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CANONICAL DELICTS INVOLVING SEXUAL MISCONDUCT AND DISMISSAL FROM THE CLERICAL STATE. A BACKGROUND PAPER (1)

The Instruction *Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State*, published by the National Conference of Catholic Bishops in 1995, represents the culmination of a long process in which the bishops in the United States struggled to find an equitable solution for the canonical separation from the clerical state of a priest who had sexually abused minors in the past in cases where, because of the probability of recidivism, his continuance as a priest represented a real danger to the Church in general and to children in particular. The Instruction provides a practical and useful explanation of the process to be followed in such cases. It also incorporates several derogations of canon law (and a transitory norm) approved by the Holy See for the episcopal conference in the United States. The principal intent of the derogations is to provide a wider applicability of the penal process of dismissal in cases of sexual abuse of a minor for future acts and, to a more limited degree, even for past acts. Since the Instruction is *in se* a commentary on the canons and speaks for itself, this paper will concentrate on the various stages of the dialogue that led ultimately to the decision of the Holy See to approve derogations and of the conference of bishops to issue an explanatory Instruction.

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The derogations were promulgated by the Holy Father on April 25, 1994, through a rescript issued by Cardinal Angelo Sodano, Secretary of State (Cf. Exhibit # 1). They apply solely to delicts committed by a priest or deacon with a minor, not to the other delicts stated in canon 1395. They are meant to address specifically the case of a priest who is guilty of sexually abusing a minor and whom the diocesan bishop considers such a danger to children that he should not in any way function as a priest. Although such a priest may seek a dispensation from the Holy See to be returned to the lay state, there are occasions where, for various reasons, he is unwilling to do so. Since « forced » or *ex officio* laicizations are no longer being granted by the Holy See, the bishops of the United States have been struggling for several years to find a canonically acceptable manner of resolving such situations. Most bishops have been loath to invoke the judicial process in the Code of Canon Law for the punitive dismissal of the priest from the clerical state. It is alien to their way of thinking in such matters. They see the whole problem as entirely pastoral, not punitive, in nature. Canonically, however, at least in some cases, the use of such a process has become a necessity (2).

A dialogue went on for many years between the N.C.C.B. and the Holy See. There were fundamentally five important stages in the ongoing discussion of how to treat such cases:

- proposals for an administrative penal procedure of dismissal;
- proposals for an administrative non-penal procedure of removal;

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(2) The same process is used to dismiss a temporary or permanent deacon from the clerical state, but here we are speaking principally about priests. Nonetheless, a diocesan bishop may very well face the same problem with regards to a deacon. On the other hand, the process may not be required in cases of sexual misconduct of this severity by priests who are members of religious institutes since they are already subject to dismissal from their religious institute (cc. 695-703, 746). Although the matter is controverted, it seems that dismissal from a religious institute, effectively speaking, leaves a priest, who was formerly a religious within the clerical state, without any institutional connection and therefore prohibited from functioning as a priest unless incorporated, at least temporarily, into some other religious institute or some diocese (cc. 695, 701). *See* James H. Provost, *Some Canonical Considerations Relative to Clerical Sexual Misconduct*, 52 *The Jurist* 615, 625-626 (1992).

- the recommendations of the papal joint commission;
- the derogations as proposed by the N.C.C.B. and as promulgated;
- the publication of an Instruction by the N.C.C.B. to facilitate use of the process.

1. *Administrative penal procedure of dismissal.*

For several years, especially during the pontificate of Pope Paul VI, bishops were able, in extreme circumstances, to petition the Holy See for the administrative (i.e., non-penal) laicization of a priest even without that priest's voluntary petition for such a dispensation. With the promulgation of the revised Code of Canon Law in 1983, the Holy See discontinued this practice. This left only two remedies for such grave cases: voluntary petition by the priest in question or penal dismissal of the priest from the clerical state by use of the judicial process (3).

Many bishops in the United States were of the opinion that the « judicial process » was too cumbersome and unwieldy, replete with unnecessary delays, and difficult to employ; they sought some remedy from the Holy See. While hoping in reality for the revival of the device of an *ex officio* (involuntaty) laicization, the bishops seemed to think that its equivalent could be achieved by obtaining from the Holy See, in lieu of the judicial penal process, an *administrative process of dismissal from the clerical state*. Conversations were held at various levels within the National Conference of Catholic Bishops and between representatives of the N.C.C.B. and the Apostolic See. The goal was to streamline the decision-making process and put it more fully into the hands of the diocesan bishop.

While various proposals were made for a simplified administrative penal process, it was difficult to reach an accord on an appropriate procedure which would protect all the rights involved: of the priest, of the bishop, of victims, and of the ecclesial community. Part of the problem on the part of bishops forced to deal with such difficult situations may have been their misperception of what any penal process, administrative or judicial, must entail.

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(3) Since dismissal from the clerical state is a perpetual penalty it cannot be imposed by an extrajudicial decree; it requires the full judicial process (c. 1342, § 2).

They viewed the predicament as a pastorally devastating situation which required immediate and decisive action: « removal of the priest from the priesthood » — or, more properly, « removal of the priest from the *clerical state* » (4).

