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Preliminary Inquiry in Marriage Nullity Procedures

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Introduction

For centuries a preliminary inquiry is recognized for criminal and canonization procedures to gather information necessary prior to commencing a specific procedure. In the context of marriage procedures, this concept appears to be rather "new," and elements of it can be seen in the late 19th century, although with a primary focus on separation and lack of form cases. Local approaches, such as in Austria and the United States of America, have a significant impact on universal legislation, but not until after the Second Vatican Council. Even today, when speaking of a preliminary inquiry in the context of marriage procedures, one customarily refers to the "session" a potential petitioner has with a member of the tribunal staff, filling out a preliminary investigation form, submitting documents and notarized copies, and other information necessary before preparing a possible *libellus*. Until 2005, there were no regulations at the universal level indicating and prescribing what is a preliminary inquiry and what is the content of it.

This study intends to outline a brief historical development of the preliminary inquiry in the context of special marriage procedures with selected local instructions and legislation, as well as selected commentaries. With reference to the legislation of the Latin Church, the universal law as promulgated in the Codes of Canon Law from 1917 and 1983 will be examined under three aspects: a) does it contain any legislation on a preliminary inquiry in the context of a process to obtain a declaration of nullity of marriage, b) what are the elements necessary for a petition and how is this information gathered, and c) the gathering of proofs prior to the *litis contestatio*. Referring to these three aspects may shed some light on a) what is a preliminary inquiry specifically in the context of marriage procedures, b) who conducts it, c) when is it conducted, and d) what is sought with its application.

1. The History of a Preliminary Inquiry

1.1. The Development of Canonical Procedural Law

In the early time of the Church, the judicial power is exercised on disciplinary matters and disputes between clergy and laity. Pope Zephyrinus allows in 208 that any appeal can be directly accelerated to him, which is the foundation for the universal papal competency in all ecclesiastical litigations.

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When the young Church found itself entrusted with the Sacrament of Matrimony it could not but realize that the prevalent secular laws and notions were at marked variance with the matrimonial doctrine taught by its Divine Founder. To the Roman mind, marriage was a sacred private matter under State tutelage, a notion which endured even in the days of Justinian. The legal existence of the Church was not recognized in the early days much less the Church's proper and exclusive competence in the matrimonial causes of Christians which was to become more pronounced with each new piece of matrimonial legislation.[1]

Until 318 the decisions of ecclesiastical tribunals are not recognized in the secular world.[2] Emperor Constantine provides bishops with judicial power, and ecclesiastical judgments begin to be recognized civilly.[3] Initially, the Church does not have an autonomous system with procedural norms, but modified Roman law supplements the lack of ecclesiastical procedural norms.[4] Although ecclesiastical tribunals follow the premise of *ecclesia iudicat de fide et sacerdotibus*, Church tribunals are still reliant on

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1 T.H. KAY, *Competence in Matrimonial Procedure*, (The Catholic University of America, Canon Law Studies, No. 53) Washington D.C., The Catholic University of America Press 1929 (= T.H. KAY, *Matrimonial Procedure*), 3.

2 "In the late Republican and early Classical Law (200 B.C.-A.D. 200), the concept of *liberum matrimonium* was prevalent in the Empire and with it came the right to end a marriage at any time in a transaction that was practically formless. If the marriage was terminated by mutual consent of the parties, it was called a *divortium*. If the marriage was dissolved at the instance of only one of the parties, a *repudium* was involved." A.J. NACE, *The Right to Accuse a Marriage of Invalidity*, (The Catholic University of America. Canon Law Studies No. 418) Washington D.C., The Catholic University of America Press 1961, (= A.J. NACE, *Invalidity*), 6.

3 See A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases: Historical Reflections, Contemporary Developments, and Future Possibilities*, (The Catholic University of America, Canon Law Studies, No. 492) Washington D.C., The Catholic University of America Press 1977 (= A.C. DIACETIS, *Judgment of Formal Matrimonial Cases*), 15-19, and 46-47.

4 "The Church courts, having no model other than that of the civil courts of provincial or urban Rome may be presumed to have looked to them for the external form of adjudicating disputes… As the idea of the need of written complaints grew among the citizens and subject peoples of Rome in the generations approaching Justinian, it seems that the Church courts of the same period (although sources are silent on written complaints in non-criminal and non-disciplinary matters) might legitimately be presumed to have proceeded in these matters much in the same way as the state courts. The influence of Roman procedural laws and practices upon the Church's judicial processes cannot be questioned. In the close alliance which joined the Church and the state following the Edict of Milan (313) mutual reaction and influence may be found without difficulty." J.J. KEALY, *The Introductory Libellus in Church Court Procedure. An Historical Synopsis and Commentary*, Washington D.C., Catholic University of America 1937, (= J.J. KEALY, *Introductory Libellus*), 10-11. See also F. ROBERTI, *De processibus. Opus ad codicis schemata exactum SS. Congregationum instructionibus normisque S.R. Rotae conlatis iurisprudentia tribunalium apostolicorum inspecta et cum iure canonico orientali comparatum. Volumen I. De actione. De praesuppositis processus et sententiae de merito*, 4th edition, Rome, Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris 1956 (= F. ROBERTI, *De processibus*), 1-2; see also G.H. JOYCE, *Christian Marriage*, 2nd edition, London, Sheed and Ward 1948 (= G.H. JOYCE, *Christian Marriage*), 215-217.

secular authorities. Figueira comments:

> This process of "romanisation" naturally accelerates after the "christianisation" of the Empire following Constantine's reign—now the emperors also saw fit to "care" for the needs of "their" Church through legislation reflecting the direct influence and exercise of Roman legal concepts and precepts on ecclesiastical organization and life. In general these imperial constitutions, along with the most pertinent portions of Roman legal tradition, all found ultimate compilation in the sixth century during the reign of Justinian.[5]

The office and function of a bishop evolves as well as his responsibilities for Christians in designated areas, "conform to the civilian governmental units of civitates (cities);"[6] he also becomes the ordinary judge in his diocese.[7] He can mandate qualified persons to be judges at his tribunal. In addition, Pope Gregory I confirms in 603 that the main principles of the classical Roman law are to be observed for litigations concerning ecclesiastical matters. He stresses out that one is to seek the truth in each process and that the right of defense of the accused is to be protected. Any accused must be cited on numerous occasions throughout the process prior to the sentence. It is now also possible to appeal a judgment or to lodge a complaint of nullity of the sentence. The marriage procedure itself still relies on the classical Roman law and recognizes two stages: the legal hearing and the judgment phase. Sanson comments:

> The purpose of the legal hearing was to clarify the point in dispute, and to determine what law was applicable. The conclusion of this first phase, the legal investigation, was the "contesting of the issue" (litis contestatio).[8]

It is necessary for the judge to determine both aspects before the judgment phase can begin. The preliminary stage concludes with the "contesting of the issue," and the second stage is composed of the formal hearing of evidence and the judgment. Sanson argues that this first stage can be compared with today's preliminary inquiry;[9]

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5 R.C. FIGUEIRA, *The Canon Law of Medieval Papal Legation*, Ithaka N.Y., Cornell University 1980, 129.

6 IBID.

7 "Undoubtedly, the bishop was the proper judge in these matters [i.e. matrimonial causes among the Christians] for he was the recognized judge in each community. The first ecclesiastical proceedings must have been informal processes in which the substance of justice and court procedure was observed." T.H. KAY, *Matrimonial Procedure*, 49. See also H.F. DUGAN, *The Judiciary Department of the Diocesan Curia*, Washington D.C., The Catholic University of America Press 1925 (= H.F. DUGAN, *The Judiciary Department*), 8-9.

8 R.J. SANSON, *A Preliminary Investigation in Marriage Nullity Trials*, Ottawa, Saint Paul University, Faculty of Canon Law, 1976, 3 (= R.J. SANSON, *Preliminary Investigation*).

9 Two different terms are used: "preliminary investigation" and "preliminary inquiry." Both terms are interchangeable and have the same meaning in a process to obtain a declaration of nullity of marriage. For consistency reasons, the term "preliminary inquiry" is used unless an author is quoted who uses the term "preliminary investigation."

> [w]hich must make some initial evaluation of the legal grounds applicable, and some determination, not of the merits of the evidence, but at least of the existence of facts or evidence that, on the surface, demand a judicial determination.[10]

The extraordinary procedure in Roman law can be considered a source for the ordinary procedure in canon law. This procedure includes that

> [t]he parties appeared for a "cognitio," a judicial hearing. They stated their cases and the facts on which they relied. The close of this stage was apparently litis contestatio, but with effects much modified. A time so defined was unsatisfactory and Justinian provided, in effect, that litis contestatio was to occur when the parties had taken the oath against calumnia.[11]

The ordinary procedure adopts several of these aspects: the ecclesiastical judge evaluates the legal ground(s) for the case and the factual evidence provided prior to the contestation of the case. This *litis contestatio* is an important aspect of the first phase in the ordinary procedure because it determines the ground(s) of the case and would conclude the introduction phase.[12]

With respect to the judicial process, the four centuries from the seventh to the eleventh century prior to Gratian's *Decretum* were marked by two characteristics: (1) a restatement of the legislation of the particular synods and provincial councils of the past, and (2) a refinement of procedural law due largely to the establishment of Roman Law as subsidiary norm for judicial processes by Pope Gregory the Great (…) and the significant Germanic influences of the ninth and tenth centuries.[13]

In the 11th century the competency of Church tribunals expands and includes jurisdiction not only over clergy but all Christian faithful in matters on the so called *causae spirituales*, e.g. marriage, ecclesiastical offices, benefice, and the so called *causae spiritualibus adnexae*, e.g. engagement, questions on the patronage and other temporal goods issues, etc.[14] At the end of the 11th century[15] Ivo of Chartres prepares the first comprehensive regulations concerning marriage nullity procedures.[16] By the 12th century, the law in the Church becomes very vast and multiple collections are

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10 R.J. SANSON, *Preliminary Investigation*, 4.

11 IBID., 9.

12 See also T.H. KAY, *Matrimonial Procedure*, 6-8.

13 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 19.

14 Joyce also recognizes that although episcopal courts were widely recognized as a competent authority by the 10th century, many regional civil courts continued to exercise jurisdiction in these spiritual cases as late as the middle of the 11th century. See G.H. JOYCE, *Christian Marriage*, 225.

15 On the 11th century reform see U.-R. BLUMENTHAL, "The Papacy and Canon Law in the Eleventh-Century Reform," in *Catholic Historical Review*, 84 (1998), 201-218. On the *libellus* in the early Church and on the Decree of Gratian see J.J. KEALY, *Introductory Libellus*, 12-15.

16 See C. ROLKER, *Canon Law and the Letters of Ivo of Chartres*, New York, Cambridge University Press 2010, 248-289.

created but none of them are consistent and difficult to use, or contained developments that needed to be addressed.[17] Outstanding is the *Concordia Discordantium Canonum* from Gratian,[18] complied in 1140. With it, the "procedural law regulating ecclesiastical trials in general at the time of Gratian reflected many factors, principally historical and doctrinal factors."[19] Despite changes and refinement of the procedural law introduced by Gratian, Diacetis concludes that "during the seventh to the eleventh centuries the Church concerned herself more with the preliminaries to marriage and the liturgical celebration of the marriage than with the problem of marital failure."[20]

Pope Innocent III introduces the general requirement of a written procedure, in other words, the entire process is kept in writing,[21] as well as the enforcement of ecclesiastical sentences. Ihli comments that "in addition to witnesses, documents, judicial inspection and experts were also permitted as evidence. If full evidence could not be provided, an oath could be imposed on the one who has the burden of proof. In addition to the ordinary procedure, the summary procedure for certain cases was also developed..."[22]

In the period between popes Gratian[23] and Gregory IX,[24] "scholars were to collect and organize"[25] the various canonical collections and regulations. Pope Gregory IX commissions Raymond of Peñafort[26] "for the general reordering of legislation in the

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17 Diacetis provides an example that led to the compilation of Gratian to address issues at the local level: "The bishop was so overburdened with judicial business that he inaugurated the delegated courts of archdeacons, deans, archpriests, and prelates of lower rank. Originally meant to be delegates of the bishop, these lower clergy came to consider their jurisdiction as ordinary and their courts as courts of first instance with appeal from their court to the court of the bishop. Nor did they hesitate to judge cases in the very presence of the bishop though they were originally appointed to handle only those cases where the bishop could not be present. Eventually the power and abuses of these lower courts would be curtailed through the legislation of the Fourth Lateran Council [1215]." A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 24.

