

## Put It in Writing

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### Introduction

There is a great deal of disillusionment with clerical sexual abuse and leaders in the Church failing to deal with sexual abuse leading to some disillusioned clergy who behave badly. Occasionally we see cases of recalcitrant priests and religious who the religious superior or bishop summons in order to rebuke them verbally or counsel them to behave correctly. The recalcitrant priest or religious may respond by making some kind of verbal commitment to change their behaviour and then continue the same pattern of behaviour as before.

Usually, the behaviour in these cases is not a crime in canon law, but it can cause scandal. Sometimes there may be a suspicion that crimes are committed, but they cannot be proven with moral certainty. These unsatisfactory situations often persist for many years. Occasionally observers note the recalcitrant priest or religious seems to have lost their vocation or their heart is not in the priesthood or religious life. Eventually a diocesan bishop or religious superior finally decides to take concrete action against the priest or religious and then discovers that because there were no proper written warnings or precepts given in the past, they are unable to act decisively, and they have to begin at step one and give a warning or a precept in writing.

### Church Culture Today

There is a huge gap between bishops and their priests, as well as between clergy and laity, concerning their acceptance of canon law and the teaching of the Church associated with the problems of recalcitrant clergy and religious.<sup>1</sup> A 2005 survey of Catholics in the United States, showed that 42% of Catholics in America thought everyone should decide for themselves whether to remarry after a divorce. Only 13% thought that the teaching of the Church on contraception was significant. Almost half of the Catholics surveyed thought that a decision about abortion was a matter for an individual's personal choice; 46% considered the morality of being in homosexual partnerships to be a matter of personal opinion; 47% considered non-marital sexual intercourse as a private matter.<sup>2</sup> These percentages will almost certainly be worse now

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<sup>1</sup> JUDITH HAHN, *Church Law in Modernity*. England. Cambridge University Press. 2019. 105 ff. (= HAHN, *Church Law in Modernity*.)

<sup>2</sup> WILLIAM D'ANTONIO, JAMES DAVIDSON, DEAN HOGE and MARY GAUTHIER, "American Catholics and Church Authority", in MICHAEL LACEY and FRANCIS OAKLEY (eds), *The Crisis of Authority in Catholic Modernity*, Oxford. Oxford University Press. 2011. 273-290; HAHN, *Church Law in Modernity*, 108-109.

with the prolonged sexual abuse crisis in the Church. There is probably not much difference between these figures and the reality in many western countries including Australia and New Zealand.

Judith Hahn summarises the situation:

For members of the Church raised in modern societies, however, respect for the law is ultimately connected with the norms being based on arguments and reasons. In this regard, the findings of the sociological study "American Catholics Today" are especially interesting, as the researchers concluded: 'The followers obey the teachings if they believe that the teachings are legitimate, justified, and true to the will of God as they understand that will. If the followers doubt the claims for whatever reason, including their own consciences, they feel free to follow their own consciences as having supremacy over obedience.'<sup>3</sup>

This attitude to Church authority is reinforced by the sexual abuse crisis and some priests and laity observing the treatment of abusers and victims. Personal respect for a bishop or religious leader is a significant aspect as to how much actual authority he holds. Most people used to obey the bishop out of respect for his office. Now some people question the credibility of bishops and superiors of religious institutes because they financially support and treat abusers better than they treat victims. Others question why they should take the sexual morality teaching of the Church seriously when some priests seem to do whatever they like with impunity. These people think the clergy do not take the law seriously, so why should they? Pope John Paul II was conscious of the impact of the example of priests and in his first Holy Thursday letter to priests in 1979 he said:

the commitment to married fidelity, which derives from the sacrament of Matrimony, creates similar obligations in its own sphere; this married commitment sometimes becomes a source of similar trials and experiences for husbands and wives, who also have a way of proving the value of their love in these "trials by fire". Love, in fact, in all its dimensions, is not only a call but also a duty. Finally, we should add that our brothers and sisters joined by the marriage bond *have the right to expect from us*, Priests and Pastors, good example and the *witness of fidelity to one's vocation until death*, a fidelity to the vocation that we choose through the sacrament of Orders just as they choose it through the sacrament of Matrimony.<sup>4</sup>

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<sup>3</sup> HAHN, *Church Law in Modernity*, 97.

