoral care, can the scandal be sufficiently repaired, justice restored and the offender reformed, he issues a decree, if he considers it prudent to do so, determining, "1º whether a process to impose or declare a penalty can be initiated; 2º whether this would be expedient, bearing in mind can. 1341; 3º 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."[16]

In addressing the facts and circumstances of the alleged offense, the Superior must consider certain specific issues.

1). Commission of Delict

Canons 1387, 1394, 1395, 1397 and 1398 list the specific actions which constitute criminal sexual offenses in the Code of Canon Law. As penal law, these norms of law are subject to strict interpretation, which means that their application cannot be extended to misconduct beyond that which is specifically named in each canon. Hence, it is necessary to recognize that not all sinful conduct of a sexual nature necessarily constitutes a criminal act. If the specific offenses or conditions listed in the Code have not been committed, penalties cannot be exacted just on the basis that an objective sinful action against the sixth commandment of the Decalogue has taken place.[17]

In any event, the violation must be grave. Canon 1399 provides that the imposition of a just penalty for any external violation of a divine or ecclesiastical law can take place "only when the special gravity of the violation requires it and necessity demands that scandals be prevented or repaired."

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[16] *Canon 1718, §1*. A clear distinction must be made between moral certitude concerning the sufficiency of the evidence and moral certitude concerning the guilt of the accused. It is for the penal process to assess the question of guilt. Since the Superior cannot provide for the right of defense of the accused during the initial investigation, he can only address the question of whether the evidence is sufficient to move forward with the process.

[17] Cf. G. Ingels, *Op. cit*., p. 181.

If, for example, a Superior should learn of a "one-night stand" involving one of his priests with a consenting adult, and there is no question of concubinage or an ongoing offense, no question of an individual being victimized, and no scandal or even notoriety arising from this clearly sinful action on the priest's part, a criminal action is probably not warranted and would most likely be an inappropriate manner in addressing this issue.[18]

2). External Act

Violations in the area of sexual misconduct 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 desire, no matter how serious. Thus, even when a cleric has committed similar delicts years before and retains a propensity to commit such acts again, are no basis for the imposition of the penalty of dismissal without proven external acts.

The external act alone does not suffice. It 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. Thus, unless a specific law determines otherwise, a cleric may not be punished canonically for an act of negligence since negligence is, by definition, non deliberate. [19]

3). Imputability

During the initial investigation, the Superior is required only to show the probability that the accused acted with imputability in the same way that he is only required to show the probability that an offense has occurred.

In effect, when addressing the specific question of the accused's imputability, "unless it appears otherwise," the presumption of law stated in canon 1321, §3, absolves the Superior from a further investigation of this matter on the basis of canon 1526, §2, 1º, which provides that "matters which are presumed by the law itself" do not require proof.

By allowing the presumption of law to provide for the probable imputability of the accused, the only issues which the Superior must then examine are: (1) whether the accused was acting maliciously, that is, with premeditation and the prior intent of harming or injuring the victim, or (2) whether he was acting culpably, that is, with objective knowledge that his actions were sinful or criminal in nature, a question which is easily resolved given the seminary formation which every priest has received.

[18] Cf. *Ibid*., pp. 181-182.
[19] Cf. *Canon 1321, §2.*

In a penal procedure, especially during the initial investigation, a Superior need not and probably should not be sending the accused priest for psychological assessments in order to investigate questions addressing the imputability of the accused. If the presumption of imputability is going to be challenged, this is an issue which is more properly brought forward by the defense during the penal trial. If the defense does not raise this issue and no proof has been presented challenging this presumption, then the Superior or tribunal conducting the penal trial can utilize the presumption of law in determining the imputability of the accused.