18 See S. KUTTNER, "The Father of the Science of Canon Law," in *The Jurist*, 1 (1941), 15.

19 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 21 and 53-57.

20 IBID., 48.

21 See J.J. KEALY, *Introductory Libellus*, 15.

22 S. IHLI, *Kirchliche Gerichtsbarkeit in der Diözese Rottenburg im 19. Jahrhundert. Ein Exempel der Beziehungen zwischen Kirche und monarchischem Staat*, Berlin, LIT Verlag 2008, (= S. IHLI, *Kirchliche Gerichtsbarkeit*), 29: "Als Beweismittel waren neben Zeugen auch Urkunden, richterlicher Augenschein und Sachverständige zugelassen. War ein voller Beweis nicht zu erbringen, konnte dem Beweispflichtigem auch ein Eid auferlegt werden. Neben dem ordentlichen Gerichtsvefahren wurde ein summarisches Verfahren für bestimmte Fälle entwickelt, das sich bereits in den Clementinen findet." English translation provided by the author of this study.

23 See F. ROBERTI, *De processibus*, 21; see A.J. NACE, *Invalidity*, 10-16, see A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 25-31.

24 See A.J. NACE, *Invalidity*, 16-30.

25 R.J. SANSON, *Preliminary Investigation*, 12.

26 For a detailed study see E.A. RENO III, *The Authoritative Text: Raymond of Penyafort's editing of the* Decretals of Gregory IX *(1234)*, New York, Columbia University 2011.

Church to provide for a more expeditious treatment of cases, both in Rome and in local curias."[27] The Decretals promulgated in 1234 speak of the presentation of the petition[28] and the prohibition to gather evidence from witnesses before the *litis contestatio*.[29]

A preliminary inquiry is not subject to any of the regulations, but one can already see first indications of such an inquiry in these universal norms: the *libellus*[30] must give indications which ground(s) will apply, and some factual evidence must be presented before the *litis contestatio* although witnesses were not allowed to provide (formal) evidence at this stage. Therefore, judicial evidence is gathered only after the *litis contestatio*; there is no mention on the permissibility of extra-judicial evidence gathered in the first stage. One of the reasons why witnesses cannot provide any judicial deposition[31] is that "the judge is not acting as an inquisitor, but is merely acting as the delegate for the matter to which he is assigned by apostolic commission."[32]

1.2. The Formal Judicial Process and the Summary Process

Soon two different canonical marriage procedures developed: a formal judicial process and a summary (administrative) process:[33]

> This bipolarity becomes evident in the gradually recognized difference between a strictly judicial process, which judgment is ordered to whether or not a marriage was validly contracted, and the administrative process which serves for marriages dissoluble by the Roman Pontiff.[34]

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27 R.J. SANSON, *Preliminary Investigation*, 13. See also F. ROBERTI, *De processibus*, 21-24.

28 "The Decretals of Gregory IX (1234) give canonical sanction to the centuries-old practice of the ecclesiastical courts regarding the *libellus*. Here are seen in succinct form the laws governing the initiating of proceedings. Henceforth a written *libellus* is of obligation and judges are not to admit a prospective plaintiff to litigation without the necessary *libellus*… and the controversy as the whether the name of the action must be expressed in the petition was finally settled by Gregory's authentic law… The *Liber Sextus* of Boniface VIII (1298) indicated the necessity for clarity and distinctness in the petition and the obligation of the judge to govern his sentence in relation to the judicial request as contained in the *libellus*." J.J. KEALY, *Introductory Libellus*, 15-16. Therefore, the judge's sentence is the answer to the request as presented in the petition.

29 See R.J. SANSON, *Preliminary Investigation*, 14-16.

30 For a definition of the term *libellus* see J.J. KEALY, *Introductory Libellus*, 3.

31 Under certain circumstances witnesses were permitted to present evidence; see R.J. SANSON, *Preliminary Investigation*, 16-18.

32 IBID., 15.

33 On the decree *Saepe contingit* on the summary procedure and the decree *Dispendiosam prorogationem* from Clement V, see G. LESAGE, "Procédures matrimoniales d'après le Schema « De Processibus »," in *Studia canonica*, 11 (1977), (= G. LESAGE, "Procédures matrimoniales"), 214-216. See also F. ROBERTI, *De processibus*, 2-8. On the history of the summary process see T.L. DUPRÉ, *The Summary Process of Canons 1990-1992*, (The Catholic University of America, Canon Law Studies No. 451) Washington D.C., The Catholic University of America 1967.

34 R.J. SANSON, *Preliminary Investigation*, 22.

Due to the lack of satisfying procedural norms, the formal process still relies on secular law. In addition, the summary procedure becomes more prevalent;[35] it does not require a written petition or a *litis contestatio*. An oral exposition suffices, and it is left to the discretion of the judge to proceed with the case.[36] This oral presentation,

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35 "Apart from a special mandate of the Pope, the formalities of solemn or ordinary canonical trials must always be observed *in criminal and disciplinary causes*, the summary trial being applicable only to civil causes. Thus Pope Clement V., who in his Constitution *Saepe* (Clem. V. 11) describes and defines the manner in which the summary trial is to be conducted, also enumerates, in his Decree *Dispendiosam* (II.1) the various causes which can be disposed of in a summary way. These causes refer to ecclesiastical elections, appointments to ecclesiastical offices and the like, but not to the punishment of offences." S.B. SMITH, *The New Procedure in Criminal and Disciplinary Causes of* Ecclesiasticis *in the United States. Or a clear and Full Explanation of the Instruction* "Cum Magnopere" *Issued by the S. Congr. de Prop. Fide, in 1884, for the United States*, New York and Cincinnati, Fr. Pusted & Co. 1887, 51. See also K. PENNINGTON, "Introduction to the Courts," in W. HARTMANN and K. PENNINGTON (eds.), *The History of Courts and Procedure in Medieval Canon Law*, Washington D.C., The Catholic University of America Press 2016, 24-29. See also S.B. Smith, *Elements of Ecclesiastical Law Compiled With Reference to the Syllabus, The "Const. Apostolicae Sedis" of Pope Pius IX., the Council of the Vatican and the Latest Decisions of the Roman Congregations. Adapted Especially to the Discipline of the Church in the United States. Vol. II. Ecclesiastical Trials. Thoroughly revised according to the Instruction "Cum Magnopere" and the "Third Plenary Council of Baltimore,"* 5th edition, New York, Cincinnati and Chicago, Benziger Brothers 1892, (= S.B. Smith, *Elements of Ecclesiastical Law*) 348-349.

36 "D'après la Constitution *Saepe contingit* (2, *de Verborum significatione*) de Clément V (2), le juge qui procède sommairement peut omettre:

1° Le libelle
2° La contestation du procès ;
3° It peut procéder validement dans la cause même les jours de vacation, ce qui n'est pas permis dans le procès ordinaire.
4° It peut retrancher, autant qu'il est possible, les causes de délai, repoussant les exceptions, les appels dilatoires qui ne serviraient qu'à traîner l'affaire en longueur, modérant les contentions, les disputes des avocats et des procureurs, et rejetant les témoins inutiles.
5° It peut omettre la citation *péremptoire* des parties, et se contenter de la citation simple.
6° It n'est pas obligé de prononcer la sentence étant assis sur son siège ; il peut validement la prononcer étant debout.
7° It peut omettre la conclusion dans la cause.

Mais cette même Constitution de Clément V observe :

1° Que le juge ne doit pas abréger le procès à ce point de ne pas admettre les preuves nécessaires et les défenses légitimes.
2° Il ne peut omettre la citation ;
3° Ni la prestation du serment (soit de calomnie et de malice, soit de vérité) *ne veritas occultetur*, dit Clément V (1).
4° Si le plaignant demande quelque chose au commencement, soit par écrit, soit verbalement, sa *pétition* doit être aussitôt insérée dans les actes.
5° Comme dans le procès ordinaire, les parties observent le droit de présénter des *positions* et des articles.
6° Par conséquent, le juge doit accorder un terme pour présenter ces positions et ces articles ; mais il peut n'assigner qu'un terme unique pour présenter simultanément et les positions et les articles.

summarized in writing by the notary present, is reaffirmed by the Constitution *Saepe* of Clement V of 1312-1314 which "established a special summary procedure for use in beneficial cases and other appeals to the Roman court."[37]

The greatest freedom and discretion on the part of the judge were moderated by the general procedural safeguards of the civil law. This was always done with great concern for, and belief in the indissolubility of the marriage bond. Hence we can understand the transition, which, although common enough, was certainly not universal either in time or in place, from the ordinary process to the summary process, with an administrative character.[38]

There are not many changes concerning marriage procedures from the 12th to the 17th century.[39] Gordon indicates that the Sacred Roman Rota becomes more influential in the 17th century, using predominately the summary process.[40]

Benedict XIV promulgates a new universal legislation on marriage procedures on November 3, 1741 through the Constitution *Dei miseratione*.[41] He also creates the office of "the defender of marriage," who a) has to bring forward arguments for the

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7° Pour les exceptions et les appels, le droit demeure le même que dans le procès ordinaire." P.J. BRILLAUD, *Manuel de la Juridiction Ecclésiastique au for extérieur et spécialement au for contentieux. Avec Appendice sur les Règles du Droit*, Paris, P. Lethielleux 1885, 343-344.

37 J.R. WRIGHT, *The Church and the English Crown. 1305-1334. A Study Based on the Register of Archbishop Walter Reynolds*, Toronto, Pontifical Institute of Mediaeval Studies 1980, 138.

38 R.J. SANSON, *Preliminary Investigation*, 24.

39 On the period of nationalism (1300-1789) see T.H. KAY, *Matrimonial Procedure*, 8-14; see also T.H. KAY, *Matrimonial Procedure*, 53-56; on the bishop's ordinary power to judge, see C. REID, *Rights in Thirteenth-Century Canon Law: An Historical Investigation*, Ithaka N.Y., Cornell University 1995, 208-216; on the impact of the Council of Trent on judicial procedures in general see A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 40-42. Sessio XXIV, de matrimonio, c. 12 of the Council of Trent "declared that matrimonial cases belonged exclusively to ecclesiastical judges. The Council furthermore recognized the struggle between the bishops and the lower prelates. Deans, archdeacons and other inferior prelates were now deprived of their competence in both criminal and matrimonial cases by general law. It was clearly determined that the court of first instance for all cases was to be exclusively that of the ordinary of the place." IBID., 64-65. The Council also created the system of synodal judges: "To further reinforce the reform of Boniface VIII with respect to the quality of delegated judges the Council prescribed that in every provincial council or diocesan synod there should be chosen at least four judges from each diocese who would take charge of the spiritual and ecclesiastical cases. These were to be called judices synodales." IBID., 65-66.

40 See I. GORDON, *De Processibus, Annotationes in L. IV Codicis Juris Canonici*, Rome, Pontificia Universitas Gregoriana 1965-1966, 10; see T.H. KAY, *Matrimonial Procedure*, 56-57. On the differences between the Latin, Greek, and Protestant marriage procedures by the end of the 18th century, see C.F. ROSSHIRT, *Beiträge zum Kirchenrecht*, Heidelberg, J.C.B. Mohr 1863, 42-48.

41 BENEDICT XIV, Constitution *Dei miseratione*, November 3, 1741, see S.B. Smith, *Elements of Ecclesiastical Law*, 430-436. See also F. ROBERTI, *De processibus*, 25, see A.J. NACE, *Invalidity*, 37-39.

validity of the marriage in question, b) is to see that the procedural law is observed, and c) appeal all nullity decisions.

