# The Normalization of the Extrajudicial Penal Process (c. 1720). Analysis, Critique, Proposal

## *La normalización del proceso penal extrajudicial (c. 1720). Análisis, crítica, propuestas*

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**Abstract:** A plain reading of c. 1342 § 1, albeit in its implicit sense, reveals that the judicial process is the ordinary instrument for handling a penal cause, while an extrajudicial or administrative penal process may only be employed when just causes impede a judicial process. Nevertheless, because the formulation of that canon is a result of a compromise in the Code Commission, and also because of the rarity of penal trials in the decades following the promulgation of the CIC, canonical doctrine has yielded much discretion to the Ordinary in selecting the form of penal process, such that the extrajudicial process has come to be considered the "normal" pathway. In any case, it is critical that the judicial nature of the decision concluding the extrajudicial process be born carefully in mind. Moreover, ongoing profound reflection is to be devoted to considering how the extrajudicial process can be a truly just one. It may be optimal for a single penal process to be proposed to the Legislator *de iure condendo*.

**Keywords:** Penal Process, Administrative Procedure, *praxis Curiae*, Moral Certitude, Right of Defense.

**Resumen:** Una simple lectura del c. 1342 § 1, al margen de su sentido implícito, revela que el proceso judicial es el instrumento ordinario para la tramitación de causas penales, mientras que el proceso penal extrajudicial o administrativo sólo se puede emplear cuando se dan causas justas que impiden el proceso judicial. Sin embargo, puesto que la formulación de este canon es el resultado de un acuerdo en la Comisión Codicial, y dado que los juicios penales fueron más bien infrecuentes en las décadas posteriores a la promulgación del CIC, la doctrina canónica le ha otorgado gran discreción al Ordinario para elegir el modo del proceso penal, hasta el punto de que el proceso extrajudicial ha venido a considerarse como la vía "normal". En cualquier caso, resulta esencial que se tenga presente con la debida prudencia la naturaleza jurídica de la decisión que concluye el proceso extrajudicial. Además, en la actualidad, hace falta una reflexión profunda para considerar de qué modo puede el proceso extrajudicial ser verdaderamente justo. Quizás lo ideal sería proponer un proceso penal único al legislador *de iure condendo*.

**Palabras clave:** Proceso penal, Procedimiento administrativo, *praxis Curiae*, Certeza moral, Derecho de defensa.

## 1. INTRODUCTION

The past two decades have seen the Church's coercive jurisdiction become more public than it had been in the previous two decades. The notoriety and scandal that prompted this has influenced the manner in which it has been carried out. Reportedly criminal activity of Churchmen has been widely addressed in the mass and local media and prosecuted in secular courts (or out-of-court), leaving little time and energy in the balance for an additional, canonical process. These factors seem to be among those that have contributed to the "normalization" of the extrajudicial canonical pathway for imposing or declaring penalties. Any reflection upon it ought to bear in mind the perspective that normalization efforts are «responses to situations of emergency, and it is therefore normal for there to be reconsiderations and modifications. It is not all final, and time will tell if the measures taken in these years and the procedures applied are just or if they have to be modified»[1].

Pragmatic solutions are scarcely worthy of the Church as a society having a divine institution, a holiness of life, and an eternal destiny. Normative solutions may only be sustained if they are just. Is this normalization legitimate? How is it verified or justified in the sacred discipline of the Church? After answering these questions (2), this study strives to examine whether such normalization is truly necessary (3) and effective (4). Being the normalized *(de facto)* ordinary penal process, attention to its nature will prove, in my opinion, to be particularly revealing (5). And since the Church is wedded to the *Iustus* and therefore

[1] See L. NAVARRO, *La dimissione dallo stato clericale in via amministrativa*, in J. WROCEŃSKI – M. STOKŁOSA (eds.), *La funzione amministrativa nell'ordinamento canonico – Administrative function in Canon Law – Administracja w prawie kanonicznym*, vol. 2, Uniwersytet Kardynała Stefana Wyszyńskiego, Warsaw 2012, 895, note 3.

must herself be just in all that she does, the means for ensuring that this process is a just one will be explored (6).

## 2. The Phenomenon of Said Normalization

A presupposition to this study is the "normalization" of the extrajudicial form of the penal process. This should not in the first place be taken in a technical sense, suggesting that the preference for that form has the force of a general *norm*. Rather, it has a colloquial sense of a phenomenon that has become *normal*, or occurring and recurring in a way that has come to be expected and socially accepted. That this normalization has come about is worthy of demonstration at the outset, and this is not difficult to do if one examines canonical doctrine's attention to the question. Additionally, however, this normalization has become somewhat normativized, having received confirmation in more recently issued norms which both verify and direct the praxis of the Roman Curia.

### 2.1. *Canonical Doctrine*

During the revision of the CIC/17's canons on the penal process and the drafting of c. 1342 § 1 in particular, there was an evolution in how vehemently to direct Ordinaries in their decision about which form of process to use. While the judicial process was initially favored clearly and strongly (cfr. c. 1402 § 2 CCEO), after debate and counterproposals within the *coetus*, the resulting norm situated it as a kind of preferred process while also prescribing a lighter condition for resorting to an administrative or summary process: «*Quoties* iustae obstent causae *ne iudicialis processus fiat*, *poena irrogari vel declarari potest per decretum extra iudicium...*» (c. 1342 § 1, emphasis added)[2]. Then-Father

[2] It had been initially proposed that a penalty could be imposed or declared «*per decretum extra iudicium*» only «*[q]uoties graves causae obstent ne iudicialis processus fiat et probationes de delicto omnino evidentes sint...*» (Pontificia Commissio Codici iuris canonici recognoscendo, *De delictis in genere. Praevium canonum schema*, *a Pio Ciprotti apparatum*, 27-XII-1966, Communicationes 44 (2012) 549-560, esp. 558 at *c. 42 § 1*. This wording was largely the same after the first discussion of the commission, which however decided to eliminate the word *omnino* (see *ibid.*, 576-577,

Velasio De Paolis, among others [3], commented that, in light of its drafting process, the norm ultimately does not leave the judicial process as the one truly favored or privileged. At the same time, he seemed to be encouraged by § 2 of the just-cited canon: «Nevertheless, from another point of view, it can be said that the judicial pathway is still retained as the one most adequate for safeguarding the attainment of justice and respect for the rights of the person, inasmuch as it is obligatory in certain particularly grave cases», namely, especially when it is a matter of imposing perpetual penalties [4]. However, as will be explored below, he would witness before his death, four years ago, an erosion in practice also of the restriction of c. 1342 § 2.

In my assessment, the CIC in force means for the penal trial *(iudicium poenale)* to be the ordinary form of the penal process. If the instruments at the Ordinary's disposal for exercising pastoral solicitude leave the condition of things in a state of scandal or injustice, with the non-reform of the putative offender, he is to make provision for a penal *«proceduram iudicialem vel administrativam»* (c. 1341). This choice is, technically speaking, subject to the discretion of the ordinary, meaning that it is *for him* (not the Legislator) to discern the personal and local circumstances and make the disposition for a penal process.

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588). One consultor of the *Coetus studiorum de iure poenali* proposed that a judicial process always be required such that a penalty could never be imposed or declared via an abbreviated process. While the rest of the study group could appreciate the rationale for this proposal, it was deemed to be *«contra realitatem quae exigit instrumentum agile et expeditum sicut est via administrativa»*, although it would be apparent in the norm that the *«praeferentia legislatoris [est] pro via iudiciali»* (Communicationes 9 [1977] 161, at *C. 28 a*). Nevertheless, there was a defense of the extrajudicial process as being sufficient for the protection of the rights of the accused; and the proposal that the accused be given the right to request a judicial process was not admitted (cfr. Communicationes 12 [1980] 190-191, at *C. 381*). On the revision process of this norm, see, e.g., G. DI MATTIA, *Diritto alla difesa e procedura penale amministrativa in diritto canonico*, Fidelium iura 3 (1993) 314-324; F. C. EASTON, *The Development of CIC Canon 1342 § 1 and Its Impact upon the Use of the Extra-Judicial Penal Process*, Studia canonica 48 (2014) 129-149.

[3] G. DI MATTIA, e.g., would conclude that «la libertà di scelta, di cui usufruisce l'Ordinario ... è senza limiti» (see his *La procedura penale giudiziaria e amministrativa nel CCEO e CJC: riflessioni comparative*, Apollinaris 69 [1996] 96, n. 34).

