

## Things Old and New: The Pre-Penal Process

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### The Preliminary investigation

When information is received about the possible commission of a delict or offence, it is very important that the Ordinary establish whether it is “knowledge, which at least seems true”.<sup>1</sup> In an Australian penal case, the Congregation for Clergy found that the archbishop violated the rights of a priest and canons 221, 51, 39 and 1717 and 483 §2 by using civil procedures.<sup>2</sup> This Congregation also pointed out in a Canadian case that a bishop should have carried out a preliminary investigation and followed the procedures in canons 1717-1720 before withdrawing faculties, or imposing any penalty.<sup>3</sup> Following the procedures of the preliminary investigation means that the facts of the case and the imputability of the cleric have been properly documented.<sup>4</sup> This documentation is important whether later there is a penal trial or an administrative process.

The *Vademecum* of the Congregation of the Faith explained the preliminary investigation of an alleged delict or crime looks to establish “34...whether there is a sufficient basis both in law and in fact so as to consider the accusation as having the semblance of truth”.<sup>5</sup> The allegation may be indisputable or notorious because of information available to the public, or it may be impossible to have taken place for some reason. Then the preliminary investigation would be superfluous.

The preliminary investigation should be “a true procedure, albeit brief and administrative in nature”,<sup>6</sup> so “the Ordinary can draw the conclusion knowledge of a

<sup>1</sup> C. 1717 §1. Translations of the *CIC* 1983 from the translation of the Canon Law Society of America 2001.

<sup>2</sup> Congregatio pro Clericis, 23 August 2001, Prot. No. 2001/1099, quoted in Augustine Mendonça, *The Bishop as the Mirror of Justice and Equity in the Particular Church: Some Practical Reflections on Episcopal Ministry*, unpublished paper.

<sup>3</sup> Congregation for the Clergy, Decree, Prot. No. 37937/05 CA. June 23, 2007, quoted in Francis Morrisey OMI, “Violations of Canon 277 (with an Adult) Appropriate and Just Responses,” *The Canonist*, 1(2010), no. 2.

<sup>4</sup> Pat Lagges, “The Penal Process: The Preliminary Investigation in Light of the Essential Norms of the United States.” in P. Cogan, ed., *Sacerdotes iuris*, Ottawa, Saint Paul University, 2005, 255-296. It must be ascertained if canons 1323 and 1324 apply.

<sup>5</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; [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20200716\\_vademecum-casi-abuso\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html), 12, 13, 16, 18, 19, 37. (=VADEMECUM)

<sup>6</sup> Frederick. Easton, *A Practical Commentary to the Code of Canons of the Eastern Churches*, Montreal. Wilson & Lafleur. 2019. Vol. 2. 2616. (=EASTON, *A Practical Commentary*)

delict has been received which seems to be true.”<sup>7</sup> The purpose of having a preliminary foundation is to establish whether there is a solid basis for conducting a penal process. A libellus can only be rejected if the petition lacks any basis and it does not seem possible that a basis will result from carrying out a process.<sup>8</sup> The promotor of justice would be the one submitting a libellus in a penal trial.

In secular justice systems police might conduct a criminal investigation<sup>9</sup> for the prosecutor to see if there is enough evidence to proceed, or what charges could be laid. In American courts there is often a preliminary hearing by a judge to determine whether a person charged with a crime should be held for trial. A hearing held in felony cases prior to indictment during which the state is required to produce sufficient evidence to establish that there is probable cause to believe that a crime has been committed and that the defendant committed it.<sup>10</sup>

Most legal systems have preliminary procedures prior to a trial. In New Zealand they are outlined in a Justice Department flowchart.<sup>11</sup>

### The Steps of the Preliminary Investigation

The preliminary investigation is outlined in canons 1717 ff. of the 1983 Code (*CIC*) or canons 1468 ff. of the Code of Canon Law for the Eastern Churches (*CCEO*):

Canon 1717 §1. Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous.