<sup>4</sup> POPE JOHN PAUL II, "Letter to Priests Holy Thursday 1979", 8 April 1979, [http://www.vatican.va/content/john-paul-ii/en/letters/1979/documents/hf\\_jp-ii\\_let\\_19790409\\_sacerdoti-giovedi-santo.html](http://www.vatican.va/content/john-paul-ii/en/letters/1979/documents/hf_jp-ii_let_19790409_sacerdoti-giovedi-santo.html).

Pope John Paul II in these insightful words saw that priests who did not keep their commitment to celibacy greatly impacted on lay faithful struggling to be faithful to their commitments.

### **Laws, Guidelines and Policies**

A fundamental problem that has been exposed by the sexual abuse crisis is the absence of detailed laws or the gaps in existing legislation concerning grooming etc. There are approximately 1.3 billion members of the Catholic Church in many countries all over the world and from hundreds of ethnic and cultural backgrounds. Obviously civil laws concerning privacy, safeguarding and financial matters will vary enormously from one country to another. It is impossible to have detailed universal law on all these matters encompassing the needs of the faithful in every culture and country, and this is why particular law is very important.

Protocols for the handling of sexual abuse complaints are often not legislated as particular law for a number of reasons. Sometimes major superiors of religious institutes and diocesan bishops want the protocol documents to be merely policies or guidelines. This allows them to handle complaints on a case-by-case basis and make an exception for a particular accused cleric, or even not report the complaint to an office for professional standards. Finally, if there are only guidelines in place, a bishop or major superior can easily disregard the recommendation. Guidelines are not law and are open to more flexible interpretations.

It is essential that protocol documents have the status of particular law to prevent flexible interpretations and processes. All particular laws must be in accord with universal law.<sup>5</sup> If there is particular law legislated by the Bishops Conference, it requires the review of the Holy See.<sup>6</sup> However, if each diocesan bishop legislates a protocol document as particular law for his diocese, it is particular law for the whole country without the prior review of the Holy See.

*Vos Estis Lux Mundi* required all Episcopal Conferences to have protocols for dealing with complaints of sexual abuse:

#### **Art. 2 – Reception of reports and data protection**

§1. Taking into account the provisions that may be adopted by the respective Episcopal Conferences, by the Synods of the Patriarchal Churches and the Major Archiepiscopal Churches, or by the Councils of Hierarchs of the Metropolitan Churches *sui iuris*, the Dioceses or the Eparchies, individually or together, must establish within a year from the entry into force of these norms, one or more public, stable and easily accessible systems for submission of reports,

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<sup>5</sup> Canon 135 §2.

<sup>6</sup> Canon 455.

even through the institution of a specific ecclesiastical office. The Dioceses and the Eparchies shall inform the Pontifical Representative of the establishment of the systems referred to in this paragraph.<sup>7</sup>

Most dioceses in western countries have also introduced child protection and safeguarding norms or guidelines. These include prohibitions on photographing children without parental permission or obtaining the phone numbers of children without parental consent. If these prohibitions, however, are only norms or guidelines, then there is insufficient legal obligation to observe them. Also, there are few sanctions for their non-observance unless the action violates civil child protection laws.

Particular law is also required for financial management and prevention of theft.<sup>8</sup> Many dioceses have financial norms and procedures such as having payments approved with two signatures on invoices or statements. One signature is to be the parish priest's signature and the other is often that of a member of the parish finance committee.

Clergy and religious engaged in misconduct can easily disregard or dismiss guidelines or policies as being optional and not applying to them and they can rationalise their behaviour. Therefore, key elements of financial norms and procedures need to be made particular law in the diocese so that priests can be held to account.

### Written Laws and Guidelines

Most countries today require that official actions of leaders and officials be in writing. Similarly, canon law requires this:

Canon 37. An administrative act which concerns the external forum is to be effected in writing likewise, if it requires an executor, the act of execution is to be in writing.

This law requires that an act concerning external forum matters is to be in writing, and if an executor of the law is required to apply the law, then the record of the execution of the law is also to be in writing. The person who applied the law must make a written record of his application of the law and this may need to be communicated to interested parties such as victims. However, putting the act in writing is not required for the validity of the act.<sup>9</sup>

<sup>7</sup> POPE FRANCIS, motu proprio, *Vos Estis Lux Mundi*, 7 May, 2019, [http://www.vatican.va/content/francesco/en/motu\\_proprio/documents/papa-francesco-motu-proprio-20190507\\_vos-estis-lux-mundi.html](http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html).