Admittedly, this approach to the question of imputability is steering a very narrow line and runs counter to the policies and procedures dealing with cases of sexual misconduct used in many dioceses. These policies usually require that an accused priest submit to psychological testing and evaluation by a special team, hospital or institution which specializes in this area. When a priest is directed to comply with such policy and if he does indeed cooperate with the process, he will often be required to address questions of his "sexual history" which may well give rise to admissions of sinful and potentially criminal actions from his past.[20]

During both the initial investigation and the penal process, great care must be taken not to jeopardize the integrity of the process by including information which is based on the accused's cooperation with a psychological assessment or evaluation, especially if this cooperation has been elicited under obedience or compliance with a diocesan or religious institute policy; as this may well constitute a "force manifestation of conscience." Canon 1728, §2 provides that "the accused person is not bound to admit to an offense, nor may the oath be administered to the accused." This right of the accused is a specific application of canon 1538 which states that "a confession, or any other declaration of a party, is devoid of all force if clearly shown to be based on an error of fact or to have been extracted by force or grave fear." A serious consideration has to be given to the fear and pressure being experienced by a priest who, innocent or guilty, finds himself caught up in an investigation of this nature, especially if information which he thought was being given in confidence in the context of a psychological assessment is now being used against him in a penal process- a classic example of an error of fact.

In examining this further, it is well also to consider the principle found in canon 1548, §2, °1, regarding those who are exempted from the obligation of answering questions posed to them in the course of a judicial process: "clerics, in those matters revealed to them by reason of their sacred ministry; civil officials, doctors, midwives, advocates, notaries and others who are bound by the secret of their office, even on the ground of having offered advice, in respect of matters subject to this secret."

[20] Cf. G. Ingels, *Op. cit.*, p. 186.

The traditional rules about the requisites for personal culpability must be addressed by a tribunal in deciding about the imputability of the alleged acts to the accused and the appropriateness of the penalty of dismissal or some lesser penalty. Each case is different and must be judged according to the law and the facts demonstrated to the tribunal. Its judgement must be based on the acts of the case and on the rules of law in determining the imputability needed for imposition of dismissal.

A.2. Notification of the Proofs and Presentation of the Right of Defense

Whoever conducts the proceedings must "notify the accused of the allegation and the proofs against him, and give an opportunity for defense, unless the accused, having been lawfully summoned, has failed to appear."[21]

The notification must be done in writing, but the accused cleric must always be called in so that he may be orally notified or so that the accusation and the proofs may be read to him. After this reading, the notification is put into writing and the text will be offered to him. This must be duly signed by the one conducting the proceedings and the notary.

The summons must be performed in due form. This means that he has to be notified by "means of the public postal service, or by some other particularly secure means."[22] The formal citation has relevance in the case of the absence of the accused. The citation ceases being as important if he himself makes his appearance, although he has been cited in other way- even by telephone – or if he appears spontaneously, for example, because he has heard that his case is being talked about, or simply because by chance he was located in that vicinity for other reasons. At all events, it is necessary to let the accused know that a procedure against him is underway. The citation has juridical effects for this reason.[23]

An important element is the right to defend himself, which has to be conceded to the cleric being accused. The accused would also be able to renounce exercising this right for different reasons. For example, some possible reasons could be the delict imputed to him and the proofs are evident, or even out of disdain for the ecclesiastical authority, or through a conviction that it will never be possible to prove the delict that they attribute to him.

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[21] *Canon 1720, 1º.*

[22] *Canon 1509, §1.*

[23] Cf. *Canon 1507, §3.* It states: "If the litigants in fact present themselves before the judge to pursue the case, there is no need for a summons; the notary, however, is to record in the acts that the parties were present at the trial."

In every case, even when the delict and the imputability are evident, the possibility to defend himself must be given to the accused cleric. The right of defense in any juridical system is one of the pivots of the penal trial, and this is also true in the juridical system of the Church, both when it proceeds along the judicial route and when it adopts the extrajudicial route. Nobody can be condemned or suffer penalties without the possibility of defending himself. The canonical process is null if "the right of defense was denied to one or other party."[24]

The Major Superior or the person designated by him, brings to the attention of the accused cleric the delict that is attributed to him as well as the proofs already assembled. The dialogue can clarify obscurities, uncertainties and discrepancies. Of course, it is possible in this phase to free the accused from total responsibility and to declare him innocent. However, if the verbal defense and the interchange do not establish the innocence of the accused, but the proofs are still strong, the Superior continues with the trial.

