
D. OPTIONS OTHER THAN PENALTIES

On the other hand, this does not mean that the bishop's hands are tied when there is good reason to believe that the cleric is guilty though perhaps the evidence to prove such a fact is insufficient, or when the nature of the misconduct does not warrant dismissal. There are less drastic non-penal and penal options that may be more appropriate in addressing such a pastoral situation:

1. *penal remedies and penances.*
2. *administrative non-penal actions:* dispensation from clerical celibacy and declaration of an impediment to the exercise of orders.

1. Penal Remedies and Penances (cc. 1339-1340)

If it is clear to the bishop that the cleric in question is guilty of a grave delict punishable by dismissal from the clerical state, the bishop may not initiate the judicial process to dismiss unless he is convinced that one or more of the three goals of the penal process (*reparation* of harm, *restoration* of justice, *reformation* of the cleric) cannot be achieved by lesser remedies such as the following:

- a. Fraternal correction of the cleric (c. 1341).
- b. Reprimand of the cleric (public or private) (c. 1339, §2).
- c. Other pastoral remedies for example:
 - 1) Admonishing or warning the cleric about his behavior (c. 1339, §1).
 - 2) Imposing a penance to be performed by the cleric, even a public penance if the delict was not occult (c. 1340).
 - 3) Attaching a specific penalty to a legitimate order (precept), the violation of which can then be punished as warned (c. 1319).
 - 4) Removing or restricting diocesan pastoral faculties — e.g., the faculty to hear confessions (c. 974, §1), the faculty to preach (c. 764), the delegation to officiate at marriages (c. 1111). Note, however, that certain faculties are incorporated into an ecclesiastical office and may not simply be removed or restricted apart from an administrative process. This applies in a special way to the office of pastor (cf. cc. 528-530).

Any of these penal remedies and penances can be imposed by a simple

decree of the bishop (c. 1342, §1). If they are not successful in remedying the situation, however, the bishop may seek to impose a medicinal or an expiatory penalty or even move to the initiation of a judicial process to dismiss from the clerical state.

What does “remedy the situation” mean? The promotion of the *three pastoral goals*: reparation, restoration, reformation. The personal reform of the cleric, although it is extremely important, is not the sole criterion for determining whether to proceed with dismissal or another type of expiatory penalty. The bishop is permitted to initiate the judicial penal process, even in the case of a reformed and repentant cleric, if a permanent expiatory penalty, including dismissal, is the only way to repair the harm to the Church caused by scandal and to restore justice to all concerned. (That all three goals must be given consideration is confirmed by the wording of canon 1727, §2 where the promoter of justice is given the right to appeal “whenever it appears that the reparation of scandal or the restitution of justice has not been provided sufficiently.”)

2. Administrative Actions of a Non-penal Nature

Besides penal remedies and penances, there are certain non-penal options that may be appropriate in individual cases. Administrative actions, such as laicization by the Holy See and declaration of an impediment to the exercise of orders by a diocesan bishop, are not penal actions; they are part of the Church’s good order and discipline. Such actions are possible even prior to the issuance of the initiatory decree of canon 1718. If, in the particular case, such administrative approaches are not feasible or appropriate at the outset, they may still emerge as viable options during the prosecution of a judicial process or even after its conclusion.

a. Dispensation (cc. 290-293)

The cleric might voluntarily petition the Holy See for a dispensation from celibacy and the other obligations attached to orders and a return to the lay state. The granting of such a dispensation is a favor; it is not a penal action. It differs essentially from penal dismissal from the clerical state, not only because it is not penal in nature, but because the papal dispensation frees the cleric from the obligation of celibacy, something that judicial dismissal does not do (c. 291).

Once the cleric submits the petition to the ordinary, he is to be removed from the exercise of sacred orders in keeping with the Apostolic norms for the instruction of such a petition (1980 Norms, in *Canon Law Digest*

9:92-99). This removal remains in effect until a final disposition of the petition is made by the Holy See.