### Decree Opening the Preliminary Investigation

Firstly, the Ordinary or Hierarch decrees the opening of the preliminary investigation and names the person conducting the investigation<sup>12</sup>, and appoints a priest notary who must be a priest in cases where the person under investigation is a priest.<sup>13</sup> The decree should also state that the investigator has the powers of an auditor:

<sup>7</sup> Easton, *A Practical Commentary*. 2616.

<sup>8</sup> C. 1505 §2. A libellus can be rejected only: 4/ if it is certainly clear from the libellus itself that the petition lacks any basis and that there is no possibility that any such basis will appear through a process.

<sup>9</sup> The crime | New Zealand Ministry of Justice <https://www.justice.govt.nz/about/learn-about-the-justice-system/explore-the-criminal-justice-system/the-crime/>.

<sup>10</sup> Henry C. Black, *Black's Law Dictionary*, St. Paul. Minn. 1983. 614.

<sup>11</sup> <https://www.justice.govt.nz/assets/Documents/Publications/MOJ0100.3C-At-a-glance-factsheet-AUG19-WEB.pdf>.

<sup>12</sup> *Vademecum* 40; *CIC* 1719, *CCEO* 1470.

<sup>13</sup> *CIC* canon 483 §2; *CCEO* 253 §2.

Canon 1717 §3. The person who conducts the investigation has the same powers and obligations as an auditor in the process; the same person cannot act as a judge in the matter if a judicial process is initiated later.

The investigator instructs the case which involves collecting the proofs to be handed over to the judge. Sometimes this may also involve deciding what proofs are to be collected and the manner of collecting them.<sup>14</sup> There may be affidavits, interviews etc. The investigator conducting the investigation cannot take part later as judge in a trial.

### Qualifications of the Investigator

The Investigator must have the appropriate knowledge to carry out the investigation. This is vital when the victim is a child so the investigator has the required training and experience. It is also critical that the investigator be competent in canon law concerning the sacrament and the seal of confession when a possible crime concerning the sacrament of Penance is being investigated. Investigators can be “clerics or lay persons outstanding for their good character, prudence, and doctrine.”<sup>15</sup> Usually investigators are lay persons and this is encouraged in most western countries.<sup>16</sup> It is most important that the investigation be seen to be credible, professional and independent.<sup>17</sup>

The person conducting the investigation must be careful to respect the right to privacy of the alleged victim and their desires. Also, the good name of the accused must be protected: “Care must be taken so that the good name of anyone is not endangered from this investigation.”<sup>18</sup>

### Sufficient evidence

The investigator inquires carefully about “the facts, circumstances, and imputability” of the accused.<sup>19</sup>

<sup>14</sup> Canon 1428 §3. It is for the auditor, according to the mandate of the judge, only to collect the proofs and hand those collected over to the judge. Unless the mandate of the judge prevents it, however, the auditor can in the meantime decide what proofs are to be collected and in what manner if a question may arise about this while the auditor exercises his or her function.

<sup>15</sup> Canon 1428 §2.

<sup>16</sup> Cf. USCCB, “Directives for the Implementation of the Provisions of Vos estis lux mundi Concerning Bishops and their Equivalents”; <https://www.usccb.org/sites/default/files/about/leadership/usccb-general-assembly/2019-june-meeting/upload/usccb-modified-amended-directives-2019-06.pdf>.

<sup>17</sup> *Vademecum* 38-39.

<sup>18</sup> Canon 1717 §2; CCEO 23; *Vademecum* 44.

<sup>19</sup> Canon 1717 §1.

The Ordinary then decides “when it seems that sufficient evidence has been collected”<sup>20</sup>:

- whether a process to inflict or declare a penalty can be initiated;
- whether, attentive to can. 1341, this is expedient;
- whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of **extrajudicial decree**.<sup>21</sup>

However, if the Ordinary decrees there is insufficient evidence to proceed with a penal process, this may be changed by a new decree according to “canon 1718.

§2. The ordinary is to revoke or change the decree mentioned in §1 whenever new evidence indicates to him that another decision is necessary.”