The interrogatory might not be sufficient for the defense, in the judgement of the accused cleric, especially when he has learned about the accusation just at that very moment. If he asks for time to prepare the defense, even in writing, the Superior must concede this to him, so long as the time requested is reasonable. When that time has expired, the Superior again cites the accused cleric to clarify the most recent matters that might have come to light in the interrogatory, both from the accusation and from the defense. If, in the judgement of the Superior or of the accused, the second interrogatory has not clarified matters, the accused has the right to other interrogatories, eventually preparing new proofs to complete his defense. However, the petition for new interrogatories that only tend to delay the proceedings must be rejected. Each interrogatory must be put into the acts and the accused, the Superior and the notary must sign them.[25]

However, if the accused cleric, though duly cited, does not appear, the Superior still goes ahead. What this means is that the accused is refusing to defend himself or he is acting as if he were renouncing a defense. At this stage, the intervention of the advocate is not admitted. The accused must personally defend himself in the interrogatories. Yet, he can consult advocates and experts beforehand, especially if he is adding a written defense to his oral answers.[26]

After having questioned the accused and having received his written defense, the Superior chooses "two assessors as advisers"[27] who are expert and of honorable

[24] *Canon 1620, 7º*.

[25] Cf. A. Calabrese, "Commentary to canon 1720," in Á. Marzoa et al (ed), *Op. cit.*, p. 2010.

[26] Cf. *Ibid*.

[27] *Canon 1424*.

conduct. With these persons, he carefully evaluates all the assembled documentation: the accusation, the proofs, the arguments and the defenses.

This is the most important, the most delicate and the most difficult moment, since it is the phase in which the Superior makes the decision of convicting or absolving the accused. The help of two assessors, who ordinarily are judges of the tribunal, permits him to make a just decision. To evaluate adequately the accusation and the proofs, the arguments and the defenses, the technical contribution of the councils and their juridical experience, is necessary, particularly when the Superior, in the situation where he is the one who directly initiates the actions, does not have an adequate knowledge of the law nor judicial experience. These considerations must constitute a recommendation to the Superior not to undertake the trial personally, but to designate his judicial vicar or another expert priest to do so. With the evaluation of the accusations, the proofs, the defenses and all the circumstances, the Superior or the person designated by him must be in a position to issue a judgement of acquittal or of guilt.[28]

It must be known with certainty that the delict has been committed by the cleric. The certainty demanded is moral, and it must be attained "from the acts of the case and from the proofs."[29] A personal conviction does not suffice, nor do secret reasons or proofs, though recognized by the Superior or his delegate but not brought forward as proofs nor presented to the accused. Moreover, it must be known with certainty that the delict is imputable to the accused, not only materially, but also morally. Therefore, there will have to be an evaluation of the circumstances that diminish or eliminate imputability.[30]

A.3. Transmission of the Acts to the Supreme Moderator

When the time limit provided for self-defense has passed, the Major Superior and the notary (usually the provincial notary) together sign the acts. The acts which must be transmitted to the Supreme Moderator will include: the minutes of the first meeting prior to beginning the process, 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, the defenses of the religious cleric received in writing or signed by the accused if given orally and later put into writing, and the minutes of the council meeting to consider incorrigibility and the sufficiency of defense.

[28] Cf. A. Calabrese, "Commentary to canon 1720," in Á. Marzoa et al (ed), *Op. cit.*, p. 2011.

[29] *Canon 1608, §2.*

[30] Cf. *Canon 1345*. It says that "Whenever the offender had only an imperfect use of reason, or committed the offence out of fear or necessity or in the heat of passion or with a mind disturbed by drunkenness or a similar cause, the judge can refrain from inflicting any punishment if he considers that the person's reform may be better accomplished in some other way."