While the voluntary submission of a petition for a dispensation does not prevent the initiation of a penal process, for dismissal from the clerical state, the latter should normally be stayed until a decision on the cleric's petition is forthcoming from the Holy See. Conversely, a negative response by the Holy See to the cleric's petition does not prohibit initiation of the penal judicial process, although the details of the petition and its rejection should be introduced into the acts of the case for consideration by the tribunal, at least regarding the appropriateness of a penalty.

b. Declaration of an Impediment to Exercise of Orders (c. 1044)

Canon 1041, §1 states that a person who labors under some form of insanity or other psychic infirmity may, upon consultation with experts, be found to be unfit for properly carrying out the ministry (*inhabilis ad ministerium rite implendum*). Such a person is, under canon 1044, §2, 2°, impeded from exercising his orders until his ordinary, upon consultation with an expert, concludes that the impediment has ceased and permits him to return to active ministry, in an unrestricted or appropriately restricted form.

Notice that the impediment cannot be declared until the person has been judged to be unfit (*inhabilis*) to carry out the ministry properly, and that such unfitness must result from the psychic infirmity. If a cleric is determined to suffer from pedophilia or ephebophilia to the extent that his own ministry becomes a true danger to children and adolescents, he may be judged *inhabilis* and declared to be unfit by his bishop.

This declaration does not remove the cleric from the clerical state even though he is impeded from any exercise of orders. He still enjoys certain rights of the clerical state, including that to decent support, and he is bound by its obligations, at least those that he is capable of fulfilling. Furthermore, if rehabilitation is successful, and the diocesan bishop, after consulting with experts, determines that the cleric's ministry no longer presents a danger to others, the bishop may then permit him to exercise orders again.

Declaring the existence of an impediment to the exercise of orders based on psychic defect is an administrative disciplinary (i.e., non-penal) act. In positing the act, due process requires, however, that the diocesan bishop acquire sufficient information to support a morally certain conclusion that the impediment exists and it also requires that such information-gathering

afford the cleric certain procedural rights (cc. 50-51). The cleric must be given an opportunity to be heard and to offer evidence to the contrary. In dealing with the diocesan bishop or his representative, the cleric has the right to be represented by canonical counsel and should be advised to do so throughout the process.

The diocesan bishop must give consideration to the cleric's information and arguments in making his final decision and must consult an expert about the cleric's condition. It is also advisable that the bishop make use of two qualified advisors to assist him in reaching his final decision. The bishop's decision should be set down in a written decree that summarizes the reasons for the morally certain conclusion about the existence of the impediment. The decree should be communicated to the cleric in writing; if there is a serious reason not to give it to him in writing, it is to be read to him in the presence of a notary or of two witnesses in accordance with the procedure of canon 55. The cleric has the right to recourse against the decree in accordance with the usual norms for administrative acts (cc. 1732-1739). This recourse, however, unlike the recourse against the administrative imposition of a canonical penalty, is not suspensive of the effects of the decree.

E. PENALTIES OTHER THAN DISMISSAL (CC. 1331-1338)

Besides administrative disciplinary actions and penal remedies and penances, there are *medicinal and expiatory penalties* which, though truly penal in nature, do not rise to the level of permanent dismissal from the clerical state. Expiatory penalties may be imposed for a specific period of time rather than permanently. Medicinal penalties such as censures are *per se* “temporary” or “indefinite” in nature since they are conditioned on the cleric’s reformation. In fact, canon 1358, §1 states that, when a person withdraws from contumacy, the remission of a censure cannot be denied.

In the penal judicial process, these less drastic penal measures are available to the judges of the tribunal when deciding about the appropriate penalty to impose. The law expresses a preference for a tribunal process in penal cases (c. 1342, §1). If, however, circumstances truly warrant it, such penalties may also be imposed by episcopal decree prior to or apart from a judicial process, provided that they are not imposed perpetually (c. 1342, §§1&2) and that fundamental due process is afforded to the cleric in accordance with the dictates of canon 1720. When such penalties are applied by decree, the bishop follows the law’s *administrative penal process*.