Besides the bishops' perception of a pastoral need for a definitive separation of the priest from the clerical state, diocesan attorneys sometimes advised their bishops of the potential liability for future wrongful acts of such a priest should the diocese choose to maintain a supervisory relationship over him. To continue the priest in any sort of official assignment or permit him to function in ministry, even simply to house him for therapy and to support him financially in a monastery, could be considered indicia of a supervisory relationship, grounding a cause of action directly or vicariously against the priest's diocese (5). Diocesan attorneys were dissatisfied with « mere » suspension *a divinis* and preferred to see a more definitive separation of the priest from the diocese, i.e., his complete removal from the clerical state and his return to the lay state.

Early discussions of a streamlined administrative penal process sought to craft a way of removing the priest from the clerical state that

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(4) The phrase « removal from the priesthood » can be misleading. A priest, once ordained, remains validly ordained. Nothing can undo his ordination nor in this sense remove him from the « priesthood » as such. Thus, any priest, even if excommunicated, no less dismissed from the clerical state, would be permitted to absolve a penitent who is in danger of death (c. 976). But the rights and duties of priests, their juridical incorporation into the Church, their commission to function as priests in the name of the Church — these are all legal concepts which are gathered together under the rubric of « clerical state ». The more precise term therefore is to remove or dismiss someone from the clerical state, not from the priesthood.

(5) For a discussion of the distinctions among right to ministry, remuneration for ministry, and decent support *see* BERTRAM F. GRIFFIN, *The Re-Assignment or Non-Assignment of a Cleric Who Has Been Professionally Evaluated and Treated for Sexual Misconduct with Minors: Canonical Considerations*, 35 *The Catholic Lawyer* 295, 296-298 (1994) [originally published in 51 *The Jurist* 326 (1991)]. *See also* PROVOST, *Some Canonical Considerations...*, cited *supra* in footnote 1, at 631-633. For a discussion of the respondeat superior and various negligence bases for liability, *see* MARK E. CHOPKO, *Ascending Liability of Religious Entities for the Actions of Others*, 17 Am.J. of Trial Adv. 289 (1993), NICHOLAS CAFARDI, *Stones Instead of Bread: Sexually Abusive Priests in Ministry*, 27 *Studia Canonica* 145, 160-163 (1993). *See John Does 1-9 v. Compcare, Inc., et al.*, 763 P.2d 1237 (Wash. App. 1988). There is disagreement in the civil courts about the degree of vicarious liability of a bishop for actions of a priest. *Compare Stevens v. Bishop of Fresno*, 123 Cal. Rptr. 171 (1975) *with Ambrosio v. Price*, 495 F. Supp. 381 (D. Neb. 1979) (automobile accidents).

would be less cumbersome and speedier than a judicial procedure, thinking that such procedural efficiencies would resolve the situation. This is where some misperception intruded into the calculus. What many bishops were looking for in an « administrative process » was not merely a form of streamlining but a decision-making apparatus in which the *diocesan bishop himself* would dismiss the priest based on *pastoral* necessity (rather than as a penalty). What canon lawyers meant by administrative process, however, was the imposition of the *penalty* of dismissal from the clerical state by the diocesan bishop in a non-judicial manner but with due process protections for the priest. The discussions faltered. The failure to produce an acceptable process led to a second stage, which involved a much more radical approach to the question, moving away from the concept of a canonical penalty.

2. *Administrative non-penal procedure of removal.*

It became apparent that, while a judicial procedure may be cumbersome and, more importantly, may remove the ultimate decision from the diocesan bishop to a collegiate tribunal of three qualified priest-judges, simply converting the *judicial* penal process into an *administrative* penal process would really not provide diocesan bishops with what they were seeking. More fundamental canonical realities made the penal process, in the eyes of many bishops, not only a clumsy but often an *inapplicable* way of separating the priest from the clerical state. It was not so much that an ornate process had to be followed but that, even after it were followed, the penalty might not be able to be applied at all.

At this stage, therefore, it was suggested that, not only the judicial procedure, but the very idea of dismissal *as a penalty* to be canonically imposed on the cleric was problematic. The penal statute of limitations of five years from the most recent act ruled out any dismissal in many cases which came to light at a later time, a not-infrequent occurrence — even though the priest was still a danger to children. The fact that the canonical delict for abusing a minor defined the minor as under 16 years of age seemed minimalist in states where state criminal codes used an older age. Finally, and most important, there seemed to be a rather prevalent opinion that the psychopathology suffered by such priests almost automatically exempted them from the penalty insofar as the imposition of

dismissal requires « full » imputability, not merely « grave » imputability (6).

Accordingly, the N.C.C.B.'s Canonical Affairs Committee proposed for discussion a process not of « dismissal », but of administrative « removal », from the clerical state. The pastoral facts and circumstances, past, present and future (e.g., likelihood of recidivism), would be the determinant of whether grounds existed for removal. In 1992, the Committee developed for discussion purposes a model based on the canons for the administrative removal of a priest from the pastorate (7).

Although the proposed process was limited to cases in which the priest had committed a canonically-proscribed offense, it was not essentially a penal process. There was no statute of limitations and the reasons for or against removal balanced both the gravity of the harm and the need for correction, reparation and restoration of justice with practical judgments about the feasibility of the priest's continued ministry in any form and the danger to others. The central basis for removing the cleric, analogous to the reason for administrative (non-penal) removal of a pastor, would be the bishop's considered pastoral judgment that the cleric's ministry had become permanently harmful (*noxium*) to the Church or completely ineffective (*inefficax*) in any reasonable ecclesial situation because of his past acts and because, all things considered, his continued ministry in any form whatsoever would represent a grave danger to the Church (8).