All these acts are transmitted together with the written and signed responses of the religious cleric to the Supreme Moderator. The Supreme Moderator with "at least four members"[31] of his council weighs the merits of the acts of the entire case.

A.4. Referral of the Acts to the Congregation for the Doctrine of the Faith

The Supreme Moderator is to notify the CDF of the results of the investigation. He is to forward the acts of the case to the CDF, along with his own *votum* and that of his council about both the merits of the case and the procedure to be followed. The *votum* should also include a *curriculum vitae* of the accused, details of the allegation, a risk assessment and the opinion of the Supreme Moderator concerning penal procedure and about the expediency of any future ministry for the accused. The referral to the CDF is always done unless the accusation is determined to be manifestly false or frivolous during the Preliminary Investigation. It is always the CDF that "makes the determination of how to proceed with the matter, even though the *votum* of the Supreme Moderator will be very important in the considerations leading to the CDF's decision."[32]

The CDF studies the acts submitted by the Supreme Moderator. The CDF ultimately decides whether to proceed with a penal process or simply to suggest a disciplinary action. Different options[33] are possible:

A. 4. 1. The CDF may decide to present the case directly to the Holy Father for a *dimissio ex officio* of the accused cleric. This is reserved for particularly grave cases in which the guilt of the cleric is beyond doubt and well documented. It is the praxis of the CDF to request that the Supreme Moderator ask the guilty cleric if he himself would prefer to seek a dispensation from his priestly and vows. If the cleric refuses, or does not respond, the case proceeds. The Disciplinary Section of the CDF prepares a report for the Holy Father who will decide the case on the occasion of the audience granted generally on a Friday to the Cardinal Prefect or to the Secretary of the Congregation. The rescript will be communicated to the Supreme Moderator. There is no appeal or recourse against the decision of the Holy Father.

A. 4. 2. The CDF may authorize a judicial penal procedure carried out by the competent tribunal at first instance, unless the CDF, due to certain circumstances, opts to handle the case itself. As an expiatory penalty perpetual in nature, dismissal from

[31] *Canon 699*.

[32] C. J. Scicluna, "A Manual for Canonical Processes for the Resolution of Complaints of Clerical Sexual Abuse of Minors," p. 6. This article was presented in a seminar held in Washington, D.C. on February 3, 2004.

[33] Cf. CDF, "De Delictis Gravioribus," in *AAS* 93 (2001), pp. 785-788. See also C. J. Scicluna, "The Procedure and Praxis…," pp. 242-243.

the clerical state "cannot be laid down by particular law,"[34] nor can it be threatened by a precept,[35] or "imposed or declared by means of a decree."[36] In expiatory penalties, the penalty has a significance autonomous from the will of the delinquent. This goal was more explicitly expressed in the 1917 Code through more severe expressions under the term: "vindictive penalties." But in all penalties, the ultimate goal to be pursued is "the salvation of souls."[37]

The Law recognizes that all clerical religious institutes of pontifical right have authentic power of jurisdiction over their members. Therefore, they exercise judicial power. Canon 1427, §1 states: "If there is a controversy between religious, or houses of the same clerical religious institute of pontifical right, the judge at first instance, unless the constitutions provide otherwise, is the provincial Superior or, if an autonomous monastery is concerned, the local Abbot." Regarding the appeal tribunal, canon 1438, 3º states: "for cases dealt with before a provincial Superior, the tribunal of second instance is that of the Supreme Moderator; for cases heard before the local Abbot, the second instance court is that of the Abbot superior of the monastic congregation." The organization of the tribunal "belongs to proper law, especially to the religious institutes' constitution."[38] The said tribunal may decree dismissal from the Institute as well as dismissal from the clerical state. The appeal judgement is reserved to the Supreme Tribunal of the CDF.