[4] For his account and analysis of the drafting of this norm, see V. DE PAOLIS, *L'applicazione della pena canonica*, Monitor Ecclesiasticus 114 (1989) 89-92, quotation at 92.

Were he to select the administrative procedure without there being truly just reasons for doing so (i.e., if just causes do not impede a trial), his choice would be illegitimate[5]. The law explicitly prohibits use of the administrative process if the process could result in a perpetual penalty (c. 1342 § 2), and it implicitly prohibits it when there are not just causes hindering a judicial process from being carried out (*ibid.*, § 1). Accordingly, while the judicial penal process is the ordinary penal process (cfr. c. 1728 § 1), the extrajudicial procedure is presented in law as, in a sense, extraordinary *(extra ordinem iudiciarium)*. For this reason, notwithstanding the debates in the Code Commission and the resulting compromise, the common doctrine has maintained, at least by way of principle, that the Legislator prefers the judicial process. It is not logical to assert that reasons in favor of a more expeditious process (the administrative) are equivalent to some reasons that might hinder the judicial process[6]. A trial may not result in a swift resolution, but this does not mean a trial cannot be carried out. To be sure, a process that is both just and swift is usually preferable: *quam primum*, *salva iustitia* (c. 1453); *celeritati*, *salva iustitia*, *consulere* (c. 1670).

According to the literal meaning of the phrase *iustae obstent causae*, the just causes that would primarily preclude or constitute an obstacle to a judicial process relate to the impossibility or grave inconvenience to carry one out, especially because there is no functioning tribunal[7].

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[5] R. Coppola, *La tutela dei diritti nel processo penale canonico*, Monitor Ecclesiasticus 113 (1988) 82, n. 6. For a proper exegesis of the norm, bearing in mind the revision debates, see C. Papale, *Il processo penale canonico. Commento al Codice di Diritto Canonico: Libro VII*, *Parte IV*, Manuali Diritto 28, Urbaniana University Press, Rome 2012, 69-73.

[6] See the incisive analysis of A. Calabrese, *La procedura stragiudiziale penale*, in *I procedimenti speciali nel diritto canonico*, Studi Giuridici 27, Libreria Editrice Vaticana, Vatican City 1992, 274, n. 11, where he concludes: «Pertanto l'Ordinario, cui la norma a prima vista sembra concedere un certo potere discrezionale, in realità, ad un più attento esame, pare che ne abbia poco e che in pratica sia raro il caso in cui egli possa fare a meno di adottare la via giudiziaria». See also M. J. Arroba Conde, *Justicia reparativa y derecho penal canónico. Aspectos procesales*, Anuario de Derecho Canónico 3 (2014) 42-44.

[7] Some also argue that the necessary discretion to be employed in the process, the privacy of the persons involved, and the risk of scandal could amount to a moral impossibility to carry out a trial (e.g., M. Gołąb, *Doble procedimiento para la imposición de la*

On the other hand, ill-preparedness for conducting penal trials on the part of diocesan officials does not constitute a truly just cause [8]; for the assumption of a public office carries with it the duty to exercise it according to the norm of law, even if this is not convenient or the cases needing attention are unfamiliar. It is thus right and just that diocesan officials prepared in canon law be expected to figure out how to conduct such a process. And if it is thought that the administrative process has to be used because of a lack of ministers of justice, the Ordinary may not yield to its habitual use but should deem himself burdened in conscience to arrange for the preparation of suitable persons in canon law, so that they may better equip the diocesan tribunal for carrying out penal trials [9].

Moreover, as was wisely observed by then-Father Frans Daneels, o.praem. [10], obstacles precluding a judicial process, which are often exaggerated, would likely make it difficult also to correctly carry out an administrative penal process, which is similarly demanding. For: *i)* even in the administrative process, the Ordinary must reach moral certitude and the right of defense of the accused must be respected; *ii)* the lack of qualified canonists needed for a judicial penal process implies also a lack of the qualified canonists needed to assist with an administrative penal process, since the Ordinary is often not a canonist and ought to consult them (cfr. cc. 1718 § 3; 1720, 2º); *iii)* the impossibility of collecting proofs for a judicial process implies the same for the administrative process; and *iv)* if it is a question of time, there is no guarantee that an administrative process will be swift, especially in light of the possibly full

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*pena de expulsión del estado clerical en las normas vigentes*, Excerpta e Dissertationibus in Iure Canonico 25 [2012-2013] 55). However, this seems overstated, especially in view of the secrecy that protects the penal trial (c. 1455 § 1), which can also be extended to all its participants (*ibid.*, § 3).

8 E. Peters, *Penal Procedural Law in the 1983 Code of Canon Law*, Canon Law Studies 537, The Catholic University of America, Washington, D.C. 1991, 299-300.

9 L. Navarro, *La dimissione dallo stato clericale...*, cit., 897.

10 F. Daneels, *L'imposizione amministrativa delle pene e il controllo giudiziario sulla loro legittimità*, in D. Cito (ed.), *Processo penale e tutela dei diritti nell'ordinamento canonico*, Giuffrè Editore, Milan 2005, 297-298, n. 6. Similarly, see A. Calabrese, *La procedura stragiudiziale penale*, cit., 274 and 280-281, nn. 11 and 19; J. Llobell, *Il giusto processo penale nella Chiesa e gli interventi (recenti) della Santa Sede*, Archivio Giuridico 232 (2012) 354.

course of recourse [11]. The law, whose text is sufficiently clear, thus creates a condition that, in the abstract, should be infrequently fulfilled, with the result of a judicial process that both is and is treated as the ordinary pathway of law.

Nevertheless, canonical doctrine – which, again, typically identifies the judicial process as the one "preferred" by the Legislator – resting on the fact that c. 1342 § 2 is effectively the result of compromises within the drafting commission, has not taken the verb *obstare* in a literal or rigorous sense. Rather, taking the phrase as if it were something like *«Quoties iusta habeatur causa processum iudicialem non celebrandi»*, it has seen the condition fulfilled if there are «reasonable, valid and proportionate» motives in favor of selecting the administrative pathway instead of the judicial [12]. One distinguished author even asserts that the phrase in the law, which does not refer to the impossibility to carry out a judicial process, means that «it is not convenient» to do so [13]. Much of canonical doctrine thus holds that the administrative pathway is legitimately used when the guilt of the accused seems already to be certain at the conclusion of the preliminary investigation or because of an adequate secular criminal trial, when the accused has admitted to commission of the delict, and when there is public benefit to a particularly swift condemnation due to the gravity and urgency of the case [14]. Strained doctrinal justifications for the normalization of the

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[11] On this last point, *vide infra* 4.

[12] A. D'Auria, *La scelta della procedura per l'irrogazione delle pene*, Periodica 101 (2012) 644-647. Also, we read: «... per poter scegliere legittimamente la via amministrativa, l'Ordinario deve avere una giusta causa che si opponga alla via giudiziale (c. 1342 § 1: *iustae obstent causae*). Questa causa ostativa tuttavia non va interpretata con rigorismo» (P. Erdö, *Il processo canonico penale amministrativo. Mezzi possibili dell'efficacia del sistema penale canonico [questioni fondamentali e preliminari]*, Ius Ecclesiae 12 [2000] 798). G. Ingels puts forward the administrative process as a kind of option when the anticipated penalty is not perpetual; see his *Chapter Eleven. Processes which Govern the Application of Penalties*, in R. R. Calvo – N. J. Klinger (eds.), *Clergy Procedural Handbook*, Canon Law Society of America, Washington, D.C. 1992, 222, n. 3.

[13] See D. G. Astigueta, *Applicazione della pena per via amministrativa*, in *La funzione amministrativa*..., cit., vol. 1, 503.

[14] On such reasons, see, e.g., J. P. Beal, *To Be or Not to Be, That is the Question. The Rights of the Accused in the Canonical Penal Process*, CLSA Proceedings 53 (1991) 89; M. Mosconi, *L'indagine previa e l'applicazione della pena in via amministrativa*, in Gruppo Italiano Docenti di Diritto Canonico (ed.), *I giudizi nella Chiesa. Processi e procedu-*

administrative penal process have left doctrine with the view that «the Legislator himself has not offered a clear and univocal criterion for resolving doubts about which may be, at one moment or another, the preferable way to follow»[15]. On the contrary, any doubt seems to be induced by doctrine itself, since the literal meaning of the expression is sufficiently clear in itself, given the common meaning of the verb *obstare* and the strict reading due the norm, which has to do with the free exercise of the right of self-defense by one accused of a delict (cfr. cc. 18; 221 § 3).