The determination of the gravity and permanence of such a situation would take into consideration factors such as the following:

(*a*) Whether the cleric's acts resulted from a persistent mental or physical disease or defect, rendering him unsuitable to carry out the duties of a cleric, and, even with appropriate treatment, it is

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(6) Canon 1324, § 1, 10°.

(7) Canons 1740-1747.

(8) « When, for the reasons stated in Norm 2, the ministry of a diocesan cleric has become permanently harmful to the Church or completely ineffective and his continued ministry represents a grave danger to the Church, the cleric may be administratively removed from the clerical state by the diocesan bishop of his diocese of incardination in accordance with the procedure found in Norms 2-14 ». CANONICAL AFFAIRS COMMITTEE, *Draft of Special Norms for Administrative Removal of a Cleric from the Clerical State*, May 1, 1992, Norm 1 [unpublished].

reasonably foreseen that the cleric will not be able to carry out his ministry without grave danger of harm to the Church.

(*b*) Whether the cleric has lost his good reputation among upright and good members of the Christian faithful and even among the public at large, or his behavior has given rise to an aversion which cannot be dispelled.

(*c*) Whether the cleric's acts have seriously damaged the good reputation of other clerics or of the clerical state in general or have caused serious scandal which, it is reasonably foreseen, will persist or even increase if the cleric continues to exercise his ministry.

(*d*) Whether the behavior of the cleric has already exposed ecclesiastical juridic persons and ecclesiastical authority to severe financial liability or, without his permanent disassociation from the Church, the ecclesiastical patrimony of the entities which would otherwise be responsible for him will be placed in serious jeopardy (9).

This was a *completely* administrative approach. It was not merely *procedurally* administrative. In fact, the procedural aspect of the proposed process was not terribly « administrative » — it was « quasi-judicial » in nature, providing notice, opportunity to be heard, use of official priest-advisors, discovery, right to canonical counsel, right of recourse, and other elements of due process (10).

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(9) *1992 Draft*, Norm 3. Notice that (*a*) reflects the wording of canons 1041 and 1044 concerning the impediment to the exercise of orders arising from *infirmitas* and that all four factors in Norm 3 reflect corresponding concerns leading to removal of a priest from the pastorate as listed in canon 1741.

(10) The following represent examples of norms dealing with due process drafted for discussion purposes which illustrate the quasi-judicial character of the procedure: « Norm 4. If the diocesan bishop becomes aware that a particular cleric's behavior may warrant his removal from the clerical state, he shall appoint three priest-advisors, from a group permanently selected for this purpose by the presbyteral council after their being proposed by the diocesan bishop. The priest-advisors are to investigate the matter and to report to him within seven. (7) days whether there is sufficient reason to proceed with the process of removal from the clerical state ».

« Norm 6. If, after receiving the report of the priest-advisors, the diocesan bishop decides to proceed with the process of administrative removal from the clerical state, he shall commission the same priest-advisors to conduct a fuller investigation, submit their findings to him, and recommend to him whether or not to remove the cleric from the clerical state ».

« Norm 7. The priest-advisors investigating the situation:

(1) shall notify the cleric that the process of removal has been initiated and

More significantly, however, the act itself, *substantively*, had become an *administrative act* of the bishop, rather than a *penalty* for violating a canonical delict.

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inform him of the allegations which they are investigating; a cleric who refuses to accept documents or other legitimate communications notifying him of the process or who prevents the delivery of such information to himself is deemed to have been legitimately notified about the process.

(2) shall give the cleric an opportunity to respond to the allegations and to offer whatever information may be relevant to their investigation; upon such notice, the cleric has a right to consult with anyone he chooses and to be accompanied and counseled by a canonical advocate. If the cleric fails to appoint a canonical advocate, the diocesan bishop shall appoint one for him unless the cleric expressly declines to have such an advocate; if the cleric neglects to participate at all in the process, the diocesan bishop shall appoint a guardian-advocate to act on his behalf and to protect his rights.

(3) shall enjoy full freedom to interview other persons, including alleged victims, to consult with experts in appropriate fields such as medicine, psychiatry, psychology, civil law and canon law, and to obtain through other legitimate means any information which may be relevant to the matter under investigation.

(4) shall observe prudent confidentiality and take care lest anyone's good name, especially that of the cleric himself, be endangered by this investigation.

(5) shall, after a full investigation, submit a written report to the diocesan bishop with their recommendation about removal and the reasons and arguments supporting such a recommendation; if the three priests are not unanimous in their recommendation, the reasons and arguments for the majority and dissenting opinions should be clearly stated.

(6) shall complete the tasks stated in paragraphs 1-5 as expeditiously as possible under the circumstances, with due regard for time limits set by the diocesan bishop as well as for the need to be adequately informed about all relevant facts and issues ».

