ISSN: 0214-3100

EXCERPTA E DISSERTATIONIBUS IN IURE CANONICO

CUADERNOS DOCTORALES

DE LA FACULTAD DE DERECHO CANÓNICO

PUBLICACIÓN PERIÓDICA DE LA FACULTAD DE DERECHO CANÓNICO
UNIVERSIDAD DE NAVARRA / PAMPLONA / ESPAÑA

Universidad de Navarra

MARK KIMANI MUHORO

A Critical Appraisal of the United States Conference of Catholic Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons

VOLUMEN 29 / 2020-21

SEPARATA

EXCERPTA E DISSERTATIONIBUS IN IURE CANONICO

CUADERNOS DOCTORALES

DE LA FACULTAD DE DERECHO CANÓNICO

PUBLICACIÓN PERIÓDICA DE LA FACULTAD DE DERECHO CANÓNICO /
UNIVERSIDAD DE NAVARRA
PAMPLONA / ESPAÑA / ISSN: 0214-3100
VOLUMEN 29 /2020-2021

DIRECTOR/ *EDITOR*
José Antonio Fuentes
jafuentes@unav.es
UNIVERSIDAD DE NAVARRA

SECRETARIO / *EDITORIAL SECRETARY*
Gerardo Núñez
gnunez@unav.es
UNIVERSIDAD DE NAVARRA

Esta publicación recoge extractos de tesis doctorales defendidas en la Facultad de Derecho Canónico de la Universidad de Navarra.

La labor científica desarrollada y recogida en esta publicación ha sido posible gracias a la ayuda prestada por el Centro Académico Romano Fundación (CARF)

Redacción, administración, intercambios y suscripciones:
«Cuadernos doctorales».
Facultad de Derecho Canónico
Universidad de Navarra.
Pamplona. España. CP 31009
Tfno.: 948 425 600.
Fax: 948 425 622.
E-mail: emarcoa@unav.es

Edita:
Servicio de Publicaciones
de la Universidad
de Navarra, S.A.
Campus Universitario
31009 Pamplona (España)
Tfno.: 948 425 600

Precios 2021:
Número suelto: 25 €
Extranjero: 30 €

Fotocomposición:
Pretexto

Imprime:
Ulzama Digital

Tamaño: 170 x 240 mm

DL: NA 1479-1988

SP ISSN: 0214-3100

EXCERPTA E DISSERTATIONIBUS IN IURE CANONICO

CUADERNOS DOCTORALES

DE LA FACULTAD DE DERECHO CANÓNICO

VOLUMEN 29 / 2020-2021

Índice general

Tiempos y dimensión sacramental del ayuno en la disciplina de la Iglesia hasta el Concilio de Trullo (691-692)

BARTLOMIEJ PAWEL PERGOL

El obispo y las iglesias en su diócesis. Tutela jurídica en su erección, reducción a uso profano, enajenación y reutilización en el marco diocesano

GUSTAVO QUEREJETA ARIAS

Praxis y problemática de la actuación del Obispo como juez en el m. p. *Mitis Iudex Dominus Iesus*
PIOTR GAŁDYN

El derecho de defensa en algunos procedimientos administrativos penales especiales introducidos por recientes normas extracodiciales
PAWEŁ PIOTR MATUSZEWSKI

A Critical Appraisal of the United States Conference of Catholic Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons

MARK KIMANI MUHORO

Compliance y ordenamiento canónico a la luz del c. 1284 § 2, 3º
ŁUKASZ PRZEMYSŁAW SZKARŁAT

La edad y la capacidad matrimonial anterior a la codificación de 1917
JORGE CASTRO TRAPOTE

Universidad de Navarra
Facultad Derecho Canónico

Mark Kimani MUHORO

A Critical Appraisal of the United States Conference of Catholic Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons

Extracto de la Tesis Doctoral presentada en la
Facultad Derecho Canónico de la Universidad de Navarra

Pamplona
2021

Ad normam Statutorum Facultatis Iuris Canonici Universitatis Navarrensis,
perlegimus et adprobavimus

Pampilonae, die 16 mensis decembris anno 2020

Dr. Ioseph Bernal

Dr. Georgius Bosch

Coram tribunali, die 22 mensis novembris anno 2013, hanc
dissertationem ad Lauream Candidatus palam defendit

Secretarius Facultatis
D. nus Eduardus Flandes

Cuadernos Doctorales de la Facultad de Derecho Canónico
Vol. 29, n. 5

A Critical Appraisal of the United States Conference of Catholic Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*

Mark Kimani MUHORO**
[mmuhoro@alumni.unav.es]

* *Excerptum* of the doctoral thesis directed by Prof. D. José Bernal: *From the offense against the sixth to* delicta graviora*: the evolution of the offense committed with a minor in light of the American experience*. Defended on 22nd February, 2013.

** Tabla de siglas y abreviaturas:

CDF:	Congregation for the Doctrine of the Faith
n.:	Number
p:	Page
vol.:	Volume
SST:	*Sacrosanctum sanctitatis tutela*
USCCB:	United States Conference of Catholic Bishops.

Introduction

When in 1985, the unprecedented case of Fr. Gilbert Gauthe, a priest accused of having molested several boys in the United States came to a close, many hoped that with it, the tragedy of clerical child abuse had also drawn to an end. No one imagined that this case marked the beginning of a purgative odyssey for the Universal Church. The sexual abuse crisis, as it came to be known, had a twofold dimension. The first was the sexual abuse by priests of minors and in a few of the cases, serial abuse carried out by paedophile priests. The second and the one that seemed to cause the most outrage, was undoubtedly the failure by the bishops to impose the necessary measures to prevent the acts of abuse from reoccurring or to punish the priests guilty of the abuse.

The floodgates of the actual crisis opened in 2002 following the investigative work of The Boston Globe's Spotlight team. The initial idea of The Globe was to investigate the role of Bernard Cardinal Law, then at the helm of the Archdiocese of Boston, in the reassignment of John J. Geoghan, a priest accused of several counts of child abuse. Their resulting expose of various cases of abuse and the failure of Cardinal Bernard Law to act upon such cases led to a public uproar and to the discovery of the existence of 150 priests with a record of abuse in the archdiocese of Boston. 2002 cannot however, be considered the beginning of the crisis. If there was a crisis in 2002, it can only be referred to as a crisis of exposure.

When the first of the stories was published, this «crisis» soon began to make itself manifest in the United States. On April 9th, St. John Paul II met with the members of the United States Conference of Catholic Bishops (USCCB). At that meeting, the Bishops asked for support from the Vatican regarding the norms that the bishops intended to frame and adopt at their meeting in Dallas in June. A proposal was also made for an inter-dicasterial meeting in Rome. Present would be all the American Cardinals, the USCCB leaders, the Prefect of the Congregation for the Doctrine of the Faith, Cardinal Joseph Ratzinger, the Prefect of the Congregation of the Clergy, Cardinal Castrillón del Hoyos, the Prefect for the Congregation for Bishops Cardinal Giovanni Battista Re and the Cardinal secretary of State, Angelo Sodano[1].

---

1 G. Weigel, *The Courage to be Catholic: Crisis, Reform and the Future of the Church*, Basic Books, New York, 2002, 139.

On April 15th, the news that the American Cardinals had been convened in Rome for a two day meeting from April 22nd to April 23rd to discuss the clerical abuse of minors became public. As George Weigel puts it, at that moment, «a media firestorm ensued» and there arose the mistaken notion among reporters that the meeting would settle the crisis once and for all. The high expectations allegedly crystallized around the phrase «zero tolerance» which the press quickly decided would be the criteria by which it would judge the seriousness of the Cardinals response to the crisis[2].

In his address to the cardinals meeting on April 23rd, St. John Paul II stated that some bishops had made decisions which «subsequent events showed to be wrong». The Pope then went on to add the catch phrase which set the tone for the Essential Norms: everyone in the Church had to know that «there is no place in the priesthood and religious life for those who would harm the young»[3]. Late the following evening, a communiqué that summarised the discussions of the preceding evening was issued. It came under six points:

i) The US Bishops would propose a set of «national standards» for handling clerical sexual abuse cases and would expect prompt action in reviewing them;
ii) The bishops conference would devise and recommend a process for the quick dismissal from the clerical state of any «notorious» priest guilty of the «serial, predatory, sexual abuse of minors»;
iii) The bishops would propose a new procedure for dealing with cases that were not «notorious» but in which the bishop had good reason to believe that the priest in question posed a threat to children and young people;
iv) An apostolic visitation of US seminaries would take place with special reference to admission requirements «and the need for seminaries to teach Catholic moral doctrine in its integrity»;
v) The bishops of the United States would pledge themselves to living the deeper holiness for which the Pope had called and commit themselves to calling others to that holiness;

---

2 *Ibid*.

3 St. John Paul II, Address to the Cardinals of the United States on 23rd April 2002. Available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_en.html, last accessed on 4 February 2019.

vi) A national day for prayer and penance should be mandated for the Church throughout the United States to foster reconciliation and renewal[4].

Fast forward then to June 14th, 2002, Dallas, Texas. The bishops met to hold a two day plenary session to discuss the first three points of their communiqué. The circumstances however were far from ideal. «In the heat of a Dallas summer and the even more intense heat of national and international media scrutiny»[5] and –as Cardinal Avery Dulles, critically puts it– «under the glare of adverse publicity and under intense pressure from various survivors' networks, they hastily adopted, after less than two days of debate, the so-called Dallas charter and an accompanying set of norms that were intended, after approval by the Holy See, to be legally binding in the United States»[6].

1. The Charter for the Protection of Children and Young People (The Dallas Charter)

On June 14th, 2002 in Dallas, the Charter for the Protection of Children and Young People, often referred to as the Charter, was approved by an overwhelming majority of the USCCB. The purpose of the Charter was explained by the USCCB President, Bishop Wilton Gregory of Belleville, Illinois, as follows:

> «First, the bishops have resolved to create national standards and policies for dealing with the devastating pain and sorrow of abuse victims. Second we have established national standards and processes for protecting all children in the future. Third we have committed to and established national processes for consistently and vigilantly dealing with clergy abus-

---

4 Full statement available at http://www.bishop-accountability.org/resources/resource-files/timeline/2002-04-24. Vatican-Statement.htm, last accessed 4th November 2012.

5 J. Beal, «Hiding in the Thickets of Law: Some Disturbing Aspects of the Dallas Charter», in *America Magazine*, October 7th 2002, available at http://www.americamagazine.org/content/article.cfm?article_id=2526, last accessed 10th November, 2012.

6 A. Dulles, «Rights of Accused Priests: Toward a Revision of the Dallas Charter and the 'Essential Norms'», in *America Magazine* June 21, 2004 available at http://www.americamagazine.org/content/article.cfm?article_id=3638, last accessed 10th November, 2012.

> ers – with no tolerance for any abuse and for barring from the ministry all abusers. Finally, we are committing dioceses and the national organization of the Conference to greater involvement of the laity in all these new procedures»[7].

As it stands today, the Charter, consisting of a Preamble, 17 articles and a conclusion[8] is «in the form of a solemn declaration of principles from which concrete measures are to be deduced»[9].

As a declaration or *statement of intention*, it has concrete measures which are intended to serve as orientation for the diverse eparchies and dioceses in the United States in handling cases of abuse. However, the Charter has no normative or legislative force. Theoretically, any bishop who did not wish to follow the dictates of the Charter in his area of jurisdiction is free to opt out (knowing however that his diocese will be adversely mentioned in the annual report on the implementation of the Charter commissioned by the USCCB)[10]. Some canonists have argued that it is «certainly *morally* binding on the bishops»[11]. Luis Navarro has gone even further, stating that the control mechanisms in the Charter and its content have caused the Charter to have such a great impact «that it is *de facto* binding»[12].

---

7 K. Boccafola, *The Special Penal Norms of the United States and Their Application*, in P. Dugan (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Proceedings, Gratianus Series, Montreal 2005, Wilson and Lafleur Ltée, 257-285 at 263.

8 *Origins*, November 28, 2002, vol. 32, n. 25, 409-415. Available as well at the USCCB official website.

9 L. Navarro, *A General Canonical Backgrounder for Interpreting the USCCB Essential Norms in the Context of the Evolution of Canonical Penal Law*, in P. Dugan (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice*, Montreal 2010, Wilson and Lafleur Ltée, 2010, 195-238 at 200.

10 An interesting example is the case of the diocese of Lincoln which as late as 2013 had never participated in the audit of the Implementation of the Charter. The Report on the Implementation of the 'Charter for the Protection of Children and Young People' 2008, states: «Unfortunately, the bishop of the Diocese of Lincoln continues to refuse to participate in the audit process; this year, he is joined by four Eastern Catholic eparchs. The Board is continually reminded that this conduct, though undoubtedly within an ordinary's canonical power, scandalizes the faithful, who cannot understand resistance to a simple measure for the protection of children». Letter by the Chairman of the National Review Board accompanying the Implementation Report dated March 2008.

11 T. Green, *Clerical Sexual Abuse of Minors: Some Canonical Reflections*, in The Jurist 63 (2003) 366-425 at 367.

12 L. Navarro, «A General Canonical Backgrounder», 209.

2. The Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons[13]

At the same time as the draft Charter was being subjected to approval, the bishops were working on the norms that would regulate the abuse of minors. These norms were called the *Essential Norms for Diocesan/Eparchial Policies dealing with Allegations of Sexual Abuse of Minors by Priests and Deacons*, or simply the «Essential Norms». In their own words, they «constitute particular law for the dioceses, eparchies, clerical religious institutes, and societies of apostolic life of the United States with respect to all priests and deacons in the ecclesiastical ministry of the Church in the United States»[14].

2.1. *The juridical nature of the Essential Norms*

As Martin de Agar has stated, «*La espressione 'diritto particolare' riveste un doppio significato in rapporto al diritto comune: può indicare le norme particolari deroganti le generali dettate dallo stesso legislatore; può indicare le norme dettate dal legislatore inferiore (che non possono derogare quelle del superiore, salvo specifiche ipotesi). Il diritto particolare emanato dalle Conferenze Episcopali rientra in questa seconda categoria*»[15].