<sup>8</sup> "Popular Perth priest denies stealing half a million dollars from Subiaco church", <https://www.watoday.com.au/national/western-australia/popular-perth-priest-denies-stealing-half-a-million-dollars-from-subiacochurch-20191106-p537z6.html>.

<sup>9</sup> Canon 10: Only those laws are to be considered invalidating or incapacitating which expressly prescribe that an act is null or that a person is incapable.

It is obvious there is less room for misunderstandings and miscommunication when an act is recorded in writing. Consequently, the code of canon law requires a written record for: the confirmation of an election (canon 179); loss of an office by reason of expiry of a predetermined time or reaching an age limit (c.186); the transfer to another office (c.190); the decree of removal from office (c.193); letters of incardination and excardination (c. 268 §1); the consent of the diocesan bishop to establish an association in a diocese (c. 312 §2); the granting of faculties to a priest (c. 973).

When there are acts emanating from the curia of the diocese, they must be signed by the Ordinary<sup>10</sup> to be valid:

Canon 474. Acts of the curia which of their nature are designed to have a juridical effect must, as a requirement for validity, be signed by the Ordinary from whom they emanate. They must also be signed by the chancellor of the curia or a notary. The chancellor is bound to notify the Moderator of the curia about these acts.

This canon notes the double signature system of the Ordinary and the Chancellor both signing the document. The signature of the Chancellor ensures the authenticity of the act.

Penal remedies are to be recorded in writing:

Canon 1339 §1. When someone is in a proximate occasion of committing an offence or when, after an investigation, there is a serious suspicion that an offence has been committed, the Ordinary either personally or through another can give that person a warning.

§2. In the case of behaviour which gives rise to scandal or serious disturbance of public order, the Ordinary can also reprove the person, in a way appropriate to the particular conditions of the person and of what has been done.

§3. The fact that there has been a warning or a correction must always be proven, at least from some document to be kept in the secret archive of the curia.

Penal remedies are measures normally used to prevent a person committing a crime but they are not a punishment or a penalty for committing a crime.<sup>11</sup> The remedies may be warnings<sup>12</sup> to direct a person to change their behaviour and avoid an occasion of

<sup>10</sup> Canon 134: Ordinary can be local diocesan bishop, vicar general, diocesan administrator, apostolic administrator or major superior of a religious institute or society of apostolic life.

<sup>11</sup> JOSEMARIA SANCHIS, in J. Arias in A MARZOA, J. MIRAS and R. RODRIGUES-OCANA, *Exegetical Commentary on the Code of Canon Law*, Vol. IV/1, Montreal, Wilson & Lafleur. 2004. 354. (=A MARZOA, J. MIRAS R. RODRIGUES-OCANA,, *Exegetical Commentary on the Code of Canon Law*)

<sup>12</sup> In the *CCEO*, canon 1406 says a warning is the equivalent of a penal precept. Cf. F. EASTON, in J. FARIS, J. ABBASS eds, *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montreal, Wilson and Lafleur. 2019, 2526-2527.

committing an offence or to correct someone who has done something wrong. Penal remedies relate to actions in the external forum and therefore should be in writing to document what happened and what action was taken by the diocesan bishop or religious Ordinary.

### Penal Laws and Precepts

Laws are concerned with the common good, and both universal and particular laws are distinct from precepts. Universal laws have general application to any member of the faithful anywhere in the world. Particular laws, legislated by a diocesan bishop for his diocese or an episcopal conference for their territory, are laws enacted for the faithful of a specific diocese or a specific territory. They do not bind the entire Church<sup>13</sup> because they are limited by personal criteria such as the territory in which members of the faithful live.