The following represent some of the rules and facts that a tribunal might take into account in deciding whether the penalty of dismissal may be imposed. It assumes that at least one external act of a delict has been proven with moral certainty and that the only issue before the tribunal is whether the imputability of the accused and the circumstances warrant the dismissal.

a). The presumption of canon 1321, §3 resolves the doubt in the external forum. Without evidence of facts which clearly show that the imputability of the accused was diminished, the tribunal must find in favor of full imputability.

b). The years of religious and seminary formation support the presumption that the accused understood the immorality of what he was doing.

c). The tribunal's judgement about sin, rationality and freedom should be grounded in Christian anthropology. The fact that society has, in many ways, lost a

[34] *Canon 1317.*

[35] Cf. *Canon 1319, §1.*

[36] *Canon 1342, §2.*

[37] Cf. Coram Colagiovanni, 14 June 1994, in *Monitor Ecclesiasticus*, Vol. 122 (1997), p. 91. In poenis expiatoriis vero poenam significationem autonomam habet a voluntate delinquentis cuius finis explicitius exprimebatur per codicem anni 1917, etsi verbis acrioribus, sub nomine "poenae vindicativa." In omnibus poenis autem finis ultimus prosequendus est "salus animarum."

[38] M.J.A. Conde, *Diritto Processuale Canonico*, Rome 1993, p. 136.

sense of serious sin or personal culpability does not mitigate the cleric's guilt if he has adopted such a clearly the attitude of the un-Christian.

d). The existence of a psychological illness and its effect on imputability must appear from the evidence. Thus, if the accused cleric has introduced expert testimony that he suffers from such an illness, the tribunal can admit such testimony and give it appropriate weight. Such an illness, however, should not be automatically equated with lack of personal responsibility for the external violations themselves. Despite the illness, the accused may have been fully aware of the nature and consequences of his actions and have possessed sufficient freedom, in a theological sense, to be charged with not merely grave, but full imputability as understood in the penal law. For example, when the accused has repeated evil acts over and over again without self-reform, this should not necessarily be deemed, in some sort of deterministic fashion, to lessen his imputability. In a way, the more a cleric identifies himself with his repetitious acts, the greater the imputability may be of those acts. In short, if the accused claims to have been subject to a compulsion, judges of the tribunal must evaluate the meaning of compulsion, the exact nature of the one claimed, and the evidence of the degree of its influence on the accused in the commission of the delict.

e). Canons 1324-1326 serve as a guide for the tribunal in weighing all the mitigating and aggravating factors that may have an effect on imputability and the severity of the appropriate penalty. It should also be noted that "a particular law may, either as a general rule or for individual offenses, determine excusing, attenuating or aggravating circumstances."[39] Likewise specific circumstances can be set down in a precept which will exempt, mitigate or aggravate the penalty threatened in that precept.

f). Two mitigating factors that may occur are the lack of the use of reason caused by drunkenness or some other narcotic agent as well as the commission of an act in the heat of passion.[40] Of course, if one is aware that drunkenness or narcotic use often lead to such acts and decides to drink or ingest such narcotics anyway, the resulting loss of the use of reason does not diminish full imputability. Similarly, when passion is freely stimulated or fostered by the accused, it "can never be taken into account"[41] as a mitigation of imputability.

g). Even if full imputability is shown to have been lessened in a particular case or there are other mitigating circumstances, the tribunal must also take account of aggravating circumstances as described in canon 1326. It may be that a cleric abuses his "position of authority or an office, in order to commit a crime."[42] If a cleric uses his

[39] *Canon 1327.*
[40] Cf. *Canon 1324, §1, 2º-3º.*
[41] *Canon 1325.*
[42] *Canon 1326, §1, 2º.*

familiarity with his parishioners or other youth to create situations in which such acts are committed, or, as an authority figure, exercises undue influence over the victim, the acts become even more heinous and admit of more severe punishment, offsetting the mitigation which might otherwise be applicable.