Since the norms were in the form of a general decree issued by the USCCB, which is the Episcopal Conference of the United States, they required revision and approval[16] –or *recognition*– of the Holy See as determined in c. 455.

---

[13] The Essential Norms approved by the USCCB can be found in *Origins*, 27th June, 32 (2002), n. 7, 107-108. The final text approved on December 8th is available at http://old.usccb.org/bishops/norms.shtml. The most recent version can be found at http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/Charter-for-the-Protection-of-Children-and-Young-People-revised-2011.pdf, last accessed 4th February 2019.

[14] Note 1 of the Notes to *The Essential Norms*, 2006.

[15] M. de Agar, *Legislazione delle Conferenze episcopali complementare al CIC*, Milano, 1990, 4. (The expression «particular law» has a dual significance in relation to the common law: it may refer to particular laws derogating the general laws that have been given by the same legislator; or it may refer to the laws given by the inferior legislator (which laws cannot derogate those of the superior save in specific hypotheses). The particular law of the Episcopal Conference enters into this last category» (My translation).

[16] As per L. Örsy, *Bishops' Norms: Commentary and Evaluation*, in Boston College Law Review, 44 (2003) 999-1029, 1001: «'Approved' is used to render the Latin *recognitum*. *Recognitio* is a rela-

As per article 82 of *Pastor Bonus*, the Congregation of Bishops is the competent Congregation to grant to either particular Councils or Episcopal Conferences *recognitio* of their general decrees. The «*recognitio* of the Holy See is an act by which the ecclesiastical authority confirms that the norms under examination are not contrary to superior norms; it does not purport to convert them into pontifical law. This seems to indicate that the *recognitio* is ultimately equivalent to a *nihil obstat*»[17].

The *recognitio* thus serves as an «act of control»[18] and does not change the nature of the norms. They remain particular law of the USCCB since they are merely the expression of a determined group of bishops and of their power of jurisdiction though they do enjoy a special moral –not juridical– authority by virtue of the *recognitio* and express communion between the particular Church and Rome[19]. The *recognitio* is necessary *ad validitatem* and hence without it, the Essential Norms could not have legitimately been promulgated and these would have remained without binding force[20]. But at the same time, the *recognitio* is not sufficient to derogate a norm of universal law.

Accordingly, the Essential Norms are subject to the principles of penal law, for example, the strict interpretation of penal law (c. 18), the application of the more favourable law to the offender (c. 1313 § 1), and the principle of non-retroactivity of the law (c. 9)[21].

---

tively new concept in the canonical tradition; in theory the term means less than 'approval' but more than 'taking notice of'; yet, in the present practice of the Holy See it amounts to approval. Note, however, that if the legislator had intended 'approval', he could have used the perfectly fitting Latin word *approbatio*. He did not».

17 L. NAVARRO, «A General Canonical Backgrounder», 206.

18 Communicationes 15 (1983) 173, *«Si tratta di un intervento di carattere aggiuntivo di controllo e di tutela, proprio dell'Autorità superiore. Tale intervento come già detto è la condizione necessaria perché l'atto della Conferenza possa acquisire forza vincolante».*

19 L. CHIAPPETA, *Il Codice di Diritto Canonico: Commento Giuridico Pastorale*, vol. I, 2ª ed., Edizioni Dehoniane, Roma, n. 2122.

20 Pontifical Council for Legislative Texts: Nota Explicativa, in Communicationes 38 (2006) 16.

21 J. BERNAL, *Las «Essential Norms» de la Conferencia Episcopal de los Estados Unidos Sobre Abusos Sexuales Cometidos por Clérigos. Intento de Solución de una Crisis*, in Ius Canonicum 47 (2007) 685-723, p. 706. For his part, Navarro states: «However on occasion it may be necessary to allow an exception but only on condition that the 'law must mention expressly that these exceptions are applied to facts and acts which occurred before it came into forc.'». L. NAVARRO, «A General Canonical Backgrounder», 207, citing P. LOMBARDÍA, sub c. 9, in *Code of Canon Law Annotated*, Wilson & Lafleur, Montreal 2004, 2nd edition, 38. This was the case with the Rescript of 1994.

2.2. *Provisions of the draft Essential Norms as approved by the bishops*

The June Draft constituted a preamble and 13 provisions. The Norms took most of their provisions from the Charter and thus the nexus between the two is quite evident. The preamble repeats the commitment of the bishops to fight against cases of sexual abuse of minors and to reach out to victims even when the case took place «long ago». The bishops declared that they would commit themselves «to the pastoral and spiritual care and emotional well-being of those who have been sexually abused and of their families»[22]. The preamble also stated that «to ensure that each diocese/eparchy in the United States of America will have procedures in place to respond promptly to all allegations of sexual abuse of minors, the United States Conference of Catholic Bishops *decrees* these norms for diocesan/eparchial policies dealing with allegations of sexual abuse of minors by priests, deacons, or other church personnel». The definition of sexual abuse was the same as used in the Charter.

Norm 1 then provided that the norms would be reviewable within two years and that they would constitute particular law for the United States once the *recognitio* had been received. Norm 2 stated that each «diocese/eparchy will have a written policy on the sexual abuse of minors by priests and deacons, as well as by other Church personnel». Norm 3 created the office of an assistance coordinator whose role was to «aid in the immediate pastoral care of persons who claim to have been sexually abused when they were minors by priests, deacons, or other church personnel».

The Norms also provided for a review board in each diocese/eparchy to assist the bishop in assessing issues of credibility of allegations, assessing fitness for ministry and of reviewing the diocesan/eparchial policies and procedures in handling abuse cases.

The composition of the review board was established at Norm 5. It would be established by the bishop and composed of «at least five persons of outstanding integrity and good judgment. The majority of the review board members will be lay persons who are not in the employ of the diocese/eparchy; but at least one member should be a priest, and at least one member should have particular expertise in the treatment of the sexual abuse of minors».

---

[22] Preamble to the draft June Essential Norms available at *Origins*, 27th June 32 (2002) n. 7, 107-108.

Norm 6 provided for the creation of an appellate review board to be established by each province. Norm 7 provided for the procedure to be followed when a «credible allegation of sexual abuse of a minor by priests, deacons, or other church personnel» was made. It added that «the alleged offender will be relieved of any ecclesiastical ministry or function». As per Norm 8, if a priest or deacon was involved, the bishop would ask that he «undergo appropriate medical and psychological evaluation and intervention, if possible».

Norm 9 which also underwent substantial modifications is here reproduced in part as originally envisaged by the bishops:

> «9. Where sexual abuse by a priest or deacon is admitted or is established after an appropriate investigation in accord with canon law, the following will pertain:
>
> A. Diocesan/eparchial policy will provide that for even a single act of sexual abuse of a minor –past, present, or future– the offending priest or deacon will be permanently removed from ministry.
>
> In every case, the processes provided for in canon law must be observed, and the various provisions of canon law must be considered... These provisions may include a request by the priest or deacon for dispensation from the obligations of holy orders and the loss of the clerical state, or a request by his diocesan/eparchial bishop for dismissal from the clerical state even without the consent of the priests or deacons. For the sake of due process, the accused is to be encouraged to retain the assistance of civil and canonical counsel. When necessary, the diocese/eparchy will supply canonical counsel to a priest.
>
> If the penalty of dismissal from the clerical state has not been applied (e.g., for reasons of advanced age or infirmity), the offender is to lead a life of prayer and penance. He will not be permitted to celebrate Mass publicly, to wear clerical garb, or to present himself publicly as a priest».

The other norms were more or less similar to the provisions in the Charter, reiterating the need to cooperate with civil authorities and to send all relevant information as relates to any offense of abuse by a cleric to the receiving bishop in the case of a cleric seeking transfer. The Essential Norms were then subjected to a vote and an overwhelming 229 voted in favour as opposed to 5 who voted against the norms[23].

---

[23] *Origins*, 27th July 32 (2002) n. 7, p. 102.

2.3. *The response of the Holy See*

The draft Essential Norms thus complete as amended and approved by the bishops were duly sent on June 26th 2002 by Bishop Wilton Gregory to the Holy See for the *recognitio*.

The reply from the Holy See was dated 14th October 2002 and was signed by the Prefect of the Congregation for Bishops, Cardinal Giovanni Battista Re. On the one hand it reflected the solidarity shared by the Holy See with the American bishops in this time of crisis and also recognised the efforts that had been taken by the USCCB. On the other hand, given the not too propitious conditions under which the norms had been enacted, the letter also communicated the Holy See's preoccupation with some of the provisions in the Charter but above all in the Essential Norms. As the letter stated in part:

> «Despite these efforts, the application of the policies adopted at the Plenary Assembly in Dallas can be the source of confusion and ambiguity, because the 'Norms' and 'Charter' contain provisions which in some aspects are difficult to reconcile with the universal law of the Church. Moreover, the experience of the last few months has shown that the terminology of these documents is at times vague and imprecise and therefore difficult to interpret. Questions also remain concerning the concrete manner in which the procedures outlined in the 'Norms' and 'Charter' are to be applied in conjunction with the requirements of the Code of Canon Law and the *motu proprio Sacramentorum sanctitatis tutela* (AAS 93 (2001) 787)»[24].

But the letter did not stop at that. Instead of remitting the matter back to the USCCB to come up with a revised set of Norms and Charter, the Holy See decided to constitute a joint commission. Thus the letter went on to state:

> «For these reasons, it has been judged appropriate that before the *recognitio* can be granted, a further reflection on and revision of the Norms and the Charter are necessary. In order to facilitate this work, the Holy See proposes that a Mixed Commission be established, composed of four bishops chosen from the Episcopal Conference of the United States, and four representatives from those dicasteries of the Holy See which have direct competence

[24] Letter by Cardinal Giovanni Battista Re dated 14th October 2002 to Bishop Wilton Gregory available at http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021018_re-usa_en.html

> in the matter: the Congregation for the Doctrine of the Faith, the Congregation for Bishops, the Congregation for Clergy, and the Pontifical Council for Legislative texts»[25].

The reply from Bishop Wilton Gregory was immediate. It was dated October 15th and in it, the President of the USCCB accepted the proposals as advanced by the Holy See and undertook to name the members from the USCCB who would form part of the Mixed Commission[26].

The members making up the Mixed Commission on the part of the Holy See were Archbishop Tarcisio Bertone, Secretary of the Congregation for the Doctrine of the Faith, Archbishop Francesco Monterisi, Secretary of the Congregation for Bishops, Cardinal Darío Castrillón Hoyos, Prefect of the Congregation for the Clergy and Archbishop Julián Herranz, President of the Pontifical Council for the Interpretation of Legislative Texts. Representing the USCCB were Cardinal Francis George, the Archbishop of Chicago, William Levada, the Archbishop of San Francisco, Thomas Doran, Bishop of Rockford and William Lori, Bishop of Bridgeport[27].

The Commission did not take long to convene, meeting for two days on the 29th and the 30th of October 2002 to discuss and propose amendments. These amendments were then considered once more by the USCCB at the general meeting of the Episcopal Conference which was held in Washington from the 11th to the 14th of November 2002. During this Conference, the changes proposed by the Mixed Commission were discussed and implemented. Immediately thereafter, on November 15th, Bishop Wilton Gregory wrote the Apostolic See forwarding the revised Norms and Charter and requesting *recognitio* for the Norms. The response of the Holy See was not long in coming. On the 8th of December 2002, Cardinal Giovanni Battista Re wrote bishop Wilton Gregory expressing the solidarity of the Holy See and at the same time forwarding the decree of *recognitio* for the Essential Norms. The letter states in part:

> «The 'Essential Norms' in their present formulation are intended to give effective protection to minors and to establish a rigorous and precise procedure to punish in a just way those who are guilty of such abominable offen-

---

25 *Ibid*.
26 http://natcath.org/NCR_Online/documents/Gregory2Re.htm
27 *Origins*, October 31, 32 (2002) n. 21, 343.

> ses because, as the Holy Father has said, 'there is no place in the priesthood and religious life for those who would harm the young'.
>
> At the same time, by ensuring that the true facts are ascertained, the approved Norms protect inviolable human rights –including the right to defend oneself– and guarantee respect for the dignity of all those involved, beginning with the victims. Moreover, they uphold the principle, fundamental in all just systems of law, that a person is considered innocent until either a regular process or his own spontaneous admission proves him guilty»[28].

The Norms were granted a *recognitio* for three years and they took effect on 1st March 2003. After the revision of the Norms in 2005, they were granted a new *recognitio* on January 1st 2006 that was to be effective *donec aliud provideatur*.

3. Amendments to the Essential Norms

We now turn our attention to the amendments introduced to the bishops' draft by the Mixed Commission which gave rise to the Essential Norms.

3.1. *Amendments to the preamble*

The changes began right from the preamble. As earlier stated, it was essential to keep in mind that these Norms were neither superior to nor could they repeal provisions of universal law. The preamble thus added the words «These norms are complementary to the universal law of the Church...» and also highlighted the fact that Canon law «has traditionally considered the sexual abuse of minors a grave delict». The Commission eliminated the definition of sexual abuse of a minor replacing it with the words: «Sexual abuse has been defined by different civil authorities in various ways, and these norms do not adopt any particular definition provided in civil law (...) The norm to be considered in assessing an allegation of sexual abuse of a minor is whether conduct or interaction with a minor qualifies as an external, objectively

---

[28] Accompanying Letter to the Essential Norms available in W. Woestmann, *Ecclesiastical Sanctions and the Penal Process*, 2nd edition revised and updated, Ottawa 2003, 355-356.

grave violation of the sixth Commandment...»[29]. This was a clear reminder that there was no new offense *per se* being created known as sexual abuse, that was not envisaged by c. 1395 § 2 of the Code of Canon Law. In case of doubts «whether a specific act qualifies as an external, objectively grave violation» then «the writings of recognized moral theologians should be consulted and the opinions of recognized experts should be appropriately obtained»[30].

Though sexual abuse was not defined, acts that would constitute such abuse were stated. Thus as per the preamble «Sexual abuse of a minor includes sexual molestation or sexual exploitation of a minor and other behavior by which an adult uses a minor as an object of sexual gratification».