1. Administrative Penal Process (c. 1720)

a. Initiatory Decree (c. 1718)

Based on the evidence collected in the initial investigation, the ordinary may decide that a process for imposing or declaring a penalty should be set in motion. Since the law does not prohibit the use of the administrative process for the imposition of censures and temporary expiatory penalties, the bishop may conclude, after considering all the circumstances, that just reasons exist to impose such penalties on the cleric by a decree without a trial (c. 1342, §1).

Before making such a determination, it is advisable for the bishop to consult with qualified canonical advisors. It is also advisable for the bishop to discuss the situation with the cleric in question. While not required by the law in the Latin Church, it provides an important opportunity for the bishop to discern more accurately the state of the cleric and

the appropriateness of the course of action under consideration. This is why such a requirement has been incorporated into the Eastern code.

Once the decision is made, the fact of the decision and the just reasons that support it should be set down in an *initiatory decree* that commences the administrative process.

b. Process (c. 1720)

Canon 1720 outlines the process to be followed in imposing or declaring a censure or temporary expiatory penalty by administrative decree:

1. The bishop is to inform the cleric about the accusation and the evidence collected to date. He must give the cleric an opportunity to explain his actions and defend himself against the accusation. A basic component of the right of defense is the cleric's right to be advised by a canon lawyer at all stages of the process. If the cleric is unwilling to cooperate at all, the bishop should formally summon him to appear before him and, if the cleric fails to comply, the bishop may then proceed.
2. The bishop is to consider carefully all the evidence and arguments in consultation with two qualified advisors.
3. If the bishop has reached moral certitude that the delict is proved and the canonical statute of limitations has not expired (*see infra* "Special Questions," Section G-1), he is to issue the administrative decree imposing the censure or temporary expiatory penalty. The decree should state his reasons in law and in fact for imposing the penalty. All of the exempting, mitigating, and aggravating factors and the other norms found in canons 1321-1327 and 1342-1350 are to be observed in drawing up and issuing the decree.

It should be noted that the administrative imposition of a canonical penalty, even a temporary one, is subject to recourse on the part of the cleric, which suspends the effect of the decree until a final determination is made on the recourse (c. 1353).

2. Censures (c. 1331-1335)

Canon 1395 is rather broad in its authorization to impose "just penalties," although there are limits on what a bishop can impose by decree when a penalty is indeterminate (c. 1349). In appropriate cases, "just penalties" may include medicinal penalties, even excommunication or interdict, provided that the misconduct is of a truly serious nature. The usual

medicinal penalty for a cleric, of course, is suspension.

a. Canonical Warning

A censure cannot be imposed validly unless the accused has been warned about the penalty at least once in advance and given the opportunity to withdraw from contumacy and repent. When suspension is threatened, its scope or extension should be determined precisely (cc. 1333, 1334). Usually the canonical warning is made specifically to the cleric in question, outlining precisely what behavior will give rise to what censure. The warning, however, may also be incorporated into the law itself.

In addition to the self-executing (*latae sententiae*) censures contained in the code, particular law can establish self-executing censures for “particularly treacherous offenses which either can result in more serious scandal or cannot be effectively punished by means of inflicted penalties” (c. 1318). This could be done, for example, through a diocesan written policy that is promulgated as particular law for the diocese (or province), and in which the liability to incur a specific *latae sententiae* censure for various sexual delicts is expressly stated in such a way that all clerics are on notice about the precise behavior which would trigger the penalty. It is important to recall the need to declare that an individual has incurred a *latae sententiae* censure before the penalty takes full effect in cases that are not notorious (c. 1352, §2).

b. Penal Precepts

Penal precepts threatening censures can also be helpful in addressing situations where clerics persist in scandalous or other prohibited behavior. In such cases, precepts that threaten the imposition of specific penalties may be issued. Such precepts can threaten a self-executing (*latae sententiae*) excommunication, interdict, or even a suspension. Unlike a suspension threatened in particular law, however, a suspension threatened by a precept must be limited in scope (e.g., suspension either from some or all of the power of orders, or from some or all of the exercise of the power of governance, or from some or all rights or functions attached to an office— cc. 1333, §1 and 1334, §§1&2). Noncompliance with precepts can also serve as the basis for imposition of censures by a penal process (*ferendae sententiae*), even an administrative penal process to impose suspension.

c. Reformation and Reparation

Once imposed, all censures, as medicinal penalties, perdure until with-

drawal from contumacy occurs. Withdrawal from contumacy involves the acts of truly repenting the offense and of making suitable reparation for damages and scandal or at least seriously promising to do so (c. 1347).

