

“A General Canonical Backgrounder for Interpreting the USCCB Essential Norms in the Context of the Evolution of Canonical Penal Law”¹

Luis Navarro

PONTIFICAL UNIVERSITY OF THE HOLY CROSS

SUMMARY: 1. Introduction / 2. Origin of the Essential Norms / 3. Nature of the Essential Norms / 4. Relationship between the Essential Norms and the Charter / 5. Some particular issues concerning the juridical status of the clergy / a) The concept of sexual abuse / b) The prescription of penal action / c) The *ex officio* dismissal from the clerical state / 6. Conclusion

1. Introduction

We focus our attention on the norms passed in response to a tragic situation; the consequence of the commission of horrendous crimes by some members of the clergy during various decades. Those guilty of these crimes

¹ This is the updated English translation of an article “Las ‘Essential Norms’ de la Conferencia Episcopal de los Estados Unidos y su repercusión en la condición canónica del clérigo,” published in *Fidelium Iura* 13 (2003), p. 13-48. As foreseen in the Essential Norms, they were updated in 2005 and approved in a definitive way. These changes received the *recognitio* of the Holy See on 1st January 2006; and were promulgated by the Bishops’ Conference on 5th May 2006. The text of the new Norms can be found in www.usccb.org/ocyp/2005EssentialNorms.pdf. A significant change has been made to the concept of sexual abuse. However, this article deals with the concept as defined in the Essential Norms promulgated in 2002. The modifications introduced by the Essential Norms of 2006 to the articles quoted in this paper are indicated in the footnotes.

had not been duly punished while those who had the responsibility of ensuring that they were penalized did not appreciate the magnitude of these canonical delicts and the great harm caused as a result. The measures taken had been clearly insufficient. The gravity of the situation had lead John Paul II to affirm that there is no place in the priesthood and religious life for those who harm the young².

In the last decades, the competent ecclesiastical authority has made an attempt to deal with the scandal. Among the steps taken, the most significant has been the promulgation of norms formulated by the dioceses most affected by civil suits and which had been forced to pay large sums of money as compensation for damages caused by the crimes in question³.

² "The abuse of the young is a grave symptom of a crisis affecting not only the Church but society as a whole. It is a deep-seated crisis of sexual morality, even of human relationships, and its prime victims are the family and the young. In addressing the problem of abuse with clarity and determination the Church will help society to understand and deal with the crisis in its midst. It must be absolutely clear to the Catholic faithful and to wider community that bishops and superiors are concerned above all else with the spiritual good of souls. People need to know that there is no place in the priesthood and religious life for those who harm the young. They must know that bishops and superiors are totally committed to the fullness of Catholic truth on matters of sexual morality a truth as essential to the renewal of the priesthood and the episcopate as it is to the renewal of marriage and family life". JOHN PAUL II, *Address to Summit of Vatican, U.S. Church Leaders*, 23 April 2002, n. 3, in *Origins*, May 2, 2002, Vol. 31: n. 46, p. 759.

³ *Vid.*, for example, DIOCESE OF SALT LAKE CITY, "Child abuse policy," in *Origins*, May 31, 1990, Vol. 20: n. 3, p. 42-44, DIOCESE OF DAVENPORT, "Sexual abuse policy," in *Origins*, June 21, 1990, Vol. 20: n. 6, p. 93-94, DIOCESE OF SIOUX CITY, "Diocesan Policy when a cleric is accused of sexually exploiting a Minor," in *Origins*, August 6, 1992, Vol. 22: n. 10, p. 178-179; ARCHDIOCESE OF BOSTON, "Pastoral Policy: Allegation of Clergy Sexual Misconduct with Minors," in *Origins*, February, 4, 1993, Vol. 22: n. 34, p. 580-582; LOS ANGELES ARCHDIOCESE, "Policy on Sexual Abuse of Priests," in *Origins*, June 16, 1994, Vol. 24: n. 5, p. 70-74, BISHOP CUMMINS OF OACKLAND, CALIF., "Statement by the Catholic Church Apologizing and Seeking Forgiveness from those who have been Sexually Abused by Priests and Other Church Employees," March 25, 2000, in *Origins*, April 20, 2000, Vol. 29: n. 44, p. 719-720.

The action taken by the Roman Pontiff and the US Bishops' Conference has had special importance. The Rescript *ex audientia* of June 1994 is noteworthy. Through this Rescript, the Roman Pontiff exempted the United States from some of the norms contained in the Code of Canon Law.⁴ It finds its origin in various petitions made by the Episcopal Conference to the Holy See. This legislative act is just one among a number of measures taken by the Roman Pontiff as a consequence of his great concern for the situation. In fact before emanating this Rescript, John Paul II had sent a letter regarding sexual misconduct among the members of the clergy to the American bishops⁵. The Roman Pontiff's preoccupation was also seen in the way he followed the evolution of the situation, and more specifically, in a special meeting he had with American cardinals living in the U.S.A and in Rome⁶. The Bishops Conference also published an instruction with the aim of guiding the dioceses in their endeavor to deal with the problem⁷.

2. The origin of the Essential Norms

⁴ SECRETARY OF STATE, *Rescript ex audientia*, 25 April 1994, in *Ius Ecclesiae*, 8 (1996), p. 193. About the origin of this Rescript, the reasons that motivated it, the meetings of the Holy See - United States Conference of Bishops mixed commission, cf. J.A. ALESANDRO, "Canonical delicts involving sexual misconduct and dismissal from the Clerical State. A background paper," in *Ius Ecclesiae*, 8 (1996), p. 173-192; IDEM, "Dismissal from the clerical state in Cases of Sexual Misconduct: Recent Derogations," in CLS A, *Proceedings of the 56th annual convention (Atlanta, Georgia. October 10-13, 1994)*, Washington 1994, p. 28-67.

⁵ JOHN PAUL II, *Lettera ai Vescovi degli USA*, 11 June 1993, in *Insegnamenti di Giovanni Paolo II*, vol. 16, 1 (1993), p. 1476-1478.

⁶ JOHN PAUL II, *Address to Summit of Vatican, U.S. Church Leaders*, 23 April 2002, in *Origins*, May 2, 2002, Vol. 31: n. 46, p. 757-759. The meeting was held in Rome on 23rd and 24th April 2002. In relation to this meeting, apart from the discourse of John Paul II, the following documents have been published: the closing speech of Cardinal Sodano, the last paper presented and a letter addressed to the priests of U.S.A, *vid. Origins*, May 2, 2002, Vol. 31: n. 46, p. 759-760; p. 771-772.

⁷ NATIONAL CONFERENCE OF CATHOLIC BISHOPS, "Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State, 25 April 1994," in *Ius Ecclesiae*, 8 (1996), p. 390-424. About this document *vid. J.A. ALESANDRO*, "Canonical delicts involving sexual misconduct and dismissal from the Clerical State. A background paper," *cit.* p. 188-192.

As a reaction to the growing publicity given by the mass media to the delicts and the increased number of suits against members of the clergy, the United States Conference of Catholic Bishops (the "USCCB") held a plenary session in Dallas from 13th to 15th June 2002. The means of communication, and public opinion as a whole, waited with bated breath to see what the Episcopal Conference would do to resolve the problem. Everyone hoped for a quick and efficient solution and an end to these crimes.

Two documents were published by the USCCB as a result of the meeting: the Charter for the Protection of Children and Young People (the "Charter")⁸ and the Essential Norms for Diocesan/Eparchial Policies dealing with Allegations of Sexual Abuse of Minors by Priests and Deacons (the "Essential Norms")⁹. The first document is in the form of a solemn declaration of principles from which concrete measures are to be deduced. It consists of a preamble, seventeen articles and a conclusion. The objective of the Essential Norms, on the other hand, is to act as a guide for the formulation of diocesan norms regarding the procedure to be followed in suits founded on allegations of sexual abuse committed by priests and deacons. These Norms consist of thirteen articles and a preamble. Both documents were drafted by the Ad Hoc Committee on Sexual Abuse of the USCCB and approved by an overwhelming majority of American bishops¹⁰.

⁸ The draft of the Charter prepared by the Ad Hoc Committee on Sexual Abuse of the United States Conference of Catholic Bishops (USCCB), is published in *Origins*, June 13, 2002, Vol. 32: n. 5, p. 65-70. The version that was approved by the Episcopal conference in June 2002 can be found in *Origins*, June 27, 2002, Vol. 32: n. 7, p. 102-106. The final text, revised the same year by the same conference in Washington, was published in *Origins*, November 28, 2002, Vol. 32: n. 25, p. 409-415

⁹ The draft of the Essential Norms presented to the Plenary session of the Episcopal Conference is published in *Origins*, June 13, 2002, Vol. 32: n. 5, p. 70-72. For the version approved by the Episcopal conference in Dallas see *Origins*, June 27, 2002, Vol. 32: n. 7, p. 107-108.

¹⁰ The Charter was approved on 14 June with 239 votes in favor and 13 against (cf. *Origins*, June 27, 2002, Vol. 32: n. 7, p. 102); the Essential Norms obtained 229 votes in favor and 5 against (cf. *ibid.*, p. 107).

The Essential Norms were thereafter sent to the Holy See for the corresponding *recognitio*. By recommendation of the Holy See, a mixed commission composed of four American bishops and four representatives of the Holy See was formed so as to revise these Norms¹¹. This Commission held meetings on 29th and 30th October 2002 and suggested various amendments which were implemented at the general meeting of the Episcopal Conference held from 11th to 14th November 2002. The Norms were subsequently sent to Rome on 15th November 2002 and the *recognitio* was granted by decree of the Prefect of the Congregation for Bishops on 8th December 2002¹². The

¹¹ The members of the commission were: Card. Castrillón Hoyos, Prefect of the Congregation for the Clergy, Archbishop Julián Herranz, President of the Pontifical Council for the Interpretation of Legislative Texts, Archbishop Tarcisio Bertone, Secretary of the Congregation for the Doctrine of the Faith, and Archbishop Francesco Monterisi of the Congregation for Bishops, all representing the Holy See. The American bishops were: Card. Francis George, the Archbishop of Chicago, William Levada, the Archbishop of San Francisco, Bishop Thomas Doran of Rockford and William Lori, Bishop of Bridgeport (cf. *Origins*, October 31, 2002, Vol. 32: n. 21, p. 343). In his statement (in which he announces the creation of the mixed commission), Bishop Gregory, president of the Episcopal conference affirms that the Holy See had identified the following important points in the documents approved by the Episcopal conference in June: "(1) The Holy See wants to look at some of the provisions for action that we have called for in these documents, because as they are currently described they 'are difficult to reconcile with the universal law of the Church' and therefore 'can be the source of ambiguity'. An example would be the proper role of the review boards to be established in each of the dioceses and eparchies as these are described in Article 2 of the Charter and Articles 4 and 5 of the Essential Norms. (2) The Holy See also wants to look at some of the language that has been used in these two documents, because 'the experience of the last few months has shown that the terminology of these documents is at times vague or imprecise and therefore difficult to interpret'. An example would be the use of the term sexual abuse which appears in Article 5 of the Charter and is defined in a footnote to that document. (3) The Holy See has likewise indicated that it would like to see further specification of 'the concrete manner in which the procedures outlined in the Norms and the Charter are to be applied in conjunction with the requirements of the Code of Canon Law and the *motu proprio* 'Sacramentorum Sanctitatis Tutela'. An example would be the procedures for dealing with a priest who is known to have abused a minor. These procedures are identified in Article 5 of the Charter and Articles 7-12 of the Norms". Bishop Gregory, Statement made on 18th October 2002, in *Origins*, October 31, 2002, Vol. 32: n. 21, p. 343.