« Norm 8. If, after discussing with the priest-advisors their report and recommendation, the diocesan bishop decides that the removal must take place, he should first ascertain that the cleric is unwilling to seek voluntarily from the Apostolic See a dispensation from his clerical obligations and a return to the lay state in accordance with Canon 290,3. Then, after the diocesan bishop has explained to the cleric, for validity, the reasons and arguments for removal, the cleric shall have a period of fifteen (15) days within which to respond to the diocesan bishop. If the cleric has not responded within the aforementioned time period, the diocesan bishop shall extend the available time for response another seven (7) days ».

« Norm 11. If the cleric responds within the aforementioned time period, expressly opposing the reasons and arguments for his removal and alleging reasons which appear insufficient to the diocesan bishop, the diocesan bishop, in order to act validly, shall:

(1) offer the cleric an opportunity to inspect the findings and recommendation of the three advisor-priests, and provide him with a reasonable period of

The proposed process was not well received. Some canon lawyers in the United States were of the opinion that, despite the due process protections, bishops could too easily abuse the process and remove priests from the clerical state without true justification. This radically new approach also met with significant resistance within the Curia, although it also had its supporters there. The failure of this initiative led to the third stage: the judicial penal process revisited.

3. *Recommendations of the papal joint commission.*

A series of meetings by representatives of the N.C.C.B. and Curial officials interested in the matter failed to agree upon a fully administrative (i.e., non-penal) approach. In May, 1993, after consulting with representatives of the U.S. hierarchy, the Holy Father directed that a small commission be appointed to study the judicial process: a bishop and two canonists from the Apostolic See and similar personnel from the N.C.C.B. (11)

This *ad hoc* joint commission, established by the Holy See at the end of May (12), met in Rome for two days, June 14-15, 1993.

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time within which to organize his challenges to removal in a written report and submit evidence to the contrary if he has any;

(2) consider the matter with the same three priest-advisors, unless others must be designated as substitutes to priest-advisors who are unable to carry out this duty;

(3) definitively determine whether the cleric is to be removed from the clerical state and, if so, promptly issue a decree to that effect, stating the reasons for removal ».

« Norm 14. (1) Upon receipt of notice of the decree, the cleric is provisionally removed from the clerical state with all the effects stated in Canons 291-293.

(2) Pursuant to the receipt of notice stated in par. 1, all the acts of the case, including any recourse against the decree the cleric may make in writing within fifteen (15) days, are to be transmitted forthwith by the diocesan bishop to the Apostolic See for its review and ratification (*recognitio*). Upon ratification by the Apostolic See of the decree, as originally issued or as modified by the Apostolic See, the provisional effects of the decree become permanent ». *1992 Draft*, Norms 4, 6, 7, 8, 11, 14.

(11) *See, e.g.*, « Pope Acts on Sex Abuse-Panel to Speed Ouster of Offending Priests », *Washington Post*, A1 (June 22, 1993).

(12) The members of the *ad hoc* joint commission were: Bishop Julian Herranz Casado, secretary of the Pontifical Council for the Interpretation of Legislative

Its purpose was « to study how to apply the universal canonical norms governing judicial process to the particular situation of the United States regarding the well-known problem » (13). The discussion about an administrative non-penal process of removal was abandoned. Instead, the commission concentrated on the substantive and procedural canons of the penal process. Of major concern, however, were the problems highlighted in the previous stage of the dialogue: the limitations of the penal process which, in many cases, rendered it, for all practical purposes, inapplicable. The small working group issued a thirteen-page report, analyzing the various provisions in canon law for dealing with such situations, noting the possibility of derogations from the law which the N.C.C.B. might wish to consider and propose to the Holy See, and interpreting how canon law should be applied to cases of clerics who have sexually abused a minor (14).

The Canonical Affairs Committee of the N.C.C.B. was charged with the task of studying the joint commission's proposals and moving things forward. The Canonical Affairs Committee undertook to develop an Instruction to provide practical guidelines on the use of the judicial process and to address the principal questions which tend to arise in such cases. At the same time, the Committee drew from the joint commission's report potential derogations of the law in this area which might facilitate the use of the judicial process. This led to the fourth stage: the proposal of derogations by the N.C.C.B. and their modification and promulgation by the Holy See.

4. *Derogations as proposed by the N.C.C.B. and as promulgated by the Holy See.*

The derogations proposed by the Canonical Affairs Committee were adopted by an overwhelming vote of the conference of bishops in November 1993 and sent to the Holy See for consideration and

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Texts; Archbishop Adam J. Maida, Archbishop of Detroit; Msgr. John A. Alesandro, chancellor of the Diocese of Rockville Centre; Msgr. Raymond L. Burke, defender of the bond of the Apostolic Signatura, Rome; Rev Velasio de Paolis, professor at the Pontifical Gregorian University, Rome; Rev. John V. Dolciamore, professor at Mundelein Seminary, Chicago.

(13) Appointment letter of Cardinal Sodano, May 31, 1993.

(14) JOINT COMMISSION, *Proposals and Suggestions of Joint Commission « Ad Hoc »*, June 15, 1993.

approval. During the next few months, the proposals were examined and commented upon by various Curial dicasteries. The derogations and the comments were then submitted to the joint papal commission which met on April 12-13, 1994, to prepare a final report and recommendation for consideration by the Holy See.