Censures can be helpful in addressing situations of sexual misconduct by clerics when they persist in scandalous or other prohibited behavior. Simply warning about the possibility of his incurring a censure may be sufficient to motivate a cleric to take steps to reform himself or repair the scandal he has caused.

Of course, using a censure to bring about the cleric's compliance can go just so far. For example, expressly ordering a cleric to seek psychiatric help under threat of canonical penalty, while theoretically possible, hardly ever works; it may even be counterproductive. It may violate the cleric's right to privacy (c. 220), and, unless information from the psychiatric intervention is freely released by the cleric and there is no hint of coercion, its admissibility in an eventual judicial process of dismissal may run afoul of the cleric's right not be forced to confess or take an oath (c. 1728, §2).

On the other hand, the threat of a censure or its imposition at least helps the cleric, when making choices about his life, to know clearly what consequences will result from his continued behavior and failure to reform his life. This, in itself, may spur him on voluntarily to seek professional help and to repair the harm he has caused.

3. Temporary Expiatory Penalties (cc. 1336-1338)

If the bishop is reasonably certain that a cleric is guilty of the sexual abuse of a minor, he may decide that just reasons exist to initiate the administrative process for the imposition of the following expiatory penalties by decree:

- a. Temporarily order the cleric to live in a certain place or territory or prohibit him from living in a certain place or territory (cc. 1336, §1, 1° -1337).
- b. Temporarily remove the cleric from his pastoral office (c. 1336, §1, 2°).
- c. Temporarily withdraw the cleric's rights, privileges, and faculties, including those granted to the cleric by reason of the law or his pastoral office (c. 1336, §1, 2°).

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- d. Temporarily prohibit the cleric from exercising his ministry at all, or partially, or in a particular place. This may even involve a prohibition from celebrating Mass privately (c. 1336, §1, 3° and c. 1338).
 - e. Temporarily transfer the cleric to another office (c. 1336, §1, 4°).

If the bishop should conclude that, although dismissal from the clerical state is not appropriate, one of the above-mentioned expiatory penalties should be imposed *permanently*, such a penalty, like dismissal itself, cannot be imposed by decree; it may be imposed only through a judicial process (c. 1342, §2).

4. Temporary vs. Perpetual

Could a bishop impose temporary expiatory penalties for a fixed period of time and then, at the end of that period, decide to extend the imposition? Yes, but only if circumstances justified the continued imposition of the penalty and the use of a judicial process continued to be justly precluded (c. 1342, §1). There might be a valid reason to renew a temporary expiatory penalty if the cleric refuses to desist from the proscribed behavior, but, if the renewal were simply a ruse or subterfuge to avoid the judicial process or an attempt to clothe a perpetual penalty in temporary trappings, it would be illegitimate.

Thus, where a truly scandalous case arises in which it is clear that a cleric has sexually abused a minor, a bishop could well be justified in deciding that certain temporary expiatory penalties must be imposed immediately by following the administrative rather than the judicial process. If, however, a reasonable period of time then elapses during which a judicial process could easily have been pursued, the extension of a temporary expiatory penalty would hardly be justified. In such cases, the original temporary imposition should remain in effect only until, within a reasonable period of time, a judicial determination of temporary or perpetual expiatory penalties is made.

The same question does not arise with medicinal penalties since they are not inflicted for a set period of time. A censure such as suspension is by its nature conditioned solely on the cleric's withdrawal from contumacy, not on the passage of a particular time period.

Finally, it should be noted that the administrative imposition of medicinal and temporary expiatory penalties differs from the action of an ordinary

taken during a penal process under canon 1722. The latter, which is sometimes referred to as an “administrative leave,” cannot be imposed until the bishop has initiated the penal process by issuing the initiatory decree mentioned in canon 1718 and must be revoked when the penal process (whether administrative or judicial) ceases.