A precept in the modern usage of the word is not understood as a law.<sup>14</sup> The word “precept” comes from the Latin *praecipere* meaning “to command”. In its proper sense a precept is not a law, but an obligation imposed on an individual person or persons to do or omit some behaviour by a competent ecclesiastical superior. The 1983 Code in canon 49 defines the term precept as “a decree by which an obligation is directly and lawfully imposed on a specific person or persons to do or omit something, especially in order to urge the observance of a law.” It is, in other words, an order commanding a person to observe what is already a legal requirement.<sup>15</sup> It is not just an exhortation or admonition. Michiels points out that precepts “should only be made if warnings have proved fruitless.”<sup>16</sup>

When a cleric is warned by the diocesan Bishop or Ordinary the warning is usually in the form of a precept. Therefore, a precept given by a competent superior is “a decree that orders someone to do, or to refrain from doing, something”. A precept can be used as a specific application of a general law or to deal with a unique, one-time situation.<sup>17</sup> A precept is usually issued by an Ordinary when Church teaching, discipline or law is not being observed. When a precept is issued with the threat of a penalty, it is then called a penal precept. In one sense the penal precept is a warning to the person violating the law so they will comply to avoid the penalty.

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<sup>13</sup> PATRICIA DUGGAN and PAUL GARGARO, *A Simple Dictionary of Canon Law*. Philadelphia. Canon Law Books. 2005. 38.

<sup>14</sup> JOSE PULICKAL, *A Dictionary of Canon Law*. Manila. Logos Publications. 2005. 312.

<sup>15</sup> JOHN HUELS in JOHN FARIS (ed), *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montreal. Wilson & Lafleur. 2019. Vol 2, 2718

<sup>16</sup> G. MICHIELS, *De Delictis et poenis*, vol. LII, *De poenis in specie*, Romae, 1961, 447; quoted in VELASIO DE PAOLIS, “Penal Sanctions, Penal Remedies and Penances in Canon Law,” in PATRICIA DUGGAN, ed., *The Penal Process and the Protection of Rights in Canon Law*, 174.

<sup>17</sup> PATRICIA DUGGAN and PAUL GARGARO, *A Simple Dictionary of Canon Law*. Philadelphia. Canon Law Books. 2005. 41.

Precepts must be issued by an Ordinary<sup>18</sup> who is competent to issue them, namely “one who possesses executive power within the limits of that person’s competence”<sup>19</sup> on those subject to them.<sup>20</sup> A penal precept applies to an individual or a group of individuals.<sup>21</sup> The precept applies the law in more detail: e.g. forbidding a cleric to go to a gay bar or to visit a woman’s house.

### Essential Elements of Precepts

The essential content of a precept is the requirement to do or not to do an action. Clergy and laity need to have a clear understanding of what is expected of them. That is why job descriptions are very important so that expectations are spelt out in writing ensuring that people are aware of them. The principal function of the precept is to urge the observance of the law. Precepts specify the individual(s), the situations and circumstances encompassed by the law.

Evidence is necessary before a precept is issued. The precept “immediately binds the behaviour of the faithful affected by it, imposing an obligation on them”.<sup>22</sup> The penal precept should have a determined penalty, so that the offender is protected from arbitrary impositions of penalties by a superior.

The Ordinary must be careful that an injustice is not perpetrated when a penalty is imposed on someone. In particular, the Ordinary is to be mindful of the requirement of “a strict interpretation” of the meaning of words in a precept when penalties are threatened or inflicted.<sup>23</sup> No one is to be punished for violating a precept if they are not gravely imputable.<sup>24</sup> Also, there may be circumstances that affect someone’s imputability for disobeying a precept.<sup>25</sup> The Ordinary must obtain the necessary proof and information, as well as consult with those who could be affected by any precept.<sup>26</sup> The exercise of authority must be fair and balanced. The rights of the faithful need to

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<sup>18</sup> Canon 134.

<sup>19</sup> Canon 35.

<sup>20</sup> Canon 1319 §1.

<sup>21</sup> Canon 49: A singular precept is a decree which directly and legitimately enjoins a specific person or persons to do or omit something, especially in order to urge the observance of law.

<sup>22</sup> A MARZOA, J. MIRAS, R. RODRIGUES-OCANA,, *Exegetical Commentary on the Code of Canon Law*, vol. IV/1, 252.

<sup>23</sup> Canon 36 §1: An administrative act must be understood according to the proper meaning of the words and the common manner of speaking. In a case of doubt, those which refer to litigation, pertain to threatening or inflicting penalties, restrict the rights of a person, injure the acquired rights of others, or are contrary to a law which benefits private persons are subject to a strict interpretation; all others are subject to a broad interpretation. §2: An administrative act must not be extended to other cases besides those expressed.