¹² As concerns the text approved by the Conference in November only one minor amendment was made to art. 8 regarding the CDF and the Ordinary: "The only alteration in the text sent for the *recognitio* is in Norm 8A which, with the addition of the word 'how,' now

Episcopal Conference finally approved them on 12th December 2002, and they came into force on 15th March 2003.

One need only to compare the Norms approved by the Episcopal Conference in June 2003 with those endorsed in November-December of the same year to realize the great differences that exist between the two texts. The Norms that received the *recognitio* have sought to define the term "sexual abuse" in the Preamble in a more precise manner; the application of the so-called principle of zero tolerance (according to which the fact of having committed an act of sexual abuse was sufficient for one to be dismissed from the clerical state) has been attenuated; and the role of the Congregation for the Doctrine of the Faith ("CDF") in these cases defined. The provincial appellate review board established by the Norms approved in June 2003 has also been abolished¹³.

reads, 'Unless the Congregation for the Doctrine of the Faith, having been notified, calls the case to itself because of special circumstances, it will direct the diocesan bishop/eparch how to proceed.' The Holy See and the USCCB agreed that this made explicit what was already implicit in the text". *Press Statement of the Episcopal Conference*, 16th December 2002, in <http://www.usccb.org/comm/archives/2002/02-258.htm>. For the text approved by *recognitio*, *vid. Origins*, November 28, 2002, Vol. 32: n. 25, p. 415-418; for Card. Re, the Prefect of the Congregation's letter to the President of the Episcopal conference dated 8 December 2002, communicating the *recognitio*, *vid. Origins*, January 2, 2003, Vol. 32: n. 29, p. 476-478. Together with these documents the President of the Episcopal conference, Bishop Gregory, sent a statement dated 16 December 2002, published in *Origins*, January 2, 2003, Vol. 32: n. 29, p. 478-479. These documents can be consulted in the home page of the Episcopal conference as well as that of the Congregation for Bishops. The latter includes the decree of the Congregation (http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html).

¹³ The sixth norm of the June version had provided for an appellate review board: "Each province will establish an appellate review board, to be composed of at least five persons of outstanding integrity and good judgment. The majority of the members will be lay persons; but at least one member should be a bishop, and at least one member should be a canon lawyer. The appellate review board's function will be to offer — upon request by the bishop, the alleged victim, or he accused — its advice to the diocesan/eparchial bishop on the case (cf. norm 4A). The request must be made within fifteen (15) days after the alleged victim or the accused has been notified of the assessment of the initial review board. Within sixty (60) days of its receiving the request, the appellate review board's advice will be communicated to those involved".

These Norms also include references to the Code of the Oriental Churches and the Code of Canon Law of 1983 ("CIC 1983"). They also apply, albeit indirectly, to religious priests and deacons¹⁴.

Following the amendments introduced in the Essential Norms, various changes have been made to the Charter¹⁵.

Before examining the articles of the Essential Norms that have an impact on the canonical status of priests and deacons, we shall look at the nature of these norms and their relationship with the Charter. The Charter, as will become evident from this brief analysis, is not a normative text. However, from an operational point of view, it has binding force primarily in public opinion.

3. Nature of the Essential Norms

The Decree of the Congregation for Bishops reads "Congregatio pro Episcopis, (...) memoratis normis (...) recognitionem concedit et ratas habet ut normas complementares Codicis iuris canonici et Litteris Apostolicis Motu

¹⁴ "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". Footnote 1 of the Essential Norms 2006.

¹⁵ With regard to this, *Origins* notes the following: "Much of the Charter remains as it was. But a footnote defining 'sexual abuse' is revised; Article 14 regarding transfers of priests is revised and the final paragraph under art. 15 is new. Article 5 also includes several other revised passages, for example one that says preliminary investigation of a sexual-abuse allegation will be conducted 'in harmony with canon law', another stating that the Vatican Congregation for the Doctrine of the Faith is to be notified when an 'investigation so indicates' and another stating that an alleged offender 'may be requested to seek, or urged voluntarily to comply with, an appropriate medical and psychological evaluation'. Article 2 has been revised, now stressing, for example, that a diocesan/eparchial board is 'a confidential consultative body to the bishop/eparch'. A revision of Article 4 is related to the reporting of sexual abuse to civil authorities". *Origins*, November 28, 2002, Vol. 32: n. 25, p. 409.

Proprio datis 'Sacramentorum sanctitatis tutela' accommodatas"¹⁶. This provision is indispensable for one to appreciate the nature of the Essential Norms.

These are norms of the particular law of the Episcopal Conference of the U.S.A approved by its General Assembly. The fact that they are expressed in the form of a general decree means that the *recognitio* of the competent dicastery of the Holy See (in this case the Congregation for Bishops) is necessary for them to be promulgated. Accordingly, the *recognitio* was granted for the duration of two years in view of the fact that the Episcopal Conference had expressed the intention of reviewing the Norms after a period of time¹⁷.

¹⁶ "Congregatio pro Episcopis, vi facultatum sibi articulo 82 Constitutionis Apostolicae Pastor Bonus' tributarum et collatis consiliis cum Dicasteriis quorum interest, memoratis normis, prout in adnexo exemplari continentur, recognitionem concedit et ratas habet ut normas complementares Codicis iuris canonici et Litteris Apostolicis Motu Proprio datis 'Sacramentorum sanctitatis tutela' accommodatas". For the *motu proprio*, *vid.* JOHN PAUL II, m.p. *Sacramentorum sanctitatis tutela*, 30 April 2001, en AAS 93 (2001), p. 737-739. This law promulgates the norms of the Congregation for the Doctrine of the Faith as concerns the *delicta graviora* which are reserved to the same Congregation. These norms have not been published in AAS. However they have been published in Latin and English in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, 2nd ed., Ottawa 2003, p. 303-309. There is also an English translation on the internet on <http://www.opusbonosacerdotii.org/CDF%20Trial%20Norms.htm> (website visited in January 2004). More information can be found in the letter of the Congregation for the Doctrine of the Faith on the most serious delicts of 18th May 2001, in AAS, 93 (2001). p. 785-788. About the above-mentioned *motu proprio* and this letter, *vid.* V. DE PAOLIS, "Norme 'De gravioribus delictis' riservati alla Congregazione per la Dottrina della fede," in *Periodica*, 91 (2002), p. 273-312; D. CITO, "Nota al m.p. Sacramentorum sanctitatis tutela," in *Ius Ecclesiae*, 14 (2002), p. 322-328; N.C. DELAFERRERA, "Normas acerca de los delitos más graves reservados a la Congregación para la Doctrina de la Fe," in *Anuario Argentino de Derecho Canónico*, 9 (2002), p. 61-78; B.E. FERME, "Graviora delicta: the Apostolic Letter M.P. *sacramentorum sanctitatis tutela*," in *Il processo penale canonico*, a cura di Z. Suchecki, Roma 2003, p. 365-382; and R.W. OLIVER, "Sacramentorum Sanctitatis Tutela: Overview and Implementation of the Norms concerning the more Grave Delicts reserved to the Congregation for the Doctrine of the Faith," in *CLSA Proceedings*, 65 (2003), p. 151-172.

¹⁷ "Cum autem ipsi Praesules Foederatarum Civitatum Americae Septentrionalis statuerint post duos annos easdem normas usus examini subicere, praesens recognitio ad biennium valet".

The Essential Norms are not pontifical norms; their authority does not come from that of the Roman Pontiff. In this context, they are inferior to the abovementioned Rescript *ex audientia* of 1994. This Rescript, having been approved by the Roman Pontiff in a specific form, derogated some prescriptions of the universal law. By contrast, the Essential Norms simply form part of the particular law of the Conference of Bishops and thus have a binding force restricted to the dioceses and eparchies of the U.S.A (that is, all the ecclesiastical circumscriptions; oriental as well as latin, of America). The decree of *recognitio* clearly indicates that these Norms are complementary to the CIC 1983 and the dispositions of the *m.p.* '*Sacramentorum sancititas tutela*'. This means that not only are they not inconsistent with the norms of the universal law (they could not possibly be) but that they complement them in some aspects. Martín de Agar has correctly affirmed that, as we are talking about a complementary particular law of the bishops' conference, we are dealing with norms passed by an inferior legislator that cannot therefore derogate norms of a superior one¹⁸.

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*¹⁹.

¹⁸ "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". J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze episcopali complementare al CIC*, Milano 1990, p. 4, n. 10.

¹⁹ As Arrieta states, "the *recognitio* (...) is not a matter of a simple forwarding of documents. Therefore, an active intervention of an objective character is required on the part of the Apostolic See, which constitutes the necessary condition for the decree to acquire binding force". J.I. ARRIETA, *Governance Structures within the Catholic Church*, Montreal 2000, p. 286. In relation to associations of the faithful, the *recognitio* also serves as an act of control by which the authority declares that there is nothing in the statutes of the association that is contrary to catholic doctrine, ecclesiastical discipline and customs. Cf. L. NAVARRO, *Diritto di associazione ed associazioni di fedeli*, Milano 1991, p. 81-84. Feliciani considers that this

In comparison with other decrees of *recognitio*, the decree that approved the Essential Norms is specific in that it does not conclude with the clause "*contrariis quibusvis minime obstantibus*". Nevertheless, it is evident from the nature of the Essential Norms that the absence of this clause does not mean that the *recognitio* can confirm a law of the Episcopal Conference that is *lex iuri superiori contraria* (c. 135 §2)²⁰. A *recognitio* is not sufficient to derogate a norm of the universal law.

The Essential Norms are binding on all diocesan laws dealing with sexual abuses committed by priests and deacons. All dioceses thus have to include them in their respective law providing for the adaptations dictated by the specific circumstances of each diocese or eparchy. Consequently, any diocesan norm passed before the promulgation of the Essential Norms would need to be reviewed and, if necessary, modified so as to render them consistent with these Norms.

In accordance with their nature, the application of the Essential Norms should take into account the provisions of the CIC 1983 as well as those of the *m.p. 'Sacramentorum sanctitas tutela'*. They also need to respect the principles of penal canon law; among others, the principle of the strict interpretation of penal law (c. 18²¹), the application of the law more favorable

meaning also applies to the *recognitio* granted in approval of the decrees of episcopal conferences. Cf. G. FELICIANI, "Le associazioni di fedeli nella normativa canonica," in *Aggiornamenti sociali*, 38 (1987), p. 693.

²⁰ In his study of the decrees of *recognitio* of the particular law of episcopal conferences, Martín de Agar explains regarding the abovementioned clause: "essa si riferisce al decreto di *recognitio*, e dovrà sempre essere interpretata alla luce della normativa del Codice, sviluppata e attuata dai decreti delle Conferenze; ma ovviamente essa non può coprire né confermare una legge della Conferenza che fosse *lex iuri superiori contraria*". J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze episcopali complementare al CIC*, cit. p. 4.

²¹ "The strict interpretation in penal matters must always be understood as a guarantee for the delinquent. Consequently, it is forbidden to give broad interpretation to laws which authorize the imposition or aggravation of penalties". P. LOMBARDÍA, *Commentary on canon 18*, in *Code of Canon Law Annotated*, Wilson & Lafleur, Montreal, 2004, 2nd ed., p. 45.

to the offender (c. 1313 §1²²), and the principle of non-retroactivity of the law (c. 9²³).