In addition to the defender of the bond, Benedict declared that two conformable sentences were required before the parties could contract a second union, and even then the sentence in a marriage nullity case was never considered as a definitively final decision [res iudicat] … However, in all of his reforms, Benedict made no mention of the need for more than one judge deciding a case, although several judges were already used in some courts, especially in the Roman Curia.[42]

The Constitution *Dei miseratione* gives some indication of an extrajudicial preliminary inquiry, [43] although it is not explicitly stated:

> In the presence of these solemn ordinances we can perceive how absurdly a confessor or rector would act in pronouncing on his own judgment the validity or nullity of a marriage. And a corollary of this conclusion is that in every diocese there should be provided means for settling matrimonial causes expeditiously as well as properly. Justice delayed is justice perverted. No action can be begun against the validity of a marriage until it appears *extrajudicialiter* that probable grounds of its nullity exist. - §3.[44]

Reaffirming the Constitution *Dei miseratione*, the Sacred Congregation of the Council issues on August 22, 1840 the Instruction *Cum moneat Glossa*, which emphasizes the observance of marriage procedure norms.[45] The Instruction does not address a preliminary inquiry, focussing rather on the petition which is then immediately followed by judicial interrogations. Sanson points out that

> [o]ne might reasonably argue that the Bishop would have to have a fairly clear opinion about the possibilities of a case before he would set in motion any process so ponderous. One could likewise compare this opinion with a similar judgment he would have to form before sending a petition for dispensation directly to the Holy Father, a process equally serious and weighty. But there does not seem to be any official, or even customary procedure for obtaining preliminary information, and forming this opinion.[46]

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42 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 74.

43 See R.J. SANSON, *Preliminary Investigation*, 25-26. See also J. KAMAS, *The Separation of the Spouses With the Bond Remaining. Historical and Canonical Study with Pastoral Applications*, (Tesi Gregoriana, Serie Diritto Canonico vol. 20) Rome, Editrice Pontificia Università Gregoriana 1997, 136-137; see S.B. Smith, *Elements of Ecclesiastical Law*, 394-395.

44 See R.L.B., "Matrimonial Causes," in *The Pastor*, IV (1885), 187.

45 The Instruction was primarily focussing on non-consummation procedures; see also D.L. D'AVRAY, *Rationalities in History. A Weberian Essay in Comparison*, New York, Cambridge University Press 2010, 175-176; see S.B. Smith, *Elements of Ecclesiastical Law*, 436-441; see T.H. KAY, *Matrimonial Procedure*, 57.

46 R.J. SANSON, *Preliminary Investigation*, 28.

The instruction also reiterates from *Dei miseratione* the bishop's function in a marriage nullity process. He is not only to issue the final sentence, but to put together the acts of the case, either personally or through delegation. The instruction of the case could then fall upon the judge delegated by the bishop, "that is, an auditor rather than a judge."[47]

1.3. The *Commissarius* in the Austrian Instruction (1855/1856)

The Austrian Instruction of Cardinal Archbishop of Vienna, Joseph Rauscher, which is part of a Concordat between Pope Pius IX and Franz Joseph I, Emperor of Austria,[48] is recognized in 1855 by the Holy See[49] and applied in the entire Austrian Empire.[50] This Instruction does not contain any new legislation but was a compilation of "the various ecclesiastical laws in force at that time, with the best extant jurisprudence and procedures of the Vatican offices, and the assistance of recognized canonists."[51]

For the first time in the Church history, although not universally, an Instruction speaks of a canonically established preliminary inquiry in the context of marriage procedures. Lesser so on marriage nullity procedures, this Instruction focusses primarily on lack of form procedures and the discovery of impediments.[52] In either

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47 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 80.

48 "Ratification of the Concordat took place on September 25, 1855, and the 'Austrian Instruction' was officially sanctioned by Emperor Franz Joseph on October 8, 1856. The original document (Urtext) was in Latin, with a German translation. The Latin and German appeared in parallel columns in the newly-founded periodical, Archiv für Katholisches Kirchenrecht, mit besonderer Rücksicht auf Oesterreich." R.J. SANSON, *Preliminary Investigation*, 33.

49 The Concordat was in force only for approximately 15 years until it was revoked in 1870. Nevertheless, the Instruction on marriage nullity procedures remained applicable. Already in 1856, it was sent to all bishops of the Austrian empire by Cardinal Viale-Prelàs. The bishops agreed to the Instruction and it was put into effect as particular law for the dioceses. As part of the concordat the Instruction would have been revoked. Already during the drafting period it became apparent that the Holy See was not much in favor of the Instruction, hence only a recognition given. It remains questionable if the Austrian bishops may have foreseen the failure of the concordat and/or did seek "protection" of the Instruction by additionally issuing it as particular law, *praeter legem* and therefore, within the scope of particular law independent from the universal legislator, further distinguishing between the rather civil character of the concordat and the *ius ecclesiasticum commune* of an Instruction issued as particular law. On the discussions see J. HAHN, *Das Richteramt – Rechtsgestalt, Theorie und Theologie*, (Beiheft 74 zum Münsterrischen Kommentar zum CIC), Essen, Ludgerus Verlag 2017, 272-273; see also S. IHLI, *Kirchliche Gerichtsbarkeit*, 34-35, see J.F. SCHULTE, "Darstellung des Eheprocesses bei den geistl. Gerichten des Kaiserthums Oesterreich," in *Archiv für katholisches Kirchenrecht*, 1 (1857), (= J.F. SCHULTE, "Darstellung des Eheprocesses") 151-154; see T.H. KAY, *Matrimonial Procedure*, 57-58, see A.J. NACE, *Invalidity*, 39-47.

50 See S. CIPRIANI, *Instructio Matrimonialis Rev. mi Domini Rauscher, Archiepiscopi Vindobonensis (1853-1856)*, Rome, Officium Libri Catholici 1952, 101-153.

51 R.J. SANSON, *Preliminary Investigation*, 33.

52 For an early commentary on the new marriage nullity procedure according to the Austrian Instruction, see J.F. SCHULTE, "Darstellung des *Eheprocesses*," 145-161, 346-365.

case, "the Instruction prescribes that [a marriage process] shall be preceded by a preliminary investigation, which it calls 'disquisitio praevia' in §142, and 'praevia inquisitio' in §143."[53] § 126 indicates that a petition must include factual proof on which the alleged nullity is founded. Consequently, the tribunal can verify the merits of the petition (§ 127) to then accept or reject it (§§ 137-138). The two reasons for rejection "will be repeated in Provida Mater of 1936: 1) the facts, although true, would not render the marriage invalid; 2) the falsity of the allegations is apparent."[54]

Responsible to conduct the preliminary inquiry is the *commissarius* (Commissär); §140 states: "Whenever there ought to be an inquiry into the validity of any marriage, the matrimonial tribunal is to name a commissary to bring to light an investigation of the facts."[55] The term *commissarius* derives from *committere*[56] which means "to entrust a mission to someone. The English word 'commissary' means primarily 'one to whom is committed some charge or office by a superior power."[57] The mandate to exercise the function as *commissarius* in a marriage nullity procedure can be delegated to an office or a particular person, who has to verify the alleged facts brought forward by the petitioner.

1.4. The *Commissarius* in the Diocese of Leitmeritz, Austria (1857)

On January 27, 1857, the "Instructions on the Procedure to be Observed by the Episcopal Commissary in Divorce Proceedings" for the diocese of Leitmeritz, Austria, are issued.[58] The introduction states that the canonical provisions must be observed for the validity of the process itself. In addition, and also for the validity, other essential elements that the commissary, or, if delegated, the parish priest of the region has to follow.[59] The commissary receives the "demand" ("Gesuch"), addressed to the

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53 R.J. SANSON, *Preliminary Investigation*, 34.

54 IBID., 36.

55 "§140. Quoties in valorem matrimonii alicujus inquirendum erit, tribunali matrimoniale commissarium ad quaestionem facti eruendam nominet." Quoted and English translation from R.J. SANSON, *Preliminary Investigation*, 36.

56 Interestingly, although the CIC/1917 does not recognize a preliminary inquiry or a commissary in the context of marriage nullity procedures, the term *committere* "is used in the Code of Canon Law, c. 1940 for the deputation of the special investigator for criminal preliminary investigations," and, therefore recognized in the context of criminal procedures with a similar function as outlined in the Austrian Instruction on marriage nullity procedures. See IBID., 36, footnote 69.

57 IBID., 36-37.

58 "Weisungen über das von den bischöflichen Untersuchungs-Commissären in Scheidungsklagen einzuhaltende Verfahren," in *Archiv für katholisches Kirchenrecht*, 1 (1857), 186-192, 226-235 (= *Von den bischöflichen Untersuchungs-Commissären*). These instructions were signed by J. Lauermann, Präses, and J. Ginsel, "Rath" of the diocesan marriage tribunal.

59 "Da das Kirchengesetz nicht nur die *Form* des bei Ehestreitsachen einzuhaltenden Verfahrens bestimmt, sondern auch einige Stücke desselben für so *wesentlich* erklärt, dass von Beobachtung derselben die *Gültigkeit des ganzen Verfahrens* abhängt, so sieht man sich veranlasst, den … zur Vornahme der Untersuchung von Scheidungsklagen bestellten bischöflichen Herren Commissären folgende Weisungen über den Gang des von ihnen einzuhaltenden Verfahrens

episcopal tribunal only if a) the parish priest was not able to assist the parties concerned to reconcile, and b) the same parish priest has submitted a report to the commissary.[60] Article 2 is on the "demand" and the supplementary information to be given to the commissary: the "demand" is to be made in writing but can also be given orally on record, explaining the cause, motivating reasons, and providing proof for the allegation.[61] Therefore, the commissary is responsible for conducting the preliminary investigation.

Once this "demand" is fully instructed, the commissary will accept this petition ("Klage") and should attempt to bring it to a conclusion in a summary trial, which, as article 3 indicates, "is much cheaper than a formal judicial process." The commissary should always try to conclude a case with a summary trial, even if he has to cite the plaintiff and gather evidence from witnesses, and even in case of an "annoying and time-consuming" search for witnesses.[62]

In the event that the commissary cannot come to a conclusion in a summary trial, he opens the formal judicial process according to article 4. The respondent is to be cited and has 14-30 days to respond. According to article 5, the respondent can object to the proofs or to the witnesses presented by the plaintiff. The objection in form of an exception is then forwarded to the plaintiff, and the plaintiff's response will then be forwarded to the respondent.[63] According to articles 6-8, the commissary has the obligation to verify the admissibility and credibility of the witnesses presented by the plaintiff and the respondent.[64] Once the witnesses are confirmed, the process continues

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mitzutheilen, an welche sich Dieselben, so wie in Delegationsfällen (…) auch die Pfarrer des Bezirkes genau zu halten haben." *Von den bischöflichen Untersuchungs-Commissären,* 186.

60 "Da eine Klage auf Scheidung bei dem bischöflichen Commissär (…) nur nach den von Seiten des Pfarrers fruchtlos gepflogenen Bemühungen zur Aussöhnung der Eheleute anhängig gemacht warden kann, so ist eine solche stets nur in Folge des erstatteten pfarrlichen Berichtes anzunehmen." *Von den bischöflichen Untersuchungs-Commissären,* 186.

61 "Wie aber die entweder schriftlich eingereichte oder mündlich zu Protokoll gegebene Klage instruirt sein müsse, nämlich dass die *Ursache,* auf welche der Kläger sein Gesuch um Scheidung stützet, und die *Gründe*, mit denen er dasselbe motivirt, so wie die *Beweismittel* für diese Gründe in der Klage namhaft gemacht sein müssen, ist des Weiteren in der genannten *Anordnung* (…) auseinander gesetzt, worauf hiermit verwiesen wird." IBID., 186-187.

62 "Ist das Gesuch gehörig und vollständig instruirt, so hat der Untersuchungscommissär der Klage Folge zu geben und den Versuch zu machen, auf dem *Wege des summarischen Verfahrens* (…) die Angelegenheit zu Ende zu führen. Dieser Versuch muss jedenfalls gemacht werden, und der Commissär hat Alles anzuwenden, um summarisch die Streitsachen zu beendigen. Er darf daher auch nicht unterlassen, den streitenden Ehegatten vorzustellen, mit welch' unangenehmen Schritten, lästigen und zeitraubenden Laufereien für sie und Andere, die sie als Zeugen in Anspruch nehmen, und mit welch' nicht geringen *Kosten* es für sie verbunden sein werde, wenn sie es auf einen förmlichen Process würden ankommen lassen." IBID., 187-188.