(a) *Raising the age in canon 1395, § 2 from below-sixteen to below-eighteen.*

This proposal sought to change a substantive element of the delict of sexual abuse of a minor so that any person under 18-years of age would meet the definition of « minor ». While state criminal codes within the United States vary in the age below which the capacity for consent to sexual acts is presumed to be lacking, it was felt that the canonical element should not be linked to local state legislation and should not vary from state to state. On the other hand, the bishops were of the opinion that the traditional limitation of such a delict to those under sixteen years of age set the cut off at too early an age. They concluded that a cleric should be liable for dismissal for committing any sexual act with a young person not yet eighteen, the general canonical age of majority (15). Since age is an element of the delict itself, the proposed derogation by the Holy See would be prospective in nature; it could not be retroactive. On April 25, 1994, the Holy Father approved the proposed change in age, effective immediately for a probationary period of five years (16).

(b) *Period of Prescription (cc. 1362, 1395).*

In canon law, the state law concept of a period set by a statute of limitations is called the period of prescription. Once the period expires, the criminal action to impose a penalty for commission of the delict is extinguished. It operates like a bar resulting from a statute of limitations although, unlike state law, it is not merely an affirmative defense (which can be impliedly waived); the canonical penal action simply cannot be brought. Currently, the prescription

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(15) Canon 97, § 1.

(16) « 1) With regard to can. 1395, § 2: this norm is to be applied to delicts committed with any minor as defined in can. 97, § 1, and not only with a minor under sixteen years of age ». Secretariat of State, *Rescript from Audience of His Holiness*, n. 346.053, 4/25/94 [cited hereafter as *4/25/94 Rescript*]. *See Exhibit # 1.*

for the delict of sexual abuse of a minor is five years from the most recent delictual act (17). This is two years longer than the standard period of prescription (18).

The bishops in November 1993 voted to request that two additional periods of prescription supplement the five-year period:

a. The period from the commission of the delict until the day the victim who was sexually abused as a minor has completed his or her twenty-third year of age.

b. Two years after the diocesan bishop of the cleric's diocese of incardination first « receives information which at least seems to be true » that the cleric has sexually abused a minor (19).

Each of the three periods would be independent of the other two. All three must have expired prior to the citation of the accused for the action to be definitively time-barred. Prescription, like the civil law statute of limitations, is technically procedural (although its radical effect on prosecution makes it very close to « substantive »). It is not an element of the delict; it affects only the judicial remedy. Accordingly, unlike the change of age, the bishops requested that the change of the period of prescription be made retroactive, applying to all processes commenced after its approval, even though the acts giving rise to the delict occurred before that date (20).

These proposed derogations would have changed the period of prescription dramatically, particularly the two-year discovery window expressed above in « b » and the retroactive nature of the changes. Concern was expressed about these two, more extreme, departures

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(17) Canons 1395, § 2 and 1362, § 1, 2°.

(18) Canon 1362, § 1.

(19) Canon 1717, § 1. This last addition would afford the diocesan bishop two years afier the duty of canon 1717 to investigate such matters first arises. During that discovery period, the action could be brought even if the first two periods had already expired. Conversely, if the information received by the diocesan bishop was not acted upon or the investigation was inconclusive, this period would expire two years after tbe receipt of the information, even if the otber two periods had not yet expired.

(20) While a retroactive change would permit bishops to address newly-discovered delicts, one must keep in mind that the bringing of a penal action would still require a formal decision by the diocesan bishop as well as the filing of an accusatory *libellus* by the promoter of justice. Moreover, if the action were brought, the collegiate tribunal, in determining whether dismissal would be an appropriate penalty, would be required to take into account the length of time which had elapsed since the delict was committed.

from canonical practice. In discussing the proposals, an alternative approach emerged within the joint commission: the possibility of extending the period beyond five years (possibly to ten years) but keeping it fixed in nature. It was also suggested that a « window » linked to denunciation (described above in « b ») should not be free-floating, but in the form of an « extension » of the statute of limitations at the end of the stated period if it had not yet expired. If the newly-defined period had completely expired, then no extension would be applicable.

On the other hand, the N.C.C.B.'s idea of « tolling » or suspending the running of the period until the minor completed his or her eighteenth year of age met with greater acceptance. It could easily happen that a minor might be prevented from bringing such delicts to the attention of the authorities by parents unwilling to raise such an issue or by the dominance of the perpetrator of the delict or simply by the minor's immaturity. The strategy of tolling during infancy, familiar in state law, was also viewed as a basis for some retroactivity, at least as regards the proposed derogation described above in « a ». (21).

In the end, the lengthening of the statute of limitations and the procedural devices of tolling and extension were used to develop an alternative to the N.C.C.B. proposal. This alternative was approved by the Holy Father on April 25, 1994. We will now examine its different *prospective* and *retroactive* effects.

(1) Prospectively: a derogation. With sexual delicts committed with a minor on or after April 25, 1994, the promoter of justice may not bring an action for dismissal from the clerical state on the basis of canon 1395, § 2 if the following periods have expired:

(1) The minor in question has completed his or her twenty-eighth (28th) year of age.

(2) At least one year has passed from the denunciation of the delict, provided that the denunciation was made before the minor completed his or her twenty-eight (28th) year of age (22).