h). Another common aggravating circumstance may be recidivism. When the accused, because of his own history and self-awareness, foresees what is going to happen and takes none of the precautions to avoid such acts that a reasonably prudent person would take, the resulting acts may warrant a more severe penalty. In other words, prior acts which contribute to the occurrence of foreseeable intentional acts may counteract the mitigation which might result from a lessening of freedom through compulsion. One who is aware of a tendency toward a certain delict has the responsibility to take due precautions, e.g., the persons he associates with, his use of alcoholic beverages, the need for psychiatric therapy, the nature of the ministerial assignment he accepts. To omit such precautions can be grounds for infliction of a more severe penalty.

i). Related to recidivism is the situation where a cleric is charged with several violation of canon 1395, §2. Multiple delicts may demonstrate an ingrained pattern of behavior that convinces the tribunal that the accused is incorrigible and represents a real threat to young persons in the future. A delict may also be aggravated by the fact that it violates more than one provision of the Code. For example, a cleric in question may have sexually abused a minor with force or threats or in some public fashion, or may have also solicited a minor in the confessional. In such situations, the justification for dismissal from his religious institute and clerical state "may be extremely strong even though some psychopathology may have diminished the malice or culpability involved in the acts."[43]

j). The imputability of the accused cleric is an essential element of any decision to dismiss a cleric from the religious institute and the clerical state. It cannot be looked upon simplistically nor can any legal rules alone settle the matter in some sort of mechanical fashion. The actual facts and circumstances of the accused cleric himself, his history, the context within which the proven acts took place, and especially the gravity of the acts must all be taken into account. The tribunal must balance both mitigating and aggravating circumstances to determine whether dismissal is in fact warranted or a lesser penalty suffices in light of the threefold goal of reparation of harm, restoration of justice, and reformation of the cleric.

A judicial determination of guilt is difficult enough, but, upon reaching moral certitude, the truth should impose itself on the consciences of judges. Determining

[43] USCCB, *Canonical Delicts ...*, p. 43.

whether the penalty of dismissal is an appropriate punishment of such proven delicts is in one way easier since it calls for an exercise of prudential discretion by judges, but, in another sense, it is much more difficult for precisely the same reason- it is a matter not merely of facts but of the delicate balancing that judicial prudence requires.[44] Finally, if the offence of the accused has been demonstrated with moral certitude and the presumption of his imputability has been upheld with indications that he has acted either maliciously or culpably, the tribunal must address the question of whether the requested penalty of dismissal from the clerical state can be imposed both in law and on the basis of the facts.

A.4.3. When the CDF decides that the case should proceed in an administrative manner, the CDF will ask the Supreme Moderator to proceed according to the norm of canon 699, §1. With his council, the Supreme Moderator can decide not to order dismissal from the institute but to issue disciplinary measures.

If it is clear to the Supreme Moderator that the cleric in question is guilty of a grave delict punishable by dismissal from the religious institute and clerical state, the Supreme Moderator may not initiate the judicial process to dismiss unless he is convinced that one or more of the three goals of the penal process (reparation of harm, restoration of justice, reformation of the cleric) cannot be achieved by lesser remedies. The Superior is permitted to initiate the judicial penal process, even in the case of a reformed and repentant cleric, if a permanent expiatory penalty, including dismissal, is the only way to repair the harm to the Church caused by scandal and to restore justice to all concerned.

A cleric subject to administrative measures has the right to hierarchical recourse, either to the CDF to contest the measures taken against him by the Superior, or to the *Feria Quarta* (the Cardinals and Bishops members of the CDF) to contest the measures taken by the Prefect of the CDF. It is the exclusive duty of the CDF to confirm the decree of dismissal from the institute according to the norm of canon 700. At the same time, the Congregation will also decide whether to impose upon the religious the penalty of dismissal from the clerical state. Copies of any decrees will be sent *ex officio* to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. Appeals against decrees issued in cases of *delicta graviora* will be decided exclusively by the Ordinary Congregation of members of the Congregation for the Doctrine of the Faith (*Feria Quarta*). There is no recourse to the Apostolic Signatura. Recourses have a suspensive effect.