63 See IBID., 188-189.

64 "Ein Einrede (Exception) und Duplik des Beklagten, sowie die Replik des Klägers betrifft nebst den Beweisartikeln die *Zulässigkeit* und *Glaubwürdigkeit der* vom Gegentheil namhaft gemachten *Zeugen*. Daher muss der Untersuchungscommissär darüber erkennen, ob die von den Parteien namhaft gemachten Zeugen *solche Personen seien, welche das Kirchengesetz zur*

with the citation of the parties and witnesses.[65] The commissary is to take the oath from everyone according to article 11 before their deposition is taken (article 12-19). Each deposition is to be signed by the witness, the commissary and an "actuary."[66]

With the gathering of evidence concludes the instructional phase of the process. The commissary has a responsibility that the next stage of the marriage nullity procedure can be initiated (article 21) by forwarding the dossier to the ecclesiastical tribunal for further instruction and judgment according to article 23.[67]

1.5. The *Commissarius* in the Diocese of Brünn, Austria (1857)

On December 25, 1857, Bishop Anton Ernest institutes for his diocese of Brünn, Austria that every district dean ("Bezirksdechant") is an episcopal commissary ("bischöflicher Commissär") who is delegated to conduct the preliminary and instructional phase for a marriage process ("Klage auf Scheidung von Tisch und Bett")[68] if it cannot be dealt with at the diocesan tribunal in Brünn. Those who wish to initiate a marriage process can contact either the ecclesiastical tribunal itself or the commissary of their domicile and can submit the demand ("Gesuch") in writing or orally. The commissary has to accept the request if he has proof that reconciliation attempts were made.[69]

The commissary has to verify his competency to accept the case. If he is competent, he has to assure that the plaintiff has a right to stand in trial. The commissary must inquire about the reason for initiating a marriage process as well as possible proofs to support the claim. Additional proofs are gathered in form of confessions of the respondent, documentary proof, as well as witness depositions. If the commissary finds no factual and/or supportive evidence, he has to inform the plaintiff about the risk that the marriage tribunal may reject the petition. If there appears factual and supportive evidence, the commissary begins with the preliminary inquiry.

Zeugenschaft zulässt; … Der Untersuchungscommissär muss sich daher folgende *Grundsätze* des gemeinen Kirchenrechts *über die Zulässigkeit oder Tüchtigkeit der Zeugen* vor Augen halten." IBID., 189-190.

65 IBID., 226-227.

66 See IBID., 234.

67 "Schliesslich warden die bischöflichen Herren Untersuchungscommissäre angewiesen, jede bei ihnen anhängig gemachte Scheidungsklage unter Angabe des Gegenstandes dem bischöflichen Ehegerichte anzuzeigen." IBID., 235.

68 A. ERNEST, decree from December 25, 1857, in *Archiv für katholisches Kirchenrecht*, 1 (1857), (= A. ERNEST, "decree from December 25, 1857") 248.

69 "Die Anweisung stellt es §. 215 in die Willkür jener Gatten, die eine Scheidung von Tisch und Bett erzielen wollen, ob sie ihr darauf gerichtetes Gesuch bei dem Ehegerichte oder bei dem *Commissär*, in dessen Bezirke sie ihren Wohnsitz haben, *schriftlich einreichen oder mündlich zu Protokoll geben wollen*. Die erste Fuction des bischöflichen Commissärs besteht also darin, das ser das ihm überreichte (…) *schriftliche Gesuch* eines … Gatten … *entgegennehme*, oder falls der Gesuchsteller es wünscht, dieses *mündlich* gestellte *Gesuch zu Protokoll nehme*. Es versteht sich von selbst, dass der bischöfliche Commissär sich hiezu erst dann verstehen könne, wenn der Gesuchsteller sich den … *Aussöhnungsversuchen* unterzogen hat." IBID., 249.

At the end of the preliminary inquiry the commissary presents the entire dossier to the ecclesiastical tribunal.[70]

In the context of the preliminary inquiry, at which the commissary attempts to identify factual or supportive proof of the claim, he also should attempt to conclude the case without submitting it to the ecclesiastical tribunal for a formal judicial process.[71] Therefore, he has to a) convince the plaintiff to revoke the petition, b) convince the respondent to offer a judicial confession, or c) find the evidence based on documentary proof.[72] According to Bishop Ernest, this is the core of the commissary's function.[73]

The commissary gathers factual and/or supportive evidence of the claim brought forward by the plaintiff during the preliminary inquiry by hearing the parties and the witnesses individually;[74] the parties or witnesses do not have to take an oath at this stage.[75] The result of this preliminary inquiry is to be presented to the ecclesiastical tribunal, which completes the involvement of the commissary.[76]

2. The Preliminary Inquiry Prior to and in the 1917 Code of Canon Law

The universal law is still silent on the issue of a preliminary inquiry in the context of marriage nullity procedures. Towards the end of the 19th century, the model as presented in the Austrian Instruction appears to be a guideline for at least particular legislation, and the office of the auditor becomes more relevant in this context. In general, elements of the preliminary inquiry can be found in the context of the *libellus* to be presented to the competent ecclesiastical authority, who, prior to accepting it, is to gather extrajudicial evidence that may or may not support the claim.[77]

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70 IBID., 249-250.

71 "Die Voruntersuchung im *Scheidungsprocesse* hat aber noch eine weitere Aufgabe … *Zuerst ist der Versuch zu machen, die Angelegenheit ohne eigentliches Beweisverfahren zu Ende zu führen.*" IBID., 250-251.

72 "Diesen Erfolg führt der bischöfliche Commissär herbei, wenn es ihm gelingt, den *klagenden Gatten zur Zurücknahme der Scheidungsklage zu bewegen*, oder den *beklagten Gatten* zum *Geständnisse* der entscheidenden Thatumstände zu bringen, oder wenn er den letzteren aus *Urkunden*, deren Echtheit anerkannt wird, dieser Thatumstände zu überweisen im Stande ist." IBID., 251.

73 "Hiermit ist das Ziel der Wirksamkeit des bischöflichen Commissärs bezeichnet, welches er in der ihm übertragenen Voruntersuchung zu verfolgen hat." IBID., 251.

74 The commissary enjoys his own discretion to conduct the instruction in the context of the preliminary inquiry and is not bound by the regulations of the formal process. See IBID., 254.

75 See IBID., 251-253.

76 "*Das Ergebniss der Voruntersuchung*, beziehungsweise das über dieselbe aufgenommene Protokoll, *hat der bischöfliche Commissär dem Ehegerichte vorzulegen* (…) womit seine hilfsrichterliche Thätigkeit ihr Ende erreicht." IBID., 253.

77 Boudinhon comments on the procedure in France: "La première démarche que fait celui qui croit pouvoir prouver la nullité de son mariage, est d'introduire sa cause devant l'officialité diocésaine compétente, par une demande écrite contenant l'exposé sommaire de la nullité qu'il invoque, et des principaux chefs de preuves qu'il se propose d'alléguer à l'appui… Vient alors l'enquête, qui commence par l'interrogatoire du demandeur, suivi de la déposition de son conjoint. Ce dernier

2.1. The Third Plenary Council of Baltimore (1884)

A main source for the Third Plenary Council of Baltimore of *titulus X – de judiciis ecclesiasticis* is the Constitution *Dei miseratione* from Benedict XIV which does not speak directly of a preliminary inquiry but refers to extra-judicial evidence gathered in the context of the petition. A second source for the Plenary Council is the Instruction *Causae matrimoniales* from the Sacred Congregation for the Propagation of the Faith.[78] In §5 the Instruction *Causae matrimoniales* states that the demand ("accusatio") needs to expose the facts and other *indicia* to support the claim, also naming factual or knowledgeable truthful witnesses.[79]

Other than the two Roman documents, the Plenary Council also recognized in title 10, §2, n. 304 the Austrian Instruction from 1855 which, in their own private judgment, was recommended by Roman theologians and canonists. This Instruction was considered "utiliter etiam consuli poterit" ("may also be usefully consulted").[80] The impact of the Austrian Instruction becomes relevant for the Third Plenary Council of Baltimore in the context of the preliminary inquiry.[81] N. 305.II is very close to §9

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peut, ou se porter partie défenderesse, faisant ainsi cause commune avec le défenseur du mariage, ou adhérer à la demande, laissant ainsi tout le soin de la défense à l'avocat du lien, ou enfin s'abstenir. Les dépositions des deux époux sont considérées, non comme des preuves, mais comme la base de l'instruction et de tout le procès. Les affirmations tendant à prouver que le mariage a été conclu avec un empêchement dirimant doivent être alors corroborées et confirmées par les dépositions des témoins produits par le demandeur ou cités d'office, par les documents et écritures diverses, dans certains cas, par des dépositions et expertises médicales; en un mot, par toutes sortes de preuves juridiques… Le juge est muni d'un pouvoir discrétionnaire dans l'appréciation de la valeur juridique des preuves… Quand l'instruction de la cause est complète, quand de part et d'autre on renonce à produire de nouveaux témoins et de nouveaux documents, le juge déclare l'enquête close, en donne avis aux parties intéressées, après quoi le dossier entier est communiqué aux conjoints, ou plutôt à leurs avocats." A. BOUDINHON, *Le marriage religieux et les proces en nullité*, Paris, P. Lethielleux 1900, 46-48.

78 SACRED CONGREGATION FOR THE PROPAGATION OF THE FAITH, *Instructio de Iudiciis Ecclesiasticis Circa Caussas Matrimoniales*, 1884, see S.B. SMITH, *Elements of Ecclesiastical Law*, 443-456; see T.H. KAY, *Matrimonial Procedure*, 61.

79 "§5. In ea, praeter accuratam facti expositionem, enarranda erunt omnia adjuncta necessaria, et omnia indicia concurrentia; indicandi et nominandi testes de re instructi, ut hoc modo fundamenta accusationis cognoscantur, et via tribunali sternatur veritati detegendae." S.B. SMITH, *Elements of Ecclesiastical Law*, 443-444.

80 THIRD PLENARY COUNCIL OF BALTIMORE, *titulus x. – de judiciis ecclesiasticis, §2. In Causis Matrimonialibus*, n. 304: "In agendis hisce causis pro rei gravitate exacte servetur tum Constitutio Benedicti XIV. *Dei Miseratione*, 3 Nov. 1741, tum Instructio a S. Congr. de Prop. Fide Nobis communicate quae incipit *Causae Matrimoniales*. Utiliter etiam consuli poterit Instructio pro judiciis ecclesiasticis Imperii Austriaci in causis matrimonialibus, a. 1855 a gravibus theologis et canonistis Romanis, licet solo private suo judicio, commendata." See ACTA ET DECRETA CONCILII PLENARII BALTIMORENSIS TERTII, Praeside Illmo. ac Revmo. Jacobo Gibbons, Archiepiscopo Balt. et Delegato Apostolico, Baltimore, Typis Joannis Murphy et Sociorum 1886, (= ACTA ET DECRETA CONCILII PLENARII BALTIMORENSIS TERTII) 174.

81 The right to provide counsel for the parties is also included and taken from the Austrian Instruction. See n. 307: "Advocatos seu defensores quidem conjugibus adducere fas est, ut sua

Causae matrimoniales: it is the auditor or moderator who convokes the tribunal, cites the parties and witnesses, orders the investigations, delegates experts that carry these out, and issues decrees for the correct compilation of the acts; in other words, the auditor or moderator provides for the necessities of the preliminary inquiry and the judicial trial itself which is proper to the judges.[82]

Two main differences to the Roman documents stand out: the function of the auditor finds a new description in this particular regulation, and it speaks directly of the preliminary inquiry ("investigationes," and "disquisitione praevia").

2.2. Selected Commentaries on the Third Plenary Council of Baltimore

One of the early commentaries soon after the Third Plenary Council is a commentary from Smith in 1892, Elements of Ecclesiastical Law, volume II on Ecclesiastical Trials. An ecclesiastical judge[83] receives a "complaint or accusation of the nullity of the marriage" from those qualified by law, in writing, including "a full statement of the case, together with a list of the witnesses and of the other proofs,"[84] indicating if the plaintiff seeks a mere separation a mensa et toro or an annulment.[85] The plaintiff, defendant and witnesses are cited to give their deposition informally.[86] Special attention is given to the plaintiff's deposition, who

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jura tueantur, eorumque consilio uti, quemadmodum in Instr. S. C. cit., § 23, declaratur. Per se patet advocatos a testibus, eorumque allegata personalia a testimoniis plurimum differe; quodsi vero illi negotium perturbarent, ab actorum moderatore intra justos limites coercendi essent, vel etiam a tribunali excludi possent, ut in superius memorata Instructione Archiep. Viennensis, § 143, monetur." See IBID., 175.