### *2.2. Praxis of the Roman Curia*

Most of the recently issued norms pertaining to penal procedural law have, to varying degrees, expressed deference to the judicial process as the form for treating penal causes, while at the same time facilitating the administrative penal procedure in a manner *praeter legem generalem*[16]. Even if there are precedents of sorts in canonical tradition, these

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*re speciali*, Quaderni della Mendola 7, Glossa, Milan 1999, 212, a; W. H. Woestman, *Ecclesiastical Sanctions and the Penal Process. A Commentary on the Code of Canon Law*, 2nd ed., Saint Paul University, Ottawa 2003, 164; A. D'Auria, *La scelta della procedura...*, cit., 651; J. P. Kimes, *Considerazioni generali sulla riforma legislativa del Motu Proprio "Sacramentorum sanctitatis tutela"*, in A. D'Auria – C. Papale (eds.), *I delitti riservati alla Congregazione per la Dottrina della Fede*, Quaderni di Ius Missionale 3, Urbaniana University Press, Rome 2014, 20-21.

15 See A. D'Auria, *La scelta della procedura...*, cit., 655.

16 Exceptionally, one confirmation of the judicial character and evolution of the penal process is seen in the *Lex propria* of the Supreme Tribunal of the Apostolic Signatura (Benedict XVI, Motu Proprio *Antiqua ordinatione*, 21-VI-2008, AAS 100 [2008] 513-538). In one area of its diverse competence, it operates as a penal tribunal, namely, when it handles a penal cause against a judge of the Roman Rota for criminal acts placed in the exercise of his function (cfr. artt. 33, 4º; 66 § 1). Such a cause «unfolds according to artt. 36-49 and the prescripts of the law of the Code, making appropriate adjustments» (art. 66 § 1). Thus, at the mandate of the Prefect (cfr. art. 67 § 2; c. 1721), the Signatura's promoter of justice introduces a *libellus* of accusation (artt. 36; 67 § 1). The secretary notifies the accused and sees to the hearing of his procurator-advocate (cfr. artt. 38-39). The *libellus* is admitted by the Prefect in *Congresso* (art. 41 § 1). The secretary cites the parties and decrees the formula of the doubt, and then instructs the cause, directs the discussion, and decrees the conclusion in the cause (artt. 43-45). Finally, at the direction of the Prefect (art. 46), a college of five judges issues the appealable sentence (artt. 68-69).

recent norms can be interpreted as confirming the above-related canonical doctrine in its interpretation of c. 1342 § 1, which strives to legitimate the use of the administrative penal process. One may also suppose that both that doctrine and the normative production of the Roman Curia are impacted by the hesitations of local Ordinaries, who may be little inclined to submit local scandals and controversies to the judgment of the diocesan tribunal.

The document that is most deferential to the judicial process is the 3-VI-1997 Circular Letter of the Congregation for the Evangelization of Peoples, which provided a means for Ordinaries in mission territories to seek the papal imposition of dismissal from the clerical state on clerics guilty of concubinage or scandalous persistence in sins against the sixth commandment. It repetitively states, as a condition for employing the procedure, the impossibility of there being a tribunal that can carrying out a penal trial. This condition is configured in the Letter as a general difficulty («because of the lack of tribunals in the mission territories or because they cannot function regularly»), as part of the motivation of the Members of the Dicastery for requesting this special faculty from the Supreme Pontiff («in the cases of dioceses in mission territories still without regularly-functioning ecclesiastical tribunals»), as the limitation of application (A, n. 1), and as a fact to be indicated in the dossier by the local Bishop (B) and verified by the interested apostolic nunciature *(ibid.)*[17]. The resulting disposition would be an extrajudicial decree subject to no challenge inasmuch as it is approved *in forma specifica* by the Supreme Pontiff (cfr. cc. 333 § 3; 1404; 1405 § 2; 1629, 1º; 1732). In the case of this Circular Letter, the Apostolic See recognizes the judicial pathway as the normative one, while also recognizing the general difficulty in mission territories to provide for the administration of justice.

The same month in which that Circular Letter was issued, another body of norms was issued which gave no deference at all to the

[17] Congregation for the Evangelization of Peoples, Circular Letter, prot. n. 2154/97, 3-VI-1997, in *Canon Law Digest*, vol. XIV, 235-237. On the difficulty of administering criminal justice in mission territories, see C. Papale, *Il can. 1395 e la connessa facoltà speciale di dimissione dallo stato clericale "in poenam"*, Ius Missionale 2 (2008) 39-41.

judicial penal process. The Congregation for the Doctrine of the Faith (CDF) issued its procedural regulations to be used for the examination of theological writings. Among its prescripts is the manner of proceeding *(forma urgens)* to be employed when writings clearly and undoubtedly contain errors endangering the faithful. If these errors do not amount to heresy, apostasy or schism, their author may be corrected or punished via a penal process. However, should the errors constitute such delicts, his excommunication is to be declared. While the accused has the right to be forewarned and given a chance to correct his errors and offer explanations, this grave sanction is declared after a process more or less equivalent to the administrative process of c. 1720, without any possibility of a judicial process or challenge of the decision [18]. This is understandable, generally speaking, since the object of the process is likely a technical matter and not a question of fact that requires an investigation by deposing witnesses and gathering factual documentation [19]. However, some right to make recourse should normally be recognized in any process, unless the competent authority is explicitly situated as the one supremely competent (cfr. c. 1629, 1º).

Additionally, some of the CDF's praxis in regard to other offenses has modelled the imposition or declaration of penalties without a trial. This occurred in the case of the attempted ordination of seven women by a schismatic bishop. They were warned in accord with the norm of c. 1347 § 1; and when they did not repent, excommunication was imposed without a trial [20], even though surely it would not have been impossible or even difficult for the Dicastery to constitute a tribunal in Rome. An at least *de facto* extrajudicial process is implied by the fact that there had been interventions by local ecclesiastical authorities prior to the Dicastery's declaration. However, the condemned parties had no right to the judicial control of the Dicastery's decision, since, after a kind of *remonstratio*, the Dicastery confirmed its prior decision

[18] CDF, *Agendi ratio in doctrinarum examine*, 29-VI-1997, AAS 89 (1997) 830-835, at 834-835, artt. 23-29.

[19] This is similarly why causes *nullitatis sententiae* are typically handled *per memorialia* and not in the ordinary or even oral contentious trial.

[20] CDF, Decree, 5-VIII-2002, AAS 94 (2002) 585.

by a decree that was approved *in forma specifica* by the Supreme Pontiff[21]. While these decrees were effective, in their own right, in regard to the reparation of scandal and restoration of justice, this praxis missed an opportunity to model the Church's manner of respecting the offenders' right to a just process and their right to be punished fully according to the norm of law (cfr. c. 221 § 3), including the jurisdictional control of extrajudicial decrees by a tribunal independent from the controversy.

One can detect a sense of the normalization of the extrajudicial imposition of penalties in the Congregation for Bishops' 2004 Directory on the ministry of Bishops. While not effecting a normative modification, it is telling that the document presents the judicial and administrative penal processes as somewhat equal alternatives, subject to different conditions: «the Bishop should proceed with the imposition of penalties, which may be applied *in either of two ways*: – via a regular penal process in a case for which canon law requires it, given the gravity of the penalty, or when the Bishop judges it more prudent; – via an extra-judicial decree, in conformity with the procedure established in canon law»[22]. Use of the judicial process is described in somewhat ambiguous terms here: for «canon law requires it» as the ordinary process for any and all penalties (cfr. c. 1342 § 1). «The gravity of the penalty», generally speaking, does not determine that the judicial process is to be used; rather the gravity of the penalty, as a rule, determines that the administrative process is *not* to be used, viz., when it is a perpetual penalty (c. 1342 § 2). And use of the judicial process is not subject to the free choice of the Bishop; technically, the judicial process is to be used, while the prudent judgment of the Ordinary more concerns whether just causes impede its use (cfr. cc. 1342 § 1; 1718 § 1, 3º).

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[21] CDF, Decree, 21-XII-2002, AAS 95 (2003) 271-273. On the limitation of jurisdictional controls on the imposition of penalties due to such elements of praxis, see F. Daneels, *L'imposizione amministrativa delle pene*..., cit., 290, note 3, *in fine*.