If both conditions have occurred prior to the citation of the accused, the action is time-barred. Effectively speaking, this statute

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(21) *See* GRIFFIN, *The Re-Assignnent of a Cleric...*, cited *supra* in footnote 3, at 308-309; *see* JOHN P. BEAL, *Doing What One Can: Canon Law and Clerical Sexual Misconduct*, 52 *The Jurist* 642, 678-679 (1992).

(22) *4/25/94 Rescript,* cited *supra* in footnote 16. *See Exhibit # 1.*

of limitations represents a variable period dependent on the age of the minor at the time of the delict. For example, if the minor were ten years old at the time of the most recent act, the cleric would be subject to the penalty for eighteen years (plus an extension of no more than one year if the denunciation did not occur until the minor in question was twenty-seven years of age). On the other hand, if the minor were seventeen years old at the time of the most recent act, the statute of limitations would expire in eleven years (plus any applicable extension if denunciation were during the last year of the period).

This new statute of limitations is applicable prospectively to all delicts committed from April 25,1994, until April 24, 1999, unless the Holy See modifies the five-year experimental nature of the derogation by shortening, extending or eliminating it.

(2) Retroactively: a transitory norm. The above-described change in the statute of limitations is *not retroactive*. It applies only to offenses committed on or after April 25, 1994. Nonetheless, the Holy Father promulgated a *transitory norm* affecting some delicts committed prior to April 25, 1994. Such delicts with a minor (i.e., one under *sixteen* years of age) are deemed to be actionable by criminal process until the minor in question completes his or her twenty-third (23rd) year of age ([23]).

Practically speaking, the transitory norm retroactively « tolls » the applicable five year statute of limitations in effect at the time of the commission of the delict (no matter how old the minor was at the time) until the minor in question has reached the age of majority, at which time the five-year period begins to run. For example, if the minor were precisely ten years old at the time of the most recent act, the transitory norm would consider the delict punishable for thirteen years, whereas, if the victim were precisely fifteen years of age at the time of the delict, the action would not be deemed extinguished for eight years. The one-year « extension » (where denunciation occurs

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([23]) « Because delicts are involved in which the victims deserve special concern and because it seems equitable that the possibility of criminal action might also be granted in the case of those who have already suffered such delicts, the Most Holy Father has judged it fitting to issue the following transitory norm: with respect to delicts already committed, criminal action is not to be deemed extinguished until the minor who has suffered the injury has completed the twenty-third year of age ». *4/25/94 Rescript*, cited *supra* in footnote 16. *See Exhibit # 1.*

during the last year of the period of prescription) would not apply to past acts. Thus, citation of the accused would be required prior to the completion of the victim's twenty-third year of age even if denunciation occurred some time during the twenty-second year.

This transitory norm supersedes the straight five-year statute of limitations of canon 1362, § 1, 2° and, by its very purpose, seems to preclude the application of the preference for the more favorable penal law stated in canon 1313, § 1.

(c) *Appeal by the defendant or the promoter of justice at the local level.*

When a diocesan tribunal hands down a sentence in any case, including a penal action, appeal can normally be taken either to the competent metropolitan or regional appellate tribunal, or to the Roman Rota. The N.C.C.B. voted in November 1993 to request the Holy See to grant such local appellate tribunals *exclusive* competency to hear appeals in second instance of cases involving dismissal from the clerical state for sexual abuse of a minor. Of course, if there were a reversal by the second instance tribunal, or if, in the case of two conforming sentences, a third instance appeal were permissible because of new and serious proofs and arguments (24), a third instance appeal would go to the Rota.

This proposed derogation met considerable opposition. There is a long tradition of maintaining every person's right to appeal to the Holy See in second instance. While such appeals directly to Rome may be lodged by individuals purely for dilatory motives (as happens in matrimonial actions), it was felt that there were less radical ways of addressing such a potential abuse of process for such a relatively small number of cases. Dialogue with Roman authorities about a speedier resolution of such appeals and the possibility of establishing one or more regional appellate tribunals in the United States to hear appeals in penal cases might be just as effective in avoiding dilatory tactics as limiting the Roman Rota to third instance. The Holy Father rejected the proposal of the N.C.C.B. in this area, leaving in place the traditional right of appeal to either the competent local appellate tribunal or the Roman Rota (25).

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(24) Camon 1644, § 1.

(25) « The Holy Father has not granted any derogation with regard to can. 1444, § 1, 1° ». *4/25/94 Rescript. See Exhibit # 1.*

5. *Instruction of the Canonical Affairs Committee of the N.C.C.B.*

Besides the development and proposal of changes in the procedural law, the Canonical Affairs Committee, pursuant to the report of the *ad hoc* joint commission, took it upon itself to draft a document to assist diocesan bishops and their tribunal personnel to apply the judicial process for dismissal from the clerical state. On Tuesday, September 13, 1994, the N.C.C.B.'s Administrative Committee, at the request of the Canonical Affairs Committee, approved the release of the Instruction. The Instruction clarifies the steps in the judicial penal process and addresses questions which would tend to arise in a case of sexual abuse of a minor, including the important element of imputability. It also incorporates the derogations and transitory norm. Since the Instruction represents both a presentation of and commentary on the canons, it would be redundant to offer here a further « commentary on the commentary », but it may be somewhat helpful to underscore the structure of the document and to highlight certain points worthy of special emphasis.