With respect to the principle of non-retroactivity of the law, 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 victims²⁴. Nonetheless the intention to apply the Essential Norms retroactively is patent and in fact they have been applied to acts committed in the past²⁵.

The Charter, on the other hand, is clearly retroactive in nature. It establishes that when sexual abuse of a minor has been admitted by its author or if it has been established after due legal process, diocesan norms should provide that the commission of such a single act -"past, present or future"-,

²² "If a law is changed after an offence has been committed, the law more favourable to the offender is to be applied" (can. 1313 §1). Thus a situation may arise in which an offence committed under the rule of the previous law is to be judged after the promulgation of the current law. In this case, if the act is an offence according to one law and not according to the other, there is no offence. Moreover, if one of the laws imposes a milder penalty or establishes conditions that make it difficult to incur in it, then this law should be applied. Cf. J. BERNAL, *Commentary on canon 1313*, in *Code of Canon Law Annotated, cit.*, p. 1023.

²³ In principle the law is not retroactive, that is, it is not applicable to situations defined by acts or facts which occurred before it came into force. 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 force". P. LOMBARDIA, *Commentary on canon 9*, in *Code of Canon Law Annotated, cit.*, p. 38.

²⁴ "The bishops of the United States have promised to reach out to those who have been sexually abused as minors by anyone serving the Church in ministry, employment, or a volunteer position, whether the sexual abuse was recent or occurred many years ago".

²⁵ Cf. JOHN THAVIS, *Vatican official says U.S. abuse norms are complex but are working*, in *Catholic News Service*, 20 January 2004. The statistics given by the President of the Episcopal conference speak for themselves: 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. Cf. Statement made by Bishop Gregory, 27 February 2004, in <http://www.usccb.org/comm/archives/2004/04-040.htm>.

will lead to the permanent withdrawal of the offender from ministry, and may even bring about his dismissal from the clerical state²⁶.

4. The relationship between the Essential Norms and the Charter

The two differ as concerns their nature: the Essential Norms are particular law of the Episcopal conference that have received the *recognitio* of the Holy See; while the Charter is not normative and, therefore, has not obtained the *recognitio* although the Holy See evidently took it into account in examining the Essential Norms.

Considering the fact that the Charter is a document of the bishops' conference without any normative force as such, a bishop may disregard any of its provisions if for grave reasons he considers it opportune²⁷. Yet it must be pointed out that this Charter has had such a great impact that it is *de facto* binding. This is attributed to at least two reasons: its content and the control mechanisms employed so as to ensure that it is effectively applied in the dioceses.

The Charter has influenced the drafting of the Essential Norms in a particular way. This is not due to the fact that the latter reproduces the content of the former, but rather because some articles of the Essential Norms have been directly inspired by those of the Charter. Examples of this are to be found in art. 4²⁸ and 5²⁹ of the Charter.

²⁶ Cf. Charter, art. 5.

²⁷ Cf. CONGREGATION FOR BISHOPS, Directory *Ecclesiae imago*, 22 February 1973, n. 212, b, in *Enchiridion Vaticanum*, vol. 4, n. 2316.

²⁸ Charter, art. 4. "Dioceses/eparchies will report an allegation of sexual abuse of a person who is a minor to the public authorities.

"Dioceses/eparchies will comply with all applicable civil laws with respect to the reporting of allegations of sexual abuse of minors to civil authorities and will cooperate in their investigation in accord with the law of the jurisdiction in question.

"Dioceses/eparchies will cooperate with public authorities about reporting in

In addition to this, 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. It is also the case that these diocesan norms often draw from the law of the respective State when they define sexual abuse with the aim of creating awareness about the civil obligation to report such allegations.

Furthermore, the Charter has been used as the basis on which many decisions have been made in the recent past. It has also led to the organization of many initiatives aimed at eradicating these abuses. These include the establishment of the Office for Child and Youth Protection whose main role is quite controversial because, as it serves as a vehicle of accountability, its function of assisting the dioceses may be erroneously interpreted as an imposition aimed at obtaining a judgment favorable to the dioceses³⁰. The National Review Board³¹ is another example. The great

cases when the person is no longer a minor.

"In every instance, dioceses/eparchies will advise victims of their right to make a report to public authorities and will support this right".

This norm influences art. 11 of the Essential Norms.

²⁹ Charter, art. 5: "When sexual abuse of a minor by a priest or a deacon is admitted or is established after an appropriate process in accord with canon law, the following will pertain: * Diocesan/eparchial policy will provide that for even a single act of sexual abuse (see Article 1, note *) of a minor — past, present, or future — the offending priest or deacon will be permanently removed from ministry, not excluding dismissal from the clerical state, if the case so warrants. In keeping with the stated purpose of this Charter, an offending priest or deacon will be offered professional assistance for his own healing and well-being, as well as for the purpose of prevention". This article directly influences art. 8 and 9 of the Essential Norms.

³⁰ Charter, art. 8. "To assist in the consistent application of these principles and to provide a vehicle of accountability and assistance to dioceses/eparchies in this matter, we authorize the establishment of an Office for Child and Youth Protection at our national headquarters. The tasks of this Office will include (1) assisting individual dioceses/eparchies in the implementation of 'safe environment' programs (see Article 12 below), (2) assisting provinces and regions in the development of appropriate mechanisms to audit adherence to policies, and (3) producing an annual public report on the progress made in implementing the standards in this Charter. This public report shall include the names of those dioceses/eparchies which, in the judgment of this Office, are not in compliance with the

influence that the Charter has had on this Board is evident for instance in the report presented on 29th July 2003, the first anniversary of its establishment. The Charter guides the working of the Board which runs initiatives aimed at encouraging total transparency in the response to these abuses by the Catholic Church. The aforementioned report sets out the following as the objectives and tasks of the National Review Board: the constitution of the Office for Child and Youth Protection; the promotion of the first audit of the norms of all dioceses and eparchies to determine their conformity or otherwise with the Charter; and the review of three studies: a descriptive study on the nature and object of the crisis, and two studies on the causes and the context of the crisis. It also establishes criteria and rules for a safe environment, both of which must be included in the diocesan norms and ordinances³².

provisions and expectations of this Charter. This Office will have staffing sufficient to fulfill its basic purpose. Staff will consist of persons who are expert in the protection of minors; they will be appointed by the General Secretary of the Conference".

³¹ When this board was formed all its members were lay persons. Among them was an ex-priest who was a psychologist and victim of sexual abuse. The board has gone through some difficult moments in its brief history. Its first moderator, Frank Keating resigned a few months after being appointed. Cf. F. KEATING, "The Last Straw. Quitting the Bishops Review Board," in *Crisis*, October 2003, p. 18-23.

³² This report is published in *Origins*, August 14, 2003, Vol. 33: n. 11, p. 185-187. Noteworthy is that the auditing was left in the hands of an agency that had nothing to do with the Church: the Gavin Group. This agency has been in charge of ensuring that the dioceses are adequately dealing with the situation through "policies for responding to abuse complaints, outreach programs for victims of abuse, the independence and use of lay review boards, policies for removing priests who have abused the innocent, safe environment programs and many facets of the commitment to cleanse the church of these scandals at every level". *Ibid.* p. 186. The John Jay College of Criminal Justice carried out a study on the nature and object of the crisis using information furnished by the dioceses as required by art. 9 of the Charter. Cf. *ibid.*, p. 186-187. Some dioceses have not presented the requested information. These are: Davenport (Iowa), Fresno (California), Lincoln (Nebraska), Newton (Catholic Greek Melkite; Massachusetts), Our Lady of Deliverance (New Jersey), and the Eparchy of Saint Maron of Brooklyn (New York). Cf. *Report on the Implementation of the "Charter for the Protection of Children and Young People"*, Chapter 3, Analysis of the Findings, *Charter compliance by Article*, art. 9, en <http://www.usccb.org/ocyp/audit2003/report.htm>. More information see DIOCESE OF LINCOLN, *Statement*, 16 January 2004, in *Origins*, February 5, 2004, Vol. 33: n. 34, p. 587-588.

As a consequence of this Charter, particularly art. 8, all dioceses are bound by the observations made by review and audit bodies run by institutions that do not belong to the Catholic Church. The report of the first audit was published on 7th June 2004. It contains an appraisal of the functioning of each diocese during the year and evaluates the compliance of their norms with the provisions of the Charter. This report also includes observations and recommendations directed to the dioceses³³. On 27th February 2004, the National Review Board for the Protection of Children and Young People presented, "A Report on the Crisis in the Catholic Church in the United States".

³³ The report is entitled *Report on the Implementation of the "Charter for the Protection of Children and Young People"* and can be found on the home page of the United States Conference of Bishops, <http://www.usccb.org/ocyp/audit2003/report.htm>. A section of this document is published in *Origins*, January 15, 2004, Vol. 33: n. 31, p. 523-540. The report consists of two parts: the first one contains the Executive Summary, Compliance Audits, Analysis of the Findings, and Recommendations, while the second part comprises the Summary Reports of Dioceses and Eparchies. While admitting the professional competence of the agency set up to carry out this study, it is clear that it is not apt to adjudicate ecclesiastical issues. This leads one to wonder why it is considered inappropriate for a priest holding an administrative position in the dioceses to deal with the victims of sexual abuse. Moreover, the inclusion of certain clauses is surprising, for instance: "The Diocese shall cooperate with the request to submit information necessary to the descriptive study regarding the 'nature and scope' of the problem of sexual abuse of minors by Catholic clergy", or "The Diocese shall expeditiously take steps to institute background investigations for all diocesan and parish personnel having regular contact with children". See the reports on the archdioceses of Anchorage, the dioceses of Alexandria, Lincoln, Memphis, Steubenville, etc. Neither is it reasonable for bishops to be advised to prevent accused priests from attending the hearing in clerical attire. See art. 5.4: "It is recommended that bishops and eparchs ensure the enforcement of the application of 'precautionary measures' found in the *Code of Canon Law*, canon 1722: as well as ensuring that priests who are defendants in a criminal case involving sexual abuse of a minor do not present themselves in clerical garb". Recommendations Regarding Implementation of the *Charter* by Article, article 5, on <http://www.usccb.org/ocyp/audit2003/sectionone>. Nor is it sound to demand that the Ad Hoc Committee on Sexual Abuse define 'prayer and penance'. Art 5.3 reads: "It is recommended that the Ad Hoc Committee on Sexual Abuse clarify the meaning of 'prayer and penance' as described in Article 5, including to whom it should apply". The article concerning the responsibility of bishops ("It is recommended that the Bishops' Committee for Canonical Affairs advise the National Review Board and the public, through an appropriate document, of the way in which the members of the USCCB intend to hold themselves accountable for adherence to the Essential Norms". Recommendations..., cit., article 9, *ibid.*) is in the same way unreasonable.

States",³⁴ based on a study carried out by the John Jay College of Criminal Justice.

The fact that the American dioceses are subjected to these kinds of controls may lead to the intimidation of ecclesiastical authorities and make them feel bound to follow what is dictated by public opinion³⁵.