<sup>24</sup> Canon 1321 §1 No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence

<sup>25</sup> Canons 1321-1330.

<sup>26</sup> Canon 50: Before issuing a singular decree, an authority is to seek out the necessary information and proofs and, insofar as possible, to hear those whose rights can be injured.

be protected before a penalty is imposed, otherwise, the infliction of the penalty could be the subject of recourse.<sup>27</sup> For example, an accused cleric could appeal a decision to the Congregation of the Doctrine of the Faith or the Apostolic Signatura.

A precept must include justifying reasons at least in summary form.<sup>28</sup> This would include the legal basis for the precept, the facts of the case and the reasons that led to this decision and the issuing of the precept. The precept concerning something under the authority of the Ordinary affects only those matters that are determined by the precept.<sup>29</sup> Also, the precept only applies to the individual or the individuals specified in the precept. It cannot be applied to other people doing the same thing, so another precept must be issued to other recalcitrants.

### Communication of the Precept or law

All acts in the external forum are to be in writing to ensure juridical certainty.<sup>30</sup> The written precept does not come into effect until it is communicated to the person or persons concerned.<sup>31</sup> A precept is valid from the moment its contents are conveyed to the addressee. If it is not in writing, then it cannot be notified with certainty. The addressee must be certain about what is commanded. The precept may also be the subject of recourse<sup>32</sup> by the addressee, which is another reason for the precept to be in writing.

In most cases, the legislator wants the addressee to have the text of the precept. There is a presumption that the precept is in writing because it is to be at least read to the person.<sup>33</sup> Only very grave reasons are to prevent the handing over of the text. It could be communicated orally, for example, if there is a genuine fear that the person to whom the precept is addressed might hand it over to the news media and cause scandal and embarrassment to the Church.<sup>34</sup> If the precept is not to be handed over to the addressee, then there is to be a written record signed by the ordinary and the two witnesses proving that it has been issued.<sup>35</sup>

<sup>27</sup> Canons 1737 and 1739.

<sup>28</sup> Canon 51: A decree is to be issued in writing, with the reasons at least summarily expressed if it is a decision.

<sup>29</sup> Canon 52.

<sup>30</sup> Canon 37: An administrative act which regards the external forum must be put in writing. Furthermore, if it is given in commissariat form, the act of its execution must be put in writing.

<sup>31</sup> Canon 54.

<sup>32</sup> Canons 1732-1739.

<sup>33</sup> Canon 56: A decree is considered to have been made known if the one for whom it is destined has been properly summoned to receive or hear the decree but, without a just cause, did not appear or refused to sign.

<sup>34</sup> MICHAEL MOODIE S.J., commentary on canon 36, in JOHN BEAL, JAMES CORIDEN and THOMAS GREEN eds., *New Commentary on the Code of Canon Law*, 113.

<sup>35</sup> Canon 55: Without prejudice to the prescripts of canons 37 and 51, when a very grave reason prevents the handing over of the written text of a decree, the decree is considered to have been made known if it is read to the person to whom it is destined in the presence of a notary or two



In these circumstances, the precept is deemed to have been made known to the person if it is read to the person to whom it is directed in the presence of two witnesses and a notary. It is not specified exactly who must read the precept, but regardless of who it is, there is still a requirement to have an additional two people as witnesses. The fact the precept was issued is to be put in a document signed by the person who read the precept and the two witnesses.

When a precept is issued to someone without the contents being put in writing, the obligation to observe the precept expires upon the expiry of the authority who issued it.<sup>36</sup> Therefore, if a diocesan bishop forbids one of his priests to allow a particular woman to stay at the presbytery and does not put the precept in writing, then this precept expires when the bishop dies.