After the explanatory Introduction, the Instruction begins its exposition with a brief allusion to perfect and perpetual continence (c. 277) as a primary rationale for the Church's decision to classify certain grave forms of sexual misconduct as canonical delicts for clerics whereas lay persons acting similarly are not subjected to the same penal sanctions (A). An analysis of the substantive penal law (c. 1395) immediately follows (B), distinguishing the delicts listed in § 1 as requiring persistence from those described in § 2 as marked by special aggravating circumstances ([26]). A crucial point emphasized at the outset in regard to the latter classification is that the act itself

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([26]) A *medicinal penalty* seeks principally the reformation and reconciliation of the wrongdoer. It must always involve some sort of canonical warning prior to imposition. Upon sufficient repentance and reparation, the penalty is remitted. By its nature, therefore, it is temporally indefinite.

An *expiatory penalty* like dismissal, on the other hand, seeks principally to redress the situation caused by the wrongful act. Thus, the initiation of the process of dismissal does not require the cleric's disregard or disobedience of prior admonishments or other acts of correction. The critical issue is not whether the cleric has been *warned* to cease and desist and has *persisted* in his offense (although repeated violations after such warnings would clearly strengthen the case for dismissal), but whether the *heinousness of the delict* is such as to warrant dismissal.

(*actus reus*) must be an objectively grave violation of the sixth commandment and may therefore differ considerably from the definitions of sexual abuse in civil law.

Turning to process (C), the Instruction next considers the preliminary investigation to be initiated by the diocesan bishop who receives information about a delict that « at least seems to be true » (c. 1717, § 1) and the threefold determination he is called upon to make when the facts have been clarified: whether a canonically imputable delict was committed; whether a penal action to punish it is prescribed; whether it is prudent to instigate a penal process ([27]). The threefold purpose of punishment is stressed: reparation of the harm caused; restoration of justice, reformation of the guilty cleric.

Before going on to study in detail the judicial process to impose the penalty of dismissal from the clerical state, the document describes other canonical responses to the particular situation which may prove more expedient under the circumstances. There are options other than penalties (D) ([28]). Penal remedies and penances may prove sufficient, or the accused cleric may voluntarily seek a dispensation from presbyteral celibacy and a return to the lay state ([29]). Another canonicai remedy may be applicable in certain cases of severe psychic infirmity: the declaration of an impediment to the exercise of orders (c. 1044) ([30]). Moreover, there are strict penalties which are less final than dismissal (E). Censures and temporary expiatory penalties may be sufficient for the particular case and may be imposed by administrative process if the circumstances warrant it ([31]). The Instruction addresses these « lesser »

([27]) *See* FRANCIS G. MORRISEY, *Procedures to be Applied in Cases of Alleged Sexual Misconduct by a Priest*, 26 *Studia Canonica* 39, 56-63 (1992).

([28]) For a discussion of various canonical options, *see* BEAL, *Doing What One Can...*, cited *supra* in footnote 21, at 660-666, 672-682.

([29]) Canon 291. *See* MICHAEL O'REILLY, O.M.I., *Recent Developments in the Laicization of Priests*, 52 *The Jurist* 684 (1992); *Procedures for a Dispensation from Priestly Celibacy*, 1980 Norms from the Congregation for the Doctrine of the Faith, Norm 4, *The Jurist*, 41 (1981), 226.

([30]) *See* BEAL, *Doing What One Can...*, cited *supra* in footnote 21, at 672-673; GRIFFIN, *The Reassignment of a Cleric....*, cited *supra* in footnote 5, at 303-304; CRAIG A. COX, *Processes Involving Irregularities and Impediments to the Exercise of Orders*, in RANDOLPH R. CALVO and NEVIN J. KLINGER, eds., *Clergy Procedural Handbook* 178-205 (Washington, D.C.: CLSA 1992).

([31]) Canon 1720 outlines the process to be followed in imposing or declarimg a censure or temporary expiatory penalty by administrative decree: (1) The bishop

remedies at the outset in order to underscore the importance of determining carefully the propriety of the particular response to the commission of such delicts (which always depends on the circumstances of the individual case) and the reservation of the penalty of dismissal for only those cases which warrant it.

The above sections (A-E) represent approximately half of the Instruction. A major portion of the remainder is devoted to an analysis of the judicial process itself (F). The text comments not on all of the process but only on canons that would seem to be especially significant for sexual misconduct cases or raise arguable points of law. After describing the required qualifications of the personnel in such cases (F3), the Instruction proceeds step-by-step through the processual acts (F4-13), ending with a brief exposition about secrecy and the disposition of the *acta* (F14). For many practicing canon lawyers (judges, chancellors, vicars), this is the area of the law that remains somewhat arcane. They have rarely been called upon even to advise another about the process to be followed no less to participate in it without procedural error. This section of the Instruction, while purporting to be nothing more than a general outline, does provide a « handbook » or a guide for the canon lawyer who is suddenly called upon to serve as a judge, promoter of justice, advocate or notary in such a case.