[22] Congregation for Bishops, Directory for the Pastoral Ministry of Bishops *Apostolorum Successores*, 22-II-2004, Libreria Editrice Vaticana, Vatican City 2004, at 68c (emphasis added).

In 2009, after the above-mentioned faculties of the Congregation for the Evangelization of Peoples were extended in various ways[23], the Congregation for the Clergy announced three special faculties it was granted[24]. Explicitly recognizing this in at least one place as a departure from, among others, the norm of c. 1342 § 2, it was now charged with advising the Supreme Pontiff to impose the penalty of dismissal from the clerical state (ambivalently expressed as «for His approval *in forma specifica* and His decision») for the delict of attempted marriage and persistence therein and for delicts against the sixth commandment not reserved to the CDF (I), as well as other delicts as indicated by c. 1399 (II). It could also declare dismissal from the clerical state due to irreversible abandonment from ministry for more than five years (III). The manner of handling such petitions related to special faculties I and II is described as «a legitimate administrative process», citing and restating c. 1720, at the end of which *vota* are transmitted to the Apostolic See for the decision. With regard to faculty III, a procedure is outlined which is largely the same: the Ordinary completes an investigation (art. 3), the cleric is notified (art. 4), and an instructor gathers any other proofs (art. 5); among the distinctive elements are that the instructor, the Bishop, and a promoter of justice draw up their individual *vota* to be transmitted to the Apostolic See.

It was only about one year later that the Congregation for the Clergy, in its "procedural guidelines"[25], made it clear that use of these

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[23] Congregation for the Evangelization of Peoples, Circular Letter, 13-III-2009, Roman Replies and CLSA Advisory Opinions (2009) 48-51, which at n. 1 describe the use of the faculty as the ability "to proceed administratively".

[24] Congregation for the Clergy, Circular Letter, prot. n. 2009 0556, 18-IV-2009, Roman Replies and CLSA Advisory Opinions (2009), 37-47.

[25] Congregation for the Clergy, Procedural Guidelines, prot. n. 2010 0823, 17-III-2010, *ibid.* (2010) 41-51. For an immediate precursor in the *praxis Curiae*, see Congregation for Divine Worship and the Discipline of the Sacraments, Letter, prot. n. 1890/02/S, 21-X-2002, Revista Mexicana de Derecho Canónico 14 (2008) 169-171, at 170: «(2) it would be at least morally impossible to conduct a judicial trial for the consideration of the dismissal of this man from the clerical state, which is the way foreseen by law of proceeding to the application of all perpetual penalties (cfr. c. 1342 § 2)». For these recent provisions and further background from the previous decades, see L. Navarro, *La dimissione dallo stato clericale*..., cit., 893-895.

faculties – in particular, the first[26] – could only be requested if there were «grave difficulties existing in the diocese which prevent the holding of a canonical penal trial» (n. III). Theoretically, this is a recognition that the penal trial is the ordinary way to impose the perpetual penalty of dismissal from the clerical state[27], but the praxis in these cases seems to suggest that the presence of inconveniences or strong preferences justify departure from the ordinary pathway. It is the experience of several canonists that the Dicastery does not ordinarily exercise detailed supervision over the question of the constitution of a tribunal, such as by demanding a list of all the canonists or judges in the diocese or encouraging the delegation of extern judges or an extension of competence from the Apostolic Signatura (c. 1445 § 3, 2º). Rather, it (at least sometimes) seems to facilely yield to the request of the Bishop without demanding an objective and persuasive account of which just causes preclude a judicial process.

The central organ to which reference is made in the current period of the general revitalization of the Church's coercive function – the CDF – has largely modelled the normalization of the administrative penal process for Ordinaries and canonists. When Pope St. John Paul II issued the Motu Proprio *Sacramentorum sanctitatis tutela*, he put forward a norm that excluded the administrative process of c. 1720 in the treatment of penal causes reserved to the Dicastery, prescribing, in art. 17, that they could only be pursued in a judicial process[28]. Less than

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[26] F. Pappadia, *Ambito e procedimento di applicazione delle Facoltà speciali della Congregazione per il Clero*, Ius Ecclesiae 23 (2011) 239, c.

[27] On the judicial pathway as the ordinary one in regard to delicts falling within the special faculties, see M. Gołąb, *Facultades especiales para la dimisión del estado clerical (Congregación para el Clero de 30 de enero de 2009). Análisis y comentario*, Ius Canonicum 50 (2010) 678.

[28] «*Art. 17. Delicta graviora Congregationi pro Doctrina Fidei reservata, nonnisi in processu iudiciali persequenda sunt*» (John Paul II, Motu Proprio *Sacramentorum sanctitatis tutela*, 30-IV-2001, AAS 93 [2001] 737-739 and Ius Ecclesiae 16 [2004] 313-320 *[Normae substantiales et processuales]*, at 318 [*SST*/2001]). On the procedural implications of this original norm, see T. Bertone, *La competenza e la prassi della Congregazione per la Dottrina della Fede. Procedure speciali*, Quaderni dello Studio Rotale 11 (2001) 38-40. On the prior norms demanding the judicial process before the Holy Office, see J. Llobell, *I delitti riservati alla Congregazione per la Dottrina della Fede*, in Gruppo Italiano Docenti di Diritto Canonico (ed.), *Le sanzioni nella Chiesa*, Quaderni della Mendola 5, Glossa, Milan 1997, 257, note 93.

two years later, however, it received from the Roman Pontiff the faculty to dispense itself from this restriction «in grave and clear cases», so that it could *("ex officio")* advise the Pope to impose the punishment of dismissal from the clerical state or authorize the Ordinary to handle them via the administrative process *(«con il rito abbreviato di cui al c. 1720»)* at the end of which he could request that the CDF impose the same punishment [29]. In that special faculty, there is no express question of the impossibility of a trial being conducted but seemingly an urgency because of the special gravity of the offense and the simplicity of the controversy because of the clarity of the law and the facts.

This modification has been received into the revised (and, as of this writing, still current) 2010 norms governing the same causes, in which further adjustments are introduced. The resulting art. 21 (successor to art. 17 of *SST*/2001) resembles c. 1342 § 1 of the CIC in regard to the use of the administrative process in general, while constituting an exception to c. 1342 § 2. As a rule, graver delicts reserved to the CDF are to be examined in the judicial process, but the CDF has the faculty (according to no stated standard) [30] to authorize the Ordinary to treat the cause via the administrative process of c. 1720 (c. 1486 CCEO) – the imposition of perpetual expiatory penalties depending upon the mandate of the Dicastery – or to defer to the Roman Pontiff *«casus gravissimos, ubi ... de delicto patrato manifeste constat»*, advising him to impose dismissal from the clerical state [31].

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[29] J. Card. RATZINGER, Rescript *ex audientia Ss.mi*, 7-II-2003, Ius Ecclesiae 16 (2004) 321, d.

[30] If the CDF does not exactly enjoy full liberty to choose between the judicial and administrative processes, the implicit standards of the "gravity and clarity of the case" (cfr. C. PAPALE, *Il processo penale canonico...*, cit., 244) seem to be scarcely restrictive, given the known praxis of the Dicastery in this matter. It should be noted that the Legislator does not establish the CDF's authorization of the administrative process as «una excepción» (see M. CORTÉS DIÉGUEZ, *La investigación previa y el proceso administrativo penal*, Revista Española de Derecho Canónico 70 [2013] 532) but simply that it has to be decided *«in singulis casibus»* (in individual cases), which does not mean «en ciertos casos» *(in certis casibus)*.

[31] CDF, *Normae*, 21-V-2010, AAS 102 (2010) 419-430, at 428, art. 21 (*SST*/2010). On these choices, see IDEM, *Vademecum* on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics, Version 1.0, 16-VII-2020, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html, nn. 85-87, 91.

One decisive factor informing the choice of process by the CDF is pragmatic in nature, considering that it would reportedly be impossible for the small staff of the Discipline Section of the CDF to conduct so many trials each year [32], and use of the administrative process typically guarantees greater speed [33]. Indeed, on its website, it has reported statistics from the years 2012, 2014 and 2016 pertaining to the pathway it has selected each of those years [34]: 60 judicial processes, 608 administrative processes *ex* c. 1720, and 111 deferrals to the Roman Pontiff for dismissal from the clerical state. In other words, in the vast majority of cases (92% from those years combined), a non-judicial pathway is selected. «All of this is evidently a kind of confirmation about the changed meaning of the principle stated by the Code concerning the preference for the judicial pathway in relation to the administrative» [35]. Indeed, it can be said that there is now «a clear preference in praxis for the administrative procedure» [36].