Another very important change was regarding the active subjects. The draft Essential Norms provided for procedures that dealt with allegations of sexual abuse of minors made against «priests, deacons, or other Church personnel». The reference to «other church personnel» was promptly eliminated. Since the Norms had to be in line with universal canon law, it was obvious that c. 1395 § 2 did not deal with the offense committed by laymen. Also included were the words «diocesan and religious» in reference to priests and deacons so that the phrase as amended read in relevant part:

> «... the United States Conference of Catholic Bishops decrees these norms for diocesan/eparchial policies dealing with allegations of sexual abuse of minors by diocesan and religious priests or deacons».

3.2. *Amendments to Norm 1*

There was really no major amendment to this norm, only a more legal precision. Thus the reference to «approval by the Holy See» of the Norms was replaced with «Having received the *recognitio* of the Apostolic See... and having been legitimately promulgated in accordance with the practice of this Episcopal Conference...» In addition, the Mixed Commission added that the evaluation of the Norms after two years would be done «by the plenary assembly of the United States Conference of Catholic Bishops».

---

[29] From the preamble, which also stated that, «A canonical offense against the sixth Commandment of the Decalogue (c. 1395 § 2) need not be a complete act of intercourse...»

[30] Notes to the Essential Norms of 2002. The original had stated «If there is any doubt about whether a specific act *fulfills this definition*...».

3.3. *Amendments to Norm 2*

The reference to «other Church personnel» in this norm was left intact since it related to diocesan policies for dealing with sexual abuse. However, the Commission added that the policy had to comply with requirements of Canon Law.

3.4. *Amendments to Norm 3*

This norm dealt with the establishment of an office to handle pastoral care for those who claim to have been sexually abused. Once more, the reference to pastoral care as regards abuse committed by «other church personnel» was eliminated.

3.5. *Amendments to Norm 4*

This norm, underwent quite a number of modifications since it dealt with the review board, an eminently lay body that was to assist the bishop. It also touched on sensitive issues such as assessing the suitability for ministry and the review of the policies on abuse. The cause for concern by the Holy See was the role of this review board and its competence which could neither overlap with that of the bishop nor undermine his role. The Commission thus provided that the review board was to «function as a confidential consultative body to the bishop/eparch». The statement that read that each diocese/eparch would have a review board «whose functions include», was changed to read «The functions of this board may include...»

Initially the draft norms had provided that the assessment of suitability for ministry would be by the review board. The Mixed Commission amended norm 4A to state that the review board would advise the diocesan bishop/eparch regarding this. In other words, the bishop would do the assessing and the review board would assist with its advice. Also eliminated was the board's function of reviewing eparchial *procedures* for dealing with allegations of sexual abuse of minors. Obviously, this was because the procedures were established by universal canon law and could not be the subject of review, not even by the Episcopal Conference. The amended version now read «reviewing diocesan eparchial *policies* for dealing with sexual abuse of minors»

where before it had read «reviewing of the... policies and procedures». As regards the assessment of the allegation, the draft provided that the review board could assess allegations both prospectively and retrospectively. This was changed to advising the bishop on all aspects of the case whether retrospectively or prospectively.

3.6. *Amendments to Norm 5*

Whereas the draft norms had only foreseen that the minimum five persons necessary to constitute the review board had to be of outstanding integrity and good judgement, the Mixed Commission added that they had to be «in full communion with the Church». The Commission also added that the priest member of the review board had to be «an experienced and respected pastor of the diocese/eparchy in question». The Commission also stated that it was desirable that the Promotor of Justice participate in the meetings of the review board seeing that as per c. 1430, the Promotor of Justice is bound by office to safeguard the public good.

3.7. *Amendments to Norm 6*

This norm had provided for the creation of an appellate review board in each province but it was eliminated in its totality by the Mixed Commission. Two main reasons for this may be posited. First, if the bishop needs more advice, he is free to consult with anyone outside of the review board as he wishes since the final decision rests with him. Secondly, an appeal to an appellate review board might result in a control procedure over the bishop before the criminal process has begun. As one writer states, «For the Vatican, this is an ecclesiological enigma (...) the idea of a layperson 'supervising' a bishop is anomalous. Moreover, many in the Vatican would say the heart of the sex abuse crisis was a failure on the part of many bishops to take personal responsibility for screening candidates for Holy Orders and overseeing the implementation of existing sex abuse policies»[31].

---

[31] T. PLANTE (ed.), *Sin against the Innocents: Sexual Abuse by Priests and the Role of the Catholic Church*, Praeger Publishers, Westport, 2004, 24.

3.8. *Amendments to Norm 7*

This Norm was amended to read Norm 6 and quite a number of additions were made. Initially, the norm had provided that when a credible allegation of sexual abuse of a minor by a priest, deacon or other church personnel was received, the alleged offender would immediately be relieved of any ecclesiastical ministry or function. An investigation in line with canon law would be initiated and the accused encouraged to retain counsel.

The norm was substantially modified, first by eliminating the reference to Church personnel for reasons already explained. Secondly, the relieving of the offender from ministry was eliminated at this stage. Rather, the offender would be removed from ministry after the investigation (if there was sufficient evidence that abuse had occurred) and after having notified the Congregation for the Doctrine of the Faith. Moreover, during the preliminary investigation, appropriate steps would be taken to protect the reputation of the accused.

3.9. *Amendments to Norm 8*

This became norm 7. The draft norm provided for the possibility of a mandatory request made by the bishop to the alleged offender to undergo a medical and psychological evaluation. The Commission revised the text of this norm to read «The alleged offender may be requested to seek, and may be urged voluntarily to comply with an appropriate medical and psychological evaluation». The evaluation would be «at a facility mutually acceptable to the diocese/eparchy and to the accused» (emphasis added).

3.10. *Amendments to Norm 9*

It became norm 8. This norm was substantially modified due to the controversy it generated with its «one strike and you're out» or «zero-tolerance» policy. Paragraph 8A was deleted in its totality though reference to the controversial zero-tolerance policy was retained in the successive paragraph 8B.

Paragraph 8B had two major revisions. The first was the inclusion of a paragraph by the Mixed Commission which provided that unless the CDF had called up the case to itself due to special circumstances, it would direct the diocesan bishop to proceed (cf. article 13 of *Sacramentorum sanctitatis tutela*, now article 16 of *Gravioribus Delicta*). The modifications further stated that if the

case were barred by prescription, then the bishop could apply for a derogation citing «appropriate pastoral reasons». The paragraph had provided that either the priest or deacon could apply for dispensation from the obligations of Holy Orders as could the bishop, even without the consent of the priests or deacons. This last sentence was moved to Norm 10. Once more, the Mixed Commission included the necessity for the observance of c. 1722. As regards the penalties, the Mixed Commission added the prohibition of administering the sacraments to the prohibition of celebrating Mass publicly, which was already in place.

3.11. *The Inclusion of Norm 9*

This was an entirely new norm added by the Commission. It reinforced the zero-tolerance policy adding that «the diocesan bishop/eparch has the executive power of governance, through an administrative act, to remove an offending cleric from office, to remove or restrict his faculties and to limit his exercise of priestly ministry». There was also included a footnote that provided for the various administrative actions open to the bishop. These included among others, requesting the cleric to resign, removing him from office and restricting or removing his faculties. All these actions were to be effected in writing and by means of decrees so as to enable the cleric have recourse against them if he so wished. The Mixed Commission then added a phrase that proved polemic. It stated that for the sake of the common good, «the diocesan bishop/eparch shall exercise this power of governance to ensure that any priest who has committed even one act of sexual abuse of a minor as described above shall not continue in active ministry».

3.12. *Norm 10*

This was a new norm but whose text had come from the draft norm 9B. Also controversial, it underwent a few minor modifications in respect to the original. In full, it stated, «The priest or deacon may at any time request a dispensation from the obligations of the clerical state. In exceptional cases, the bishop/eparch may request of the Holy Father the dismissal of the priest or deacon from the clerical state *ex officio*, even without the consent of the priest or deacon». What is debatable is whether or not it had a basis in law at the moment of the drafting. Though the code was totally silent on such a provision, it is known that there existed such praxis in the Congregation for Divine Worship and the Discipline of the Sacraments.

3.13. *Norm 11*

Initially Norm 10, it stated that the diocese/eparchy would comply with all civil laws as regards reporting of allegations and would cooperate in any investigations. The Mixed Commission at the same time reiterated the authority of the Church to legislate on the delict of sexual abuse of minors within the ecclesial ambit.

3.14. *Norm 12*

Initially Norm 11, it provided that no cleric guilty of sexual abuse of a minor could be transferred to another diocese/eparchy on ministerial assignment. Before transfer, the bishop/eparch/religious ordinary of any cleric would send (in a confidential manner) the receiving bishop/eparch/religious ordinary, any information concerning any act of sexual abuse of a minor or any information that may indicate that a cleric was not fit for ministry. The bishop/eparch/religious ordinary who received a cleric from outside his jurisdiction was also bound to obtain any such information regarding the cleric.

3.15. *Norm 13*

This Norm, formerly Norm 12, was left virtually unchanged. It related to the restoring of the good name of a priest if he had been falsely accused. The last norm in the draft norms, Norm 13, was deleted in its entirety as it was incorporated in Norm 1 which provided that the Essential Norms would come into effect after having received the *recognitio* and after having been legitimately promulgated.

4. Reception of the Norms: Elements Most Critiqued

Within the ambit of canon law generally, the Norms were negatively received. As Msgr. Ronny Jenkins admits, «To the surprise of many, or perhaps with no surprise at all, criticism of the bishops' pragmatic solution surfaced

quickly, leaving at times the impression that the Charter and Norms, from a canonical perspective at least, comprised more of a highly complex, legalistic and unworkable way forward than a viable proposal consonant with the canonical tradition. Critics of the *Essential Norms* spoke out relentlessly while defenders of the law were sparse and subdued»[32].

One of the most vocal criticisms came from Cardinal Avery Dulles. In a stinging article[33], he began by citing the role of the Catholic Church in championing the inviolable human rights of the individual person. He then made reference to a document entitled «Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice»[34] that the USCCB had issued on November 15th 2000. The document was a reflection on *inter alia* the question of crime and punishment in the United States and on the dignity of the person. In the introduction, the document, declared that «New approaches [to dealing with crime] must move beyond the slogans of the moment (such as 'three strikes and you're out')». It went on to state that «The causes of crime are complex and efforts to fight crime are complicated. One-size-fits-all solutions are often inadequate (...) Therefore, we do not support mandatory sentencing that replaces judges' assessments with rigid formulations»[35]. It was thus surprising that barely two years later, the anteriorly rejected «three strikes» were replaced by the even simpler «one strike and you're out». As the USCCB itself stated, «There will be severe consequences for any act of sexual abuse. No free pass. No second chances. No free strike. For those who think or say that this is not zero tolerance, then they have not read it carefully»[36].

Maybe we are thus in a position to understand the criticism by Cardinal Avery Dulles as the bishops proceeded to adopt «positions at odds with these

---

32 Rev. Msgr. R. JENKINS, *The Charter and Norms Two Years Later: Towards a Resolution of Recent Canonical Dilemmas*, CLSA Proceedings 66 (2004) 115-136, 115.

33 Cardinal A. DULLES, «Rights of Accused Priests: Toward a Revision of the Dallas Charter and the 'Essential Norms'», in *America Magazine* June 21, 2004 available at http://www.americamagazine.org/content/article.cfm?article_id=3638, last accessed 10th November 2012.

34 A Statement of The Catholic Bishops of the United States, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, available at http://old.usccb.org/sdwp/criminal.shtml#conclusion, last accessed on 4th February 2019.

35 *Ibidem*.

36 Statement by Bishop Wilton Gregory, President of the USCCB, June 14 2002 as quoted in J. SÁNCHEZ-GIRÓN, La Crisis en la Iglesia de Estados Unidos: Normas Propuestas por la Conferencia Episcopal, in Estudios Eclesiásticos 77 (2002) 631-660, 654.

high principles»[37]. To many canonists, the Essential Norms were a violation not only of the principles of canon law, but also of any good system of law. Generally, what has been criticised is the following:

4.1. *The haste and the pressure under which the Norms were prepared*

Many are in agreement as to the pressure faced by the bishops coming not only from the media but also from the faithful. There is also consensus that two days to come up with a set of norms regulating so important an issue while facing such pressure was highly insufficient. Bishop Harry Flynn, the then President of the *Ad Hoc* Committee on Sexual Abuse in 2004, attempted a defence of the bishops' actions. Speaking on the Charter, he stated that although the adoption of the Charter had been swift, «speed should not be confused with acting in haste. The Charter was adopted so quickly because its elements had been discussed at length by the bishops. Not only had these particulars been discussed, but many of them were already operational by June 2002»[38]. But: however well-intentioned the defence, it seems at odds with the whirlwind of events preceding the Dallas meeting (a «fire fighting» atmosphere). Moreover, such haste was evident in several passages with errors in both the Charter and the Norms. There was a lack of juridical or canonical precision in some terminology which was revised by the Mixed Commission. There was an attempt to create an offense, «sexual abuse of minors», as though existing canon law had not contemplated such a situation. There was the use of terminology somewhat unknown to canon law but employed in systems of common law e.g. «due process» and the expressions «Children» and «Young People» at least twice in the text[39].

---

37 A. DULLES, «Rights of Accused Priests», cit.

38 Bishop H. FLYNN, «What Has the Charter Accomplished?», in *America Magazine*, October 18, 2004, http://www.americamagazine.org/content/article.cfm?article_id=3812, last accessed 4th November 2012.

39 It is not uncommon in countries that adopted the common law jurisdiction to make reference to Children and Young Persons. The UK has a «Children and Young Persons Act» of 1933 and of 2008. A child was commonly defined as a person aged below 14 years and a young person as one aged below 18 years. It is possible that the Essential Norms and the Charter use it with the same meaning but such a distinction is not made in universal canon law. The word «minor» was sufficient.