The Ordinary is advised “In issuing the decrees mentioned in §§1 and 2, the Ordinary is to hear two judges or other experts of the law if he considers it prudent.”<sup>22</sup>

The preliminary investigation should establish the following:

- The facts on which the investigation is based;
- The number of criminal acts;
- When they took place;
- The circumstances in which they took place;
- The general details of the alleged victims;
- Make a preliminary evaluation of the physical, psychological, spiritual, and moral harm inflicted.<sup>23</sup>

The Investigator needs to verify the external acts that occurred which would constitute a delict. The investigator is not supposed to be trying to prove the allegation is proven with moral certainty or beyond reasonable doubt. Sometimes preliminary investigations include hundreds of pages of evidence. This should not happen because it means that an investigator is trying to carry out an administrative penal process. The procedures of a trial or penal process safeguarding rights are non-existent. A preliminary investigation only needs to establish that the “knowledge of the delict”

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Canon 1718 §3.

<sup>23</sup> Canon 1717 §1; *Vademecum* 34.

("notitia de delicto") seems to be true. It is most important that the investigator gets an accuser or a witness to give their testimony under oath, sign at the end of a typed-up transcript, and initial each page of the transcript. This may prevent the person being required to be re-interviewed again.<sup>24</sup>

### Sacrament of Penance

When an accusation or a case involves the sacrament of Penance, it is vital that the confidentiality of the seal of the sacrament is upheld. The CDF *Vademecum* states:

Care should also be taken care to determine any possible relation to the sacramental internal forum (in this regard, however, account must be taken of the prescriptions of art. 24 *SST*. At this point, any other delicts attributed to the accused (cf. art. 8 § 2 *SST*) can be added, as well as any indication of problematic facts emerging from his biographical profile.<sup>25</sup>

The investigator must not reveal the identity of the alleged victim to the accused priest. *Sacramentorum Sanctitatis tutela* is explicit about this protection for the sacrament of Penance and the accuser.

### Competence

When a complaint is received, the investigation is to be carried out either by the Ordinary of the accused person or the Ordinary of the place where the delict took place according to the *Vademecum* 22:

This task belongs to the Ordinary or Hierarchy of the accused cleric or, if different, the Ordinary or Hierarchy of the place where the alleged delicts took place. In the latter case, it will naturally be helpful for there to be communication and cooperation between the different Ordinaries involved, in order to avoid conflicts of competence or the duplication of labour, particularly if the cleric is a religious.

This is spelt out in detail by the *Vademecum* 31:

In accordance with art. 2 § 3 *VELM*, an Ordinary who has received a *notitia de delicto* must transmit it immediately to the Ordinary or Hierarchy of the place where the events were said to have occurred, as well as to the proper Ordinary or Hierarchy of the person reported, namely, in the case of a religious, to his major Superior, if the latter is his proper Ordinary, and in the case of a diocesan priest, to the Ordinary of the diocese or the eparchial Bishop of incardination. In cases where the local Ordinary or Hierarchy and the proper Ordinary or Hierarchy are not the same person, it is preferable that they contact each other to determine which of them will carry out the investigation. In cases where the report concerns a

<sup>24</sup> *Vademecum* 34, 51.

<sup>25</sup> *Vademecum* 34.

member of an Institute of Consecrated Life or a Society of Apostolic Life, the major Superior will also inform the supreme Moderator and, in the case of Institutes and Societies of diocesan right, also the respective Bishop.

There must be good communication and transparency between all the Ordinaries involved in a case including Religious Ordinaries.<sup>26</sup>

### Anonymous Complaints

The *Vademecum* states anonymous complaints must be accepted, although they are harder to verify.

11. At times, a *notitia de delicto* can derive from an anonymous source, namely, from unidentified or unidentifiable persons. The anonymity of the source should not automatically lead to considering the report as false. Nonetheless, for easily understandable reasons, great caution should be exercised in considering this type of *notitia*, and anonymous reports certainly should not be encouraged.

The anonymous complaint may give clear knowledge of a delict especially if it alleges the exact time, date and place of the delict. Of course, when someone makes an anonymous complaint, the person's motive and hiding of their identity may be suspect. However, the anonymity of the complainant may be understandable if there is a danger of retribution in their culture or political situation.