In general, the praxis of the Roman Curia, in harmony with the compromise reached in the Code Commission and the doctrinal interpretation of the norm, legitimizes the use of the administrative penal process «whenever it presents the objective advantages of speed, precision, and effectiveness and not only whenever some factor opposes the carrying out of a regular judicial process» [37]. This juridical situation creates a risk that the judicial penal process will «fall into total disuse» in general and even, in practice, for the penalties that can only be imposed with it in the general legislation [38].

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[32] J. P. Kimes, *Considerazioni generali...*, cit., 20.

[33] C. Dezzuto, *Le principali obiezioni alla prassi della Congregazione per la Dottrina della Fede nel trattamento dei "delicta graviora" ad essa riservati*, in C. Papale (ed.), *I delitti riservati alla Congregazione per la Dottrina della Fede. Norme prassi obiezioni*, Quaderni di Ius Missionale 5, Urbaniana University Press, Rome 2015, 95, n. 3.12.

[34] See http://www.vatican.va/roman_curia/congregations/cfaith/attivita-cfaith/rc_con_cfaith_index-attivita-cfaith_it.html (accessed 10-II-2021), where annual reports from the years 2012-2018 are present without, however, giving such statistics in each report.

[35] See D. Cito, *Las nuevas normas sobre los "delicta graviora"*, Ius Canonicum 50 (2010) 656-657.

[36] See J. Bernal Pascual, *Delicta graviora*, Ius Canonicum 58 (2018) 367.

[37] See A. D'Auria, *La scelta della procedura...*, cit., 667-668.

[38] See M. Gołąb, *Doble procedimiento...*, cit., 63, b.

Accordingly, when an Ordinary receives notice of a delict reserved to the CDF against the Sacraments of the Most Holy Eucharist or of Penance or against morals, the delicts of cc. 1394-1395, offenses not defined by legislation (c. 1399), or the irreversible abandonment of the sacred ministry, it is likely in the Church today that it will be treated using the relative administrative penal process. Nevertheless, the norm of c. 1342 § 1 holds for other delicts, such that use of the judicial penal process is to be decreed by Ordinaries unless just causes impede it, namely, the inexistence or non-functionality of a competent (inter)diocesan tribunal. This, in my view, is the norm, but since the normalization of the administrative process has been modeled and legally sanctioned by several Dicasteries of the Roman Curia, an Ordinary would almost have to be countercultural to hold himself to mandating a penal trial.

### 3. Use of the Judicial Penal Process

Canonical doctrine often points out how rare penal trials are in the Church. Contrary to what one may think from a plain reading of c. 1342 § 1, they are practically more the exception than the rule. Thus, in the current state of things, the manner of proceeding is largely left to the free choice of the public administration. However, the election of the administrative process arguably appears to be arbitrary when there is a functioning tribunal in the particular Church, or when the Bishop has joined an interdiocesan tribunal competent for all causes. For the existence and operations of a judicial organism with judges, a promoter of justice, and notaries verifies that there is no obstruction hindering a trial.

Ironically, even though the judicial process should be at least a kind of "default" in the Church's penal system (cfr. c. 1342 § 1), because of the normalization of the administrative process, even the choice to follow the judicial pathway could come to be seen as somewhat arbitrary. In other words, the general normalization of the administrative penal process, held up against c. 1342 § 1, poses the unfortunate question: why in practice should the judicial process *ever* be used? If the just causes sufficient for employing the administrative pathway are substantive in nature and not organizational, and if that pathway is the real default

in practice, does not the choice to employ the judicial process constitute a kind of prejudicial judgment against the common good, a judgment *in limine* that *this* penal cause is not urgent or grave or as clear as others? [39] Or, from another perspective, in a milieu in which "zero tolerance" is socially acceptable or even expected, does not the habitual use of the administrative process constitute a kind of prejudicial judgment against the accused, suggesting that *this* cause is urgent, grave, and clear, while some are not?

The whole institution of the judiciary, of which coercive penal jurisdiction is an integral part (c. 1400 § 1, 2º), is founded on the impartiality of the judge, who is forbidden from making any prejudicial judgments about the merits of the principal cause. This standard would be protected by a strict implementation of c. 1342 § 1 as proposed above, since all penal causes would normally be treated by a tribunal of justice that handles judicial causes independently from the public administration. The administrative process would only be normal in places lacking a functioning tribunal or due to acute local obstacles in a given case.

There is one procedural safeguard currently abiding in the discipline of the CIC whose implementation, among others, can mitigate a perception of injustice in the Church in this regard. It is a safeguard of the accused's rights *in limine processus*. When the preliminary investigation has been completed and the Ordinary has decided that a penal process can and is to be carried out, he has to determine the form of process (c. 1718 § 1, esp. 3º). This is a matter not of mere logistics but «a decision of the Ordinary pronounced by means of a decree (c. 1718 §§ 1 and 2, cfr. c. 48)» [40]. That decision, being informed already and supported by some proofs, is one that may only legitimately and justly be made after hearing the accused, since his rights could be injured (c. 50), namely, the specific extent to which and manner in

[39] J. A. Renken has illustrated some reasons to use the judicial process: generally speaking, when there are positive doubts of fact resulting from the preliminary investigation, not the least source of which is the denial of the accusation by the one accused (*The Penal Law of the Roman Catholic Church. Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, Saint Paul University, Ottawa 2015, 146).

[40] See P. Erdö, *Il processo canonico penale amministrativo...*, cit., 793.

which he may defend himself before the ecclesiastical forum [41]. In this prior hearing, the accused may plead for use of the judicial penal process, which thus should inform the better exercise of the Ordinary's prudential discretion in implementing c. 1342 § 1. Any canonical counselors involved at this moment would rightly advise their client to request a swift but thorough penal trial and to insist that nothing impedes it, owing to the fact that the diocese is clearly equipped to carry out trials in its tribunal. In sum, there should generally be no good reason why the accused should have no say in whether he will be judged by an impartial third party (a judge) in a position of equality vis-à-vis the accuser.

Should such a prior hearing not occur or, even if it does occur, result in an allegedly illegitimate use of the administrative process, the accused enjoys the right, *servatis servandis*, to make recourse against the decree, which is an *administrativus actus singularis*, *qui in foro externo extra iudicium datur* (cfr. c. 1732) [42]. Perhaps the *remonstratio* (c. 1734 § 1) on the part of the accused, which has to precede such recourse, could be considered by the Ordinary to be a *novum elementum* based upon which *aliud sibi decernendum videtur* (c. 1718 § 2).

## 4. The Aspiration for the Celerity of the Penal Process

The normalization of the administrative penal process is in part based on a presumption – «with or without foundation» – that the judicial penal process is difficult to carry out in practice and is necessarily slow [43]. Conversely, it is presumed that the administrative process is more likely to be simple and swifter. These presumptions seem rarely

[41] *In iure condendo*, the norm of c. 1656 § 1 should be applied here. That is, if the extrajudicial process is to be normal and normative, the legislation should be forthright about it by stating that it is to be used unless the accused requests a judicial process or the Ordinary determines otherwise according to his prudent judgment.

[42] See, e.g., A. Calabrese, *La procedura stragiudiziale penale*, cit., 274, n. 11; M. Cortés Diéguez, *La investigación previa...*, cit., 526.

[43] See J. Sanchis, *L'indagine previa al processo penale (cann. 1717-1719)*, in *I procedimenti speciali nel diritto canonico*, Studi Giuridici 27, Libreria Editrice Vaticana, Vatican City 1992, 262.

to be called into question, but with reflection and experience they may yield to an expected, different conclusion.

Let us consider the second presumption first. It is true that any administrative process or procedure is meant to be abbreviated; this is the old-fashioned sense of "administrative", meaning "economical" or summary. This is due to it being less formal and more subject to the *procedural discretion* of the Ordinary, who is able to tailor procedures in particular cases to their own dynamics. This means that it can proceed very swiftly if all participants are active and responsive, if the Ordinary, or his delegate, is appropriately directive (as *dominus processus*), and if the proofs are simpler. These are rather ideal circumstances, however. And the matter is complicated by the essentially judicial nature of the penal decision (*vide infra* 5). In practice, the loosely defined character of the administrative penal process does not necessarily suggest its speed but may, on the contrary, be a cause for necessary delays. For a just administrative penal process will naturally oblige the Ordinary at times to pursue some additional proof possibly suggested by an assessor on the eve of the decision, admit some additional proof from the accused, publicize all proofs to him perhaps more than once, and make time and room for recourses of various kinds and levels. It also may lend itself to the pastoral care of the accused or complainants as part of the ordinary pastoral governance of the Ordinary, in a way (unlike in a trial) that is integrated into the different moments in the process, thus possibly causing certain delays or complications.