The final substantive section of the Instruction (G) addresses the derogations described in the earlier part of this paper regarding the applicable period of prescription (prospectively and retroactively) and the change in the age of the minor (prospectively). It then seeks to provide some very limited guidance on the all-important element

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is to inform the cleric about the accusation and the evidence collected to date. He must give the cleric an opportunity to explain his actions and defend himself against the accusation. A basic component of the right of defense is the cleric's right to be advised by a canon lawyer at all stages of the process. If the cleric is unwilling to cooperate at all, the bishop should formally summon him to appear before him and, if the cleric fails to comply, the bishop may then proceed. (2) The bishop is to consider carefully all the evidence and arguments in consultation with two qualified advisors. (3) If the bishop has reached moral certitude that the delict is proved and the canonical statute of limitations has not expired, he is to issue the administrative decree imposing the censure or temporary expiatory penalty. The decree should state his reasons in law and in fact for imposing the penalty. All of the exempting, mitigating and aggravating factors and the other norms found in canons 1321-1327 and 1342-1350 are to be observed in drawing up and issuing the decree.

of imputability (G3). This is a difficult and delicate area. Every aspect of science seems to have something to say: epistemology, psychology, moral theology, legal interpretation, judicial prudence, and so on. The document emphasizes that there is no bright-line or hard-and-fast rule. Each case is different and must be judged according to the law and the facts and circumstances demonstrated to the tribunal. The tribunal's judgment must be based solely on the acts of the case and on the rules of law in determining the imputability needed for imposition of dismissal. The Instruction stresses four areas of concern to be addressed by the judges of the case:

1. *Actus Reus* (G3c). Imputability is not an issue without an objective delict. Although propensity to abuse minors may be very valuable evidence as to imputability and the appropriate punishment, it alone is no basis for the imposition of the penalty of dismissal from the clerical state without proof of the *actus reus*.

2. *Mens Rea* (G3d). Conversely, the external act alone does not suffice. It must be imputable to the accused, a human act, done with deliberation and freedom, arising from personal malice or culpability (c. 1321, § 1). The imputability must be not merely « grave » but « full » (c. 1324, § 1, 10°).

3. Presumptions and Burden of Proof (G3e-f). Despite the need to delve into the world of the accused's conscience, the judge is not set adrift in the sea of the internal forum without a rudder. The process and the judgment remain that of the external forum. Thus, the presumption of canon 1321, § 3 resolves the doubt in the external forum. An especially important point in this canon is the interpretation of the phrase *nisi aliud appareat* ([32]). Without evidence of facts which clearly show that the imputability of the accused was diminished, the tribunal must find in favor of full imputability ([33]). The Instruction takes the position that an accused's psychological illness should not mechanistically be interpreted as the lack of personal responsibility for the external violations committed and illustrates how presumptions may be used to clarify whether the full

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([32]) Canon 1321, § 3.

([33]) *See* discussion on the presumption in MICHAEL HUGHES, O.M.I., *The Presumption of Imputability in Canon 1321, § 3*, 21 *Studia Canonica* 19 (1987). In my opinion, Hughes goes too far when he concludes that the presumption yields not simply before contrary proof or before a probability but even before a « *possibility* that it may be false » [emphasis his]. At 34.

imputability required by the canons was present at the time of the commission of the delict.

4. Exempting, Mitigating and Aggravating Circumstances (G3f5-9). The document ends with an illustration of the kinds of circumstances, *pro* and *con*, which must be weighed in determining imputability and the appropriateness of dismissal as a penalty: the use of alcohol or some other narcotic agent; the heat of passion; abuse of authority or of office; recidivism; multiplicity of delicts.

JOHN A. ALESANDRO

EXHIBIT # 1

Rescript from Audience of His Holiness

His Excellency the Most Reverend William Henry Keeler, Archbishop of Baltimore and President of the Conference of Bishops of the United States of America, on November 30, 1993, in the name of the same Conference, petitioned that, in consideration of the particular circumstances in that nation, certain derogations be granted from the canons of the Code of Canon Law about the penal process pertaining to a delict against the Sixth Commandment of the Decalogue committed by a cleric with a minor (cf can. 1395, § 2).

The Most Holy Father, to whom the same petition was submitted, — having taken account of the proposals of the commission *ad hoc* of experts in Canon Law, chosen both by the Apostolic See and said Conference of Bishops, — has kindly and graciously granted the following derogations for a period of five years:

1) With regard to can. 1395, § 2:

this norm is to be applied to delicts committed with any minor as defined in can. 97, § 1, and not only with a minor under sixteen years of age.

2) With regard to can 1362, § 1, 2°:

in those matters which pertain to the above-mentioned delict, this norm is so to be applied that criminal action is not extinguished unless the following conditions have been fulfilled:

a) the one who suffered the delict has completed the twenty-eighth year of age; and

b) at least one year has passed from the denunciation regarding the same delict, as long as the denunciation was made before the one who suffered the injury had completed the twenty-eighth year of age.

The derogations take effect from today, April 25, 1994.

The Holy Father has not granted any derogation with regard to can. 1444, § 1, 1°.

Because delicts are involved in which the victims deserve special concern and because it seems equitable that the possibility of criminal action might also be granted in the case of those who have already suffered such delicts, the Most Holy Father has judged it fitting to issue the following transitory norm:

with respect to delicts already committed, criminal action is not to be deemed extinguished until the minor who has suffered the injury has completed the twenty-third year of age.

Given at the Vatican, the twenty-fifth day of the month of April in the year 1994.

Cardinal *Angelo Sodano*
Secretary of State