As regards institutes of diocesan right, each presentation from the Supreme Moderator to the CDF must be endorsed by the bishop of the religious person's domicile or quasi-domicile according to the norms of canon 103.

[44] Cf. *Canons 1343-1346*.

A. The Effects of Dismissal

Dismissal from the clerical state and dismissal from the religious institute have a number of consequences. Because the cleric is no longer a member of the clerical state, he is no longer bound by its obligations not does he enjoy any of its rights. Dismissal from the religious institute brings with it the cessation of vows, rights and obligations, both for the cleric and for the institute. All rights and obligations deriving from profession cease; the vows no longer oblige; and the cleric is no longer incardinated in the institute.

Dismissal from the clerical state- in accordance with canon 292- brings with it the cessation of all rights and duties of the cleric, with the exception of celibacy, which can be dispensed only by the Holy Father. He alone determines occasions when he may wish to grant the favor of the dispensation. The Holy See has made changes, approved by the Holy Father, in the rescript of dispensation from the obligations arising from priestly ordination, including celibacy.[45] In a case (Prot. N. 2052/00/S), a rescript of dispensation issued by Pope John Paul II spelled out a number of conditions: 1) the rescript of dispensation inseparably includes the dispensation from sacred celibacy together with the loss of the clerical state. The priest petitioner has no option to separate one from the other, such as accepting the first and refusing the second; 2) in the event that the petitioner is a religious, the rescript includes his dispensation from the vows; 3) the same rescript includes the absolution from censures if so needed.[46]

Canon 292 states:

> "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."

Two realities may be noted in canon 292. First, the loss of the clerical state does not erase the sacramental character received by the person during his ordination, neither does it dispense him from celibacy. Sacred ordination confers an indelible character on its recipient in the same way that the sacraments of baptism and confirmation do. Yet

[45] "Amplectitur inseparabiliter dispensationem a sacro coelibatu et simul amissionem status clericalis. Numquam oratori fas est duo illa elementa seiungere, seu prius accipere et alterum recusare." See F.S. Pedone & J.I. Donlon (eds.), *Roman Replies and CLSA Advisory Opinions*, CLSA, Washington DC 2001, p. 16.

[46] Congregation for Divine Worship and the Discipline of the Sacraments, Prot. N. 2052/00/S, in O.V. Cruz, *Canon 290 CIC*, ALD Publications, Dagupan City 2001, pp. 168-169.

considering that the priesthood of the Church is an ontological participation of the high priesthood of Christ, it follows as a matter of course that the said "indelible character imprinted by the sacrament of sacred orders has a higher ranking, so to speak, than those conferred by the aforesaid two other sacraments baptism and confirmation."[47] Second, the effects of the loss of the clerical state, however, concern only the loss of the juridical status of the cleric, vis., his rights and obligations. Therefore, when a cleric is laicized, only his canonical status is really affected. He remains sacramentally ordained as a cleric, but juridically becomes a layman.

Canon 1350 provides that when penalties are imposed on a cleric, except in the case of dismissal from the clerical state, care must be taken that he does not lack what is necessary for his worthy support. In any case, this right ceases when a cleric has been expelled from the clerical state. However, even in that case, the Ordinary is required out of charity or equity to provide "in the best way possible"[48] for a dismissed cleric, provided that he is in a state of indigence because of the penalty. It must be emphasized that this is not a duty of justice, since there is no longer any relationship of justice between an Ordinary and a dismissed cleric, at least under sacred ordainment and sacerdotal ministry; the cleric has no right derived from the Church to respectable support.