### Scope of the Investigation

The investigator should focus on the specific allegation against the accused. E.g. If the bishop is accused of not dealing with the allegation of abuse against a priest, the investigator should focus on that priest and not trawl through all the files of the priests in the diocese. The investigator should only look at the file of another priest if a particular failure to act is revealed. This will help to avoid delays in dealing with a particular allegation.<sup>27</sup>

The investigator is not carrying out a general inquiry into how the accused performed his ministry, but if other unlawful or criminal behaviour is revealed, this should be investigated. The investigator may need to request the Ordinary to amend the opening decree of the preliminary investigation if other delicts or misconduct come to light.

<sup>26</sup> *Vademecum* 22, 31; *VELM* art. 2 par. 3.

<sup>27</sup> *Vademecum* 34, 35, 66.

### Prohibition to exercise Sacred Ministry

The Ordinary or Hierarch has the right to impose precautionary measures<sup>28</sup> from the beginning of the investigation.<sup>29</sup> He will usually prohibit the accused from the exercise of sacred ministry:

Canon 1722. To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases.

The accused cannot normally exercise any ministry or function including public concelebration of the Eucharist until the investigation and any process has concluded. Usually, the accused must reside at a specified residence and is forbidden to have any contact with the accuser, or their relatives and friends. The *Vademecum* explains:

64. The precautionary measures referred to in no. 58 are imposed by a singular precept, legitimately made known (cf. canons 49ff. and 1319 CIC and 1406 and 1510ff. CCEO).

65. It should be noted that whenever a decision is made to modify or revoke precautionary measures, this must be done by a corresponding decree, legitimately made known. This will not be necessary, however, at the conclusion of the possible process, since at that moment those measures cease to have legal effect.

### Credibility

The accuser is presumed to be telling the truth until the contrary is demonstrated. However, the investigator should validate the plausibility of the complaint. This is particularly important if the case involves the sacrament of penance because the accused priest cannot reveal any conversation within the sacrament, but can only admit or deny the offence.

Evidence from other processes such as for a declaration of marriage nullity may be included in the file by the investigator:

It can be useful to assemble testimonies and documents, of any kind or provenance (including the results of investigations or trials carried out by civil authorities),

<sup>28</sup> *Vademecum* 58-65.

<sup>29</sup> *SST*, art. 19.

which may in fact prove helpful for substantiating and validating the plausibility of the accusation. It is likewise possible at this point to indicate eventual exempting, mitigating or aggravating factors, as provided for by law. It could also prove helpful to collect at this time testimonials of credibility with regard to the complainants and the alleged victims. An Appendix to the present *Vademecum* contains a schematic outline of useful data that those carrying out the preliminary investigation will want to compile and have at hand (cf. no. 69).<sup>30</sup>

Other useful data could include evidence from any civil investigation. Although there may be no witnesses, the credibility of the persons involved, the consistency of the facts and the accounts of what happened, other accusations against the accused, previous patterns of offending, documents etc all help to establish the truth of the accusations.

### Imputability

There is the maxim “the accused is innocent until proven guilty” in “The Declaration of Rights” from the time of the French Revolution.<sup>31</sup> On the other hand, according to canon 1321, if it is proven the accused committed the action, the presumption of the law is that the accused is culpable for the offence.

The investigator is to assess the imputability of the accused.<sup>32</sup> “Imputability is a person’s moral responsibility for an act they have performed.”<sup>33</sup> This depends on how freely, deliberately and intentionally the person violated the law, without compulsion or limits on their freedom of action. The imputability of a person is presumed when it is shown the person performed the action.<sup>34</sup> However, some factors such as reoffending may increase imputability,<sup>35</sup> while other factors such as ignorance may decrease imputability.<sup>36</sup>

### Protecting Good Reputations

When someone is convicted of a crime, they lose their good reputation. This has happened legitimately because of a legal process and their own action. However, canon 220 states “No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy.”

<sup>30</sup> *Vademecum* 34.