All these elements, together with a flood of civil suits and penal cases in the courts, have brought about a new state of affairs: the submission of ecclesiastical jurisdiction to civil jurisdiction in some cases, or the omission of the exercise of the Church's jurisdiction leaving the resolution of these cases in the hands of civil authorities. A paradigmatic example of this grave threat is seen in the agreements made between some diocesan bishops as representatives of their diocese and local authorities of the corresponding states. One such agreement is that entered into by the diocese of Manchester (which includes the entire state of New Hampshire) and the Office of the Attorney General of New Hampshire. With effect from 10th December 2002, and for a period of five years, the diocese agreed to submit to an annual audit to be performed by the Office of the Attorney General regarding compliance by the diocese with the terms of the agreement and diocesan policies. The audit may include the inspection of records and the interview of diocesan personnel³⁶. The Diocese of Manchester in turn agreed to ensure that upon receipt of an allegation of sexual abuse, pending the resolution of the case, the alleged offender will be removed from any position in which there is the possibility of contact with minors³⁷. In addition, the diocese committed itself

³⁴ On <http://www.usccb.org/nrb/nrbstudy/nrbreport.pdf>. This 145 page report is an analysis of the results of the study. It goes on to make recommendations.

³⁵ Albeit the fact that this way of acting may lead to the infringement of the right to a just and fair legal process as required by canonical norms.

³⁶ *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, p. 481.

³⁷ n. 2, f), *cit.*, p. 481.

to provide the Office of the Attorney General copies of its policies and protocols for review and comment on an annual basis³⁸.

Another example is the agreement made between the Bishop of Phoenix and the Diocese of Phoenix, and the Maricopa County Attorney. What is striking in this Agreement is that the Bishop delegates certain administrative duties to the moderator of the diocesan curia. These duties include the responsibility for dealing with the issues that arise relating to the revision, enforcement and application of the sexual misconduct policy.³⁹ It is worth taking note of the comment made by the County Attorney with reference to this agreement: it "effectively removed [the Bishop] role in anything from having to do with the sexual abuse allegations in the diocese"⁴⁰.

5. The Essential Norms and certain aspects of the juridical status of priests and deacons

At this point, instead of examining the Preamble and each one of the thirteen articles of the Essential Norms, I intend to consider certain specific aspects that affect the juridical status of priests and deacons. These aspects

³⁸ "The Diocese of Manchester agrees to continue to provide to the Office of the Attorney General copies of its policies and protocols for review and comment on an annual basis pursuant to Paragraph 4 or as otherwise requested by the Office of the Attorney General". n. 3, *cit.*, p. 481.

³⁹ "Certain administrative duties have been delegated by Thomas J. O'Brien to the moderator of the curia, which shall include the responsibility for dealing with the issues that arise relating to the revision, enforcement and application of the sexual misconduct policy". *Agreement of Bishop Thomas O'Brien of Phoenix and the Diocese of Phoenix with the Maricopa County Attorney Richard Romley, May 3, 2003*, in *Origins*, June 12, 2003, Vol. 33: n. 5, p. 69.

⁴⁰ "The newspaper reported that the County Attorney, Richard Romley had said on June 2 that the agreement 'effectively removed O'Brien from having to do with the sexual abuse allegations in the diocese". *Ibid.*, p. 68, lateral column. The power of the bishop has also been curbed through the creation of job positions whose carrying out does not require the bishop's consent, for instance, youth protection advocate and special counsel. In addition the intervention of agents not associated with the Church in the training of diocesan personnel is now imposed as a condition. Cf. *ibid.* p. 69-70.

have to do with penal and procedural issues concerning the defense of their juridical status: the concept of sexual abuse; the prescription of criminal action; and the dismissal from the clerical state through administrative procedure. The three refer to the determination of the law that should be applied to priests and deacons accused of having committed sexual abuse.

I am aware that there are other important issues that arise from an analysis of the Essential Norms, and that have an impact on the rights of the faithful in the Church: How should the accused person's right to a good reputation be protected especially when cautionary measures such as the prohibition of the exercise of the ministry are employed? Is it possible to recover the good reputation of an accused person who has been acquitted? How can the presumption of innocence of the accused be guaranteed when he is required to undergo psychiatric treatment? All these are pertinent questions which, however, I do not intend to address⁴¹.

a) The concept of sexual abuse

Sexual abuse is defined in the Preamble of the Essential Norms. This concept⁴² can be said to be a good definition in so far as: a) it associates

⁴¹ As regards these aspects, *vid.* G. GHIRLANDA, "Doveri e diritti implicati nei casi di abusi sessuali perpetrati da chierici," in *La Civiltà cattolica*, 2002, II (19 Maggio 2002), p. 341-353. Concerning investigation and cautionary measures that the Ordinary can take, *vid.* P.R. LAGGES, "The Use of Canon 1044 § 2, 2° in the Removal of a Parish Priests," in *Studia Canonica*, 30 (1996), p. 31-69. G.P. MONTINI, "Provvedimenti cautelari urgenti nel caso di accuse odiose nei confronti di ministri sacri. Nota sui canoni 1044 e 1722," in *Quaderni di diritto ecclesiale*, 12 (1999), p. 191-204, P. MILITE, "Utrum "pedofilia" irregularitas "ex delicto" sit? Et quatenus affirmative, indolem poenae habet an non?," in *Apollinaris*, 76 (2003), p. 575-585, C. ARRU, "Procedure canoniche da seguire in caso di accuse odiose nei confronti di ministri sacri," in *Apollinaris*, 75 (2002), p. 807-830. Regarding the right to a good reputation, *vid.* A. SOLFERINO, "I diritti fondamentali del fedele: il diritto alla buona fama e all'intimità," in *Diritto 'per valori' e ordinamento costituzionale della Chiesa*, a cura di R. BERTOLINO, S. GHERRO, G. LO CASTRO, Torino 1996, p. 372-382.

⁴² "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. Sexual abuse has been defined by different civil authorities in various ways, and these norms

sexual abuse with grave and external violation of the sixth commandment; b) it specifies that the offence need not be a complete act of intercourse; c) it does not adopt any particular definition provided in civil law; d) it provides that if there is any doubt as to whether a specific act qualifies as sexual abuse, the writings of recognized moral theologians should be consulted and the opinion of recognized experts obtained.

Nonetheless, the concept is not satisfactory in some aspects, for example when it indicates that it includes any act of an adult who uses a minor as an object of sexual gratification, or where it states that sexual abuse need not involve physical contact or a discernible harmful contact.

It must be admitted that the actual concept adopted by the Essential Norms is the result of notable progress. Note that the definition previously used in the Charter followed the Canadian concept⁴³ which was very broad and included a

do not adopt any particular definition provided in civil law. Rather, the transgressions in question relate to obligations arising from divine commands regarding human sexual interaction as conveyed to us by the sixth commandment of the Decalogue. Thus, 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 grave violation of the sixth Commandment (USCCB, *Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State*, 1995, p. 6). A canonical offence against the sixth commandment of the Decalogue (CIC, c. 1395, § 2; CCEO, c. 1453 §1) need not be a complete act of intercourse. Nor, to be objectively grave, does an act need to involve force, physical contact, or a discernible harmful outcome. Moreover, 'imputability [moral responsibility] for a canonical offense is presumed upon external violation ... unless it is otherwise apparent' (CIC, c. 1321, §3; CCEO, c. 1414 §2. Cf. CIC, canons 1322-1327, and CCEO, canons 1413, 1415, and 1416)". The footnote to this definition reads: "If there is any doubt whether a specific act qualifies as an external, objectively grave violation, the writings of recognized moral theologians should be consulted, and the opinions of recognized experts should be appropriately obtained (*Canonical Delicts*, p. 6). Ultimately, it is the responsibility of the diocesan bishop/eparch, with the advice of a qualified review board, to determine the gravity of the alleged act". The new norms give a more limited definition: "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)". *Essential Norms 2006*, Preamble. For more about these delicts, *vid. V. DE PAOLIS, Delitti contro il sesto comandamento*, in *Periodica* 82 (1993), p. 293-316, and J. PROVOST, *Offenses against the sixth commandment: toward a canonical analysis of canon 1395*, in *The Jurist*, 55 (1995) p. 632-663.

⁴³ "Notice that a sexual offense violative of Section 2 need not to be a complete act of intercourse, nor should the term necessarily be equated with the definitions of sexual abuse or other crimes in civil law. 'Sexual abuse (includes) contacts or interactions between a child and an adult when the child is used as an object of sexual gratification for the adult. A child is

wide variety of acts. Even so, the concept to be found in the Essential Norms should be applied with special prudence when determining whether an act is a canonical delict or not. It is for this reason that diocesan norms should clearly set out what consists in a delict⁴⁴ as well as address the gravity of each such act⁴⁵. This will ensure that the danger of labeling as an offence against minors

abused whether or not this activity involves explicit force, whether or not it involves genital or physical contact, whether or not it is initiated by the child and whether or not is discernable harmful outcome' (Canadian Conference of Bishops, "From Pain to hope", 1992, p. 20). If there is any doubt about whether a specific act fulfills this definition, the writings of recognized moral theologians should be consulted and, if necessary, the opinion of a recognized expert be obtained ("*Canonical Delicts Involving Sexual Misconduct and Dismissal from the Clerical State*", 1995, p. 6). We also note that diocesan/eparchial policies must be in accord with civil law". *Origins*, June 27, 2002, Vol. 32: n. 7, p. 106.

⁴⁴ An analysis of some diocesan norms shows that they satisfactorily provide criteria regarding the conduct of priests and deacons as well as others who work in the diocese. However, when it comes to defining the term delict, after citing the definition given by Essential Norms, many then make reference to state legislation. Cf., among others, the following documents available on the corresponding home pages of various dioceses: DIOCESE OF SAINT AUGUSTINE, *Policy Procedural Guidelines Relating To Protection of Children and Vulnerable Adults*, 26 March 2003; DIOCESE OF DALLAS, *Policy on Sexual Misconduct*, revised March 2003; DIOCESE OF BEAUMONT, *Ethical and responsible conduct policies*, revised 2003; DIOCESE OF HELENA, *Policy regarding Abuse of Minors, Sexual Misconduct and Sexual Harassment*, May 16, 2003; DIOCESE OF DAVENPORT, *Policies Rating to Sexuality and personal Behavior*, reviewed and revised June 2003; DIOCESE OF LEXINGTON, *Decree on a Pastoral Response to Issues of Sexual Misconduct by Church Personnel*, revised July 2003; DIOCESE OF BURLINGTON, *Policies on Ethics and Integrity in Ministry*, revised 2003; DIOCESE OF SALINA, *Policy for the Protection of Children and Young People*, September 2003; DIOCESE OF SPRINGFIELD-CAPE GIRARDEAU, *Sexual Misconduct Policy*, revised 2003.

⁴⁵ On 27 February 2004 the National Review Board for the Protection of Children and Young People published a document entitled *A Report on the Crisis in the Catholic Church in the United States*. This document indicates that since not all of them are equally grave there is a wide variety of acts of abuse and the age of the victims always differs. (cf. p. 25-28 of the cited document). All these elements should be taken into account in identifying the appropriate sanction to be inflicted on the offender. This is the reason why the zero-tolerance policy has been criticized. "Law hastily framed runs the risk of abrogating any semblance of fundamental fairness and justice. In the months following the formulation of the Dallas policy, it was not uncommon for a priest with a single allegation against him, which was placed in his diocesan personnel file twenty or more years ago, to be summarily dismissed from any active and fruitful ministry. Following years of faithful service, the priest suddenly found himself deprived of his life's work and with his reputation irreparably damaged. Placed on indefinite administrative leave without adequate notice or opportunity to be heard, he received the same penalty as a serial child abuser. The implementation of the zero-tolerance approach in certain instances stunned priests and their parishioners and caused attorneys for the accused to raise

what really is not is avoided⁴⁶; bearing in mind the present setting characterized by a lack of trust. Prudent judgment should take into account the circumstances, the customs of each place, family relations, etc.⁴⁷.