4.2. *The seeming disregard for the presumption of innocence*

Whereas the presumption of innocence is a basic principle that should inform all penal law, the spirit of the Essential Norms seems not to have encapsulated that notion at its drafting and in its initial years. It was not until 2006 that the amendment was included. In the interim period, it seemed that some key players were not too convinced that it was applicable to the Essential Norms. As Rev. Monsignor Ronny Jenkins, at the time consultant to the Bishops' Committee on Canonical Affairs said, «the code contains no explicit expression equivalent or perhaps even comparable to the American legal notion of a presumption of innocence»[40]. The mistake here was to look for an express provision in the Code. The presumption of innocence as a principle, informs penal canon law. As Joaquin Llobell has aptly stated, «At the level of international treaties and national constitutions, the principle of *favor rei* is most often expressed in the principle which presumes the innocence of the accused. Certainly, the principle of *favor rei* must underpin or inform the whole penal juridical order even if it is not defined normatively»[41]. This juridical order certainly includes canon law.

Msgr. Jenkins then went on to add that:

> «For the doctrine of a presumption of innocence is precisely a matter applicable to the due process of law pertaining to criminal proceedings. Canon lawyers who wish to appropriate the principle only confuse matters when they apply it outside of its proper domain»[42]

He also states:

> «At any rate, the procedural safeguards placing the burden of proof on the accuser and envisioning acquittal of the defendant when this bar is not met, does not transfer neatly to non-penal administrative actions placed by the bishops with the common good in mind»[43].

---

40 Msgr. R. Jenkins, «The Charter and the Norms Two Years Later», 117.

41 J. Llobell, *The Balance of the Interests of Victims and the Rights of the Accused: The Right to Equal Process*, in P. Dugan (ed.), *The Penal Process and the Protection of Rights in Canon Law*: *Proceedings of a Conference held at the Pontifical University of the Holy Cross*, *Rome*, *March 25th-26th*, *2004*, Wilson and Lafleur, Montreal, 2005, 100.

42 Msgr. R. Jenkins, «The Charter and the Norms Two Years Later», 117.

43 *Ibid.*, 118.

In an article that traces the origin of the maxim «Innocent Until Proven Guilty» from the canonists in the 13th century to the European *Ius commune* and lastly to the jurisprudence of the Common Law, Kenneth Pennington states,

> «Because American law did not inherit the jurisprudence of the *Ius commune* directly, its broader meanings were lost during the transplant. Consequently, the focus in American Law has been entirely on its meaning for the presenting of evidence and for procedural rules in the courtroom»[44].

The principle was wider than that. To suggest that the principle does not apply when the accused is being investigated because no penal procedure has started is erroneous. It leads to the absurd conclusion that the presumption of innocence somehow begins to function only when the actual trial has begun. Moreover, the assertion that the procedural safeguards do not transfer neatly to non-penal administrative actions is worth taking into account. It serves to reveal the intention of some US bishops to circumvent the judicial process so as to apply a penalty referred to as a «non-penal administrative action» as a means of excusing themselves from the observance of canonical procedures.

Lastly, Msgr. Jenkins statements also seemed to disregard what Cardinal Re had assumed of the Essential Norms, when he stated that the Norms «uphold the principle, fundamental in all just systems of law, that a person is considered innocent until either a regular process or his own spontaneous admission proves him guilty».[45]

4.3. *The definition of sexual abuse*

This proved to be a hot-button issue. Many canonists weighed in with comments critiquing the definition that had been adopted. Perhaps mercifully, the Mixed Commission rejected the initial definition present in the draft norms that had been taken from the draft Charter. Though well intentioned,

---

44 K. PENNINGTON, *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, in P. DUGAN (ed.), *The Penal Process and the Protection of Rights*, 45-66, 65.

45 Accompanying Letter to the Decree of *Recognitio* of the Essential Norms in W. WOESTMANN, *Ecclesiastical Sanctions*, 355-356.

the attempt at definition in effect gave the appearance of creating an offense that went beyond the scope of what was regulated by the code of canon law even though it mentioned c. 1395 § 2. The definition that was eventually adopted by the Essential Norms also came under severe criticism. The preamble to the 2002 Essential Norms in part stated: «Sexual abuse of minors includes sexual molestation and exploitation of a minor and other behaviour by which an adult uses a minor as an object of sexual gratification». Most critics are in agreement as to the lack of a precise legal definition in the norms, yet it was a difficulty avoided by the Code and by SST which refer to the general offense against the sixth. The bishops did learn from their mistake and the Essential Norms were twice modified. First on June 17th 2005[46] when the definition was changed to read:

> «For purposes of these Norms, sexual abuse shall include any offense by a cleric against the Sixth Commandment of the Decalogue with a minor as understood in CIC, canon 1395 §2, and CCEO, canon 1453 § 1 (*Sacramentorum sanctitatis tutela*, article 4 § 1)».

And secondly in 2010 with the changes made to *Sacramentorum sanctitatis tutela*, the Norms now made reference to article 6 § 1 of SST (and not 4 §1).

The attempt at definition was thus corrected. Once the definition of the delict is based on an «offense against the sixth», then it is not preposterous to suggest recourse to the writings of recognized moral theologians to assist in the interpretation of what constitutes such an offense. What, however, is demanding of criticism and seems unjustifiable is the provision that «When even a single act of sexual abuse by a priest or deacon is admitted (...) the offending priest will be removed permanently from ecclesiastical ministry»[47]. Although several criticisms were levelled at this provision, perhaps the one that best highlights its shortcomings was expressed by John Beal who stated that «This definition admits no gradation of offenses. Forcible rape, various forms of fondling, exhibitionistic behavior and displaying arguably indecent pictures, all fall under the rubric of 'sexual abuse' if minors are involved –and

---

46 By decree dated January 1st 2006 signed by Cardinal Giovanni Battista Re, the then President of the CDF and Rev. Francesco Monterisi, then Secretary of the same Congregation, the *recognitio* of 2002 was extended to the revised version *donec aliter provideatur* as stated in the Introduction to the Revised Essential Norms 2006 and 2011.

47 Norm 8 of The Essential Norms.

all require the same punishment: permanent removal from ministry for even one offense (Norm 9, A)»[48].

Having failed to adequately define «sexual abuse» and bearing in mind the varying *facti species* of the offense, it is unacceptable to meet out the very same punishment for such varied actions. As the report by the National Review Board admitted, «One consequence of this broad definition of sexual abuse is that all acts of improper sexual conduct with a minor are subject to the Charter's zero-tolerance policy, irrespective of the degree of impropriety or seriousness of the consequences»[49].

4.4. *Zero tolerance and proportionality*

«Displaced by zero tolerance, the principle of proportionality finds no place in the 'Essential Norms'. A priest who uttered an inappropriate word or made a single imprudent gesture is treated in the same way as a serial rapist»[50]. So states Avery Dulles regarding the zero-tolerance policy. In defence of the actuation of the bishops, the Rev. Harry Flynn stated that what had been considered were moral, pastoral and legal issues. Yet a look at the implementation of the zero-tolerance policy reflects that it at times violates these very principles. Firstly, as stated, the principle of proportionality was thrown out of the window. As Avery Dulles adds, «While speaking of 'grave' offenses, the 'Essential Norms' do not distinguish among different degrees of gravity. Pope John Paul II, however, has insisted on this distinction. In an address given on Feb. 6, 2004, to a plenary meeting of the Congregation for the Doctrine of the Faith, he declared, 'Once a delict is proven, in each case you need to discern well both the just principle of proportionality between the offense and the penalty and the predominant need to safeguard the people of God'»[51].

The third principle that marked the revision of the code stated in part that, «To favour the pastoral care of souls, the new law must provide not only for justice, but there must also be a place for charity, temperance, humaneness and moderation by which fairness shall be found not only in the application of

---

48 J. Beal, «Hiding in the Thickets of Law», cit.
49 *National Review Board Report 2004*, cit., 52.
50 A. Dulles, «Rights of Accused Priests», cit.
51 *Ibid.*

the laws by pastors but also in the legislation itself»[52]. The Rev. Harry Flynn countered in defence of the Norms and the Charter that the «protection of children and youth» was the «charter's overall and ultimate purpose». Yet the protection of children and youth cannot be said to be mutually exclusive to the observance of the principle of proportionality or to the observance of moral, legal and pastoral principles.

To understand the attitude of the bishops, we must take into account that a common concern of the USCCB has been public perception. In examining the defence of the actuation of the bishops, we read in various places,

«Reassignment without disclosure caused great damage to the public perception of how seriously the bishops were dealing with this problem». And: «Past mistakes have limited the bishops' flexibility today»[53].

As Avery Dulles argued, «Having been so severely criticized for exercising poor judgment in the past, the bishops apparently wanted to avoid having to make any judgments in these cases»[54].

Yet as against the principle of proportionality, Rev. Flynn stated that «The 'one-size-fits-all' criticism reflects a different question from the one we bishops had to ask ourselves –a question not about the degree of punishment deserved by a particular act of abuse but whether a cleric with a proven or admitted act of sexual abuse can and should function in ministry»[55]. Obviously that would depend on what the act of sexual abuse constituted. Not every offense against the sixth commandment with a minor as encompassed in c. 1395 § 2 renders one incapable of «functioning as a priest». «A 'one-size-fits-all' penalty defies reason, justice and charity. The penalty for miscreant behaviour must recognize a difference between inappropriate affection and violent rape, between youthful naiveté and predatory behaviour, and between profound, irresolvable immaturity and exploitation. All are harmful. Not all are equally unrecoverable. It might even be that the unilateral treatment of all as the same is harmful, if not unjust»[56]. The National Review Board itself commented that according to some observers, the penalty of «laicization» for each and every offense is «inconsistent with concepts of natural justice and canon law that are

---

52 Principle No. 3 of the principles governing the revision of the Code, E. CAPARROS (ed.), *Code of Canon Law Annotated*, 19.

53 Rev. H. FLYNN, «What has the Charter accomplished», cit.

54 A. DULLES, «Rights of Accused Priests», cit.

55 Rev. H. FLYNN, «What has the Charter accomplished», cit.

56 D. DEIBEL, *Canon 1341: Pastoral Principles within the Penal Process*, 108.

premised upon differentiation in penalties depending upon the gravity of the misconduct»[57].

No one denied the seriousness of the problem or the need to protect minors. But it was a mistaken assumption that decades of neglect and wrong decisions could be resolved by enacting norms and providing for their retroactivity. As John Beal has argued, «To solve problems with a lightning bolt of penal sanctions is always a temptation for those uncomfortable with the messiness of human life and a human church, but we who ply the law should know better»[58].

In defence of the bishops, Rev. Msgr. Ronny Jenkins argued that «the code itself allows for particular law to modify the usual penalties established in the common law (...)» As we read in c. 1315 § 3 «if universal law threatens an indeterminate or facultative penalty, particular law can also establish a determinate or obligatory one in its place». As against this, it has been argued first of all that as per c. 1317, particular law cannot establish a perpetual penalty[59]. Secondly, that c. 1395 § 2 does not contemplate one single offense. It encompasses a wide range of delictual conduct such that there is no *one offense* of sexual abuse of a minor. To establish the maximum penalty for conduct that may be indeterminate is to clearly go against the code. What is considered an offense by one moral theologian may not be so considered by another. Moreover it should be remembered that «Since a perpetual penalty (...) can only be determined and applied by an ecclesiastical judge at the end of a judicial process, it makes no sense to claim that the bishops can categorically determine from the outset that the 'offending priest or deacon will be removed permanently from ecclesiastical ministry', especially when one considers canon 1344»[60].

There is, however, another important consideration that has to be factored in: The monetary question. The bishops were under increasing attack on the legal front facing massive lawsuits that threatened to bankrupt dioceses. The fear of this monetary damage was not unfounded. The Archdiocese of Los Angeles was to agree to a settlement of more than 500 cases of sexual abuse in July 2007. They agreed to pay $660 million, which was about $1.3 million per plaintiff, «the largest compensation paid to victims of sexual abuse

---

57 A. DULLES, «Rights of Accused Priests», cit.

58 J. BEAL, «To Be or Not to Be That is the Question. The Rights of the Accused in the Canonical Penal Process» (1991) *CLSA Proceedings*, 77-97, 79.

59 K. BOCCAFOLA, «The Special Penal Norms of the United States», 279. Though it may also be argued that the Essential Norms don't establish a perpetual penalty for the offense. The code does. The Norms merely apply the maximum penalty provided for in line with the code.

60 *Ibid.*

by clergy of the Catholic Church in the United States to date»[61]. In 2011 alone, dioceses paid out a total of $107,814,410[62].

The bishops were thus afraid that anything less than «zero-tolerance» would financially cripple the diocese. These cases posed a substantial financial liability that the already broke dioceses could not afford.

To conclude this debate, perhaps the words of Ladislas Örsy are most fitting. He says that «the law should have 'zero tolerance' toward any crime by proscribing it, but the judge and jury should weigh and ponder the personal responsibility and culpability of the accused (which can exist on different degrees) and come to a decision accordingly. This distinction is foundational for any civilized legal system and is also a matter of natural justice. Yet, the Norms ignore it, a grave omission»[63].

4.5. *Retroactivity*

It has been stated that without the zero-tolerance principle and retroactivity, the Norms and Charter «could well have been approved even more quickly»[64]. Since the norms were subject to universal canon law, they had to respect the principle of non-retroactivity of the law. As Luis Navarro has stated, «the Essential Norms do not expressly specify their applicability to cases of sexual abuses committed before they came into effect. The Preamble, however, does mention acts committed in the past though only in relation to the victims. Nonetheless the intention to apply the Essential Norms retroactively is patent and in fact they have been applied to acts committed in the past»[65].

A look at the numbers is sufficient to show that the Essential Norms have been applied retroactively. «Approximately 700 priests and deacons were removed from office between January 2002 and January 2004. This means that the majority of these abuses were committed before the Essential Norms entered into force»[66]. Yet another study in 2007 states that «since the advent

---

61 W. Bassett, «Church Records and the Courts», in *America* Magazine, Oct. 29th, 2007, available at http://www.americamagazine.org/content/article.cfm?article_id=10335, last accessed 15th December 2012.