<sup>31</sup> Canons 220; 1321 par. 3; 1728 par. 2; cf. Kenneth Pennington, “Innocent until Proven Guilty: The Origins of a Legal Maxim”, *The Jurist*, 63(2003), 106-124.

<sup>32</sup> Canon 1717 §1.

<sup>33</sup> P. Dugan and P. Gargaro, *A Simple Dictionary of Canon Law*, Philadelphia. Canon Law Books, 2012. 29.

<sup>34</sup> Canon 1321 §3 When there has been an external violation, imputability is presumed, unless it appears otherwise.

<sup>35</sup> Canon 1326.

<sup>36</sup> Canons 1323-1325.

“Illegitimately” includes careless use of information, lack of concern for privacy or libel.

Any investigation must take care that the reputation of anyone involved is not endangered. This includes the accused, the accuser, and witnesses. All these people have a right to privacy and protection against, prejudice, retaliation, or discrimination.<sup>37</sup>

### Protection of Whistle-Blowers

Significant measures in recent law provide for accusers and whistle-blowers to be protected from retribution.<sup>38</sup> *Vos Estis Lux Mundi* provides protection for them in article 4:

#### Article 4 – Protection of the person submitting the report

- §1. Making a report pursuant to article 3 shall not constitute a violation of office confidentiality.
- §2. Except as provided for by canons 1390 CIC and 1452 and 1454 CCEO, prejudice, retaliation, or discrimination as a consequence of having submitted a report is prohibited and may constitute the conduct referred to in article 1 §1, letter b).
- §3. An obligation to keep silent may not be imposed on any person with regard to the contents of his or her report.

The person making the report is protected from prejudice, retaliation, or discrimination because of submission of the report. This brings the Church legislation into line with most civil jurisdictions.

Obviously, persons making a report could easily be members of a religious institute or diocesan clergy. Paragraph 3 makes it clear that no obligation to silence or secrecy can be imposed on a person about their report or its contents. This eliminates non-disclosure agreements, as well as making it clear that the person making the report is free to report to any police or civil authority concerning the abuse.

### Rights of the Accused

The accused does not have any procedural rights during the preliminary investigation apart from their rights in natural justice. At some stage of the process, the accused would normally be informed unless it might compromise the integrity of the

<sup>37</sup> Canon 1717 §2; c. 220; *Vademecum* 44-46.

<sup>38</sup> <https://www.nytimes.com/2019/05/09/world/europe/pope-francis-abuse-catholic-church.html>

investigation or the evidence. When the accused is informed, he should be encouraged to get civil and canonical advice and invited to respond to the accusation against him.<sup>39</sup>

The accused is not bound to confess or admit committing the delict, and cannot be required to take an oath to tell the truth.<sup>40</sup>

### Pastoral Care of those involved

The complainant, the one(s) harmed, the one under investigation and the community involved may need pastoral care including spiritual, medical, and psychological help.<sup>41</sup> The diocesan bishop would be the first person responsible for this offer.<sup>42</sup>

### Conclusion of the Investigation

Investigations vary in length. The investigator and the Ordinary need to continually evaluate whether “it seems that sufficient evidence has been collected.”<sup>43</sup> It may well be that at a certain point a decision can be made that it is unlikely evidence will be found that significantly contradicts what seems to be the truth of the case.

Once the investigation is concluded, it must be decided whether the original investigator’s report establishes that it seems to be true an ecclesiastical delict was committed.

<sup>39</sup> *Vademecum* 52-54:

52. During the investigative process, a particularly sensitive task falling to the Ordinary of Hierarch is to decide if and when to inform the person being accused.
53. In this regard, there is no uniform criterion or explicit provision in law. An assessment must be made of all the goods at stake: in addition to the protection of the good name of the persons involved, consideration must also be given, for example, to the risk of compromising the preliminary investigation or giving scandal to the faithful, and the advantage of collecting beforehand all evidence that could prove useful or necessary.
54. Should a decision be made to question the accused person, since this is a preliminary phase prior to a possible process, it is not obligatory to name an official advocate for him. If he considers it helpful, however, he can be assisted by a patron of his choice. An oath cannot be imposed on the accused person (cf. *ex analogia*, canons 1728 § 2 CIC and 1471 § 2 CCEO).