Stephen Doktorczyk proposes “ten commandments” concerning precepts and implementing canon 1371 2° when the precept is disobeyed:

1. Thou shalt be sure to issue a written warning before proceeding penally;
2. Thou shalt warn only those people subject to you and for matters over which you are competent;
3. Thou shalt clearly and concisely set out expectations in a command, prohibition or warning and schedule follow up meetings with the person to ensure that the precept is understood and is being respected;
4. Thou shalt be as consistent as possible in applying this canon;
5. Thou shalt keep in mind that the penalty/punishment should fit the crime;
6. Thou shalt act with concern for the *salus animarum*;
7. Thou shalt be proactive in your *munus* of governance;
8. Thou shalt be obedient to the legitimate commands of your hierarchical superiors, including the Apostolic See;
9. Thou shalt normally undertake a penal process before imposing penalties upon one accused of a delict (cf. canons 1341; 1342; 1718 §1);
10. Thou shalt attempt to employ conciliatory methods when possible.<sup>37</sup>

Clergy have successfully taken recourse against penal actions by bishops and religious ordinaries, so superiors would be wise to observe carefully all the procedural and penal laws.

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witnesses. After a written record of what has occurred has been prepared, all those present must sign it.

<sup>36</sup> Canon 58 §1. A singular decree ceases to have force through legitimate revocation by competent authority as well as through cessation of the law for whose execution it was given. §2. A singular precept not imposed by a legitimate document ceases when the authority of the one who issued it expires.

<sup>37</sup> STEPHEN DOKTORCZYK, *Persistent Disobedience to Church Authority: History, Analysis and Application of Canon 1371 no. 2*, Rome, Editrice Pontifica Universita Gregoriana, 2016, 286.(= DOKTORCZYK, *Persistent Disobedience to Church Authority*)

As an example of specificity in a precept Doktorczyk gives this example:

Further criticism of the bishop, whether during a homily or any other occasion that provides an audience to the priest, will be interpreted as persistent disobedience (cf. c. 1371, no. 2) and may result in the eventual imposition of a just penalty, not excluding removal from your office as pastor (c. 1336, §1 no. 2), or other consequences, including removal of your faculties to preach (c. 764).<sup>38</sup> This example ordering a priest not to publicly criticise the bishop, covers the priest doing this in the homily, as well as encompassing any other situation. The consequences of disobeying the precept are clear and unequivocal.

### **Receipt of laws**

A fundamental aspect of making clergy accountable is to ensure that each cleric receives particular laws and has them explained to him. Each priest needs to sign a declaration that he has received a copy of the particular law and that he understands the law, whether it be financial law or safeguarding and sexual abuse law. This prevents accused priests escaping punishment or sanction in the future by simply saying “I never received a copy of that law”, or “I did not know or understand I was not allowed to do that”.

### **Warnings**

If the penalty for an offence is a medicinal penalty such as suspension, then the cleric must be warned before he receives the penalty of suspension for a repeat offence.<sup>39</sup>

Most importantly, if there is no warning given, the cleric cannot be considered to be persistently disobedient under canon 1371 2°. The diocesan bishop is implicitly giving a warning to the cleric when he gives him a precept. If the text of the warning is not recorded in writing, it will be difficult to prove if it was ever given.

A religious superior is required to give at least two warnings before proceeding to dismiss a religious for offences in canon 696 such as neglect of the obligations of consecrated life:

Canon 697. In the cases mentioned in canon 696, if the major Superior, after consulting his or her council, judges that the process of dismissal should be commenced:

- 1° the major Superior is to collect or complete the proofs;
- 2° the major Superior is to warn the member in writing, or before two witnesses, with an explicit caution that dismissal will follow unless the member

<sup>38</sup> DOKTORCZYK, *Persistent Disobedience to Church Authority*, 264.

<sup>39</sup> Canon. 1347.

reforms. The reasons for dismissal are to be clearly expressed and the member is to be given every opportunity for defence. If the warning has no effect, another warning is to be given after an interval of at least fifteen days;

The preference always is that the member of the religious institute is given written warnings, but allowance is made for the warnings to be given verbally before two witnesses and then recorded in writing.