At the same time the concept of sexual abuse employed by the Essential Norms is not the same as that used in the legal documents promulgated earlier. Let us now briefly examine how the term was defined in the legislation in force until 1983 and thereafter up to the promulgation of the *m.p.* 'Sacramentorum sanctitas tutela'. I shall focus on what is analogous to what is at present referred to as sexual abuse.

questions about lack of fundamental due process". J.J. COUGHLIN, *The Clergy Sexual Abuse Crisis and the Spirit of Canon Law*, in *Boston College Law Review*, 44 (2003), p. 991.

⁴⁶ In an article published in *First Things*, Neuhaus criticizes the Canadian definition, especially its reference to sexual gratification. "But who is to say whether sexual gratification is involved, however subliminally? It is a deeply dumbed-down psychology or moral theology that would deny the pervasiveness of the erotic in human interactions. The unlimited elasticity of the Canadian rule is such that a substantial minority, if not a majority, of adults might be deemed guilty of sexual abuse". Immediately after, Neuhaus gives the following example: "Consider this application of the Canadian rule. Almost twenty years ago a priest in the Midwest was ministering to a family whose father had just died. The fourteen years old daughter was utterly distraught, sobbing that God did not care. The priest, with the mother present, held the girl in his arms, assuring her, It isn't true. God loves you. The Church loves you. I love you'. I expect every priest or minister has done that more than once. As have doctors, teachers, fathers, uncles, and innumerable others in similar circumstances. The girl in question has subsequently led a most unhappy life, with two divorces, multiple affairs, and a serious drug problem. She has now charged the priest with sexual abuse, citing that embrace of almost twenty years ago. The priest, a beloved parish pastor, has been publicly shamed and removed from the ministry, for the rest of his life. The bishop says he acted reluctantly, 'but Dallas gave me no choice'. In other words, 'Dallas made me do it'. Such is the product of panic". R.J. NEUHAUS, *Seeking a Better Way*, in *First Things*, October 2002, p. 85.

⁴⁷ Canonical doctrine reveals that there exist motives that justify acts which if were not for such motives would be rightly considered abuses. "Iam vero haec iusta causa (...) quoad oscula, amplexus, manuum contractationem secundum probatos auctores adesse censentur, cum, attentis moris regionalis, urbanitatis, bonae amicitiae, etiam viri vinculo sanguinis devincti et boni amici amplexus et oscula sibi mutuo praestant, praesertim si id fit in publico, sine ullius offensione, a personis quoque honestis; pariter cum blanditias, oscula, etc. ex nostra humanissima comitate impuberibus (saltem infra decennis) coram eorum parentibus vel aliis personis honestis veluti obsequium quoddam exhibemus. Itaque ubi secundum sanum viri prudentis timorataeque conscientiae iudicium actus externus positus *nullam fundatam suspicionem* libidosae voluntatis pandit, ibi sermo de 'delicto' commisso moveri nequit. Quod locum habet de actu posito sive circa puberem sive circa impuberem". A. YANGUAS, *De crimine pessimo et de competentia S. Officii relate ad illud*, in *Revista Española de Derecho Canónico*, 1 (1946), p. 429.

Canon 2359 §2 of the Code of Canon Law of 1917 ("CIC 1917") defines as a canonical delict any act against the sixth commandment committed with a minor of less than sixteen years⁴⁸.

This delict was also regulated, at least partially, by the norms of the Congregation of the Holy Office⁴⁹ because it was included in the so-called *crimen pessimum* defined as "quodcumque obscoenum factum externum, graviter peccaminosum, quomodocumque a clerico patratum vel attentatum cum persona proprii sexus"⁵⁰. The Congregation of the Holy Office was thus competent to decide cases of delicts against the sixth commandment committed by a priest or deacon with a minor of the male sex. Offences committed with minors of the female sex were not included. However, the norms of the Congregation also indicated that, as concerns its penal consequences, "quodvis obscoenum factum externum, graviter peccaminosum, quomodocumque a clerico patratum vel attentatum cum *impuberibus cuiusque sexus*"⁵¹ was considered a *crimen pessimum*. Therefore the Congregation of

⁴⁸ "Si delictum admiserint contra sextum decalogi praeceptum cum minoribus infra aetatem sexdecim annorum, vel adulterium, stuprum, bestialitatem, sodomiam, lenocinium, incestum cum consaguineis aut affinibus in primo gradu exercuerint, suspendantur, infames declarentur, quolibet officio, beneficio, dignitate, munere si quod habeant, priventur, et in casibus gravioribus deponantur" (c. 2359 § 2, CIC 1917).

⁴⁹ It was a delict which was under the competence of that Congregation; this competence was at times exclusive, while in some cases, only the prior information of the Congregation was required for such competence to arise. Cf. A. YANGUAS, *De crimine pessimo et de competentia S. Officii relate ad illud*, cit. p. 430. Cf. SUPREMAE SACRAE CONGREGATIONIS SANCTI OFFICII, *Instructio cum conceptu criminis pessimi eiusque reservatione*, 1937. These norms were never published in AAS but one may come across references to them in some legal collections, for instance, SUPREMAE SACRAE CONGREGATIONIS SANCTI OFFICII, *Notificatio ad Supremos Moderatores Institutorum perfectionis de modo procedendi contra religiosos reos criminis pessimi*, 1 August 1962, in X. OCHOA, *Leges Ecclesiae*, vol. 3, n. 3072.

⁵⁰ SUPREMAE SACRAE CONGREGATIONIS SANCTI OFFICII, ad omnes patriarchas, archiepiscopos, episcopos aliosque locorum ordinarios etiam ritus orientalis, *Instructio de modo procedendi in causis sollicitationis*, Typis Polyglottis Vaticanis MCMLXII, n. 71. This instruction was approved by John XXIII on 16th March 1962. It was however never published in AAS. It can be found in <http://www.bishop-accountability.org/downloads/crimenlatinfull.PDF> (visited on 20th January 2004). After transcribing this definition of *crimen pessimum*, Miguélez adds, "Unde non sola sodomia consummata seu perfecta nomine venit criminis pessimi, sed etiam actus imperfecti, uti oscula, amplexus, tactus impudici, etc., qui ex libidine perguntur et in foro externo sunt clerico imputabiles". L. MIGUÉLEZ, *Comentario al can. 2359*, in L. MIGUÉLEZ-S. ALONSO-M. CABREROS, *Código de Derecho Canónico y legislación complementaria*, Madrid 1976, p. 872.

⁵¹ The norm in full reads: "Crimini pessimo, pro effectibus poenalibus, aequiparatur

the Holy Office was competent to handle delicts against the sixth commandment committed by a priest or deacon with a minor of the female sex who was less than sixteen years old but had not attained the age of puberty (twelve years). Where the minor was more than twelve years old, the crime was left to the competence of the ordinary tribunals under c. 2359 §2 of the CIC 1917⁵².

The competence of the Congregation of the Holy Office was also seen in the fact that the legal process for this delict was carried out according to its special norms. For this reason if a diocesan tribunal decided the matter it was obliged to apply these special procedural norms.

The CIC 1983 provided that some delicts were to be under the sole competence of the CDF⁵³ but did not, however, specify which delicts it was referring to. As a result, its promulgation left unclear whether or not the norms of the Congregation of the Holy Office of 1962 were still in force especially because the CIC 1983 had derogated previous laws (cfr. c. 6, § 1, 3°). Llobell comments that "considerando che il CIC 1983 ha incluso alcune delle fattispecie costitutive del 'crimen pessimum' nel can. 1395 e applicando il principio di legalità penale, si potrebbe sostenere – in modo simile a quanto abbiamo detto sulla sollecitazione – sia la riserva di tali fattispecie alla Congregazione, sia l'applicazione della menzionata *lex propria processuale*"⁵⁴. This statement

quodvis obscenum factum externum, graviter peccaminosum, quomodocumque a clerico patratum vel attentatum cum impuberibus cuiusque sexus vel cum brutis animantibus (*bestialitas*)". SUPREMAE SACRAE CONGREGATIONIS SANCTI OFFICII, *Instructio de modo procedendi in causis sollicitationis*, cit. n. 73.

⁵² "Immo nec omne peccatum obscenum a Clericis commissum 'cum minoribus sexdecim annorum': v.g. fornicatio cum puella tredecim annorum, cadit sub ambitu competentiae, de quo nunc loquimur, illius Supremi Tribunalis; talia enim delicta, exceptis commissis a clericis cum viro pubere vel impubere, cum femina impubere et cum brutis animantibus, non veniunt nomine criminis pessimi. Quare tribunal dioecesanum, absoluta causa super quocumque alio delicto obsceno enumerato, certius de eo S. Officium reddere non tenetur". A. YANGUAS, *De crimine pessimo et de competentia S. Officii relate ad illud*, cit., p. 431.

⁵³ This can be deduced from the special period stipulated for the prescription of criminal actions for delicts reserved to the Congregation for the Doctrine of the Faith. Cf. c. 1362 § 1,1.º. The Apostolic Constitution *Pastor bonus*, art. 52, also provides for the reservation of certain delicts (among them: "graviora delicta contra mores commissa"). The *Regolamento generale della Curia Romana*, of 4th February 1992, art. 112 confirmed this reservation (cf. *Enchiridion Vaticanum*, vol. 13, n. 942). The new version of the *Regolamento generale della Curia Romana*, of 30th April 1999 in art. 128 does the same (cf. *Enchiridion Vaticanum*, vol. 18, n. 791, English translation: *General Regulations of the Roman Curia*, in *Exegetical Commentary on the Code of Canon Law*, Montreal/Chicago, 2004, vol V , p. 234).

⁵⁴ J. LLOBELL, "I delitti riservati alla Congregazione per la dottrina della Fede," in *Le*

made in 1997, that is, before the promulgation of *m.p. 'Sacramentorum sanctitas tutela'* and the letter *Delicta graviora*, alluded to the fact that the 1962 Norms were still in force. Nevertheless, the author mentions that there was uncertainty in the doctrine above all after the promulgation of the Rescript *ex audientia* of 25th April 1994 which established a particular penal law for the USCCB that could annul the legal force of the special procedural law⁵⁵.

It is surprising that the Rescript *ex audientia* does not mention the special norms of the Congregation of the Holy Office (not even when it deals with the competence of ecclesiastical tribunals to decide cases of sexual abuse of minors). This is particularly notable if one takes into account the fact that the *m.p. 'Sacramentorum sanctitas tutela'* appears to confirm that those norms remained in force until the promulgation of the *motu proprio*.

Consequently, in accordance with the law in force until 1983, a sin against the sixth commandment committed by a priest or deacon with a minor who had attained sixteen years of age was not considered a reserved delict except in the case of *crimen pessimum*.

b) Prescription of penal action

Art. 8A of the Essential Norms, after making reference to the CDF, reads: "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 dispensation from the prescription, while

sanzioni nella Chiesa, Quaderni della Mendola, 5, Milano 1997 p. 275.