While it is difficult to offer anything resembling an exhaustive report, in reality the penal administrative process may not be very swift and may even be prolonged for an excessive period of time. This can be detected in the contentious-administrative jurisprudence of the Apostolic Signatura [44], which offers a good gauge for this question due its position at the extreme end of the ordinary [45] administrative penal process,

[44] On this point and an illustration of it, see M. J. Arroba Conde, *Justicia reparativa*..., cit., 46-47.

[45] In regard to causes reserved to the CDF, the course of the whole process depends upon the Dicastery's initial provision *ex* art. 21 § 2 of *SST*/2010. What is described here is parallel to the three steps of 1) a CDF-authorized extrajudicial penal decision of the Ordinary, 2) recourse to the CDF decided in *Congresso*, and 3) recourse against the latter to the special College (art. 27; AAS 106 [2014] 885-886).

parallel to the final tribunal of appeal in a penal trial. For example, in one penal cause, the process was initiated on 2-XII-2007 by the Ordinary, who issued the decree of condemnation one year later, on 5-XII-2008. The condemned party made a *remonstratio* in response to which the decree was confirmed; and he would then make recourse to the Apostolic See, before which the cause was protracted due to the silence of the competent Dicastery. Recourse was made to the Supreme Tribunal against this silence, leading ultimately to a 21-V-2011 declaration of a violation of the law on the part of the Dicastery, based ultimately on the incompetence of the Ordinary who issued the original penal decision [46]. The whole administrative process thus spanned about three-and-a-half years. While this cause, like any [47], had its own difficulties, it serves to illustrate the fact that even an administrative penal process proper (i.e., to say nothing of the prior investigations) can last one year, and the resulting decree may be subject to two levels of recourse: both administrative hierarchical recourse and contentious-administrative recourse.

Let us return to the first presumption: that the judicial penal process is difficult and more time consuming than the administrative. In regard to this presumption, what exactly is difficult about it may often not be well explained. It might be a way of saying that it is much more complex than the seemingly three-step process of c. 1720. However, while the judicial process clearly has more than three steps, it is neces-

[46] Supreme Tribunal of the Apostolic Signatura, Definitive Sentence *coram* Echevarría Rodríguez, prot. n. 42677/09 CA, *Poenalis* (Rev.dus X – Congregatio pro Institutis vitae consecratae et Societatibus vitae apostolicae), Boletín Oficial del Obispado de Cuenca 2 (May-August 2011) 209-214.

[47] In another, the administrative penal process seems to have begun in June 1986. Then this sequence of events followed: the decree of condemnation on 1-XII-1986 (a process of about 6 months), *remonstratio* and the decree of confirmation, recourse to the Nuncio and then the competent Dicastery, the vicar general's decree extending the penalty on 16-XI-1987, the competent Dicastery's rejection of the recourse on 12-V-1989, recourse to the Signatura, its rejection by the *Congresso* on 30-X-1990, recourse to the College of Judges, and the definitive decree of the College on 8-V-1993. See Supreme Tribunal of the Apostolic Signatura, Definitive Decree of the College *coram* Agustoni, prot. n. 18881/87 CA, *Interdictionis ingrediendi ecclesiam* (D.na X – Congregatio de Cultu Divino et Disciplina Sacramentorum), in W. L. Daniel (ed.), *Ministerium Iustitiae. Jurisprudence of the Supreme Tribunal of the Apostolic Signatura. Official Latin with English Translation*, Gratianus Series, Wilson & Lafleur Ltée, Montréal 2011, 607-615.

sary to recognize that it is a process that is well-defined in the *pars dynamica* of Part II of Book VII. Those canons – 1501-1655 – are not 154 individual steps, but a whole system of heterogeneous norms (procedural steps, criteria, definitions, rules of evaluation, legal exceptions); and a trial is thus not as complicated as it may seem. An easily simplified vision of these procedural norms has been accomplished by canonical doctrine, which recognizes four stages with several basic elements: (1) THE INTRODUCTION (*libellus accusationis*, constitution of the tribunal, admission of the *libellus*, citation, formulation of the doubt), (2) THE INSTRUCTION (citation of the accused and witnesses, their interrogation, possible expert report, publication of the acts, conclusion in the cause), (3) THE DISCUSSION (submission of argumentation, responses), and (4) THE DECISION (study of acts by judges, judicial session, preparation, publication and execution of the definitive sentence).

Moreover, in practice, the penal trial is (or should be) highly familiar to diocesan canonists, since it is modeled on the ordinary form of the process (c. 1728 § 1), which is conducted daily in almost all tribunals of the Church, when they handle causes of matrimonial nullity. These canonists, who are ministers of justice, may often be the ones counseling the Ordinary in, or at least working behind the scenes of, an administrative penal process, and they are able to turn to their judicial knowledge when something unforeseen occurs in the administrative process (cfr. c. 1342 § 3), because it is a process they know so well.

It is true that trials can and do take some time. If a tribunal is diligent, it can (and is to) complete the first instance of a trial in one year (c. 1453), though shorter is possible. Generally, a penal trial may be resolved definitively after only one appeal if this results in a double conforming sentence (cfr. c. 1641, 1º); and it specifically will be resolved after one appeal when it involves a *gravius delictum*, since the CDF's second instance decision is unappealable [48]. More than one year may seem far too lengthy a time to wait for a definitive decision; however, justice does take time, even when it is administered via an economical process. In any event, if the Ordinary decrees that a particular case is markedly grave and urgent, it can be given priority within the tribunal before any and all matrimonial nullity causes (c. 1458).

[48] *SST*/2010 art. 28, 1º and 4º.

## 5. An "Administrative" Process with a Judicial Decision

The Legislator repeatedly calls this normalized penal process the imposition or declaration of a penalty *«per decretum extra iudicium»* (e.g., cc. 1342 §§ 1 and 3; 1363 § 2; 1718 § 1, 3º; 1720 *incipit*), while in one place it is called a *procedura administrativa* (c. 1341). The decree by which the Ordinary imposes or declares a penalty is indeed configured in the canonical system as a singular administrative decree that makes a decision (c. 48), governed therefore also by the norms of cc. 50-58 § 1, as well as the norms common to singular administrative acts (cc. 35 ff.). However, the essence of the penal decisional decree (i.e., its dispositive part) is unlike most other singular decrees that make a decision. Decrees of removal from office, compulsory transfer, suppression of juridical persons, revocation of faculties, denial of a favor, and the like have as their principal object the *volitio boni*, that is, a disposition that provides for the common good and coercively alters or extinguishes a sphere of rights or freedoms. It is an act whose dispositive part could be various while still being "true", since it is based on the prudent discretion of the public administration. In fact, we do not normally call an administrative decree's disposition "true" (or false) but decisive or final – that is, an effective manifestation of the will of the administration. The truth or error of such a decision resides in its supporting motives.

The penal decisional decree, however, is in essence an act of a judicial character *(ad instar sententiae definitivae)*. The principal element of its dispositive part cannot be various; that is, it may not be one among multiple dispositions subject to the choice of the authority. The conclusion about commission of the delict (distinct from the penalty flowing from it, which is discretionary) is either true or false, since the accused is either proven to be guilty of committing the delict, or it is not proven, or he is proven to be innocent. Only one of these conclusions can be true, and the dispositive part of the decree is unjust if the wrong conclusion is reached. This conclusion, having the character of the *cognitio veri*, has to be based on what was carried out in the penal process *(ex actis)* and what has been proven by the proofs *(ex probatis)*, in accord with c. 1608 § 2. For the standard to be employed in making the penal decision is not prudent discretion (the typically administra-

tive standard) but moral certitude (the typically judicial standard)[49]. Whether a punishment is being imposed or declared by a judicial sentence at the end of a penal trial or a decree at the end of the administrative process, it has to be based on moral certitude. For the Ordinary is deciding *«si de delicto certo constet»* (c. 1720, 3º, emphasis added); and if commission of a delict by one imputable is not certainly established, the Ordinary *«conventum absolutum dimittat»* (c. 1608 § 4), or *«reum dimittat»* (c. 1869 § 4 CIC/17)[50].