62 Cf. *2011 Annual Report on the Implementation of the Charter for the Protection of Children and Young People*, 38.

63 L. Örsy, «Bishops' Norms: Commentary and Evaluation», 1013.

64 Rev. H. Flynn, «What has the Charter Accomplished?», cit.

65 L. Navarro, «A General Canonical Backgrounder», 208.

66 *Ibid*., note 25.

of the Charter in 2002, more than 1,000 Roman Catholic priests have been permanently removed from ministry»[67].

It is also clear that the bishops intended the Norms to be retroactive. Speaking on *the Charter*, Rev. Flynn declared that a «policy stating that every future act of abuse would bring with it removal from ministry and possibly dismissal from the clerical state would simply mean that we were implementing what canon law already provides for»[68]. But it would be wrong to apply this way of thinking to the Norms. The Revised Guide to the Implementation of the Essential Norms clearly states «Had the U.S. bishops intended a change in the universal law, they would have sought from the Roman Pontiff an explicit derogation from the law»[69].

The Essential Norms even though so intended could not operate retroactively. In fact, in the almost identical provision of the *Norms*, Norm 9[70] (which became Norm 8 after the revision by the Mixed Commission) had the words «Diocesan/eparchial policy will provide that for even a single act of sexual abuse of a minor-past, present, or future-the offending priest or deacon will be permanently removed from ministry» deleted from the draft by the Commission. The Guide as well in its introduction affirms that «the Norms are not retroactive (CIC c. 9; CCEO c. 1494). However, since the sexual abuse of a minor by a cleric is reserved exclusively to the Congregation for the Doctrine of the Faith in the apostolic letter *Sacramentorum sanctitatis tutela*, any question involving the application of penalties at the present time for past incidents can only be resolved by the Congregation»[71].

Ladislas Örsy, however, argues that there is «nothing in canonical tradition to forbid the legislator from introducing a disqualification for a present office as from now, *ex nunc* as the consequence of a crime committed in the past, *tunc*. Such disqualification is not a retroactive law establishing a crime or a penalty; it is a disciplinary provision for the future (...) It follows that the provision of Norm 8 disqualifying a person found guilty of the crime of sexual abuse perpetrated before the promulgation of the *Norms* from exercising eccle-

---

67 M. Chopko, «A Response to Timothy Lytton: More Conversation is Needed», in *Connecticut Law Review*, February 2007, vol. 39, n.º 3, 911, note 75.

68 Rev. H. Flynn, «What has the Charter accomplished?», cit.

69 CLSA, *Revised Guide to the Implementation of The U.S. Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* May 2004, 1.

70 This Norm was taken from article 5 of the Charter.

71 *Revised Guide to the* Implementation, 2.

siastical ministry in the future is valid»[72]. Such an interpretation is, however, too broad and would seek to circumvent the actual application of Norm 8. The truth is that this norm does not provide for a «disqualification» from office: It is a privation of office applied as a penalty. It is permanent removal from ministry and in more serious cases loss of the clerical state. It cannot be interpreted as a mere «disqualification from office». In addition, if the legislator meant to apply a law that has penal effects retroactively, he would need to expressly say so-providing that it is a derogation. The CDF in dealing with a case of removal from ministry as per the Essential Norms stated, «It is necessary to understand that there is a discrepancy between the Charter for the Protection of Young People, Article 5 and the Essential Norms, Norm 8. The former, which has no force of law, explicitly mentions the condition of admitted guilt in the past, present or future (...) In the future, that is from the time of the Essential Norms and onward, an Ordinary must permanently remove the priest from ministry. The Essential Norms cannot be construed retroactively, as this would be in conflict with *ne bis in idem*, and cann. 221.3 and 1313.1»[73].

Lastly, in keeping with c. 1313, as the CDF pointed out, if this interpretation favoured by Örsy constituted a change in the application of the law, then the law most favourable to the offender would have to be applied[74].

It should be kept in mind in any case that the Essential Norms cannot be extended to the case of a priest or deacon who had committed an offense against the sixth with a minor who was, however, aged above 16 years if the offense took place before the Rescript of 1994 came into effect. Moreover, the penalty of dismissal from the clerical state cannot be applied to any priest or deacon by a judge if the offense took place before the present code came into effect, that is, before 25th January 1983. This is because the code of 1917 had as the maximum penalty for the equivalent offense, the deposition of a cleric[75].

---

72 L. Örsy, «Bishops' Norms», 1002-1003, note 12.

73 F. Morrisey, *Penal Law in the Church Today: New Documents Complementing the Code of Canon Law*, in P. Dugan (ed.), *Advocacy Vademecum*, Wilson and Lafleur, Montreal, 2006, 33-47, 53, citing a response by the CDF to a local Ordinary.

74 In this regard, the remarks by Davide Cito, though making reference to the *motu proprio* SST and the introduction of the extended period of prescription for offenses against the sixth committed with a minor, are trite: «Since the *motu proprio* does not have a retroactive effect (because in it, there is not an explicit reference in this regard as required by canon 9, in force of canon 1313 § 2), the accused is judged on the basis of the law more favourable to him». (D. Cito, *Prescription in Penal Matters*, in P. Dugan (ed.), *The Penal Process and the Protection of Rights*, 200-201.

75 W. Woestmann, «Dismissal from the Clerical State for the Sexual Abuse of a Minor», in *Roman Replies and CLSA Advisory Opinion* 2005, 89-91, 90.

4.6. *Relationship between the Norms and the Charter*

A cause for concern is the relationship between the Norms and the Charter. Whereas the Essential norms constitute particular law and they are subject to universal law (which in a sense acts as their check), the Charter is not normative. Yet, as Luis Navarro states, the «Charter has had such a great impact that it is *de facto* binding»[76]. As one canonist has opined regarding the Charter and the Essential Norms, «*Los dos documentos nacieron unidos, pero se puede afirmar que la matriz es la* Charter. *Ella da las claves de interpretación de las* Norms (...) *Por su parte, las* Essential Norms *fundamentalmente regulan el proceso a seguir por el obispo o eparca ante una acusación de abuso de menores contra un sacerdote o diácono; proceso en el que resulta clave la investigación preliminar. De un modo u otro, la mayor parte de sus artículos tienen su origen en la* Charter»[77].

In fact, observance of the Charter is followed much more stringently. The fight against sexual abuse of minors in the United States is judged according to the fulfilment of the provisions of the Charter[78]. When the Charter was formulated, the Office of Media Relations of the USCCB described it as the «definitive response of the U.S. bishops to the laity's, the clergy's, and the public's concern over the issue of sexual abuse of minors by clergy»[79].

Why is this the case? In a sense, because the Norms were seen as the legislative interpretation of the Charter. Any mention of the Norms is seen as fruit of the policies of the Charter[80]. Moreover, a number of the Essential Norms were taken from the provisions of the Charter or strongly influenced by the Charter. An example is the effect of article 5 on Norms 8 and 9 of the

---

76 L. Navarro, «A General Canonical Backgrounder», 209.

77 J. Bernal, «Las Essential Norms», 701.

78 *Ibid*.: «Sin embargo, el documento cuyo cumplimiento se sigue más de cerca es, sin duda, la *Charter*. Periódicamente se han realizado informes sobre el grado de cumplimiento de sus criterios en las diversas diócesis, incluyendo severas amonestaciones para los casos de poca o escasa colaboración. La *Charter* ha sido también la referencia fundamental a la hora de elaborar las políticas de prevención de abusos en las variadas circunscripciones. Todo eso ha podido causar que la *Charter* se viera revestida de un carácter imperativo que, probablemente, por su propia naturaleza no tendría».

79 Text available at http://old.usccb.org/comm/archives/2002/02-111.shtml, last accessed 10th November, 2012.

80 As an aside, it is interesting to note that the USCCB official website (last accessed on 4th February, 2019) does not have a link titled «Essential Norms». To access the Norms, one clicks on a document that shows, «The Charter for the Protection of Children and Young People». The Essential Norms are found at the end of the Charter.

Essential Norms which has led to the retroactive application of the provisions of the Essential Norms. In addition, the observance of the Charter is rigidly followed. There is the annual audit report prepared by the Office of Child and Youth Protection for gauging the compliance with the Charter. In addition, «the Charter constitutes an important point of reference for diocesan norms on the sexual abuse of minors. Indeed, one frequently comes across explicit references to the Charter while the Essential Norms are hardly mentioned»[81]. For many, compliance with the Charter is what is key and is the benchmark for gauging the fight against sexual abuse of minors in the Church.

4.7. *Prescription*

The common law tradition speaks of Statute of Limitations rather than prescription. As Ladislas Örsy argues, the power of the CDF to set aside prescription is novel[82]. The relevant Norm 8A of the Essential norms states in part:

> «If the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the bishop/eparch shall apply to the Congregation for the Doctrine of the Faith for a derogation from the prescription, while indicating appropriate pastoral reasons»[83].

According to Örsy,

> «the drafters of this Norm confused the nature of and effect of the canonical 'prescription' with that of the Anglo-American 'statute of limitations' (...) Both erect a bar to a legal action (estoppel)[84] after a certain time period elapses, but they are radically different in nature. Statutes of limitations merely bar actions; prescriptions create or extinguish the rights and obligations themselves[85]. Hence dispensation from a statute of limitations is

---

81 L. Navarro, «A General Canonical Backgrounder», 210.

82 L. Örsy, «Bishops Norms», 1015.

83 Norm 8A which however has been modified to read «shall apply to the Congregation for the Doctrine of the Faith for a derogation from the prescription, while indicating relevant grave reasons».

84 B. Garner (ed.), *Black's Law Dictionary*, 9th Edition, West Publishing Co., St. Paul, Minnesota 2009, defines estoppel as «A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true».

85 A view that finds support in C. Renati, *Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases*, in P. Dugan (ed.), *Advocacy Vademecum*, 67-84, 76: «The extinguishment

> conceivable; dispensation from the rights and duties created by prescription does not make sense. Apart from undermining genuine 'vested rights' in all circumstances, in criminal law it would be equivalent to retroactive legislation: it would recreate an extinguished crime and destroy an acquired innocence»[86].

The view finds support as well in Charles Renati. As he rather forcefully states, «Norm 8 (A) of the Essential Norms requires a useless and impossible request. There can be no dispensation from prescription for a case which is 'barred by prescription'. Equally useless would be a bishop's request for a penal trial on a criminal action which has been 'otherwise barred by prescription'. The case for which he seeks a penal trial no longer exists»[87]. In fact, Renati goes even further stating that while the accused acquires a right, the Promotor of Justice, the Ordinary and any other ecclesiastical authority lose the right to initiate a penal process[88].

On the other hand, before making too harsh a criticism on the Essential Norms as relates to the issue of prescription, it must be kept in mind that offenses reserved to the Holy Office were not subject to prescription. With the Rescript of 1994, the prescription period was considerably extended (ten years from the day the victim has attained eighteen years). In what was considered a novelty, prescription was applied to an offense reserved to the CDF with the promulgation of the *motu proprio* SST. Thus «for the first time ever, the delicts reserved to the Congregation for the Doctrine of the Faith are submitted to a period of prescription, concerning both the criminal action and the penalty»[89].

But as argued, one thing is a crime that does not prescribe and yet another is dispensing from prescription. Prescription results in an acquired right[90]. Dispensing from prescription is «dispensing from a right». The «error» then asserted by Ladislas Örsy is not unique to the Essential Norms

---

of a canonical criminal action by prescription thus confers on the accused priest the right to be forever free from any canonical penal process for that action, a right not conferred on a defendant in civil law by the running of a statute of limitation».

86 L. Örsy, «Bishops Norms», 1015-1016.

87 C. Renati, *Prescription and Derogation from Prescription*, 76.

88 *Ibid*.

89 D. Cito, *Prescription in Penal Matters*, 192-193.

90 Presciption «is a means by which one acquires or loses a subjective right or frees himself from an obligation upon the passage of a specific period of time and the fulfilment of specific conditions prescribed by law»; C. Renati, *Prescription and Derogation from Prescription*, 67.

since the Holy Father granted the faculty to the CDF in November 2002 «to be able to derogate from the terms of prescription case by case, on the motivated request of individual Bishops»[91]. Not only Ladislas Örsy, but other canonists have been surprised by this faculty. As Davide Cito states, «Personally I do not know how to reconcile the guiding principles of the canonical penal system in force, with such a faculty that, if worst comes to worst, permits the retroactive application in a single case of a norm unfavourable to the accused. It would be more comprehensible perhaps if, at least for some delicts, one returned to their imprescriptible nature (in every case safeguarding the principle of the more favourable law) (...) Otherwise it is easy to see that an arbitrary use of power could spread, despite the fact that the motives which have pushed for such a decision are certainly dictated by the necessity of being able to intervene in an effective way in the face of most grave and scandalous situations»[92].

4.8. *Withdrawal from Ministry*

As per the Essential Norms, Norm 6, when there is an allegation of an offense, a preliminary investigation should be carried out in accord with c. 1717 of the Code. However, the bone of contention is what follows. As the norm provides, when there is sufficient evidence that abuse of a minor has occurred, after notifying the CDF, «The bishop/eparch shall then apply the precautionary measures mentioned in CIC, canon 1722, or CCEO, canon 1473 –i.e., withdraw the accused from exercising the sacred ministry or any ecclesiastical office or function, impose or prohibit residence in a given place or territory, and prohibit public participation in the Most Holy Eucharist pending the outcome of the process».

Canon 1722 states the following:

> «At any stage of the process, in order to prevent scandal, protect the freedom of the witnesses and safeguard the course of justice, the Ordinary can, after consulting the Promotor of Justice and summoning the accused person to appear, prohibit the accused from the exercise of sacred ministry or of some

---

91 D. Cito, «Prescription in Penal Matters», 198.
92 *Ibid.*, 201.

> ecclesiastical office and position or impose or forbid residence in a certain place or territory, or even prohibit public participation in the Blessed Eucharist. If, however the reason ceases, all these restrictions are to be revoked; they cease by virtue of the law itself as soon as the penal process ceases».

This measure is generally referred to as «administrative leave» in the Common Law tradition. It is not a penal measure but is rather a preventive and prudential one.

Here there were four issues that suggested the misinterpretation of c. 1722 or the abuse of the canon:

i. the stage of the application of the measures;
ii. the reasons for which c. 1722 could be invoked;
iii. the measures applied;
iv. the discretionary power of the Ordinary.