<sup>40</sup> *Vademecum* 110: “It should be carefully noted that, according to canon 1728 § 2 CIC, the accused is not bound to confess (admit) the delict, nor can he be required to take an oath to tell the truth.”

<sup>41</sup> *VELM* 5; *Vademecum* 55.

<sup>42</sup> Canon 383 §1. In exercising the function of a pastor, a diocesan bishop is to show himself concerned for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality they are, whether living in the territory or staying there temporarily; he is also to extend an apostolic spirit to those who are not able to make sufficient use of ordinary pastoral care because of the condition of their life and to those who no longer practice their religion.

<sup>43</sup> Canon 1718 §1.

The investigator should make a report and give it and the evidence collected to the Ordinary. The report should make an assessment of what has been found in the evidence and suggest anything else that could be done concerning the collection of further evidence.

### Decree closing the Preliminary Investigation

The Ordinary or Hierarch must then decree the conclusion of the preliminary investigation.<sup>44</sup>

Then Ordinary must then decide whether the allegation has a sufficient basis in law and in fact to have a semblance of truth.<sup>45</sup>

A decision needs to be made whether prescription has precluded a penal process.

A decision needs to be made whether it is a delict reserved to the Holy See.

If the investigation concerns a *graviora delicta*, the Ordinary or Hierarch must according to the *Vademecum*:

69. In accordance with art. 16 SST, once the preliminary investigation has concluded, whatever its outcome, the Ordinary or Hierarch is obliged to send, without delay, an authentic copy of the relative acts to the CDF.

Even if the Ordinary concludes the accusation is unfounded or unproven, the CDF *Vademecum* states he must forward the acts of the case with his votum to the Congregation for the Doctrine of the Faith.

71. Whenever the Ordinary who carried out the preliminary investigation is not the Ordinary of the place where the alleged delict was committed, he is to communicate to the latter the results of the investigation.

72. The acts are to be sent in a single copy; it is helpful if they are authenticated by a notary who is a member of the curia, unless a specific notary had been appointed for the preliminary investigation.

73. Canons 1719 CIC and 1470 CCEO state that the original of all the acts is to be kept in the secret archive of the curia.

74. Again, according to art. 16 SST, once the acts of the preliminary investigation have been sent to the CDF, the Ordinary or Hierarch is to await communications or instructions in this regard from the CDF.

<sup>44</sup> *Vademecum* 68; CIC canon 1719 and CCEO 1470.

<sup>45</sup> Canon 1718.

75. Clearly, if other elements related to the preliminary investigation or new accusations should emerge in the meantime, these are to be forwarded to the CDF as quickly as possible, in order to be added to what is already in its possession. If it appears useful to reopen the preliminary investigation on the basis of those elements, the CDF is to be informed immediately.

The revised Book VI of the Code (2021) includes the crime of neglecting to report an offence whether it be to an Ordinary or the Apostolic See.

Canon 1371 §6. A person who neglects to report an offence, when required to do so by a canonical law, is to be punished according to the provision of can. 1336 §§ 2-4, with the addition of other penalties according to the gravity of the offence.

### Informing Civil Authorities

The Ordinary or Hierarch is to inform the civil authorities of the receipt of the allegation according to the following principles:

Two principles apply: a/ respect for the laws of the state (cf. art. 19 VELM); and b/ respect for the desire of the alleged victim, provided that this is not contrary to civil legislation. Alleged victims should be encouraged – as will be stated below (no. 56) – to exercise their duties and rights vis-à-vis the state authorities, taking care to document that this encouragement took place and to avoid any form of dissuasion with regard to the alleged victim (*Vademecum* 48).

If the law requires the Ordinary or Hierarch to report, they must do so.<sup>46</sup> When civil authorities issue subpoenas, the Ordinary or Hierarch must obey them (*Vademecum* 50).