82 "Auditoris seu moderatoris est tribunal convocare, partes et testes citare, ordinare investigationes, viros peritos ad eas instituendas deputare, edere decreta pro recta actorum compilatione; uno verbo, omnia praestare tam in disquisitione praevia, quam in processu probatorio, quae judicis propria sunt." See IBID., 174.

83 On the mode how an ecclesiastical judge receives the complaint or accusation, see S.B. Smith, *Elements of Ecclesiastical Law*, 396.

84 IBID., 395-396.

85 "As a rule, a similar [to the annulment] informal preliminary trial (*processus informativus*) takes place, as has been shown, also in causes of divorce *a mensa et toro*. However, the effect of such preliminary investigation is sometimes different in causes of nullity from its effect in causes of mere separation *a mensa et toro*. For in the latter case, if the judge discovers sufficient evidence on the preliminary trial, he may forthwith pronounce the sentence; whereas in the former case - i.e., in causes of nullity – the real or formal trial, as traced out above, cannot be omitted," meaning it cannot be "conducted in a summary manner." IBID., 399.

86 "This preliminary trial usually consists in the informal examination of the married couple, of the witnesses on both sides, and of all the other evidence bearing on the case. We say, *informal*, etc.; for the proceedings are informal, and the judge is not bound to observe any judicial formalities… Generally, the judge does not conduct this preliminary examination in person, but commissions some other person to do it and to report him. As in the preliminary trial for a simple divorce *a mensa et toro*, so also in the preliminary trial for the annulment of the marriage, the parish priest or rector of the parish of the parties whose marriage is being called in question is requested by the bishop's court for matrimonial causes to forward a statement of the case to the court." IBID., 399.

> should in his examination give a clear and full *exposé* of the case, or of the grounds of his demand for the annulment of the marriage, indicate the various kinds of proofs by which he believes he can sustain his demand, state all the circumstances which he either knows of his own personal knowledge or has heard from others, and if he affirms that he can prove his assertions by the testimony of witnesses, he should name them, and they should afterwards be examined.[87]

This stage of the process is the preliminary inquiry which is meant to gather facts of the case, if possible, to "enable the judge to know whether he is justified in going on with the trial or hearing of the case."[88] The focus here is on the evaluation of factual and/or supportive evidence brought forward, in other words, that there is some merit to the case that will be outlined in the libellus. This becomes partially a foundation for canon 1708, 2° of the Code of Canon Law from 1917.

Smith's 1893 commentary The Marriage Process in the United States, in the section of "General Outline and Characteristics of the Trial," repeats that

> [t]he process or trial, therefore, in matrimonial causes of nullity, is nothing else than the hearing of all the parties and of their witnesses, conducted in the manner as prescribed by law, namely, by the Const. Dei miseratione of Pope Benedict XIV. and by the Instr. Causae Matrimoniales of the S. C. de P. F.[89]

The general characteristics of the nullity process are twofold: "the substantial formalities of a formal trial are to be observed, but the non-essential formalities can be omitted," or, as Smith states, that judicial hearings can be "conducted in a summary manner."[90] Substantial are a) the juridical petition, b) the citation of the parties including the defender of the bond, c) the joining of issues, d) canonical proofs, e) publication of the acts, f) "final summing up by both parties or their advocates," and g) "the final decision by the judge or auditor."[91]

The preliminary inquiry is part of the first step of the process, the juridical, informal petition[92] or demand for the annulment of the marriage presented to the bishop or judge based on an alleged diriment impediment. The preliminary inquiry is the stage at which

> on receipt of this demand the judge should carefully, though extrajudicially, examine whether the petition is well founded, that is, whether the asserted impediment is *prima facie* capable of being canonically proved. For this

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87 IBID., 397.
88 IBID., 398.
89 S. B. SMITH, *The Marriage Process in the United States*, New York, Benziger 1893, (= S. B. SMITH, *Marriage Process*) 274.
90 IBID., 274.
91 IBID., 274.
92 On the petition for an annulment, see IBID., 276-277.

> purpose he should examine the petitioner, the spouses, and others who may know of the facts, on all the circumstances of the case… if he finds that there are *prima facie* solid proofs for the existence of the impediment, he should issue the citation to the parties, that is, to the petitioner or plaintiff, to the defendant spouse or spouses, and to the official defender of the marriage, to appear for trial.[93]

To do so, the petitioner should provide some proof with the petition in form of witnesses, documents and other evidence that can support the claim of alleged nullity of marriage.[94] This (extra-)judicial proof[95] is to be submitted to the judge for verification prior to or at the moment of submitting the petition.[96]

Furthermore, the petition is presented in writing to the ordinary of the place of the husband; if it is "presented by the priest or advocate, the petitioner must also, in every case, present himself before the ordinary or the latter's matrimonial tribunal, and orally explain the full circumstances of the case."[97] The preliminary inquiry is exactly this "full and detailed oral account of the whole case."[98]

If the petitioner refuses to "appear before the ordinary for a preliminary examination, his accusation is not, as a rule, to be accepted as an accusation in the

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93 IBID., 275.

94 "646. Q. Is it necessary to produce the proofs together with the petition or accusation?
A. It is sufficient for the petitioner to *indicate* the proofs which he will produce subsequently, that is, after the citation of the defendant and the *contestatio matrimonii*. Thus the Instr. Austr., under article 126 says of the contents of the *libellus*: 'Probationes quas praesto sibi esse autumat (actor) *indicandae* sunt.'" IBID., 282.

95 "647. Q. Can the proofs be sometimes juridically produced before the matrimonial court, simultaneously with the juridical accusation, and prior to the *matrimonii contestatio*?
A. Yes, in two cases. *First, documents*, such as letters, marriage certificates, etc., etc., can be presented at any time, and therefore can be annexed to or enclosed in the *libellus*, or petition for the annulment… *Second*, as in other causes, so also in matrimonial, when there is danger that the proofs will be lost by delay … recourse can be had at any time to the examination of witnesses *ad perpetuam rei memoriam*, as described in our New Procedure, n. 264 sq." IBID., 282.

96 "The preliminary investigation, as understood and practiced in the late XIX century was clearly an 'extrajudicial' procedure, not under oath. Smith clearly distinguishes this testimony of witnesses from the judicial type, which is permitted only exceptionally before the contestation, as was seen in the Decretals of Gregory IX, and will be seen in the Code of Canon Law, canon 1730. Yet this extrajudicial procedure took place before the tribunal or its representative, with the defender and notary often present; and the results were apparently placed in the acts of the case. These results could also be helpfully interpreted by the commissary or auditor. The probatory part of the process has not yet begun. In fact, the petition has not been officially accepted. The preliminary investigation is used not only when the plaintiff has submitted a petition, but also to help a plaintiff to formulate a petition." R.J. SANSON, *Preliminary Investigation*, 63.

97 IBID., 279.

98 IBID., 280.

proper sense of the term." [99] Smith also refers to the character of the petitioner: if the petitioner is deemed "good, reliable, trustworthy," and "where consequently there is no danger of fraud or calumny, the bishop or the moderator of the matrimonial court may admit the accusation or petition for the annulment of the marriage, and proceed to the trial, without requiring the plaintiff to appear before him for a preliminary extrajudicial hearing."[100] In other words, according to Smith, no preliminary inquiry is necessary if the petitioner is deemed "good, reliable, and trustworthy," but an inquiry is necessary if the petitioner is lacking these characteristics. Unfortunately, Smith does not offer any objective standards for the bishop or moderator of the tribunal to determine if the petitioner is of good character or not.

Smith continues that if the accusation shows at the end of the preliminary (informal) inquiry that it is lacking a) its foundation, or b) canonical proofs for the alleged impediment, or c) sufficient proof, the "judge should advise the petitioner to withdraw the petition, or he should simply reject it himself."[101] But "when it is found that there are good proofs, v.g., a canonical half-proof, extant of the existence of the alleged impediment and consequent nullity of the marriage, the process or trial, or rather its probatory term, can then be begun."[102] In conclusion:

> When the juridical petition for the annulment, or the *accusatio matrimonii*, has been properly made, as already shown, it becomes the duty of the ordinary or the moderator to examine carefully, though extrajudicially, whether the alleged annulling impediment, and consequently the asserted nullity of the marriage, rests upon proofs which appear *prima facie* full and conclusive. For it would be evidently worse than useless to begin a process where there is no good reason or proof for assuming the invalidity of the marriage, or where the nullity, if it really exists, cannot be juridically proved. Hence, in this preliminary investigation, the judge should seek orally from the plaintiff and others all the available information on the alleged impediments.[103]

2.3. The *Regulae Servandae* of the Apostolic Tribunal of the Roman Rota (1910)

The 1910 *Regulae servandae in judiciis apud Sacrae Romanae Rotae Tribunal*[104] confirm the *peritus consultor pro illustrandis quaestionibus quae S. Theologiam attiens* which was first mentioned in the 13th century by pope Innocent III.[105] Hallein

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99 IBID., 279.
100 IBID., 279.
101 IBID., 291.
102 IBID., 291.
103 IBID., 289-290.
104 See SACRAE ROMANAE ROTAE TRIBUNAL, "Regulae servandae in iudiciis apud Sacrae Romanae Rotae Tribunal. Approbatae et confirmatae a Pio Papa X," August 4, 1910, in *AAS*, 2 (1910), 784-850.
105 See A. BUCCI, *Diritto della Chiesa e diritto dello Stato nel divenire dell'atto processuale. Un approccio giuridico alle attuali prospettive*, Roman (NT), Editura Serafica 2003, 205.

states that these regulations do not add anything to the previous legislation but highlights the office, function and involvement of the defender of the bond.[106] Of importance is §208 *Regulae servandae* in the context of gratuitous advocacy that gives some indication of a preliminary inquiry exercised at the Roman Rota: "The petition is given to the presiding judge with the appropriate documents, not only concerning the condition of poverty, but also upon the merits of the case…"[107]

Sanson comments: "Therefore, either the petition or the attached statements must give some foundation in law and in fact so that the judges can make their preliminary decision as to whether to accept or reject the petition."[108] Although the regulations of the Roman Rota do recognize the factual and substantial evidence provided prior to the acceptance or rejection of a petition, the *Regulae servandae* do not speak directly of a preliminary inquiry and mention this implicitly only in the section on the gratuitous advocacy but not in the section on the petition itself.

2.4. The Preliminary Inquiry in the 1917 Code of Canon Law

The Code of Canon Law from 1917 does not speak of a preliminary inquiry in the context of marriage nullity procedures,[109] although it does so in criminal and

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106 "Les *Regulae servandae in iudiciis* n'apportent rien de nouveau en vue de la législation précédente. Ce règlement de la Rote requiert: le nécessité de la présence du défenseur du lien aux procès sur la validité du lien matrimonial…" P. HALLEIN, *Le défenseur du lien dans les causes de nullité de mariage. Étude synoptique entre le code et l'instruction « Dignitas connubii », fondée sur les travaux des commissions préparatoires de l'instruction*, (= Tesi Gregoriana, Serie Diritto Canonico, vol. 83) Rome, Editrice Pontificia Università Gregoriana 2009, 35. See also S. KILLERMANN, *Die Rota Romana. Wesen und Wirken des päpstlichen Gerichtshofes im Wandel der Zeit*, Frankfurt am Main, Peter Lang Verlag 2009, 210-211.

107 SACRAE ROMANAE ROTAE TRIBUNAL, "Regulae servandae in iudiciis apud Sacrae Romanae Rotae Tribunal. Approbatae et confirmatae a Pio Papa X," August 4, 1910, in *AAS*, 2 (1910), 843: "§208. Petitio exhibebitur Ponenti opportunis instructa documentis, non modo circa conditionem pauperitatis, sed etiam super meritum causae, dummodo ad meritum quod attinet, non agatur de causa quae ad Sacrae Rotae tribunl per *commissionem* pervenerit." This has changed in the 1934 Norms of the Roman Rota. The reference to the "merits of the case" is no more mentioned in art. 177: "§1. – Qui exemptionem ab expensis iudicialibus, vel earum deminutionem vult obtinere, Ponenti labellum exhibere debet, adiunctis documentis, quibus quaenam sit oeconomica eius conditio demonstret." See SACRA ROMANA ROTA, "Normae S. Romanae Rotae Tribunalis," June 29, 1934, in *AAS*, 26 (1934), 490.