### Penalties as a Result of Precepts

If a precept has not resulted in improving the behaviour of a cleric, then a penalty should be imposed. An ecclesiastical penalty is the privation of some good and is inflicted by the legitimate authority for the correction of an offender or the punishment of a crime.<sup>40</sup> Offenders are not to receive a penalty unless they have violated a law in the external forum and this action is imputable by reason of malice or negligence.<sup>41</sup> ‘Dolus’ or malice is understood to mean a “deliberate violation of a penal law or precept.”<sup>42</sup> The essence of malice “is the positive will to act against the law, humanly and freely, whatever the reasons may be that lead to violating the law or precept, provided that freedom continues during the act.”<sup>43</sup> ‘Negligence’ is “the omission of due diligence including ignorance, and even inadvertence and error.”<sup>44</sup> “Before a person can be accused of an offence the person must be a proper subject of penal action.”<sup>45</sup>

There should always be a preliminary investigation (canons 1717-1720), before any precept or penalty is given. This requirement and the procedures involved are spelt out in detail in the *Vademecum* of the Congregation for the Doctrine of the Faith promulgated on 16 July 2020.<sup>46</sup>

While canon 1342 §1<sup>47</sup> allows for an extra-judicial decree by a bishop, canon 1342 §3 requires the ordinary to “hear” the person upon whom he proposes to impose the

<sup>40</sup> Canon. 2215, 1917 *CIC*.

<sup>41</sup> Canon 1321 §1: No one is punished unless the external violation of a law or precept, committed by the person, is gravely imputable by reason of malice or negligence.

<sup>42</sup> J. ARIAS in E. CAPARROS, M. THERIAULT, J. THORN, eds., *Code of Canon Law Annotated*, (Montreal, Wilson & LaFleur: 2004), 1029.

<sup>43</sup> VELASIO DE PAOLIS, “*De Sanctionibus*,” quoted by ANGEL MARZOA, in MARZOA, MIRAS, RODRIGUES-OCANA, *Exegetical Commentary on the Code of Canon Law*, Vol. IV/1, 271.

<sup>44</sup> *Ibid.*, Vol. IV/1, 272. Cf. *Communicationes*, 8 (1976), 176.

<sup>45</sup> DAVID PRICE, “Penal Law Revisited for the ‘90’s,” *Canon Law Society of Australia and New Zealand, Proceedings of the Twenty-eighth Annual Conference*, Adelaide, 1994, 70.

<sup>46</sup> CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Vademecum, On Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, 16 July 2020, [http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_2020\\_0716\\_vademecum-casi-abuso\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_2020_0716_vademecum-casi-abuso_en.html)

<sup>47</sup> Canon 1342 §1. Whenever just causes preclude a judicial process, a penalty can be imposed or declared by extrajudicial decree; penal remedies and penances, however, can be applied by decree in any case whatsoever.

penalty.<sup>48</sup> Therefore, there must always be some due process involved in any penal case.

Offences such as sexual abuse of minors<sup>49</sup> incur an expiatory penalty and so a person can be dismissed from the clerical state without a warning. A religious brother or sister is to be dismissed from the religious institute without a warning.<sup>50</sup>

## Conclusion

Apart from legislation, there are other good employment and personnel practices such as performance reviews. Each year there needs to be some kind of performance review for clergy and diocesan employees. The review could be incorporated into the process for clergy changes. A performance review helps to keep job descriptions and expectations up-to-date. It can easily happen that a person's workload or responsibilities evolve and develop over time. Circumstances change and other people can impinge on an individual's role. Many of these things can affect how a person carries out their duties and responsibilities, and a performance review gives both parties an opportunity to deal with this

Accountability and transparency are important in all areas of life today, and society rightly expects accountability and transparency in the Church. For clergy, knowledge of canon law is professional knowledge that the Church can reasonably expect them to know. Similarly, accountants can be expected to know financial regulations. Consequently, after there is an external violation of the law or a precept it is presumed that the offender is imputable,<sup>51</sup> and if he is a cleric, he cannot use the excuse of ignorance.

Before an Ordinary imposes penalties, he must have exhausted all pastoral means available to him.<sup>52</sup> Jesus taught this approach for dealing with wrongdoers in Mt. 18:15-17. Correction of an offender is most important for the Church that wants all members of the faithful to live according to the teaching and example of Jesus Christ. Therefore, in dealing with clergy or religious engaged in crimes or misconduct, put it in writing.

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<sup>48</sup> Canon 1342§3. What a law or precept states about the imposition or declaration of a penalty by a judge in a trial must be applied to a superior who imposes or declares a penalty by extrajudicial decree unless it is otherwise evident or unless it concerns prescripts which pertain only to procedural matters.

<sup>49</sup> Canon 1395.

<sup>50</sup> Canon 695.

<sup>51</sup> Canon 1321.

<sup>52</sup> Canon 1341: An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, and reform the offender.