In the common work of general administration, there is much liberty in the manner of proceeding and in the gathering and weighing of facts and information. This freedom also seems to inform the generic procedural elements stipulated in c. 1720. However, the generic quality of those elements may do little to assist the Ordinary in conducting an efficient process, because the ultimate standard of moral certitude naturally has multiple implications for the foregoing process. It is a matter of there being moral certitude (or not) about some specific question, or the accusation (c. 1720, 1º). Most demandingly, it requires that there has been a thorough investigation into the truth of the matter. Beyond a mere incorporation of the information gathered during the preliminary investigation, additional proofs may be proposed by the accused. And, for his part, the Ordinary *«procedere potest et debet etiam ex officio in causis poenalibus»* (c. 1452 § 1) by seeking out the proofs

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[49] See, e.g., J. P. Beal, *To Be or Not to Be...*, cit., 91; A. Calabrese, *sub* c. 1720, in Á. Marzoa – J. Miras – R. Rodríguez-Ocaña (eds.), *Exegetical Commentary on the Code of Canon Law*, vol. IV/2, Gratianus Series, Wilson & Lafleur Ltée, Montréal 2004, 2011, n. 7a; F. Daneels, *L'imposizione amministrativa delle pene...*, cit., 297, 298; G. di Mattia, *La procedura penale...*, cit., 106, n. 53; T. J. Green, *sub* c. 1720, in J. P. Beal – J. A. Coriden – T. J. Green (eds.), *New Commentary on the Code of Canon Law*, Paulist Press, New York-Mahwah 2000, 1811; J. Llobell, *Contemperamento tra gli interessi lesi e i diritti dell'imputato: il diritto all'equo processo*, Ius Ecclesiae 16 (2004) 380; Idem, *Il giusto processo penale nella Chiesa...*, cit., 327-333, 354; M. Mosconi, *L'indagine previa...*, cit., 219-220.

[50] The decisions resolving extrajudicial penal processes thus, over time, give birth, no less than definitive sentences, to a proper penal jurisprudence. In our opinion, the word "praxis" is best reserved to the strictly administrative manner of handling cases and coordinating their treatment, rather than to the substantive content of the extrajudicial decision inflicting or declaring a penalty (cfr. C. Scicluna, *Clerical Rights and Duties in the Jurisprudence and Praxis of the Congregation for the Doctrine of the Faith on "Graviora delicta"*, Folia Canonica 10 [2007] 272, n. 2).

necessary for shedding light on the truth of the matter. If at the time of taking counsel with the assessors (c. 1720, 2º) and carrying out his own deliberation the Ordinary abides in a state of doubt, he must determine if this doubt is based on a fillable *lacuna* in the proofs or on a question of law [51] that needs to be further researched (cfr. c. 1609 § 5), or if it is simply a reasonable doubt of fact that demands a *decretum absolutorium* or *dimissorium*.

While the imposition or declaration of a penalty by extrajudicial decree is not formally judicial (and is thus not bound by the norms of cc. 1607ff., nor is it subject to judicial remedies), its conclusive disposition (the *decretum extra iudicium latum*) is materially judicial in this sense. Because of this, there are necessarily properly judicial components to the process which the Ordinary has to incorporate *ex* c. 1342 § 3. Otherwise, he will place himself in a position of making a decision based on an inadequate process.

## 6. Towards a Just Penal Process

Ultimately, a penal process is substantially just inasmuch as it is an effective instrument for discovering the truth and declaring it fairly [52]. Its effectiveness depends upon the diligent use of the standard of moral certitude, with all of its procedural implications (*vide supra* 5). Its fairness is optimally expressed when the following elements are included:

– *equality of the accused and the accuser*, since then the process is able to bring about an authentic *contradictorium*, wherein the two parties (are able to) assert and respond in an orderly and proportionate way;

[51] Moral certitude involves the elimination of doubts not only of fact but also of law (cfr. art. 247 § 2 of the Instruction *Dignitas connubii*).

[52] J. Llobell, *Il giusto processo penale nella Chiesa...*, cit., 294 ff.; M. J. Arroba Conde, *Verità e relazione processuale nell'ordinamento canonico: sfide circa il metodo extragiudiziale*, in G. Dalla Torre – C. Mirabelli (ed.), *Verità e metodo in giurisprudenza. Scritti dedicati al Cardinale Agostino Vallini in occasione del 25º aniversario della consacrazione episcopale*, Libreria Editrice Vaticana, Vatican City 2014, 23-50, especially 41-45.

– *the impartiality of the judge*, for this alone guarantees that the decision will be objective and detached from any preconceived outcome or external pressures (cfr. c. 1620, 3º), being based on moral certitude and without regard for public or private consequences of a just judgment;
– *a defined means for bringing about the discovery of the truth*, thus allotting to both parties the procedural resources needed for expressing and supporting their claims;
– *a rational evolution for expressing one's own defense*, since an effective defense is one that is stated in clear terms and received as such by the judge, whether it is an allegation or a response to one, the production of proof, an argument that interprets a body of proofs, or the challenge of a jurisdictional act; and
– *a right to challenge every first condemnatory decision*, thus giving the accused at least a second hearing in a matter so grave [53].

Because these elements are carefully defined and regulated in the Church's general *ordo iudiciarius*, «it appears undeniable that the judicial process presents greater safeguards of justice», being ordered as it is «to the ascertainment of the truth, the defense of the accused, and the impartiality of the procedure» [54].

The lack of regulation or even absence of some of these elements gives rise to a risk that the administrative process «may become a mere

[53] «Ogni provvedimento penale (giudiziario o amministrativo) di prima istanza può essere impugnato» (J. LLOBELL, *I delitti riservati...*, cit., 241, at 3). The same author thus justly proposes that the penal decision associated with the special faculties of the Congregations for the Evangelization of Peoples and of the Clergy be issued by the Dicastery itself and not in any way be subject to papal approval (like a judicial sentence of an apostolic tribunal [*PB* art. 18, 1st part]), lest that first, very grave decision be unchallengable. Indeed, they would thus be singular administrative decrees subject to administrative jurisdiction before the Supreme Tribunal of the Apostolic Signatura (*PB* art. 123) (cfr. IDEM, *Il giusto processo penale nella Chiesa...*, cit., 353).

[54] See A. D'AURIA, *Il processo penale amministrativo. Rilievi critici*, in C. PAPALE (ed.), *La procedura nei delitti riservati alla Congregazione per la Dottrina della Fede*, Quaderni di Ius Missionale 12, Urbaniana University Press, Rome 2018, 77, n. 12. M. J. ARROBA CONDE teaches that the administrative pathway is directed toward speed and simplicity, but it may leave less opportunity for the repentance of the accused, his taking responsibility for acts placed against others, the interrogation of possible victims as witnesses, and their pastoral care in relation to the carrying out of the penal process.

formality for a decision already made by the Superior, and a procedure devoid of safeguards»[55]. This is due to the defect of any accuser and the institutional (at least perceived) lack of impartiality in the judge, that is, the Ordinary. The Ordinary is especially burdened to demonstrate how the principle of the *favor rei* is going to be protected[56]. «In reality, the practical preference given the administrative procedure ... risks the administrativizing of the application of penal sanctions with the evident problems in regard to the right of defense, the accused's presumption of innocence, etc.»[57]. Canonical doctrine[58] is justifiably concerned about the lack of impartiality in the Ordinary, who formally initiates the process based on an initial positive judgment about the guilt of the accused and proceeds to decide the cause. He has an interest in punishing the accused, since the alleged delict has introduced disturbance to the circumscription subject to his pastoral governance. The adages *nemo iudex sine actore* and *nemo iudex in propria causa* are thus both undermined. The configuration of the Ordinary as judge is further objectionable in comparison with the judicial process, in which there is a specific procedural accuser, the promoter of justice, distinct both from the Ordinary and the collegial or monocratic judge. In that scenario, the Ordinary effectively leaves the judgment to the tribunal, which is to enjoy total freedom in judging vis-à-vis the public administration. These dynamics are plainly lacking in the administrative penal process.

On the other hand, the canonical tradition[59] sees the Ordinary's becoming aware of the delictual event, together with the norm of penal

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See his *Verità e relazione processuale...*, cit., 45-50. The author concludes: «Tutto ciò suggerisce la promozione abituale della procedura giudiziale per l'imposizione delle pene» (49).