108 R.J. SANSON, *Preliminary Investigation*, 93.

109 On the understanding of the three different matrimonial causes in the CIC/1917, Kay states: "A matrimonial cause in the strict sense deals with the validity or nullity, and the inseparable effects of the married tie – all that is intrinsic to the contract: while under the wider meaning come all the other possible matrimonial disputes – the matters extrinsic to the bond. More specifically matrimonial causes in the proper sense embrace any and all disputes as to the validity or invalidity of the bond due to the existence of diriment impediments, lack of consent, or defect in required form, the declaration of the fact of consummation or non-consummation of the marriage, perpetual separation, the verifications of the conditions for the solution of a '*matrimonium legitimum*' by virtue of the Pauline privilege, the rights and obligations necessarily inherent in the marriage contract, and the legitimacy of offspring. Practically, the matrimonial causes brought

canonization procedures. Some indications though can be drawn from certain canons, especially those dealing with

a) the petition,[110] and

to ecclesiastical authorities today are reducible to three classes, *viz*., (1) validity or nullity of the contract; (2) declaration of the fact of non-consummation; (3) perpetual separations." T.H. KAY, *Matrimonial Procedure*, 24. See also See NOVAL 1907. *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars I. De Iudiciis in Genere. Tit. I-XIX. Votum Rmi. P. Iosephi Noval O.P.P. Consultoris*, Rome, Tipis Vaticanis 1907; in J. LLOBELL, E. DE LEÓN, J. NAVARRETE (eds.), *Il libro "De processibus" nella Codificazione del 1917. Studi e documenti. Vol. I. Cenni storici sulla codificazione "De iudiciis in genere." Il processo contenzioso ordinario e sommario. Il processo di nullità del matrimonio*, Milan, Giuffrè Editore 1999 (= LLOBELL- LEÓN-NAVARRETE, *De processibus*), 406.

110 FISCHER 1907. *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars II. De Iudiciis Non Criminalibus. Sectio I. De Iudiciis Non Criminalibus, in Genere [Tit. VI-XX]. Votum Ottonis Fischer, Professoris ord. Iuris in Universitate Vratislaviensi*, Rome, Tipis Vaticanis 1907; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 547: "§1 [20]. Processus incipit per libellum conventionis iudici oblatum. Libellus conventionalis continere debet: (…) 2. facti narrationem cum exhibitione probationum. Instrumenta vel saltem copiae eorum libello addendae sunt…"
See also the vote of NOVAL 1908. *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars II. De Iudiciis Contentiosis. Sectio I. De Iudiciis Contentiosis in Genere [Tit. VI-XVI]. Votum R. P. Iosephi Noval O.P. Consultoris*, Rome, Tipis Vaticanis 1908; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 574:
"Can. 32. Libellus clare et succinte contineat:
1°. Nomen et cognomen iudicis aut designationem tribunalis cui porrigitur.
2°. Nomen, cognomen et domicilium porrigentis, procuratoris at adversarii.
3°. Speciem facti cum mentione pacificae compositionis intentatae vel secus.
4°. Positiones seu assertiones referentes factum vel facta, vel facti adiuncta, quae actor tanquam occasiones sui iuris petendi retinet.
5°. Petitionem seu petitiones praecisas, quae distincte exprimant quid ab adversario faciendum vel omittendum sit.
6°. Titulos seu fundamenta iuris quibus singulae petitiones innituntur.
7°. Actoris vel procuratoris subscriptionem cum data et loco."
Similar also the votum of MANY 1908. *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars Secunda. De Iudiciis Contentiosis. Sectio I. De Iudiciis Contentiosis in Genere. Titulus VI-XXII. Votum Seraphini Many, C.S. Sulpitii Consultoris*, Rome, Tipis Vaticanis 1908; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 616:
"Can. 18. §1. Iudicium exorditur oblatione libelli, in quo actor intentionem suam in scriptis iudici proponat.
§2. In libello quatuor contineri debent:
1°. Brevis narration rei, de qua agitur.
2°. Res quam actor a reo praestari, vel factum quod ab eodem poni petat.
3°. Tituli quibus nititur actor ad petendum a reo rem praedictam vel factum.
4°. Summaria indicatio probationum."
These vota are incorporated in the SCHEMA 1 1908 (Schema 1 inc). *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars II. De Iudiciis Non Criminalibus. Sectio I. De Iudiciis Non Criminalibus in Genere [Tit. 6-14]*, Rome, Tipis Vaticanis 1908; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 675; see also SCHEMA 2 1909 (Schema 2 inc). *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars II. De Processu Iudiciario in Generali*, Rome, Tipis

b) the (extrajudicial) proof[111] prior to the *litis contestatio* in (marriage) procedures.

It must be remembered that most of the canons apply to trials in general, and not specifically to marriage procedures.[112]

Vaticanis 1909; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 716. See also with final changes IL PRIMO SCHEMA UNITARIO DELLE PARTI PRIMA E SECONDA. SCHEMA 1909 PER IL CONGRESSO DEI CARDINALI 1910 (Schema 1909 Cardinali). *Codex Iuris Canonici. Liber Quartus [Quintus]. De Iudiciis. Titulus Praeliminaris. De Iudicii Ecclesiastici Natura et Ambitu. Pars I. De Tribunalium Ecclesiasticorum Ordinatione. Pars II. De Processu Iudiciario in Generali*, Rome, Tipis Polyglottis Vaticanis 1909; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 791-792:

"Can. 1 [218]. Qui aliquem convenire vult, debet libellum competenti iudici exhibere, in quo controversiae obiectum proponatur, et ministerium iudicis ad praetensum ius vindicandum expostuletur.

Can. 3 [220]. Libellus litis introductivus debet 1° exprimere coram quo iudice causa introducatur, quid petatur, et a quo petatur; 2° innuere probationis argumenta, quibus uti intendit actor ad comprobanda factorum asserta; 3° subscriptionem referre actoris vel eius procuratoris speciali tamen mandato muniti, cum die, mense et anno, nec non et cum loco in quo actor vel eius procurator habitant, aut residentiam eligunt ad acta iudicii recipienda."

111 On the admissibility of judicial proof prior to the litis contestatio, see SCHEMA 2 1909 (Schema 2 inc). *Codex Iuris Canonici. Liber Quintus. De Iudiciis. Pars II. De Processu Iudiciario in Generali*, Rome, Tipis Vaticanis 1909; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 723: "Can. 4 [147]. §1. Nullae et a iudicii limine omnino repellendae sunt probationes, quas pars pro suo lubitu extra iudicium conficere nititur, et dein producit, ceu praesertim sunt gratiosae suffragationes et ultroneae declarations, aut attestationes. §2. Probationes autem aliae non sunt validate nisi a iudice competente admittatur vel conficiantur. [*sic*] eius delegato assumi.

Can. 5 [148]. §1. Iudicis est determinare tempus, modum ac limites probationum sumendarum. §2. Attamen ad probationis assumptionem iudex procedere non potest ante litis contestationem, nisi in casu quo timetur ne probatio peritura sit, ad perpetuam scilicet rei memoriam."

See also IL PRIMO SCHEMA UNITARIO DELLE PARTI PRIMA E SECONDA. SCHEMA 1909 PER IL CONGRESSO DEI CARDINALI 1910 (Schema 1909 Cardinali). *Codex Iuris Canonici. Liber Quartus [Quintus]. De Iudiciis. Titulus Praeliminaris. De Iudicii Ecclesiastici Natura et Ambitu. Pars I. De Tribunalium Ecclesiasticorum Ordinatione. Pars II. De Processu Iudiciario in Generali*, Rome, Tipis Polyglottis Vaticanis 1909; in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 799: "Can. 4 [147]. §1. Nullae et a iudicii limine omnino repellendae sunt probationes, quas pars pro suo lubitu extra iudicium conficit, ceu praesertim sunt gratiosae suffragationes et ultroneae declarations, aut attestationes.

§2. Sed probationes ut sint validae debent a iudice competente vel ab eius delegato admitti vel confici.

Can. 5 [271]. §1. Iudicis est determinare tempus, modum ac limites probationum sumendarum. §2. Attamen ad probationis assumptionem iudex procedere non potest ante litis contestationem, nisi iuxta *can. 6* [264] *tit. praec.*"

112 Bassibey, referring to the Austrian Instruction, proposes in his votum on marriage procedures: "Art. 19. 'In ea, praeter accuratam facti expositionem, enarranda erunt omnia adiuncta necessaria et omnia iudicia concurrentia; indicandi et nominandi testes de re instructi, ut fundamenta accusationis et via sternatur veritati detegendae.' Omnis accusatio ab ipso actore subsignabitur.

Kealy comments:

> Among the safeguards for the administration of justice in ecclesiastical courts is the requirement that the claim of the plaintiff be presented in writing, or reduced to writing by the court notary, to form the basis of the action and to be a guide to the judge in rendering sentence… The requirement of a written petition in ordinary trials, as stated in the Code of Canon Law, is a crystallization of Decretal law.[113]According to canon 1706, the petition[114] needs to outline briefly the narrative and facts[115] as well as the object of the controversy:[116] "Whoever wishes to convene another must show a libellus to the competent judge in which the object of the controversy is set

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Art. 20. Recepto accusationis libello, ed Episcoporum vel delegatum pertinebit inquire: §1 an ipse sit in casu competens, ut accusatorem ad competentem iudicem remittat; §2 an accusator iure accusandi adhuc fruatur; §3 an accusatio fundamento iuris et facti innitatur, ut vel tanquam frivola repellatur, vel accusator, de falsitate aut improbabilitate causae edoctus, ab ea desistat, vel, eo renuente, per conclusionem iudicialem accusatio reiiciatur; §4 an revalidari matrimonium, aut partes inter se reconciliari, aut res amice inter sponsos componi possit.
Haec *auditori*, si adsit, melius commitentur inquirenda.
Observatio. Auditoris praesentia apud tribunalia ecclesiastica, magnae utilitatis erit, ut rite processus conficiatur et causae tantum probabiles ad tribunal deferantur." VOTO DI BASSIBEY SUL PROCESSO MATRIMONIALE, *Codex Iuris Canonici. De Processu Matrimoniali. Titulus I-VIII. Textus et Observationes. Votum Rev. P. R. Bassibey Consultoris*, Rome, Typis Vaticanis 1908, in LLOBELL- LEÓN-NAVARRETE, *De processibus*, 854-855.

113 J.J. KEALY, *Introductory Libellus*, 21.

114 "It was the common opinion that in *ordinary* trials a *libellus* was required for the validity of the process, while in *extraordinary* (*extra ordinem*) or *summary* trials a written petition was not required. In the procedure *extra ordinem* it was sufficient for the plaintiff to state his claim orally to the judge. The statement was then written into the acts of the trial." IBID., 22.

115 "*Libellus est brevis scriptura continens clare actoris petitionem et petendi causam*. – *Tres partes* in eo considerantur: a) *narratio*, seu *summaria facti species*, ex qua sufficienter appareat quodnam sit *obiectum* litis, et quaenam sint *personae contendentes*, et quodnam *tribunal competens*; b) *causa petendi*, seu ut dicitur, *medium concludendi*, sufficienter indicata, ut iudex et adversarius sciant quo iure agitur; c) *petitio ipsa*, seu *conclusio*." I. NOVAL, *Commentarium Codicis Iuris Canonici, Pars I. – De iudiciis*, Rome, Augustae Taurinorum 1920, (= I. NOVAL, *De iudiciis*), 278; see also J.J. KEALY, *Introductory Libellus*, 34-35.

116 "The elements essential to the *libellus*, according to Canon 1706 are a) the proposing of the object of the controversy, and b) the request for its judicial adjustment. Both elements must be present if the writing is to be regarded as *libellus*. If only a statement of controversy is made, the document is simply a narration of facts; if only the services of the judge are asked and there is no recitation of the matter at issue, the request falls of its own ineptitude. Each part is of the essence of the instrument." J.J. KEALY, *Introductory Libellus*, 33. See also IBID., 39-40.
On non-consummation see SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, decree *Catholica doctrina*, May 7, 1923, in *AAS*, 15 (1923), 389-436; 393: Art. 6 §2: "Curandum est ut libellus referat genuinam factorum narrationem ab ipsa parte, si fieri potest, scripto exaratam et subscriptam (cf. in Appendice, n. I)."