The best way to access the provision depends upon: the financial and economic situation of the community to which the dismissed cleric belongs, but as well as his behavior, and other social circumstances. There is a charitable duty insofar as the cleric is truly in indigence; the state of indigence assumes that he has not even what is necessary for a respectable living. The state of indigence should be linked to the fact of having been dismissed. If it derives from a lack of willingness to work, a lack of diligence, or a dissolute life, there is no question of any charitable duty. The economic situation of the community that has the charitable duty of support the cleric must also be taken into consideration.[49]

Similarly, Canon 702, §2 speaks of treating the departing member with equity and evangelical charity. The canon suggests a rightful co-existence between *aequitas* and *caritas* in the implementation of such serious action. J. Coughlin opines that "equity joined with charity would have an equivalent meaning with canonical equity."[50]

In order to understand the context of equity, paragraph one of canon 702, §1 must be taken into account. It states that "whoever lawfully leaves a religious institute

[47] O.V. Cruz, *Penal Law of the Church in Default Mode?,* CBCP Communications Development Foundation, Manila 2009, pp. 90-91.

[48] *Canon 1350, §2.*

[49] Cf. V. De Paolis, "Commentary to canon 1350," in Á. Marzoa et al (ed), *Op. cit.*, p. 391.

[50] J. Coughlin, "Canonical Equity," in *Studia Canonica* 30 (1996), p. 423.

or is lawfully dismissed from one, cannot claim anything from the institute for any work done in it." Therefore, a religious who is separated from the institute, either after having legitimately departed or been dismissed, "has no right of claim in justice towards compensation for those years of works and services rendered while in the institute."[51]

CONCLUSION

The issue of dismissal of religious in cases of sexual misconduct is complicated and difficult to analyze, in general. It is very complex because, above and beyond the common good of the Church, it involves the duties and rights of various persons: the Superior, the victims and the religious himself. In fact, this is dealing with three victims: first and foremost the person who was subjected to sexual misconduct by a religious, particularly if that person is a minor; second, the Christian community and the religious institute wounded by the action; third, the religious himself or herself, not only when he or she is accused falsely, but when in reality he or she is guilty of one of the delicts of sexual misconduct, since, in this latter case, he or she is his or her own victim.

Clerics and religious are subject to special penalties on sexual misconduct because they are obliged to observe perfect and perpetual continence. The fundamental demand addressed to clerics and religious is to live a continent life, which must not only be "perfect," viz., total and complete, but also "perpetual," viz., continuous and permanent. Grave violations of these fundamental obligations constitute a scandal for the faithful, a true obstacle and stumbling block in their own pursuit of holiness.

The law foresees various punishments against religious who commit the delict of sexual misconduct, which may vary according to the gravity of the violation. Dismissal is a last resort. The Superior must be sure that before processing the dismissal, effective arrangements have been made to provide for the correction and amendment of the offender. The Superior must ensure that everything necessary to be done to restore justice and to repair the scandal. The process of dismissal can be taken only if those efforts for restoring justice and repairing the scandal have failed.

Canon 1321, §1 provides: "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. The violation of the law must be external. 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'

[51] V.R. Uy, "The Principle of Equity in the Code of Canon Law," in *Philippine Canonical Forum*, Vol. VIII (2006), pp. 94-95.

sexual misconduct cannot be considered a crime unless it results in some external action which violates a law or precept. As an external violation, the delict of sexual misconduct must be *permanens* or "persists" and *cum scandalo* or "with scandal."

The external act alone does not suffice. It must be an action that has been committed. 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. 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 by reason either of malice or of negligence. While malice involves a deliberate intent to violate a law, negligence is concerned with not applying due diligence to a situation.

Canon 1321, §3 states: "Where there has been an external violation, imputability is presumed, unless it appears otherwise." This does not simply mean that a person performed his/her action, but that he/she was responsible for what he/she did. When the accused religious has repeated evil acts over and over again without self-reform, this should not necessarily be deemed, in some sort of deterministic fashion, to lessen his/his imputability. In a way, the more a religious identifies himself/herself with his/her repetitious acts, the greater the imputability may be of those acts.