⁵⁵ After a detailed study of the Rescript he concludes: "Di conseguenza si potrebbe sostenere che la fattispecie di pedofilia del chierico con un minore di sedici anni è stata esclusa dal *crimen pessimum*. Ciò comporterebbe, secondo classici criteri ermeneutici, l'abrogazione della riserva alla Congregazione sulle altre fattispecie vigenti rientranti nel *crimen pessimum*. (...) Se la nostra esegesi fosse esatta, si dovrebbe concludere che non è vigente la riserva alla congregazione sulle fattispecie del *crimen pessimum* comprese nel can. 1395 né, quindi, è vigente la legge processuale propria di questo dicastero né lo speciale termine di prescrizione dell'azione penale da essa previsto". J. LLOBELL, "I delitti riservati alla Congregazione per la dottrina della Fede," cit. p. 378. De Paolis observes: "con la riforma della Congregazione c'è stato un momento in cui si è dubitato della sua riserva. Anzi in un rescritto *ex Audientia Santissimi* risultava come ovvio che esso fosse della competenza ordinaria del Tribunale della Rota Romana, almeno come tribunale di appello". V. De PAOLIS, "Norme 'De gravioribus delictis' riservati alla Congregazione per la Dottrina della fede," in *Periodica*, 91 (2002), p. 309.

indicating appropriate pastoral reasons".⁵⁶ This means that the prescription of a delict according to universal law does not disqualify the possibility of initiating a legal action.

The CIC 1917 stipulated five years as the prescription period of a penal action for delicts against the sixth commandment⁵⁷. The same canon provided that different norms applied to the delicts reserved to the Congregation of the Holy Office and according to these norms action for such delicts was never extinguished⁵⁸.

The time span predetermined by the CIC 1983 for the prescription of the delicts enumerated in c. 1395 is five years instead of the normal period of three years⁵⁹. However, there was no clear legal provision as regards the prescription period for delicts reserved to the CDF.

⁵⁶ The new text is more precise: "If the case would otherwise be barred by prescription, because sexual abuse of a minor is a grave offense, the bishop/eparch may apply to the Congregation for the Doctrine of the Faith for a derogation from the prescription, while indicating relevant grave reasons". Essential Norms 2006, art. 8 A. As a complement to what art. 8 said, the dioceses need to specify how pastoral reason were to be evaluated: "In determining whether such pastoral reasons exist, the Archbishop may consider the following: testimony concerning the cleric's life and ministry since the time of the allegation; harm caused to the complaint; harm caused to the ecclesial community by the complaint; whether the harm may be repaired by other means". ARCHDIOCESE OF BOSTON, *Policies and Procedures for the Protection of Children*, 26 June 2003, Art. 10, 1.3.

⁵⁷ Cf. canon 1703, 2°.

⁵⁸ Albeit the fact that the norms of the Congregation explicitly prohibited the non prescription of the penal action only in the case of the delict of solicitation (cf. SUPREMAE SACRAE CONGREGATIONIS SANCTI OFFICII, *Instructio de modo procedendi in causis sollicitationis*, cit. n. 22), the indication that the legal dispositions concerning the delict of solicitation also apply to *crimen pessimum* ("Quae de crimine sollicitationis hucusque statuta sunt, valeant quoque, mutatis tantum pro rei natura necessario mutandis, pro crimine pessimo, si quis forte clericus penes loci Ordinarium de eo (quod Deus avertat) accusari contingat, excepta obligatione denunciationis ex lege Ecclesiae positiva, nisi forte ipsum fuerit cum crimine etiam sollicitationis in confessione sacramentali coniunctum". n. 72) leads us to conclude that the penal action of the rest of the delicts cannot also be extinguished. Cf. J. LLOBELL, "I delitti riservati alla Congregazione per la dottrina della Fede," *cit.* p. 256.

⁵⁹ Cf. canon 1362, § 1, n. 2. With regard to this, *vid.* V. DE PAOLIS-D. CITO, *Le sanzioni nella Chiesa. Commento al Codice di Diritto canonico. Libro VI*, Roma 2000, p. 275. Here the authors express their perplexity in relation to the brevity of the prescription period provided for in c. 1395 considering that the victim in question is a minor. They thus recommend an extension if this period.

Canon 1362 of the CIC 1983 has been derogated in at least three cases. In the first place, in 1994 in the U.S.A it was derogated by the already mentioned Rescript which provided that "this norm is so to be applied that criminal action is not extinguished unless the following conditions have been fulfilled: a) the one who suffered the delict has completed the twenty-eighth year of age; and b) at least one year has passed from the denunciation regarding the same delict, as long as the denunciation was made before the one who suffered the injury had completed the twenty-eighth year of age"⁶⁰. This means that the prescription period of penal action was to be ten years from the day on which the victim had attained the age of majority, with the exception of the cases where there had been an extension of one year. The consequences of that derogation, J.A. Alesandro asserts, vary depending on the age of the minor at the moment of the commission of the offence⁶¹. This derogation had initially been granted *ad tempus* for five years and was later extended to 25th April 2009⁶².

The second exception applies to the Catholic Church as a whole. The period of prescription specified in c. 1362, §1, 2° was modified when it became clear that the delict provided for in c. 1395 §2 if committed with a minor was included among the delicts reserved to the CDF⁶³. On account of this and by

⁶⁰ The Roman Pontiff granted this exemption for a period of 5 years, cf. SECRETARY OF STATE, *Rescript*, April 25, 1994, in *Ius Ecclesiae*, 8 (1996), p. 193. For a commentary on this decision, *vid.* J.A. ALESANDRO, "Canonical delicts involving sexual misconduct and dismissal from the clerical state. A background paper," in *Ius Ecclesiae*, 8 (1996) p. 183-186.

⁶¹ "For example, if the minor were ten years old at the time of the most recent act, the cleric would be subject to the penalty for eighteen years (plus an extension of no more than one year if the denunciation did not occur until the minor in question was twenty-seven years of age). On the other hand, if the minor were seventeen years old at the time of the most recent act, the statute of limitations would expire in eleven years (plus any applicable extension if the denunciation were during the last year of the period)". J.A. ALESANDRO, "Canonical delicts involving sexual misconduct and dismissal from the clerical state. A background paper," *cit.* p. 186.

⁶² Cf. T.J. GREEN, *Commentary on can. 1395*, in *New Commentary on the Code of Canon Law*, New York 2000, p. 1599, n. 290.

⁶³ By virtue of the Apostolic Constitution *Pastor Bonus*, art. 52, it was known that the Congregation for the Doctrine of the Faith was competent to examine and adjudicate those delicts committed against the faith as well as the more grave delicts against morals and the celebration of the sacraments. *De delictis gravioribus*, a letter of the Congregation for the Doctrine of the Faith dated 18th May 2001, indicates that the reserved delicts include: "Delictum contra mores, videlicet: delictum contra sextum Decalogi praeceptum cum minore infra aetatem duodeviginti annorum a clerico commissum" (in *Ius Ecclesiae*, 14 [2002], p. 344). However, before the publication of this letter it was not possible to single out these reserved delicts. With regard to this, cf. J. LLOBELL, "I delitti riservati alla Congregazione per la

virtue of c. 1362 §1, 1°, the offence was to have a special prescription period. This period had not been established in the CIC 1983 and thus the only thing that was certain was that it was not three years. The special law that regulates reserved delicts has served to fill in the lacuna. The letter of the CDF dated 18th May 2001 concerning grave delicts reserved to that Congregation specifies that the prescription period of those delicts is ten years⁶⁴. This is also provided for in art. 5 of the Substantive and Procedural Norms for these delicts promulgated together with *m.p. 'Sacramentorum sanctitas tutela'*⁶⁵.

Thirdly, on 7th November 2002 the Roman Pontiff granted the CDF the faculty to derogate the prescription period in specific cases after considering the petition of the bishop and the reasons on which such a petition is grounded⁶⁶.

dottrina della Fede," *cit.*, p. 237-278.

⁶⁴ "Notandum est actionem criminalem de delictis Congregationi pro Doctrina Fidei reservatis praescriptione extingui decennio. Praescriptio decurrit ad normam iuris universalis et communis; in delicto autem cum minore a clerico patrato praescriptio decurrere incipit a die quo minor duodevicesum aetatis annum explevit". C. PRO DOCTRINA FIDEI, Epistula *De delictis gravioribus* eidem Congregatione pro Doctrina Fidei reservatis, 18 May 2001, in *Ius Ecclesiae*, 14 (2002), p. 344.

⁶⁵ *Normas de gravioribus delictis Congregatione pro Doctrina Fidei reservati*, art. 5 provides: "§ 1. A criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by a prescription of ten years. § 2. Prescription runs according to the norm of can. 1362, §2, of the Code of Canon Law and can. 1152, § 3, of the Code of Canons of the Eastern Churches. In the delict however spoken of in art. 4, § 1, prescription begins to run from the day on which a minor reaches the eighteenth year of age". The delict mentioned in art. 4 is the one against the sixth commandment committed by a priest or deacon with a minor of less than 18 years. These norms have not been published in AAS; an English translation may nevertheless be found on <http://www.opusbonosacerdotii.org/CDF%20Trial%20Norms.htm> (website visited in January 2004); some publications also cite them in Latin. De Paolis observes the following with reference to the 10 year period: "L'ultima norma sostanziale riguarda il tempo della prescrizione, che rimaneva indeterminato nel c. 1362. Essa viene estesa a dieci anni. Un periodo sufficientemente lungo, e certamente molto più lungo di quanto previsto nella legislazione precedente. La lunghezza del periodo diventa ancora più rilevante, se si pensa che il tempo del decorso è stato fissato ai 18 anni della vittima del crimine. Si pensa infatti che il bambino non sia ancora in grado di far valere il diritto di avviare l'azione penale se non ha raggiunto un certo limite di anni, ossia se non è uscito dalla minore età". V. DE PAOLIS, "Norme 'De gravioribus delictis' riservati alla Congregazione per la Dottrina della fede," in *Periodica*, 91 (2002), p. 309.

⁶⁶ "Il Santo Padre nell'Udienza concessa all'Ecc.mo Segretario della CDF, S.E.R. Mons. Tarcisio Bertone, il 7 novembre 2002, ha concesso la facoltà alla CDF di derogare ai termini della prescrizione, caso per caso, su motivata domanda dei singoli Vescovi", in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, *cit.* p. 314. With regard to this

It is in this context that art. 8A of the Norms of the USCCB was formulated and passed.

Although the Essential Norms do not mention it, it seems reasonable that the motives that justify the dispensation of the prescription period or the dispensation of the prescription itself should take into account all the circumstances in which the delict was committed. These circumstances include the age of the victim and the fact that he was a minor when the offence was committed. The age of the minor is pertinent due to the fact that according to Canon Law the mere fact of not having attained the age of majority does not exonerate from legal responsibility. Consequently, the minor is not considered incapable of acting legally. In fact the normative system distinguishes categories of minority according to age, and recognizes the progressive legal capacity⁶⁷. It is for this reason that it is necessary to take into consideration the age of the minor and whether he consented to the offence.

Another circumstantial element that is significant is the context in which the offence was committed. The clerical condition of the offender is essential because it places him in a position of superiority in relation to the minor not only due to the difference in age but also due to the fact that the offender represents the Church (he represents Christ and this is what aggravates the offence). It is therefore important to show that the victim knew (when he consented to the offence) that the offender was a priest or deacon.

The possibility of obtaining a derogation of the prescription undoubtedly creates an unusual situation in which, in certain cases, action for some offences against minors can always be initiated. Although this situation can be reasonably justified, it does bring about serious problems as concerns the institute of prescription.