4.8.1. Stage of application

Whereas it is true that the canon stated «at any stage of the process», the word «process» here should be understood as referring to the canonical penal trial[93]. In the Code, the preliminary investigation (cc. 1717-1719) is clearly separated from the penal process *in se* which is governed by the canons beginning from c. 1720-c.1728. The precautionary measures thus mentioned in c. 1722 referred to the penal process already commenced yet the Essential Norms applied them during the phase of the preliminary investigation. This was prejudicial to the accused for a number of reasons: Firstly, because the preliminary investigation was meant to establish whether there was reason enough to proceed to a trial having obtained reasonable certainty that a delict had been committed. In the case of the Essential Norms, it only speaks of «sufficient evidence». In addition, in some instances, «the decree was being imposed prior to the preliminary investigation taking place. (...) The question was raised as to whether the action described in c. 1722 could only be taken after the preliminary investigation had been completed (c. 1717) and after it was determined that a penal process was called for (c. 1718). On the other hand (...) some canonists maintained that the decree of canon 1722 could be imposed even at the beginning of the preliminary

[93] J. Beal, *Administrative Leave: Canon 1722 Revisited*, in Studia Canonica 27 (1993) 293-320.

investigation described in canon 1717»[94]. Due to pressure from the office of the Attorney General, the diocese of Manchester went so far as to sign an agreement to the effect that on the receipt of an allegation of sexual abuse of a minor, the accused would be removed immediately from any office that involved contact with a minor[95].

The erroneous application of the use of c. 1722 came under much criticism. However, the issue was partly resolved by the changes made to *Sacramentorum sanctitatis tutela* in 2010. Article 19 was added to SST and it provides:

> «With due regard for the right of the Ordinary to impose from the outset of the preliminary investigation those measures which are established in can. 1722 of the Code of Canon Law, or in can. 1473 of the Code of Canons of the Eastern Churches, the respective presiding judge may, at the request of the Promotor of Justice, exercise the same power under the same conditions determined in the canons themselves».

Still the revision did not state whether the measures could be invoked *before* the preliminary investigation as was happening in the United States. If they are invoked before the preliminary investigation, it is unclear as to why the accused is even cited since the decision has already been arrived at to relieve him of his duty[96].

4.8.2. Reasons for the application of the precautionary measures

The reasons for which the precautionary measures could be adopted, as one canonist, reading from the code, opines, were only three:

> «– the person's misconduct or the accusation of committing an offense is known and thus causes scandal;
> – the danger of the subornation of witnesses by the accused;
> – the danger that the trial may be impeded or harmed»[97].

---

94 P. LAGGES, *Resolution of Cases by Rescript, Penal Process or Decree*, in Dugan, P. (ed.), *Towards Future Developments*, 167.

95 *An Agreement Between the Diocese of Manchester and the New Hampshire Attorney General's Office*, 10 December 2002, n. 4, in *Origins*, January 2, 2003, vol. 32, n. 29, 481.

96 View reinforced by various canonists: As per F. LOZA in E. CAPARROS (ed.), *Code of Canon Law Annotated*, 1350 «the Ordinary *must* hear the Promotor of Justice and summon the offender».

97 W. WOESTMANN, *Ecclesiastical Sanctions*, 175.

This canonist goes on to add that:

> «Of course, if none of these reasons exists, this canon cannot be invoked...»[98].

Yet the Essential Norms went on to state that where there was «sufficient evidence» that sexual abuse of a minor had occurred, then the precautionary measures were to be applied. This was not in keeping with c. 1722 which clearly spelt out the reasons for which the precautionary measures could be applied. According to the guide, «the reasons for this leave must be verified, that is the prevention of scandal, the protection of the freedom of witnesses and safeguarding the course of justice»[99]. The only plausible explanation is that the bishops interpreted c. 1722 to infer that *every act* of «sexual abuse» of a minor (whether public or not) causes scandal and thus the precautionary measures need to be applied. Otherwise, there is no other way of explaining the measures adopted.

4.8.3. The measures to be applied – (i.e. should all be applied or only some?)

A reading of c. 1722 above shows that the Ordinary has the discretion to apply any or all of the measures (use of the word «or» in c. 1722) yet the Essential Norms focus on the application of all three (use of the word «and» in Norm 6). It would thus seem that the bishop/eparch is bound to apply all three measures at the same time.

4.8.4. The discretion of the Ordinary

Canon 1722 spoke of the fact that the Ordinary «can» adopt the precautionary measures. The Code thus interprets it as a discretionary power[100]. In the Essential Norms, this discretionary power became obligatory and the bishop/eparch was bound to apply the precautionary measures. In the memorandum sent to the USCCB by Bishop Gregory, the then President of the Conference, we read,

---

98 *Ibid*.

99 *Revised Guide to the Implementation 2004*, 26.

100 F. Gil, *Abusos Sexuales a Menores Realizados por Clérigos: Normas de los Obispos de los Estados Unidos de América (2002). Textos y comentario*, in Revista Española de Derecho Canónico 62 (2005) 9-87, 70-71.

> «Archbishop Montalvo [papal nuncio to the United States] has further informed me that the Holy Father has conceded a derogation [sic] from Canon 1722 of the CIC and from Canon 1473 of the CCEO in favor of Norm 6 of the Norms. This action by His Holiness effectively strengthens our particular law in the United States by making it an obligation on the part of the bishop/eparch to impose the precautionary measures mentioned in Canon 1722 and Canon 1473 following the notification to the Congregation for the Doctrine of the Faith that there is sufficient evidence of [sic] sexual abuse of a minor has occurred»[101].

This memorandum has of course been used to interpret the Essential Norms. In addition, as per the Guide to the Implementation of the Essential Norms:

> «In effect, when there is sufficient evidence of the sexual abuse of a minor, not only 'can' the bishop/eparch exclude the accused cleric from ministry as this canon provides, rather, he 'shall' exclude the accused cleric from ministry, as Norm 6 requires».

As William Woestmann, however, questions, would this imply that Norm 6 was approved in *forma specifica*?[102]. Nowhere else is this «derogation» mentioned. The «derogation» that we have seen is rather an extension of c. 1722 to include the application of the precautionary measures during the preliminary investigation. There is no document that evidences the need to apply as of right any precautionary measures. Thus the mystery of this «derogation» has not been adequately explained.

4.9. *The Case of the Religious*

One other issue that had not been adequately addressed pertains to the religious and religious superiors. The norms initially had a footnote that read that «In applying these norms to religious priests and deacons, the term 'religious ordinary' shall be substituted for the term 'bishop/eparch' mutatis mutandis». Clearly, this was another case of lack of legal precision. As Ladis-

---

[101] Memorandum of Bishop Wilton Gregory to all bishops and the National Review Board dated December 16th 2002 as quoted in W. WOESTMANN, *Ecclesiastical Sanctions*, 351.
[102] W. WOESTMANN, *Ecclesiastical Sanctions*, 351.

las Örsy has argued, unexplained was «who is applying the *Norms* to 'religious priests and deacons', who is substituting 'religious ordinary' for 'bishop/eparch'» and also «whether the term 'religious' includes secular institutes and societies of apostolic life»[103]. The question arose because Episcopal Conferences generally do not exercise legislative power over institutes of consecrated life. As Ladislas Örsy states,

> «whenever a member of a pontifical institute of consecrated life or of a society of apostolic life enters into the service of a diocese (...) he must accept to be bound by the same rules as the diocesan ministers (...) Further, the bishop may condition the granting of the 'faculties' for apostolic work in the diocese on the acceptance of the diocesan norms (...) Beyond that, the *Norms* are not binding on members of the institutes and societies of pontifical right (...) It is soundly arguable, though, that institutes of diocesan right are subject to the *Norms*»[104].

This was an issue on which the Holy See had expressed its reservation since effectively, there remained a lacuna. In fact, in the letter forwarding the decree of *recognitio*, the then prefect of the CDF, Cardinal Giovanni Battista Re, had already made mention of the need to make provision for religious clerics. The letter stated in part:

> «As regards religious priests and deacons, I would ask the representatives of the Episcopal Conference to continue to meet with the representatives of the Conference of Major Superiors of Men to examine more closely the various aspects of their particular situation, and to forward to the Holy See whatever agreements they may reach»[105].

The Episcopal Conference however did take this issue into account and introduced amendments in 2006. The sentence in the preamble stating:

> «In applying these norms to religious priests and deacons, the term 'religious ordinary' shall be substituted for the term 'bishop/eparch' *mutatis mutandis*»

---

[103] L. Örsy, «Bishops' Norms», 1004.
[104] L. Örsy, «Bishops' Norms», 1004-1005.
[105] Letter by Cardinal Giovanni Battista Re dated 8th December 2002 available at W. Woestmann, *Ecclesiastical Sanctions*, 356.

It was now replaced with

> «These Norms constitute particular law for the dioceses, eparchies, clerical religious institutes, and societies of apostolic life of the United States with respect to all priests and deacons in the ecclesiastical ministry of the Church in the United States. When a major superior of a clerical religious institute or society of apostolic life applies and interprets them for the internal life and governance of the institute or society, he has the obligation to do so according to the universal law of the Church and the proper law of the institute or society».

It was also explained that the provisions of cc. 678 and 738 apply (with due regard for cc. 586 and 732) concerning the use of the expression «ecclesiastical ministry» with regard to the clerical members of institutes of consecrated life and societies of apostolic life. These canons address the relationship governing religious, members of institutes of consecrated life and societies of apostolic life and the local ordinary as well as their own superiors[106].

Amendments were also introduced to Norm 12 which dealt with the transfer of priests. The issue at hand obviously lay in the autonomy that a religious institute of Pontifical Right for example enjoys to transfer a priest or deacon from one province to another especially in the case where the priest or deacon has no contract with the diocese. The new Norm 12 now read:

> «No priest or deacon who has committed an act of sexual abuse of a minor may be transferred for a ministerial assignment in another diocese/eparchy. Every bishop/eparch who receives a priest or deacon from outside his juris-

---

[106] The two canons that capture the general spirit of the amendment are herein cited.
Canon 678 § 1 «In matters concerning the care of souls, the public exercise of divine worship and other Works of apostolate, religious are subject to the authority of the Bishops, whom they are bound to treat with sincere obedience and reverence.
§2 In the exercise of an apostolate towards persons outside the institute, religious are also subject to their own Superiors and must remain faithful to the discipline of the institute. If the need arises, Bishops themselves are not to fail to insist on this obligation.
§ 3 In directing the apostolic works of religious, diocesan Bishops and religious Superiors must proceed by way of mutual consultation».
Canon 586 § 1 «A true autonomy of life, especially of governance is recognised for each institute. This autonomy means that each institute has its own discipline in the Church and can preserve whole and entire the patrimony described in can. 578.
§ 2 Local Ordinaries have the responsibility of preserving and safeguarding this autonomy».

> diction will obtain the necessary information regarding any past act of sexual abuse of a minor by the priest or deacon in question (...) In the case of the assignment for residence of such a clerical member of an institute or a society into a local community within a diocese/eparchy, the major superior shall inform the diocesan/eparchial bishop and share with him in a manner respecting the limitations of confidentiality found in canon and civil law all information concerning any act of sexual abuse of a minor and any other information indicating that he has been or may be a danger to children or young people so that the bishop/eparch can make an informed judgment that suitable safeguards are in place for the protection of children or young people. This will be done with due recognition of the legitimate authority of the bishop/eparch; of the provisions of CIC, canon 678 (CCEO, canons 415 §1 and 554 §2), and of CIC, canon 679; and of the autonomy of the religious life (CIC, c. 586)».

There was thus an effort made to respect the legitimate ambit of freedom of religious institutes, societies of apostolic life and institutes of consecrated life. It also reflected a desire by the bishops to bring this Norm of the Essential Norms in line as much as possible with universal law.

4.10. *Remuneration*

This is a contentious issue of the Essential Norms not for its presence but rather for its absence. As Avery Dulles has charged, «The 'Essential Norms' say nothing about the support of priests who have been removed from ministry, and as a result some bishops seem to be failing to give decent remuneration required by Canons 281[107] and 1350 §1»[108]. There has been debate about the extent of c. 281.

---

[107] Canon 280 provides in part that: 280 § 1 «Since clerics dedicate themselves to the ecclesiastical ministry, they deserve the remuneration that befits their condition, taking into account both the nature of their office and the conditions of time and place. It is to be such that it provides for the necessities of their life and for the just remuneration of those whose services they need.
§ 2 Suitable provision is likewise to be made for such social welfare as they may need in infirmity, sickness or old age».
Canon 1350 § 1 «In imposing penalties on a cleric, except in the case of dismissal from the clerical state, care must always be taken that he does not lack what is necessary for his worthy support.
§ 2 If a person is truly in need because he has been dismissed from the clerical state, the Ordinary is to provide in the best way possible».

[108] A. DULLES, «Rights of Accused Priests», cit.

> «Some bishops take the canon to mean that clerics deserve remuneration if they are exercising ministry, but deserve limited or no remuneration if they are not (...) Other bishops have argued that since the diocese has often made payment to the priests' accusers, the diocese either does not have the money, or in justice cannot supply the money, to support a priest who is not working because he has been accused of sexual misconduct with a minor (...) There does not seem to be a similar debate about the meaning of c. 1350 [on providing] 'sustenance' to priests who have been penalized for their actions. There is some lack of clarity, however, as to the precise amount that is considered necessary for such sustenance»[109].

Legitimate questions may well be raised as to what is considered decent support. Other than meals and accommodation, would this include medical expenses, travel allowance, vacation allowance, etc.?[110]. And could the diocese decide where the priest is to stay (e.g. in a diocesan house) so as to mitigate costs?

It is true that the diocese should guard against an ill-intentioned cleric turning the ministry into a «meal ticket for life»[111] yet some steps taken by the bishops have been extremely harsh and not in keeping with justice or equity. Apparently, in some cases, «Once the media began announcing any claim of abuse for which it could get even a slight amount of information, some bishops reacted by giving that priest 24 hours to leave the rectory where he lived, without any substitute place to live and without any financial support, not even his monthly salary»[112]. By making removal from ministry automatic, it is incumbent on the Essential Norms to regulate this matter.