> forth and which requests the ministry of the judge to pursue the asserted rights."[117]

Canon 1708, 2° states: "Indicate at least generally by what right the petition undertakes [the action] and what things are alleged and asserted by way of proof." Similar to the above mentioned previous regulations on the petition since the 18th century, it is not required that the plaintiff must provide the proof, but at least that he has to indicate how to prove the allegations and assertions with regards to the object of the controversy[118] as per canon 1706.

In conclusion, the petition requires as substantial content "a foundation both in law and in fact."[119] If it is not present, is the petition to be rejected? According to canon 1709 §1 the petition is rejected due to incompetence of the judge or the petitioner's lack of standing in trial: "The judge or the tribunal, after it sees both that the thing is within its competence and that the petitioner has legitimate personal standing in the trial, must promptly admit or reject the libellus, adding in the second case the cause for rejection."

Interestingly, it does not provide any indication on specific criteria necessary to reject a petition based on a lack of substantial grounds. Although a preliminary inquiry is not mentioned directly in the Code in this context, some commentaries refer to it. Kealy states:

> This preliminary examination should extend itself to a consideration of the right or law upon which the plea is founded, its application to the present cause, and the scrutiny of the *libellus* in respect to its content of the essential elements of the instrument, and of its meeting of the requirements respecting its form.[120]

Therefore, according to Kealy, the preliminary inquiry is now part of the examination of the *libellus*, and no more an inquiry to verify the facts, which took place before a *libellus* is submitted. As indicated in some regulations since the 18th century, substantial grounds and facts were gathered through extrajudicial testimonies given by the parties and witnesses in the context of a preliminary inquiry. This would not be in violation with the norm of canon 1730 which does not permit the judicial interrogation prior to the *litis contestatio*:

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117 English translation of all references to the CIC/1917 are taken from E.N. PETERS, *The 1917 Pio-Benedictine Code of Canon Law. In English Translation With Extensive Scholarly Apparatus*, San Francisco, Ignatius Press 2001.

118 "Indicare generatim: id est, in compendio et quoad sensum, probationes quibus demonstrare intendit quod verbis sequentibus praescribitur, nempe: … quo iure innitatur … allegantur … asseruntur: videlicet, facta, adducta in narratione seu facti specie, et indicata in expositione causae petendi … actorum recipiendorum gratis…" I. NOVAL, *De iudiciis*, 280-281.

119 R.J. SANSON, *Preliminary Investigation*, 76.

120 J.J. KEALY, *Introductory Libellus*, 49.

> Before the joinder of issues takes place, the judge shall not proceed to receive evidence or testimony, except in the case of contumacy or unless the deposition of the witnesses must be received lest it cannot be received later, or [would be only] received with difficulty, because of the probable death of the witness or his leaving the area or some other just cause.

Sanson argues that the "deposition" referred to in canon 1730 is "judicial evidence." He further refers to Gordon's argument "*Rei dubiae seu controversae per legitima argumenta Judici facta ostension*," and concludes:

> However, proofs can be considered extrajudicial if they are not obtained in an ecclesiastical trial according to the laws of procedure. In this sense, the information and statements gathered under the preliminary investigation of the Austrian Instruction were extrajudicial, and so outside the strict scope of canon 1730. Thus, this type of preliminary investigation does not seem to be forbidden by canon 1730, or in the Code. All the canons regarding the introductory process in the Code would seem to discourage any judicial action before the formal steps of the process.[121]

On the extrajudicial confession, canon 1753 states:

> A confession, whether in writing or orally, that is made outside the trial to the adversary himself or to others is called extrajudicial; it is for the judge, having admitted it to the trial and weighting the circumstances of all things, to decide what is to be made of it.

Therefore, an extrajudicial confession is one that is "made to one's opponent or to others outside the court… If this confession is introduced in court, it is left to the discretion of the judge, after considering all the attendant circumstances, to determine its weight."[122] Woywod, although not referring to a preliminary inquiry, avoids the term "extrajudicial confession" and introduces the term "qualified admission:"

> Since it is not a confession pure and simple, it does not come under the rules here specified in the Code. Such so-called qualified admissions are rather a method of defence (e.g., if a party admits he owes another the sum of money which he demands, but that also the opponent owes him a debt which offsets his claim; again, in a suit for injuries, the defendant may admit that he inflicted the injury, but did so by accident, in self-defence, etc.). It is evident that a fact admitted by the defendant needs no further proof, but, by pleading exceptions and other defences, the defendant has the burden to prove the facts which he pleads in his defence. Though proof seems superfluous if a fact is admitted by the opponent, the Code nevertheless admits judicial confession as full proof

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121 R.J. SANSON, *Preliminary Investigation*, 78-79.

122 S. WOYWOD, *A Practical Commentary on the Code of Canon Law*, Volume II, New York, Joseph F. Wagner Inc. 1948, (= S. WOYWOD, *A Practical Commentary*), 294.

> only in private affairs; in cases in which the public welfare is concerned (e.g., validity of marriage …), judicial confession does not relieve the opponent from the necessity of proving the case.[123]

Some particular regulations recognize the function of a commissary etc. who would be in charge of gathering extrajudicial documentation prior to the *libellus* being submitted. But, as already stated above, the Code of Canon Law from 1917 is silent on the preliminary inquiry in general. Dugan discusses the possible extent of the auditor's function in the context of contentious cases:

> (1) The auditors may be commissioned to take care of the many duties detailed in a judicial proceeding from the "contestatio litis" usque "ad publicationem processus."
>
> (2) In contentious cases the auditor may be ordered to make the necessary preparations for the "introductio causae," or the formal opening of the cause. These preparatory duties include, the acceptance or the rejection of the libellus or the allegation in which the charge is made by the plaintiff; the sending out of the first summons to the parties in dispute and also the "contestatio litis" or formal opening of the cause before a court…[124]

Woywod's and Dugan's interpretation could lead to an understanding of a possible preparation for the formal introduction of a case, permitting "qualified admissions" as those indications the petitioner intends to provide factual evidence.

2.5. The Instruction *Provida Mater* (1936)

On August 15, 1936 the Sacred Congregation for the Discipline of the Sacraments issues the Instruction *Provida Mater* which provides regulations specifically for marriage procedures at diocesan tribunals.[125] The Instruction not only has as source the Code of Canon Law from 1917, but also the revised procedural norms of the Roman Rota from 1934.[126] *Provida Mater*, in article 226, confirms canon 1990 and states that marriage cases are to be adjudicated in a formal judicial process and not in a summary process, and it speaks additionally in article 227 §2 of the *via ordinaria*, and in article 231 §2 of *ordinarii processus trames*.[127]

Unlike the Code of Canon Law from 1917, *Provida Mater* "clarified the criteria for rejecting a petition on substantial grounds, but still leaves unclear the type of

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123 IBID., 294-295.

124 H.F. DUGAN, *The Judiciary Department*, 53.

125 See SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, "Instructio servanda a tribunalibus dioecesanis in pertractandis causis de nullitate matrimonium *Provida Mater*," August 15, 1936, in *AAS*, 28 (1936), 313-372.

126 See SACRA ROMANA ROTA, "Normae S. Romanae Rotae Tribunalis," June 29, 1934, in *AAS*, 26 (1934), 449-491.

127 See K. MÖRSDORF, "Zur Eheprozeßordnung für die Diözesangerichte vom 15.8.1936," in *Theologische Quartalschrift*, 120 (1939), (= K. MÖRSDORF, "Eheprozeßordnung") 214-216.

evaluation that judges must make of the foundation of a petition."[128] It also addresses that the involvement of legal assistance for both parties is not necessary.[129]

Just like canon 1707, article 55 § 2 states that everyone who has a right to stand in trial can submit a written petition[130] to the competent judge:[131] "Whoever wishes to impugn a marriage must present to the competent tribunal a *libellus* in which the object of the controversy is set forth and the services of the judge are requested to declare the nullity of the marriage."[132]

The object of the controversy must be described in detail; it does not suffice to present a "mere enumeration of difficulties … to constitute a canonical *libellus*."[133] Although article 55 is on some of the necessary elements of a petition, *Provida Mater* does not give any indication in this context of a preliminary inquiry. Doheny suggests:

> Neither the Code [of Canon Law from 1917] not the *Instruction* refers to any preliminary hearing on the *libellus*. It appears that this is permitted and that this is left entirely to the discretion of the judges or the special regulations or custom of the tribunal. In some cases such a preliminary hearing may be highly advisable; in others it might be necessary. The court should seek to secure the amount of information sufficient for its own enlightenment and necessary for the *Defensor Vinculi* to prepare his questions intelligently.[134]

Article 56, repeating canon 1707, §§ 1 and 3, allows for an oral petition that can be presented but must be transcribed.[135] According to article 57, 2°, the *libellus*: "[…] should indicate the object of the petition; namely, that the marriage be declared null and on this or that ground; for example, because of impotence, fear, and the like, or on several grounds if there are many grounds of nullity." This implies that the petitioner not only needs to indicate the object of the claim, but also has to name specific grounds upon which the petitioner believes that the marriage is null.[136] Therefore, the law in

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128 R.J. SANSON, *Preliminary Investigation*, 83.

129 See J. J. HOGAN, *Judicial Advocates and Procurators*, (The Catholic University of America. Canon Law Studies, No. 133) Washington D.C., The Catholic University of America Press 1941, 69-72.

130 See J.J. KEALY, *Introductory Libellus*, 25.

131 On the competency of a tribunal by reason of quasi-domicile, see SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, "Instructio de competentia iudicis in causis matrimonialibus ratione quasi-domicilii," December 23, 1929, in *AAS*, 22 (1930), 168-171.

132 PROVIDA MATER, art. 55, English translation of all references to the Instruction are taken from W. J. DOHENY, *Canonical Procedure in Matrimonial Cases. Volume I. Formal Judicial Procedure*, 2nd edition, Milwaukee, The Bruce Publishing Company 1948 (= W. J. DOHENY, *Canonical Procedure*), 183.

133 IBID., 187.

134 W. J. DOHENY, *Canonical Procedure*, 187.

135 See J.J. KEALY, *Introductory Libellus*, 28-29.

136 "In n. 2 wird die Angabe des Klagebegehrens (petitio = quid petatur, c. 1708 n. 1) verlangt nebst Anführung des Nichtigkeitsgrundes (caput) oder gegebenenfalls auch mehrerer." K. MÖRSDORF, "Eheprozeßordnung," 356-357.

conjunction with possible evidence to be presented in the process must be included according to article 57, 3° and 4°:[137]

> 3° It should set forth, at least in a general way, the law upon which the plaintiff bases his claim to prove the things that are alleged and asserted. It is not necessary, nor is it expedient to formulate an exact and detailed exposition of the evidence, for this belongs to the subsequent stages of the proof and defense of the case. It suffices to indicate that the petition has not been presented temerariously.
>
> 4° The facts should be stated about the domicile and quasi domicile of the consorts, as well as their actual residence, so that the court can determine its proper competency.

The wording used in this article suggests that a presentation of (judicial) proof is not necessary at this stage of the trial, but the petitioner needs to at least outline the supporting evidence of the claim. Based on this indication of the evidence that will be presented in the context of the formal instruction, the judge can accept or reject a petition.[138]

Article 59 recommends that the proof, indicated in the petition, is a) documentary proof, b) witness testimony, and c) presumptions:

> If proof is offered in the form of records or documents, these should be submitted with the *libellus*, insofar as possible; if through witnesses, their names and domicile should be stated with the indication of city, street, and

[137] "Fast mit denselben Worten wie c. 1708 n. 2 fordert n. 4, daß wenigstens im allgemeinen anzugeben sei, auf welches Recht sich der Kläger zum Beweise seines Vorbringens und seiner Behauptungen stützt. Hinzugefügt wird die Erklärung, es sei weder notwending noch zweckdienlich, eine ausführliche und breite Darlegung der Beweise zu geben, da dies zur Beweisaufnahme und Verteidigung gehöre; es genüge, wenn ersichtlich ist, daß das Klagebegehren nicht mutwillig gestellt sei. Daraus geht eindeutig hervor, daß eine Substantiierung der Klage verlangt wird, d.h. es genügt nicht, die genau bestimmte Angabe des Klagegrundes (Individualisierungstheorie) … sondern überdies müssen wenigstens im allgemeinen die die Klage begründenden Tatsachen angegeben warden (Substantiierungstheorie). Mittelbar ergibt sich daraus eine ungefähre Angabe der Beweismittel." IBID., 357. See also J.J. KEALY, *Introductory Libellus*, 45.