The crime under discussion is certainly grave. It is also true that the offender should be punished and damages paid. However, following traditional juridical principles, the Legislator has seen it reasonable and just to establish that criminal proceedings should not be initiated after a certain period of time has lapsed (from the day the offence was committed or, if the offence was enduring and habitual, from the day it ceased)⁶⁸.

decision, *vid.* R. W. OLIVER, "*Sacramentorum Sanctitatis Tutela: Overview and Implementation of the Norms concerning the more Grave Delicts reserved to the Congregation for the Doctrine of the Faith,*" *cit.*, p. 158.

⁶⁷ In relation to this, cf. L. NAVARRO, *Persone e soggetti nel diritto della Chiesa*, Roma 2000, p. 41-45.

⁶⁸ "The public good of the Church requires that a criminal action be initiated within a certain time. After that time has elapsed, the action is extinguished by prescription". A. BORRAS, *Commentary on canon 9*, in *Exegetical Commentary on the Code of Canon Law*, edited

In order to fully appreciate the ecclesiastical dimension of prescription⁶⁹ one needs to take into account the possibility of repentance of the offender and the fact that time plays an important role in this. Furthermore, the fact that the delinquent has abstained from criminal action during a certain period of time goes to demonstrate that he is no longer a threat to the ecclesiastical society. Prescription is also justified by the fact that with the passage of time there is a higher likelihood of condemning an innocent person due to the consequent difficulty of obtaining witnesses and also because there is a tendency to forget things as time passes⁷⁰.

It is worth mentioning that if, according to the law most favorable to the offender, the criminal action is considered extinguished by prescription, criminal proceedings cannot be justly initiated.

c) *Ex officio* dismissal from the clerical state

Art. 10 of the Essential Norms deals with the loss of the clerical state through the dispensation of corresponding obligations and dismissal *ex officio*. It reads: "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"⁷¹.

It is perfectly comprehensible that a priest or deacon, who has committed this kind of delict, after having reflected on the situation, freely decides to seek

by A. Marzoa, J. Miras and R. Rodríguez-Ocaña, vol. IV/1, Wilson & Lafleur, Montreal Canada, 2004, p. 426. For a comment on the appropriateness of prescription, cf. R. W. OLIVER, "Sacramentorum Sanctitatis Tutela: Overview and Implementation of the Norms concerning the more Grave Delicts reserved to the Congregation for the Doctrine of the Faith," *cit.*, p. 157-158.

⁶⁹ "Ex una parte sane, qui equidem deliquit, sed tam constanter postea modeste vixit, magis modo videtur peccavisse impetu, ignorantia, aut infirmitate, quam dolo, animove ingenuitatis experte: ex factis quippe secutis cum in omnibus rebus, tum praecipue in his, quae ad mores attinet, conjecturam praecedentium probabilissimam accepimus; ex altera parte vero, si ex criminis reus in perpetuo accusationis et mortis metu sit futurus, in desperationem actus ulterius grassabitur; dum secus spe poenae vicennio (vel post aliud temporis spatium) evadendae facilius ad verecundiam ac honestam vitam erit excitandus, ne interea per mores improbos in patrati criminis suspiciones, deducatur". G. MICHIELS, *De delictis et poenis*, vol. II, *cit.*, p. 325-326.

⁷⁰ Cf. G. MICHIELS, *De delictis et poenis*, vol. II, Parisiis-Tornaci-Romae-Neo Eboraci 1961, p. 325.

⁷¹ Art. 10.

dispensation from celibacy and the obligations of the clerical state. The corresponding ecclesiastical authority may also advise the priest or deacon to do so. In effect, in ordinary circumstances such a petition is made by the priest or deacon given that the dispensation is considered a favor, that is, not due out of justice.

The possibility of *ex officio* dismissal even without the consent of the priest or deacon, albeit only in exceptional cases, is quite surprising. Taking into account the fact that expulsion from the clerical state is a sanction for particularly grave delicts, the law establishes that this sanction (perpetual in nature) should be applied only after the matter has gone through a judicial process presided over by a collegial tribunal (cf. c. 1342 §2). Thus the hypothetical situation where a priest or deacon could be dismissed from the clerical state without prior judicial process is contrary to the law. It is also inconsistent with the *m.p. 'Sacramentorum sanctitatis tutela'* which in art. 17 provides that: "Delicta, quae Congregationi pro Doctrina fidei reservata sunt, nonnisi in processo iudiciali, perseguenda sunt"⁷².

Yet the Roman Pontiff in a decision of 7th February 2003 granted the CDF the faculty to allow the dispensation of art. 17 in very grave cases. This refers to matters which on examination by the Congress of this Congregation are deemed apt to be presented to the Roman Pontiff for *ex officio* dismissal or to be resolved through the brief process (c. 1720). In such cases, if the diocesan bishop is of the opinion that the offender should be dismissed from the clerical state, all he needs to do is ask the Congregation to apply the punishment by way of decree⁷³. In addition, appeal to the Apostolic Signatura against

⁷² *Normae procedurales*, art. 17, in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, cit. p. 307.

⁷³ The decision reads as follows: "Viene concessa alla CDF la facoltà di dispensare dall'art. 17 nei casi gravi e chiari che a giudizio del Congresso Particolare della CDF: a) possono essere portati direttamente al Santo Padre per la dimissione *ex officio*; ovvero b) possono essere trattati con il rito abbreviato di cui al can 1720 dall'Ordinario che, nel caso sia del parere di procedere alla dimissione del reo, dovrà chiedere alla CDF la comminazione di detta pena per decreto", in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, cit. p. 315.

sentences made through the administrative procedure of this Congregation with regard to *delicta graviora* is not allowed⁷⁴.

A similar situation applies to cases of dispensation from celibacy. Since 1989 till 2005 this dispensation was granted exclusively by the Congregation for Divine Worship and the Discipline of the Sacraments⁷⁵. This Congregation has on few occasions employed the administrative procedure *ex officio* where priests in irregular circumstances refused to solicit the dispensation after the judicial process had been declared and proved impossible. In each of these cases the Roman Pontiff's consent had been previously sought so as to follow this procedure as an exception to the rule. A look at statistics published in official journals reveals that there have been 22 cases of dismissal of the clerical state *in poenam ex officio* between 1996 and 2001⁷⁶.

Ex officio dispensation is always an exception given that the general rule is that dispensations should be granted on petition by the interested person. The only legal norms that have ever provided for *ex officio* dismissal from the clerical state and dispensation from celibacy (that is, by way of administrative procedure) are those of the CDF of 1971 (at that time the competent body to grant the aforementioned dispensation). This sanction was applied only in cases in which it was deemed necessary after sufficient investigation. Where

⁷⁴ On 14th February 2003, the Roman Pontiff established special norms for the recourse against certain administrative acts of the Congregation for the Doctrine of the Faith: "Nei casi di *delicta graviora*, le richieste di revoca di provvedimenti amministrativi della CDF e tutti gli altri ricorsi contro detti provvedimenti, fatti a norma dell'art. 135 del *Regolamento Generale della Curia Romana*, saranno riferiti alla FERIA IV che deciderà nel merito e sulla legittimità *remoto quovis ulteriore recursu de quo in art. 123 Constit. Apost. Pastor Bonus*" (in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, cit. p. 316). In addition to this, the Roman Pontiff granted the Congregation the faculty to validate procedural acts of inferior tribunals. (cf. decision of 7th February 2003, in W.H. WOESTMAN, *Ecclesiastical Sanctions and the Penal Process*, cit. p. 316).

⁷⁵ Since 1st August 2005 the competent dicastery is the Congregation for Clergy.

⁷⁶ The report presented by the Secretary of the Congregation for Divine Worship and the Discipline of the Sacraments in the plenary session held in 2001 (the previous one had been in 1996) indicates that in the case of deacons who are unsuitable for this ministry but who do not petition for dispensation the Ordinary should follow the judicial procedure provided for in c. 1425. It adds that: "poiché tale procedura vale anche per i sacerdoti *non idonei che si rifiutano* di chiedere la dispensa, per alcuni pochi casi (finora 22) per i quali fu dichiarata e dimostrata l'impossibilità di seguire la procedura giudiziaria, il Dicastero ha riferito al Santo Padre chiedendo ed ottenendo, di volta in volta, l'autorizzazione ad irrogare la dimissione dallo stato clericale *in poenam ex officio*". F.P. TAMBURRINO, "Relazione all'adunanza "plenaria" della Congregazione per il Culto Divino e la Disciplina dei Sacramenti," in *Notitiae*, 37 (2001), p. 430.

the results of such an inquiry revealed a perverse life, doctrinal errors or any other grave cause, the priest would be dismissed from the clerical state; and at the same time, out of mercy, would be granted a dispensation from the corresponding obligations so as to avoid his eternal condemnation⁷⁷. In some of these cases, even though there was sufficient proof that the offender had committed the delicts he had been accused of, the ecclesiastical authority ensured that the defense of the offender and the fairness of the sanction were both guaranteed.

During the revision of the Code of Canon Law the question as to whether or not to allow the *ex officio* dismissal from the clerical state arose. The Commission in charge of the review even received a proposal regarding the *ex officio* dismissal of deacons who not being apt for ministry refused to solicit dispensation⁷⁸. In spite of that, the Commission decided not to admit this possibility because they were of the view that it could give rise to abuses⁷⁹.

⁷⁷ "Congrua congruis referendo, ea quae in his regulis statuta sunt pro casibus in quibus sacerdotes sponte petunt reductionem ad statum laicalem cum dispensatione ab oneribus ex sacra ordinatione manantibus, applicando sunt etiam in casibus in quibus aliquis sacerdos, vel ob pravam vitam, vel ob errores in doctrina, vel ob aliam gravem causam, videtur post necessariam investigationem reducendus ad statum laicalem et simul ex misericordia dispensandus ne periculum aeternae damnationis incurrat". S.C. PRO DOCTRINA FIDEI, *Normae ad apparandas in Curiis dioecesanis et religiosis causas reductionis ad statum laicalem cum dispensatione ab obligationibus cum sacra Ordinatione conexis*, 13 January 1971, n. VI, AAS 63 (1971), p. 308. For a case of dismissal *ex officio* during the period in which the 1971 norms were in force, cf. VICARIATO DI ROMA, Decreto, 2 August 1976, in X. OCHOA, *Leges Ecclesiae*, vol. 5, n. 4461. As concerns the same case, *vid.* also statements made by Cardinal Poletti on 4th April 1975 (in *Rivista diocesana di Roma*, 16 [1975], p. 293-294) and on 16 June 1976 (in *Rivista diocesana di Roma*, 17 [1976], p. 735-737), and press conference given by the Vicariate of Rome (in *Rivista diocesana di Roma*, 17 [1976], p. 738-740).

⁷⁸ Cf. V. FERRARA, "L'istituto canonico della dispensa pontificia dal celibato e dagli altri obblighi dell'ordinazione. Evoluzione storico-giuridica della normativa sostanziale e procedurale ed attribuzione di competenza a trattarne: dalle origini alla Costituzione Apostolica *Pastor bonus* (1988) di Giovanni Paolo II," in *Apollinaris*, 67 (1994), p. 552-553.