4.11. *Wide Administrative Powers*

Norm 9 of the Essential Norms cited various provisions which referred to the powers of the bishop to remove a person from office, powers to judge suitability of a candidate etc. Therefore «(i)mmense prudence is needed in the application of this norm and of the canons to which it refers»[113]. As a result of

---

109 P. LAGGES, «Resolution of Cases by Rescript», 191-192.
110 Vid. F. MORRISEY, «Procedures for Loss of Clerical State», 100-103.
111 *Ibid*., 100.
112 P. DUGAN, *The Need to Know vs. Confidentiality*, in P. DUGAN (ed), *Towards Future* Developments, 9-31, 21.
113 L. ÖRSY, «Bishops' Norms», 1017.

this Norm, the bishops were clothed with very wide executive powers which claimed a basis in the code. In effect, these powers equated the priest to an office-holder and seemed to provide for his removal from ministry or impeding his faculties, not as a penalty but as an administrative act. As Kenneth Boccafola argues, «(c)onsidering then the general tenor of the new Code of Canon Law in light of the revision of the Code of 1917, the claim to such broad executive power seems somewhat startling to the professional canonist»[114].

The argument advanced by Boccafola is that many of the provisions cited in the Code are taken «out of context or presented with a forced or inappropriate interpretation» which is not in keeping with canon 18[115]. By way of example, he states that «just because the original conferral of office is at the free disposition of the bishop (c. 157) and that a person may freely resign his office (c. 187) does not mean that a person can justly be deprived of office and livelihood, against his will, without a grave cause for such action being legitimately proven. The reference to canon 906, i.e that a priest should not, without a just reason, say Mass without some member of the faithful being present, is particularly inept as it seems to be cited as if it could somehow justify the bishop's forbidding a priest to celebrate the Eucharist publicly. Moreover, the same can be said of the reference to canon 284, because to dispense a priest from the obligation of wearing clerical garb cannot be considered equivalent to prohibiting him from wearing it»[116]. Boccafola reads in this claim for such broad powers a «nostalgic desire (...) to resurrect a provision of the Code of 1917 (...) '*suspensio ex informata conscientia*'»[117] a charge reiterated by various canonists.

4.12. Ex-officio *dismissal from the clerical state*

Norm 10 states:

> «The priest or deacon may at any time request a dispensation from the obligations of the clerical state. In exceptional cases, the bishop/eparch may request of the Roman Pontiff the *ex officio* dismissal of the priest or deacon from the clerical state, even without the consent of the priest or deacon».

---

114 K. Boccafola, «The Special Penal Norms of the United States», 280.
115 Canon 18: «Laws which prescribe a penalty, or restrict the free exercise of rights, or contain an exception to the law, are to be interpreted strictly».
116 K. Boccafola, «The Special Penal Norms of the United States», 280.
117 *Ibid.*, 280-281.

There would be no problem with an accused person who is guilty and who after having seriously reflected on the issue decides to request dispensation from celibacy and from the obligations of the clerical state. This dispensation would be granted by the Apostolic See by way of rescript as provided for by c. 290, 3°[118]. But seeing as at times the accused would not collaborate in making the petition, the bishops in the Essential Norms petitioned for the possibility of requesting it themselves without the consent of the accused cleric and even without his knowledge.

As early as 1985, the then Prefect of the CDF, Cardinal Ratzinger had inquired about the possibility of such a provision but had received a negative response from the Pontifical Council for Legislative Texts. This time, the bishops in effect got what they were asking for. However, at the time, this provision was not in conformity with any universal law and was expressly against the provisions of *Sacramentorum sanctitatis tutela* which at article 17 stated:

> «The more grave delicts reserved to the Congregation for the Doctrine of the Faith may only be tried in a judicial process».

The application of Norm 10 at the time should have raised eyebrows for being inconsistent with universal law. However, on 7th February 2003, a mere two months after the promulgation of the Essential Norms, the Holy Father granted the CDF the faculty to dispense in more grave cases from article 17 of SST[119] (that is dispense with the judicial process) and instead, resolve the issue through the brief process by extra-judicial decree as per c. 1720[120]. The struc-

---

[118] Can. 290: «Sacred ordination once validly received never becomes invalid. A cleric, however, loses the clerical state:
1° by a judgement of a court or an administrative decree, declaring the ordination invalid
2° by the penalty of dismissal lawfully imposes
3° by a rescript of the Apostolic See; this rescript, however, is granted by the Apostolic See to deacons for only grave reasons and to priests for only the gravest of reasons».

[119] The text available at William Woestmann, *Ecclesiastical Sanctions*, cit., 315 stated:
«The faculty is granted to the CDF to dispense from art. 17 in those grave and clear cases which, according to the Particular Congress of the CDF:
may be referred directly to the Holy Father for an ex officio dismissal from the clerical state or may be treated under the summary process of can. 1720 by the Ordinary who, in case he is of the opinion that the accused should be dismissed from the clerical state, will ask the CDF to impose dismissal by decree».

[120] Can. 1720, «If the ordinary believes that the matter should proceed by way of an extra-judicial decree:

ture of article 21 of *Normae de gravioribus delictis* (which was then article 17 of SST) is that of the application of a penalty and contemplates an extra-judicial process save in cases where the guilt of the accused is manifest. The Essential Norms did not mention these safeguards in Norm 10 or anywhere else. Thus it is not wholly true that they are a reflection of the universal law. This norm in universal law was meant to be applied only in the gravest cases. Whereas Norm 10 is *now applicable*, it lacks the safeguards contemplated in universal law.

4.12.1. Virtual dismissal from the clerical state

Norm 8 of the Essential Norms fails to clarify how permanent removal from ministry differs from dismissal from the clerical state. The only difference appears to be that the one merely removed from ministry is still bound by the obligations of the clerical state and may celebrate Mass privately[121]. As Avery Dulles has argued, «removal from public ministry without a canonical trial or special action by the Roman pontiff should never be permanent or excessively prolonged, since for practical purposes such removal amounts to the very harsh penalty of forced laicization»[122]. It may be asked whether this removal is modelled on c. 192 of the CIC. If so, then as per c. 193, such removal can only be «for grave reasons and in accordance with the procedure defined by law». Legitimate questions may well be asked whether Norm 8 does not constitute some form of deposition.

Then there is also the added problem of Norm 6 on «administrative leave» during or even before investigation. It is trite to ask whether there is a possible recourse against this measure taken ostensibly as per c. 1722. As per Fernando Loza, no recourse is possible against a decree issued as per c. 1722. This is:

- «Because it is not issued *extra iudicium* (cf. c. 1732) but in *quolibet processus stadio*, precisely to guarantee and protect the free course of justice;
- Because any such recourse would paralyze the process; for instance by restricting the freedom of the witnesses to appear and testify at the trial;

1° he is to notify the accused of the allegation and the proofs, and give opportunity for defence, unless the accused, having been lawfully summoned, has failed to appear;
2° together with two assessors, he is accurately to weigh all the proofs and arguments;
3° if the offence is certainly proven and the time for criminal action has not elapsed, he is to issue a decree in accordance with cann. 1342-1350, outlining at least in summary form the reasons in law and fact».

121 K. Boccafola, «The Special Penal Norms of the United States», 278.

122 A. Dulles, «Rights of Accused Priests», cit.

– Because the parallel c. 1958 of the *CIC*/17 expressly states that against such decrees, *non datur iuris remedium*: consequently, interpretation of the *ius vetum* must be applied, according to c. 6 § 2, of the *CIC*/83».[123]

If this interpretation is correct, then given the changes introduced by SST, questions must be raised if recourse is possible against such a decree if it is issued *before* the process has begun. In this case it would have been issued *extra iudicium*. John Beal seems to suggest that such recourse is possible. As he has stated rather poetically, «Despite the benign sound of the phrase 'administrative leave' (Canon 1722) and frequently repeated insistence that its imposition and continuation are not penalties and do not imply a 'permanent resolution' of the case, such a leave has all the characteristics of a perpetual expiatory penalty except the name (Canon 1336, 1, 1°-3°). Once such a 'leave' has been imposed after or without an opportunity for the priest to refute the accusation, he has only two equally unpalatable options: either to 'go gentle into that good night' of open-ended 'administrative leave' or to 'rage against the dying of the light' by embarking on the arduous and time-consuming procedure of recourse to the Holy See»[124]. The possibility of such recourse needs to be clarified in light of the changes introduced in the universal law.

4.13. *The role of the Diocesan Review Boards*

When the review boards were established, many felt that it was finally the opportunity to get lay people involved in the management of the diocese and deal with the abuse scandal. This was also seen as a positive move since responsibility would now fall on the entire Church both clergy and laypersons. The Mixed Commission, not wishing to mix up issues relating to governance in the *ordo-plebs* structure, insisted that the role of the board would be advisory. Unfortunately, the way these boards were meant to function was not set out in the Norms. Thus whereas there have been success stories, the cases where the review boards have failed to work has pointed to the failure in delimiting their roles. One recent case in point is Philadelphia. The Philadelphia review board came under strong criticism from the grand jury after an investigation

---

[123] F. Loza in E. Caparros (ed.), *Code of Canon Law Annotated*, 1351.
[124] J. Beal, «Hiding in the Thickets of Law», cit.

was carried out into alleged acts of child sexual abuse in the Archdiocese of Philadelphia[125].

The grand jury faulted the review board for a series of glaring errors and omissions. As it stated, «in cases where the Archdiocese's review board has made a determination, the results have often been even worse than no decision at all. The board takes upon itself the task of deciding whether it finds 'credible' the abuse victims who dare come forward. It is the board, though, that strikes us as incredible»[126]. As Ana Maria Catanzaro, chair of the review board was to state afterwards, «But until the grand-jury report came out, the board was under the impression that we were reviewing every abuse allegation received by the archdiocese. Instead, we had been advised only about allegations previously determined by archdiocesan officials to have involved the sexual abuse of a minor –a determination we had been under the impression was ours to make»[127].

In this case, it appears that while the grand jury studied allegations against thirty-seven priests, the review board had only been presented with allegations against ten. The bishops in Philadelphia did not hand over all the details they had to the review board. The end result is that the review board was made to look incompetent and the bishops were once more perceived as having kept information on priest abusers secret.

It would also seem that the review board members were not given clear directives as to how to proceed and the nature of c. 1395 § 2 as it stands was not explained to them. Some of the questions the review board's chair poses are: «What is meant precisely by 'an offense by a cleric against the Sixth Commandment of the Decalogue with a minor'? What about 'grooming' –when an adult attempts to establish a relationship leading to sexual relations? In cases where review-board members argued that grooming constituted sexual abuse, one canon lawyer countered that it does not»[128].

Clearly, there was a lack of communication between the bishops and their review boards. This thus brought to the fore the question of the role of the review boards and the need for an established modus operandi.

---

[125] Grand Jury Report in the Court of Common Pleas Philadelphia County dated 21st January 2011.
[126] Grand Jury Report in the Court of Common Pleas Philadelphia County dated 21st January 2011, 9.
[127] A. Catanzaro, «The Fog of Scandal», in *Commonweal Magazine*, available at http://commonwealmagazine.org/fog-scandal-1, last accessed 4th November, 2012.
[128] *Ibid.*

5. Sanctions

As has been seen, the Essential Norms have two sanctions. One is the permanent «removal» from ministry which in all respects appears to be the equivalent of a deposition, and the other is removal from the clerical state. As discussed, the Norms would do well to define exactly what the removal from ministry constitutes as well as the duties and the obligations of the cleric who finds himself so removed from ministry.

6. Recent amendments to the Essential Norms

Though there was opposition to the Essential Norms on their promulgation, there were also voices that made a spirited defence of them seeking to explain them in light of the peculiar circumstances that were taking place in the United States. Consensus, however, seemed to be that in time the spirit of the law would once more pervade the Norms, but for the moment these measures were needed. As Bishop Harry Flynn stated, «(d)espite its own qualms about the bluntness of this so-called 'zero-tolerance' policy, the National Review Board concluded in its Report on the Crisis in the Catholic Church in the United States that 'for the immediate future', this policy 'is essential to the restoration of the trust of the laity in the leadership of the church, provided that it is appropriately applied'»[129].

Evidence that the bishops have somewhat began to heed the call for reform is seen in the amendments to the Norms. By way of recompilation, we briefly list the amendments that were made to the Norms in 2005[130].

6.1. *Amendments to highlight the complementarity with universal law*

a) There was a notable attempt in this regard beginning right from the preamble. The first amendment in effect states that the norms «are to be interpreted in accordance with that law». [«that» = universal law of the Church].

---

[129] Rev. H. Flynn, «What has the Charter Accomplished», cit.

[130] There was as already seen, an amendment in 2011 whose only effect was to change the reference to SST art 4 § 1 in the preamble to art 6 § 1 after the modifications made to SST in 2010.

b) The definition of sexual abuse was eliminated and in its place, reference made to c. 1395 § 2 of the code and SST 6 § 1.
c) Amendments were made to Norm 6 which now stated that the preliminary investigation would be carried out «in accordance with canon law» where initially it spoke of «in harmony with canon law».
d) Amendments to Norm 6 that now states «withdraw the accused from exercising the sacred ministry» in place of «remove the accused from ministry». The Latin word used in c. 1722 is «*arcere*» which literally translated would be «keep away from» or «prevent». However, «withdraw» is a valid translation given the context. This undoubtedly brought the Norms more in line with canon law since «withdraw from exercise» does not convey the same sense of finality that «remove from ministry» does.