### Role of the Complaints Advisory Committee

This committee was created by particular law. It advises about the credibility of the report and what to recommend to the Ordinary and the Holy See.

### Non-reserved Delict

The Ordinary must discern and decide about initiating a penal process:

Canon 1718 §1. When it seems that sufficient evidence has been collected, the ordinary is to decide: whether a process to inflict or declare a penalty can be initiated.

He may decide that the matter can be resolved with other measures: Canon 1718 §1 no.2 whether, attentive to canon 1341, this is expedient.

<sup>46</sup> *Vademecum* 49.

It must be remembered that the penal process has the objects of repairing scandal, restoring justice and reforming the offender.<sup>47</sup>

Then, if a penal process is to be used, he must decide which process:

Canon 1718 §1 3° “whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.”

If new evidence comes to light:

Canon 1718 §2. The ordinary is to revoke or change the decree mentioned in §1 whenever new evidence indicates to him that another decision is necessary.

The Ordinary is required to consult two judges or experts in canon law if he considers it prudent:

Canon 1718 §3. In issuing the decrees mentioned in §§1 and 2, the ordinary is to hear two judges or other experts of the law if he considers it prudent.

The Ordinary might resolve the matter between the parties if it involves libel:

Canon 1718 §4. Before he makes a decision according to the norm of §1 and in order to avoid useless trials, the ordinary is to examine carefully whether it is expedient for him or the investigator, with the consent of the parties, to resolve equitably the question of damages.

### Conclusion

The preliminary investigation is a crucial part of the procedures before a penal process. If the investigation is performed correctly, it goes a long way to ensure a just outcome for all those involved.

<sup>47</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, reform the offender.

## Things Old and New: The Penal Processes

Rodger J Austin

To begin with something old, one hundred and fifty years old in fact, we recall that the first Ecumenical Council ever held at the Vatican was in 1869-1870. At this Council, the Bishops of France summed up the situation in the Church with regard to canon law: “We are overwhelmed with laws since canonical legislation, to use the fine expression of Eunapius, ‘has become a crushing load even for camels’”.<sup>1</sup> The Council adjourned on 29 September 1870 following the occupation of the Papal States by the armies of the Kingdom of Italy and never reconvened.

Pius X was elected the Bishop of Rome on 4 August 1903 and on 17 March 1904 commenced the process of consolidating the Church’s laws. In keeping with the codification of the civil law in European nations during the nineteenth century in particular, the Church adopted a codified system for its legislation.

### 1917 Code of Canon Law

Pope Benedict XV promulgated the Code of Canon Law on 27 May 1917 and decreed that it come into force on 19 May 1918.

Adapting a legal principle from old Roman jurists - *all our law treats of either persons or things or actions* - and the format used by Giovanni Lancelotti [1522-1590] a canonist of the University of Perugia who added a fourth namely crimes, the systematic order of the 1917 Code of Canon Law comprised five books: General Norms, Persons, Things, Procedures and Crimes and Punishment.<sup>2</sup>

In the old Code of Canon Law, Book IV - *Procedures* - comprised three parts: Procedure for Ordinary Trials, Processes for Beatification and Canonization, Procedure in Certain Cases and the Application of Penalties.

The last part of Book IV dealt with seven particular issues which were spoken of as trials but did not follow the formal procedure rather a summary procedure. These issues included the removal of parish priests as well as the violation of the law of residence and clerics living in concubinage. The diocesan bishop was obliged to consult with the diocesan consultors and the only remedy for a cleric against a decision was recourse to the Holy See.

The 1917 Code of Canon Law required that each diocese have its own tribunal as

<sup>1</sup> AMLETO G. CICOGNANI, *Canon Law* Second Revised Edition Authorized English Version of *Ius Canonium* Maryland, Newman, 1934, 414. Eunapius was a 4<sup>th</sup> Century Greek Sophist and Historian.

<sup>2</sup> CONSTANT VAN DE WIEL, *History of Canon Law* Louvain, Eerdmans, 1991, 170.

**CANON LAW SOCIETY OF AUSTRALIA AND NEW ZEALAND**

**PROCEEDINGS  
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