⁷⁹ In the session held on 17 January 1980 to discuss *ex officio* dismissal which had been proposed in the draft of canon 290 (canon 150: "clericus statum clericalem amittit: (...) 4.º per decretum dimissionis e statu clericali *ex officio* ad normam iuris prolatum". *Schema canonum libri II "De Populo Dei"*, 1977, in *Communicationes*, 14 [1982], p. 85), the Secretary of the Commission pointed out that "la dimissio *ex officio* è una questione molto difficile e delicata. Gli organi consultivi non hanno fornito elementi validi. Le cause e motivi da essi proposti per la dimissio *ex officio* sono quasi tutte cause e motivi da considerarsi nel diritto penale per le *poenae dimissionis a statu clericali*; rimangono escluse due o tre fattispecie peraltro poco chiare" (*Communicationes*, 14 [1982], p. 85). As a result, "concordano tutti di tenerlo in sospeso. La dimissione *ex officio*, senza cioè una motivazione o causa da configurarsi

What was at stake was nothing less than the canonical condition of a faithful and his rights as a priest or deacon. After the *Schema* CIC of 1980 nothing more was heard of *ex officio* dismissal; this was also because the new norms of the CDF vis-à-vis the dispensation from celibacy had entered into force in October of the same year⁸⁰. There was only one amendment in the phrasing of what would eventually become c. 290, 3° that provides for the loss of the clerical state *ex rescripto Apostolicae Sedis*. The *Schema* CIC of 1980 had specified that this Rescript would only be granted following the petition of the priest or deacon but later on the phrase "*ad instantiam ipsius clerici concessio*" was removed⁸¹. Though this may be used as a basis for allowing *ex officio* dismissal, at present this argument cannot be sustained since the dispensation from celibacy is subject to specific norms which do not permit this possibility.

The reasons which led the Commission responsible for the revision of the CIC 17 to reject the aforementioned proposal to authorize *ex officio* dismissal lead to the conclusion that the judicial process is the most suitable in such cases⁸²

come delitto, può dare adito ad abusi; comunque, se rimane, deve, secondo Mons. Segretario, essere completato specificando bene le cause e la procedura. Sono d'accordo, anche in quest'ultima considerazione, sia il terzo che il settimo Consultore per cui la tutela dei diritti dell'uomo non può essere lasciata alla discrezionalità nell'ambito amministrativo" (*ibidem*, p. 87).

⁸⁰ S.C. PRO DOCTRINA FIDEI, *De modo procedendi in examine et resolutiones petitionum quae dispensationem a caelibatu respiciunt*, 14 October 1980, in AAS, 72 (1980), p. 1132-1137.

⁸¹ The reason for this is indicated in the *Relatio* 1981: "Deleantur verba 'ad instantiam ipsius clerici' quia oportet praevideri quoque casus reductionis ad statum laicalem 'propter indignitatem' ipsius clerici. (Duo Patres). "R. Recipitur animadversio, quia rescriptum est responsum auctoritatis competentis 'ad petitionem alicuius' (can. 59), et 'impetrari potest pro alio, etiam praeter eius assensum' (can. 61). Attamen standum est normis S. Congr. pro Doctrina Fidei quoad dimissionem a statu clericali 'ex officio'". *Communicationes*, 14 (1982), p. 175.

⁸² Grochowski observes that to accept proposals to modify the Code of Canon Law so as to allow the application of the administrative procedure in cases of very grave sanctions, such as dismissal from the clerical state, would amount to "un forte regresso in relazione a) al generale progresso compiuto, con il contributo del pensiero cristiano, in materia di applicazione delle pene; b) alla valorizzazione della dignità della persona umana e dei suoi diritti, da parte del Concilio Vaticano II; c) alla determinazione del Codice del 1983, affievolendo notevolmente anche la proclamazione, al citato can. 221, dei diritti fondamentali in materia; d) e pure alla tutela della giustizia e della carità, in quanto il processo amministrativo non dà più garanzie per arrivare alla certezza morale e al rispetto del diritto di difesa che quello giudiziario". Z. GROCHOLEWSKI, *Presentazione*, in *Il processo penale canonico*, cit. p. 7. About the draft legislation of 1997 about *ex officio* dismissal, *vid.* A. D. Busso, "La dimisión del estado clerical *ex officio* de los clérigos no idóneos que han cometido delito grave y rechazan pedirla *pro*

as it guarantees the protection of the rights of the accused person. Yet it is not enough for the process to be a judicial one, it should also be presided over by a collegial tribunal and the possibility of appeal provided for⁸³.

Furthermore, as required by art. 10 of the Essential Norms, the consent of the Roman Pontiff is necessary for the validity of the imposition of *ex officio* dismissal as it is considered an exceptional measure. Here the principle of subsidiarity can also serve as a guide: the Holy See should not do what the dioceses can do especially if they have sufficient means and well trained personnel⁸⁴. In other words, it would not make sense to opt for the administrative procedure where it were possible to use the judicial process.

6. Conclusion

It should be clear from what has been said that the manner in which the implementation of the Essential Norms is carried out is of utmost importance. Key in this process is the role of the canon lawyer.

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.

The exhortation of the Roman Pontiff to the Congregation for the Doctrine of the Faith regarding penal procedural law can be applied to the Essential Norms in relation to those priests and deacons accused of sexual abuse. The Roman Pontiff pointed out that canonical norms should be applied with justice and equity. This means that, among other things, they should protect the right of the accused person to defend himself, they should seek the common good and also ensure the due proportionality between the offence and the punishment

gratia, en relación con el período de su formación sacerdotal," in *Anuario Argentino de Derecho Canónico*, 9 (2002), p. 39-50.

⁸³ A decree for the dismissal from the clerical state and dispensation from clerical obligations of the Congregation for the Doctrine of the Faith dated 25 January 2003 and published on http://www.viottoli.it/download/fogliocdb/all_apr03.PDF deals with a case in which the Roman Pontiff is said to have decreed such disposition in a supreme and definitive (not appealable) decision after receiving information concerning the grave misconduct of the priest in question.

⁸⁴ Some mission dioceses which do not have the possibility of counting on professionally trained personnel in judicial matters may be justified in seeking the intervention of the Roman Pontiff. Yet even in such cases the accused person should be given an opportunity to defend himself and the sanction should not be inflicted without the prior moral certitude required by law.

meted out⁸⁵. Therefore, each case should be examined in light of the circumstances surrounding the commission of the delict, taking into consideration the time that has lapsed since the commission of the criminal act and possible attenuating or aggravating factors. Moreover, whenever feasible the principle of graduality in the application of canonical sanctions should be respected⁸⁶. The judge should be prudent and avoid acting in a precipitated manner even though he may perceive the need to give an immediate solution. Such decisions often end up being counter-productive; an act of injustice cannot be remedied by another act of injustice⁸⁷.

⁸⁵ "In the past two years your Congregation has witnessed a considerable increase in the number of disciplinary cases referred to it because of the competence the Dicastery possesses in *ratione materiae* on *delicta graviora*, including the *delicta contra mores*. The body of canonical norms that your Dicastery is called to apply with justice and equity strives to guarantee both the exercise of the right of defense of the accused and the demands of the common good. Once the offence has been proven, it is necessary in each case to assess carefully both the just principle of proportionality between fault and punishment, as well as the predominant need to protect the entire People of God". JOHN PAUL II, *Address to the plenary assembly of the Congregation for the Doctrine of the Faith*, 6th February 2004, n. 6.

⁸⁶ The importance of this principle is shown by a recent decision of the Roman Rota which modified the sentence of a penal tribunal that had inflicted the sanction of dismissal from the clerical state on a priest who had been found guilty of sexual abuse. The substitution of the sanction was attributed to complex personal circumstances of the offender that amounted to attenuating elements. "His complexibus subiectivis circumstantiis prae oculis habentibus Patres censuerunt reductionem ad statum laicalem, quae est poena gravissima et perpetua in hoc stadio vitae conventi irrogandam non esse, dum, uti canon 1395 § 2 praevidet, iusta, gravi et diuturna poena puniendum esse, quae una cum oratione, meditatione et superna gratia possit sauciata personalitas mederi et ita plenam libertatem, dignitatem humanam et sacerdotalem recuperare queat, spe ducti ne reincidatur in iisdem delictis, quo in casu ad maximam sanctionem praevisa a canone 1395 § deveniendum forte fore". *Tribunal regionalis W.: Poenalis, Sententia definitiva c. Colagiovanni*, 14 June 1994, n. 11, in *Monitor Ecclesiasticus*, 122 (1997), p. 94-95. The priest was put under the supervision of the Superior of a monastery where he was to live for a period of ten years. During this time he was not permitted to exercise his ministry and could only celebrate Holy Mass in the monastery. Cf. *ibid.*, n. 12, p. 95. About this case, cf. A. MENDONZA, "Justice and equity in Decisions involving Priests," in *Philippine Canonical Forum*, 3 (2001), p. 80-85.

⁸⁷ Dismissal from the clerical state does not resolve the problem of sexual abuse seeing as it does not guarantee that the delinquent will not commit the delict again. In fact he may even find himself in a worse situation where he does not have adequate means to overcome the tendency to commit such crimes. Religious congregations in the United States have preferred not to expel the religious out of the institute while at the same time ensuring that he does not find himself in a situation which would lead him to the commission of other delicts. "Because of who we are as religious living lives in the witness of community, we are also called to compassionate responses to any among us who has committed this abuse. He is

In conclusion, the words of John Paul II in his last post-synodal apostolic exhortation with regard to the role of bishops may be enlightening to canon lawyers involved in cases of sexual abuse of minors:

“In cases of grave lapses, and even more of crimes which do damage to the very witness of the Gospel, especially when these involve the Church’s ministers, the Bishop must be firm and decisive, just and impartial. He is bound to intervene in a timely manner, according to the established canonical norms, for the correction and spiritual good of the sacred minister, for the reparation of scandal and the restoration of justice, and for all that is required for the protection and assistance of victims.”⁸⁸

Fidelity to what the Roman Pontiff affirms will also help civil society to see that the Church has a just juridical system. Canon lawyers are called upon to be firm, decisive, just and serene in the exercise of their function as jurists at the service of the People of God.

still our brother in Christ. We must share his burden. He remains a member of our family. Just as a family does not abandon a member convicted of serious crimes, we cannot turn our backs on our brother. If a religious has abused a child or adolescent, he is not only subject to civil and criminal law, but, according to the *Charter for the Protection of Children and Young People* adopted by the U.S. Conference of Catholic Bishops, he also cannot be reassigned to public ministries or be involved with young people. Though it may be long in coming, we must walk the journey with him through repentance, healing, forgiveness, and hopefully reconciliation. But our compassion does not cloud our clarity. We abhor sexual abuse. We will not tolerate any type of abuse by our members. Our tradition of fraternal correction requires us to hold one another accountable. In addition to being a crime, sexual abuse of this type violates our most fundamental values as religious. Bearing our responsibility, we place these men under severe restrictions after treatment and those with the greatest danger to the public are carefully supervised to avoid occasions where they can engage in abuse again. In situations where dismissal is appropriate, due process will be respected". CONFERENCE OF MAJOR SUPERIORS OF MEN, *Annual Assembly, Statement of LCWR National Board concerning Sexual Abuse*, Philadelphia, PA, Aug. 10, 2002, in <http://www.vidimusdominum.org/biblioteca/en/comunicatistampacom0033.htm>.

⁸⁸ JOHN PAUL II, Post-synodal Apostolic Exh. *Pastores gregis*, 16 October 2003, n. 21.