   Yet away from the mere change of terminology, legitimate questions still need to be asked about the duration of such withdrawal. The Essential Norms state that this withdrawal from ministry lasts «pending the outcome of the process». If «process» is here used in the canonical sense, meaning the penal process, then the statement is superfluous since these precautionary measures «cease by virtue of the law itself as soon as the penal process ceases»[131]. Could «process» refer to the investigation solely? Highly unlikely for if the accusation is found credible then the «process» proper is instituted and it would make no sense to lift the precautionary measures then. The problem lies in the fact that the Essential Norms make this step compulsory thus removing the discretionary power that the bishops enjoy to place such precautionary measures based on scandal or the protection of witnesses or safeguarding the process of justice. The Norms should contemplate the lifting of the precautionary measures by the bishop within a given time or given certain conditions or, if not, then specify how long one can be «withdrawn from the exercise of ministry» until a decision is taken.
e) Norm 9 was also introduced so as to curb any abuse of the executive power by the bishop by adding the amendment that the bishop exercised his executive power of governance «within the parameters of the universal law of the Church». The amendment was made necessary

[131] Can. 1722.

by the probability of misinterpreting the canons cited in Norm 9 and using them in ways that were not contemplated by canon law.

f) The amendments to Norm 12 introduced so as to bring the Norms into accord with the provisions of the code as relates to religious priests or priest members of societies of apostolic life or secular institutes or institutes of consecrated life.

6.2. *Amendments highlighting the elements of justice*

a) The most notable amendment here was Norm 6 which added the following sentence: «During the investigation the accused enjoys the presumption of innocence, and all appropriate steps shall be taken to protect his reputation». This should affect the manner in which the accused is treated. The protection of the reputation of the accused has also been much debated though it is felt that more concrete steps should have been detailed other than the merely exhortative «appropriate steps shall be taken».

b) In line with the amendments to Norm 6, Norm 13 was amended to read «When an accusation has been shown to be unfounded...» from the previous «When an accusation has proved to be unfounded...» By restating the presumption of innocence, the Norms highlight that the burden of proof does not shift to the accused to prove his innocence unless the accuser has discharged his burden.

c) The amendment to Norm 8 C which indicated that the bishop/eparch «may» apply for a derogation from prescription instead of the mandatory «shall» apply as per the 2002 Norms. Moreover, the bishop has to cite «relevant grave reasons» and not merely give «appropriate pastoral reasons» as before. This introduces a sense of the gravity and the exceptionality that is involved while seeking such a dispensation. Another curious amendment is the inclusion of the word «canonical» to describe the «canonical» due process. This might have been in response to the criticism that the expression «due process» does not have a foundation in canon law. Perhaps with the addition of the word «canonical» it was thought that «due process» and its content had been canonised as understood in common law tradition. Here it probably means no more than the observance of the required procedures in canon law.

Conclusion

The Essential Norms were enacted at a time of crisis in response to a particular situation and it was patent that they would cause much division. It was also to be expected that with time, they would evolve once calm had returned and once the spirit of justice and equity had been allowed to penetrate the norms. What was not obvious at the time was the role they would play in influencing the universal law. The Norms in themselves were meant to be interpreted in the light of universal law but such has been their impact that they have modified universal law. On a positive note, the Essential Norms roused the bishops to action. The public thus had a standard to judge the criteria of acting of the bishops. Concrete articles or norms that were being violated could be pointed out. Lay persons were included in the whole process especially through their participation in the review boards. But the environment was not the most propitious. The bishops, after years of inaction, found themselves called upon to clean up the presbytery and perhaps theirs as a knee-jerk reaction.

Legislation whose main aim is to legislate a crime must start off by defining as precisely as possible the elements that constitute the crime. The crime cannot consist of various vague actuations that are all subject to the same punishment. Next, the law should take into account the fundamental rights of all parties. On these two major fronts, the Norms and the Charter have fallen short.

The Norms have been revised though many feel that they fell short of a true revision. The zero-tolerance policy, especially with so vague a notion as «Offense against the sixth», the lack of gradation of offenses and the *dimissio ex-officio* all call for much caution in their application. Much has been accomplished by the Norms and the Charter, not least is the commendable fact that they exemplified a joint collective action by the bishops that also integrated the lay faithful. Yet the Norms and Charter still fell short of a true change of attitude by all bishops to exercise good judgement. That cannot be legislated. The initiative still lies with the bishops to provide the leadership and honesty needed; to act motivated by true Christian charity and to safeguard the spirit of canon law. The canon lawyers in the United States must also take up the responsibility to aid the bishops in their task. As Luis Navarro has stated, «The jurist is called to seek the administration of justice and it is, therefore, incumbent upon canon lawyers and all those called upon

to apply these Norms to do so in accordance with the juridical principles of penal canon law»[132].

The Essential Norms constitute a potent tool in the hands of the bishops who seem to have got all that they wanted from the Holy See. Undeniable is also the lasting effect that these Norms are bound to leave on penal law in the Church. Only time will show with what prudence and good judgement these norms will be put to effect.

[132] L. Navarro, «A General Canonical Backgrounder», cit., 235.

BIBLIOGRAPHY

I. *Sources*

Code of Canon Law, 1983. GARNER, B. (ed.), *Black's Law Dictionary*, 9th Edition, West Publishing Co., St. Paul, Minnesota 2009. Apostolic Constitution *Pastor Bonus*, 28th June, 1988, AAS 80 (1988) 841-930. *Presbyterorum Ordinis*, AAS 58 (1966) 991-1024. Pontifical Council for Legislative Texts: Nota Explicativa, in Communicationes 38 (2006) 16. Communicationes 15 (1983) 173. *The Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* (The Essential Norms), available at http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm, last accessed on 4 February 2019. United States Conference of Catholic Bishops, *The Charter for the Protection of Children and Young People (The Dallas Charter)*, available at http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm, last accessed on 4th February 2019. Letter of His Holiness ST. JOHN PAUL II to the Bishops in America, June 11 1993, available at https://w2.vatican.va/content/john-paul-ii/en/letters/1993/ documents/hf_jp-ii_let_19930611_vescovi-usa.html, last accessed on 4 February 2019. Letter Cardinal Giovanni Battista Re to Bishop Wilton Gregory dated 14th October 2002, http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021018_re-usa_en.html, last accessed on 10th November 2012. *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice*, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/criminal-justice-restorative-justice/crime-and-criminal-justice.cfm last accessed on 4th February 2019. *2011 Annual Report on the Implementation of the Charter for the Protection of Children and Young People* available at http://www.usccb.org/issues-and-action/child-and-youth-protection/archives.cfm last accessed on 4th February 2019. *An Agreement Between the Diocese of Manchester and the New Hampshire Attorney General's Office*, 10 December 2002, n. 4, in *Origins*, January 2, 32 (2003) n. 29. Grand Jury Report in the Court of Common Pleas Philadelphia County dated 21st January 2011, available at www.bishop-accountability.org/reports/2011_01_21_Philadelphia_Grand_Jury_Final_Report_Clergy_Abuse_2.pdf, last accessed on 4th February 2019.

II. *Authors*

BASSET, W., «Church Records and the Courts», in *America* Magazine, Oct. 29th, 2007, available at http://www.americamagazine.org/content/article.cfm?article_id=10335, last accessed 15th December 2012. BEAL, J., *Administrative Leave: Canon 1722 Revisited*, in Studia Canonica 27 (1993) 293-320; *Hiding in the Thickets of Law: Some Disturbing Aspects of the Dallas Charter*, in America Magazine, October 7th 2002, available at http://www.americamagazine.org/content/article.cfm?article_id=2526, last accessed 10th November 2012; «To Be or Not to Be That is the Question. The Rights of the Accused in the Canonical Penal Process» (1991) *CLSA Proceedings*, 77-97. BERNAL, J., *Las «Essential Norms»*

de la Conferencia Episcopal de los Estados Unidos Sobre Abusos Sexuales Cometidos por Clérigos. Intento de Solución de una Crisis, in Ius Canonicum 47 (2007) 685-723. Bishop FLYNN, H., «What Has the Charter Accomplished?», in *America Magazine*, October 18, 2004, http://www.americamagazine.org/content/article.cfm?article_id=3812, last accessed 4th November 2012. BOCCAFOLA, K., *The Special Penal Norms of the United States and Their Application*, in DUGAN, P. (ed.), *The Penal Process and the Protection of Rights in Canon Law*, Proceedings, Gratianus Series, Montreal 2005, Wilson and Lafleur Ltée, 257-285. CAPARROS, E. (ed.), *Code of Canon Law Annotated*, 2nd Edition revised and updated, Wilson and Lafleur, Montreal, 2004. Cardinal DULLES, A., «Rights of Accused Priests: Toward a Revision of the Dallas Charter and the 'Essential Norms'», in *America Magazine* June 21, 2004 available at http://www.americamagazine.org/content/article.cfm?article_id=3638l last accessed 10th November 2012. CATANZARO, A., «The Fog of Scandal», in Commonweal Magazine, available at http://commonwealmagazine.org/fog-scandal-1, last accessed 4th November, 2012. CHIAPPETA, L., *Il Codice di Diritto Canonico*: *Commento Giuridico Pastorale*, vol. II, Edizione Dehoniane, Seconda Edizione, Roma, 1996. CHOPKO, M., «A Response to Timothy Lytton: More Conversation is Needed», in *Connecticut Law Review*, February 2007, vol. 39, no. 3, 911. CITO, D., *Prescription in Penal Matters*, in DUGAN, P. (ed.), *The Penal Process and the Protection of Rights in Canon Law*: *Proceedings of a Conference held at the Pontifical University of the Holy Cross*, *Rome*, *March 25th-26th*, *2004*, Wilson and Lafleur, Montreal, 2005. CLSA, *Revised Guide to the Implementation of The U.S. Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* May 2004. DE AGAR, M., *Legislazione delle Conferenze episcopali complementare al CIC*, Milano, 1990, 4. DEIBEL, D., *Canon 1341: Pastoral Principles within the Penal Process*, in DUGAN, P. (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice*, Montreal 2010, Wilson and Lafleur Ltée, 2010. DUGAN, P., *The Need to Know vs. Confidentiality*, in DUGAN, P. (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice*, 9-31. GIL, F., *Abusos Sexuales a Menores Realizados por Clérigos: Normas de los Obispos de los Estados Unidos de América (2002). Textos y comentario*, in Revista Española de Derecho Canónico 62 (2005) 9-87. GREEN, T., *Clerical Sexual Abuse of Minors: Some Canonical Reflections*, in The Jurist 63 (2003) 366-425. LAGGES, P., *Resolution of Cases by Rescript*, *Penal Process or Decree*, in DUGAN, P. (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice*, Montreal 2010, Wilson and Lafleur Ltée, 2010. LLOBELL, J., *The Balance of the Interests of Victims and the Rights of the Accused: The Right to Equal Process* in DUGAN, P. (ed.), *The Penal Process and the Protection of Rights in Canon Law*: *Proceedings of a Conference held at the Pontifical University of the Holy Cross*, *Rome*, *March 25th-26th*, *2004*, Wilson and Lafleur, Montreal, 2005. LOMBARDÍA. P., sub c. 9, in *Code of Canon Law Annotated*, Wilson & Lafleur, Montreal 2004, 2nd edition. MORRISEY. F., *Penal Law in the Church Today: New Documents Complementing the Code of Canon Law*, in DUGAN, P. (ed.), *Advocacy Vademecum*, Wilson and Lafleur, Montreal, 2006, 33-47. NAVARRO. L, *A General Canonical Backgrounder for Interpreting the USCCB Essential Norms in the Context of the Evolution of Canonical Penal Law*, in DUGAN, P. (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice*, Montreal 2010, Wilson and Lafleur Ltée, 2010, 195-238. ÖRSY, L., *Bishops' Norms: Commentary and Evaluation*, in Boston College Law Review 44 (2003) 999-1029. PENNINGTON, K., *Innocent Until Proven Guilty: The Origins of a Legal Maxim*, in DUGAN, P. (ed.), *The Penal Process*

and the Protection of Rights in Canon Law: *Proceedings of a Conference held at the Pontifical University of the Holy Cross*, *Rome*, *March 25th-26th*, *2004*, Wilson and Lafleur, Montreal, 2005, 45-66. PLANTE, T. (ed.), *Sin against the Innocents: Sexual Abuse by Priests and the Role of the Catholic Church*, Praeger Publishers, Westport, 2004. RENATI. C., *Prescription and Derogation from Prescription in Sexual Abuse of Minor Cases*», in DUGAN, P. (ed.), *Advocacy Vademecum*, 67-84. Rev. Msgr. JENKINS, R., *The Charter and Norms Two Years Later: Towards a Resolution of Recent Canonical Dilemmas*, CLSA Proceedings 66 (2004), 115-136. SÁNCHEZ-GIRÓN, J., *La Crisis en la Iglesia de Estados Unidos: Normas Propuestas por la Conferencia Episcopal*, in Estudios Eclesiásticos 77 (2002) 631-660. WEIGEL, G., *The Courage to be Catholic: Crisis*, *Reform and the Future of the Church*, Basic Books, New York, 2002, p. 139. WOESTMANN, W., «Dismissal from the Clerical State for the Sexual Abuse of a Minor», in *Roman Replies and CLSA Advisory Opinion* 2005, 89-91. WOESTMANN, W., *Ecclesiastical Sanctions and the Penal Process*, 2nd edition revised and updated, Ottawa 2003.

INDEX OF DOCTORAL THESIS

the Essential Norms. D. Amendments to the Charter and the Norms. 1. Amendments to the Charter. 2. Amendments to the Norms by the Mixed Commission. 3. Reception of the Norms And The Charter: Elements Most Critiqued. 4. Sanctions. 5. Recent Amendments to the Essential Norms. 6. Balance of the Essential Norms and the Charter. CHAPTER IV: THE NEW FACULTIES AND THE EX OFFICIO DISMISSAL FROM THE CLERICAL STATE. A. Ex Officio Dismissal From the Clerical State. 1. *Ex-Officio* Dismissal in The Era Of The Pio-Benedictine Code. 2. *Ex Officio* Dismissal in the Present Code. 3. The Change in Competence as Regards *Ex Officio Dismissal*. 4. The Project of 1997. B. The «Special Faculties». 1. Historical Origins of the Faculties. 2. Characteristics and Juridical Nature of These «Faculties». 3. The 1997 Special Faculty of the Congregation for the Evangelization of Peoples. 4. The New Faculties Granted to the Congregation For The Clergy (2009) And the Congregation For The Evangelization of Peoples (2008). CONCLUSIONS. APPENDICES. BIBLIOGRAPHY.