55 See D. G. Astigueta, *Applicazione della pena...*, cit., 517.

56 Cfr. J. Llobell, *Contemperamento...*, cit., 374; A. D. Busso, *Consideraciones acerca de la defensa de los derechos*, Anuario Argentino de Derecho Canónico 17 (2011) 94.

57 See D. Cito, *La dichiarazione delle censure penali e il bene comune*, in J. I. Arrieta (ed.), *Discrezionalità e discernimento nel governo della Chiesa*, Studi 8, Marcianum Press, Venezie 2008, 257.

58 See, e.g., V. De Paolis, *L'applicazione della pena canonica*, cit., 93; F. Daneels, *L'imposizione amministrativa delle pene...*, cit., 297, n. 6.

59 Cfr. Lateran Council IV, c. 8 *Qualiter et quando*, 1215, in A. García y García et al. (eds.), *Conciliorum oecumenicorum generaliumque decreta. Editio critica*, vol. II/1, Brepols Publishers, Turnhout 2013, 171-172.

law, as constraining him to intervene *motu proprio* with his coercive jurisdiction. His objectivity in weighing and responding to the *notitia de delicto*, which he is obliged to do (cfr. cc. 1717 § 1; 1718 § 1; 1341), and his selection of the form of process should and can flow out of a correct deontology, which ought to be a *judicial* deontology. He can and must set aside his ordinary inclination to resolve disordered situations within his circumscription and become the impartial judge who is disposed to serenely investigate whether what he hears reported is accurate, what proofs and arguments the accused may have, what proofs he can find either to support or undermine it, and then proceed to issue the right decision. His admission of the penal claim to a process need not suggest prejudice but should assume the character one should detect in a judicial vicar or presiding judge who – all the while having a private impression of the vehemence or not of the *fumus boni iuris* – calmly admits a *libellus* and carries out a trial.

In carrying out a penal process, the Ordinary conducts himself in a judicial manner:

- *with transparency toward the accused*, e.g., indicating the name of a delegate, assessors, and notary just as soon as they are appointed and before they place any substantive acts[60], informing the accused if a new accusation is added[61] or if new proofs are gathered (cfr. cc. 1514; 1598 § 2);
- *with suitable formality*, e.g., communicating citations (c. 1509)[62], hearing the accused and witnesses (c. 1561)[63];
- *fully respecting the accused's right of self-defense*, e.g., allowing him to appoint an advocate or canonical counselor[64], telling the ac-

[60] Cfr. CDF, *Vademecum*, cit., nn. 95-96.

[61] Cfr. F. R. Aznar Gil, *La expulsión del estado clerical por procedimiento administrativo*, Revista Española de Derecho Canónico 67 (2010) 265.

[62] Cfr. CC, Procedural Guidelines, cit., Enclosure 1: Documents Required, n. 5c. On a second citation if the first remains unheeded, see CDF *Vademecum*, cit., nn. 99-100.

[63] Cfr. CC, Procedural Guidelines, cit., Enclosure 1: Documents Required, 5a,d.

[64] Cfr. cann. 1481; 1483; 1484 § 1; 1723. While there is clearly no obligation to be defended by an advocate, one can speak of a right to an advocate approved by the Bishop, since this is an ordinary part of defending oneself. Thus we read of a "right to appoint canonical counsel of his choosing" (CC, Procedural Guidelines, cit.,

cused the accusation and possible maximum penalty[65] (cfr. c. 1720, 1º) before any witnesses are cited (cfr. c. 1529), directing the introduction of witnesses by the accused[66] (cc. 1466; 1552-1553), publishing the acts (cc. 1598 § 1; 1720, 1º)[67], allowing for the presentation of argumentation (c. 1601);

– *deliberating objectively in counsel with the assessors* (c. 1720, 2º) with detachment from earlier impressions and with a healthy judicial indifference; and
– *arriving at the correct decision*, which is externalized in a sufficiently motivated decree issued outside a trial (cc. 1720, 3º; 51).

This list – not unique within canonical doctrine – is offered as a principle-based illustration of the legitimate application of norms of the ordinary (i.e., judicial) penal process *ex analogia* (cfr. c. 1342 § 3). This does not contradict c. 19, which applies *«nisi sit poenalis»*, since the latter prohibits «the analogical application of norms which configure a delict and which establish a penalty for cases not expressly foreseen for such dispositions», not for questions of procedure which offer «greater safeguards in favor of the accused»[68]. And indeed, the norms particular to penal trials have a note of personalism, vis-à-vis the accused, which may unfortunately be lost without some due incorporation into the administrative process[69] and which in fact may be naturally appealing to the general service of the Ordinary. As Ordinaries, their counselors, and canonical doctrine reflect on the implications of cc. 1342 § 3 and 1720, they do well to rely on the reflections of J. Miras, who prudently

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Enclosure 1, n. 1); "The cleric in question must be informed of his right to nominate an advocate of his choosing..." (*ibid.*, Enclosure 2: Documents Required, at "Nota bene"); use and admission of one is "most fitting" (CDF, *Vademecum*, cit., n. 98).

65 On the latter point, see my *La "Litis contestatio" en el proceso penal canónico*, Ius Canonicum 60 (2020) 602.

66 Cfr. M. Medina Balam, *Proceso penal administrativo*, Revista Mexicana de Derecho Canónico 15 (2009) 307. On judicial discretion in admitting proofs, see CDF *Vademecum*, cit., n. 112.

67 Cfr. CDF *Vademecum*, cit., nn. 101-102, 104.

68 See J. Miras – J. Canosa – E. Baura, *Compendio di diritto amministrativo canonico*, Subsidia Canonica 4, 2nd ed., EDUSC, Roma 2009, 150.

69 Cfr. M. J. Arroba Conde, *Justicia reparativa...*, cit., 49-50.

speaks of the norms of judicial-procedural law as *orienting* the evolution of the administrative penal process [70].

## 7. Conclusion

«Perhaps today the "administrativization" of the canonical penal process represents a point of no return; it could appear anachronistic and unrealistic to re-impose the judicial procedure» [71]. For the CIC and the general praxis of the Church present two modalities of exercising coercive jurisdiction: the judicial pathway as the ordinary method in law but the exception in practice, and the extrajudicial pathway as the exception in law but the ordinary method in practice. Reversal of this praxis will not be accomplished by individual recourses and perhaps not even by a reform of c. 1342 §§ 1-2 stated in the clear terms of c. 1402 §§ 1-2 CCEO (which, in any case, is not anticipated). Still, some change is demanded by the inadequacy of c. 1342 § 1, whose doctrinal interpretation and actual implementation can, in my opinion, be scarcely reconciled with the proper meaning of the text (c. 17).

A solution to this conflict between legislation on the one hand and doctrine and praxis on the other may reside in an eventual reform that reconciles the ordinariness of the judicial process and the normalization of the extrajudicial process. Instead of the double pathway, the formulation of *a single form of penal process* would be highly beneficial. This would involve the abrogation of the remission to the norms of the ordinary contentious trial in c. 1728 § 1 and the envisioning of no alternative forms of process. Rather, there would be an ordinary contentious process for contentious causes (c. 1400 § 1, 1º) and a penal process for penal causes (*ibid.*, 2º). The latter would be one that provides all the basic formal safeguards required by natural justice and the

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[70] J. Miras, *Guía para el procedimiento administrativo canónico en materia penal*, Ius Canonicum 57 (2017) 323-386, at 365-368. This splendidly comprehensive presentation of substantive and (administrative-)procedural penal law is fittingly displayed on the website of the Pontifical Council for Legislative Texts (www.delegumtextibus.va) in the original Spanish, together with Italian and English translations. D. G. Astigueta considers the adaptable utility of procedural norms as a «strong point» in favor of the administrative process (see his *Applicazione della pena...*, cit., 517).

[71] See A. D'Auria, *Il processo penale amministrativo...*, cit., 79, n. 13.

wisdom of the Church's judicial tradition, while also enjoying built in measures to provide for simplicity and agility, such as whether the case is urgent and notorious, or when the guilt and imputability of the accused is evident.

Making a proposal for the *ius condendum* at a time when c. 1720 has been subject to extensive, official scrutiny – and may even be revised while this article is pending publication – may seem ill-timed. Still, the perfection of procedural law is ever worthy of consideration by the Church, so that she may increasingly shine forth in the world as the *speculum iustitiae*.

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