[138] Doheny comments: "Experience indicates that bills of complaint are frequently vague and inaccurate. To avoid misunderstandings and delays, the party should clearly state the one point, or several points, in some cases, upon which the validity of the marriage is impugned. All irrelevant details should be omitted. Long narrations of difficulties, vicissitudes of married life, and the like may be presented to the court later, if they are considered necessary or relevant, but they should be inexorably excluded from the bill of complaint. The *libellus* should further indicate the grounds, at least the general outline, upon which the plaintiff bases his case to prove the allegations and assertions he proffers. It is neither necessary nor opportune to draw up a long and accurate list of arguments, for these belong to the subsequent process of proof and defense in the trial proper. It suffices to give only enough information about the case to indicate that the petition for annulment is not unfounded." W. J. DOHENY, *Canonical Procedure*, 189.

> number; if in the form of presumptions, the facts and indications whence they are deduced should be indicated in at least a general way. However, nothing prevents the plaintiff from adducing additional proofs during the course of the trial.

It is not necessary that the petitioner is to bring forward all factual and substantial evidence possible at this stage, as indicated in article 57 §3: "It is not necessary, nor is it expedient to formulate an exact and detailed exposition of the evidence."[139]

Furthermore, extrajudicial confessions are also recognized in *Provida Mater*, but just like the Code of Canon Law from 1917, it does not directly refer to the possibility of the petitioner to submit an extrajudicial confession in the context of a preliminary inquiry or, in general terms, prior to submitting a *libellus*; the Instruction rather refers to any statements made at an unsuspect time: "The extrajudicial confession of a consort which impugns the validity of marriage and which has been made before the marriage was contracted or after the marriage, but at a time that was not suspect, is to be duly estimated by the judge as an adminicular support of proof"(article 116, *Provida Mater*). If a petitioner intends to submit a *libellus* to an ecclesiastical court, it cannot be considered *tempore non suspecto*.

On the admission of proof prior to the *litis contestatio*, article 68, §2, 4° simply refers to the provision contained in the canon 1730: "Admit proofs before the *litis contestatio* in those cases referred to in Canon 1730." It is a responsibility of the "presiding judge" to admit them prior to determining the ground(s) for the case. This also means, that it is done after the *libellus* is submitted because only then the tribunal is established, the case admitted to a collegiate tribunal, and a presiding judge is determined by the judicial vicar. The reasons for admitting them are the same as per canon 1730: "This Canon states that the judge may admit proofs in cases where it is necessary to take the deposition of witnesses before they die or move away or when for any other good reason it would be difficult or impossible to get the testimony."[140]

Article 64 outlines the examination of facts presented in the *libellus*:

> The *libellus* should be rejected by a decree of the collegiate tribunal if the fact upon which the accusation is based would nevertheless be absolutely insufficient to render the marriage null, even if it were entirely true; or if the

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139 "Das Ehehindernis oder der Ehenichtigkeitsgrund müssen sich auf so sichere und stichhaltige Rechts- und Tatsachenbeweisen stützen, daß die Nichtigkeit durchaus wahrscheinlich ist bzw. daß – wie Art. 39 a mit anderen Worten sagt – an dem Bestehen und der (ehezerstörenden) Kraft des Hindernisses (i.e.S.) oder des Nichtigkeitsgrundes ernstlich nicht gezweifelt warden kann." K. MÖRSDORF, "Eheprozeßordnung," 350. A petition in case of a lack of form procedure is to incorporate the same elements; see A. MARX, *The Declaration of Nullity of Marriages Contracted Outside the Church*, (The Catholic University of America. Canon Law Studies, No. 182) Washington D.C., The Catholic University of America Press 1943, 75-76; see W. J. DOHENY, *Canonical Procedure*, 194-195.

140 W. J. DOHENY, *Canonical Procedure*, 225.

> assertion of fact is obviously false even though the fact itself would nullify the marriage.

Kealy cautions that a petition, containing sufficient factual evidence, if admitted, does not automatically lead to a sentence.[141] Therefore,

> one might ask the reasons for the weighting of fact and law in the examination of the bill's assertions and allegations. Manifestly the article does not intend a judicial investigation and examination in the usual sense of the words but rather a prudent analysis of the matter at hand with due regard for the law's interpretation as possible for or against the plaintiff. The tribunal's duty as to estimating the juridical value of the plaintiff's exposition of his cause should be correlated with the plaintiff's obligation toward the same matter which is performed sufficiently well if the exposition of the issue, in so far as the law is concerned, shows an absence of rashness in petitioning.[142]

Consequently, in his interpretation Kealy recognizes the "prudent analysis" of (prejudicial evidential) facts,[143] but he fails to distinguish between the preliminary inquiry necessary to actually gather and determine necessary supportive, factual evidence, and the evaluation of the merits of the case presented in the petition itself to either accept or reject it. The two different stages are "merged" into one, possibly due to the fact that the law itself is silent on the preliminary inquiry necessary to determine what actually can be deemed necessary and factual for the *libellus* itself.

In conclusion, just like the Code of Canon Law from 1917, the Instruction *Provida Mater* does not recognize a preliminary inquiry explicitly, and a) requires in the context of the *libellus* some indication on how to prove the allegation or claim, and b) only

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141 Referring to *Provida Mater* art. 116 and art. 117, Pijnapples states: "In 1936 the world was surprised with *Provida Mater* and with it […] the clock was turned back 80 years: it moved us back to the Austrian Instruction, for in art. 117 it regulates that the judicial depositions of the consorts are not admissible – "*Non sunt aptae*" – as proof against the validity of a marriage. And their extra-judicial statements did not fare much better, either: art. 116 regulates their import to mere adminiculars, scraps of proof, and even in this reduced value they must be correctly evaluated by the judge." P.A. PIJNAPPLES, "Sufficiency of Evidence in Formal Trials," in *Studia canonica*, 8 (1974), 174-175. See also A. Jullien, *Juges et avocats des tribunaux de l'Église*, Rome, Officium Libri Catholici 1970, 374.

142 J.J. KEALY, *Introductory Libellus*, 59.

143 Doheny comments: "Since the final rejection of the *libellus* is equivalent to closing the avenues of a judicial examination of a case, tribunals are naturally to be very slow to decide peremptorily that a case is too trivial or too obviously entwined with falsehood to warrant its presentation before an ecclesiastical court. Not infrequently cases that appear at first sight to be unfounded or fantastic become well substantiated during the progress of a trial. Similarly, assertions, that might appear false, may be true. Hence, experienced members of the tribunals are circumspect in forming their judgments. Any negligence or injustice for which judges might be culpable in this matter could be punished according to the rulings of Canon 1625." W. J. DOHENY, *Canonical Procedure*, 206.

permits for a grave cause the submission of evidence prior to the *litis contestatio*. The documentation customarily presented prior to or with the petition – the preliminary inquiry – are proof, e.g. the marriage certificate, baptismal records, prenuptial inquiry, civil divorce decree, etc. After the "petitioner" contacts the tribunal for the first time, "someone" informs him what documentation he is to present to verify that there is indeed a marriage that has (civilly) failed. There is a discrepancy at the first stage of a process between "don't provide proof" (canon 1730 and article 68, §2, 4°) and "provide information how you wish to prove your claim," (canon 1708, 2° and article 57 §3), and "proof in form of records and documents is permitted" (article 59).

3. The Preliminary Inquiry in the Current Legislation

Prior to the promulgation of the 1983 Code of Canon Law, discussions arise on the implementation of a suitable preliminary inquiry that is not primarily limited to separation and lack of canonical form cases, but applicable to all cases to obtain a declaration of nullity of marriage. Surprisingly, some elements of a more pastoral approach as for example discussed by Lesage can be found in recent legislation. The revision of the law on marriage procedures of the 1983 Code of Canon Law was partially influenced by the Synods on the Family held in 2014 and 2015 that resulted in the post-synodal apostolic exhortation *Amoris Laetitia* (2016).[144] These influential changes were made with the motu proprio *Mitis Iudex Dominus Iesus* and the *Ratio procedendi* from 2015, requiring a possible revision of the Instruction *Dignitas connubii* from 2005.

3.1. Lesage's Proposal "Pour une rénovation de la procédure matrimoniale" (1973)

In 1973, while the reforms of the procedural law after the Second Vatican Council were ongoing, Germain Lesage proposes an alternative model for the adjudication of marriage nullity cases.[145] His reform proposal has two main objectives: (1) to safeguard the traditional "essential elements of procedural law," and (2) to respond "more adequately to the needs of our present period and culture,"[146] since the current procedure does not passably respond to those who's marriages have failed.[147]

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144 See POPE FRANCIS, Post-Synodal Apostolic Exhortation *Amoris Laetitia* to Bishops, Priests and Deacons, Consecrated Persons, Christian Married Couples and all the Lay Faithful on Love in the Family, March 19, 2016, in *AAS*, 108 (2016), 311-446; English translation in https://w2.vatican.va/content/dam/francesco/pdf/apost_exhorta tions/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf

145 See G. LESAGE, "Pour une rénovation de la procédure matrimoniale," in *Studia canonica*, 7 (1973), (= G. LESAGE, "Rénovation de la procédure matrimoniale") 253-279.

146 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 257.

147 "Il est notoire que l'appareil judiciaire de l'Église reste inapte, in plusieurs contrées, à répondre aux besoins de fidèles dont le marriage est acculé à une facillité." G. LESAGE, "Rénovation de la procédure matrimoniale," 253.

Therefore, he calls for a procedure that is less "adversatory" and more focussed on the discernment of truth.[148] Diacetis comments on Lesage's proposal:

> Lesage acknowledges the importance of the adversary dimension of the marriage process, especially in those times and places where ecclesial judgments had civil effects. Because of the serious economic, political and personal consequences in the temporal order, minute and precise regulations for the resolution of challenges to the marriage bond were developed. Such regulations were often meant to preclude possible collusion and fraud by those who perhaps sought to be free in the only way possible from an inconvenient union without concern for the spiritual benefits of an ecclesial judgment. In such a context institutional values may have taken precedence over personal values.[149]

Given the separation of civil and ecclesiastical marriage procedures in the North American context, Lesage, therefore, questions for marriage nullity procedures the concept of "adversary" is appropriate, and the "very purpose for which people approach ecclesiastical tribunals today in North America has changed."[150] The material conflict of the failed marriage is dealt with at civil courts, whereas the establishment of their objective conjugal status, the conscientious dimension and the "remake of their lives" is addressed at ecclesiastical courts.[151]

For Lesage, therefore, the purpose of the matrimonial process is not primarily to resolve personal or interpersonal conflict, but to search for the truth about the authenticity of the matrimonial consent. For him, the primary object in a matrimonial case is to discern if it is possible for a person whose marriage has failed to remake his life with another spouse within the Church. The answer is found in the truth of the facts: was the matrimonial consent valid or not? The central preoccupation of the judge should be to discover the truth of the situation and to clarify with authority the freedom of the parties to remarry.[152]

A revised marriage process should not focus primarily on detailed legal formalities but rather on ecclesiology, the sacramental dimension of marriage, and the person whose marriage has failed, so that they can participate again in the life of the

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148 "Le proces judiciaire a pour fin de résoudre un litige entre adversaires: par nature, il est donc 'contradictoire.' Il met en opposition deux parties, ou deux ennemis, engages dans une lutte qui laissera sur le champ de bataille un vainqueur et un vaincu." IBID., 256.

149 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 259.

150 IBID., 260.

151 "Pratiquement partout, c'est aux tribunaux de l'État que les fidèles recourent pour régler leurs conflits matériels; tandis qu'ils s'adressent aux services de l'Église uniquement pour établir leur statut conjugal objectif et afin de pouvoir, en sûreté de conscience, 'refaire leur vie.'" G. LESAGE, "Rénovation de la procédure matrimoniale," 256.

152 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 261.

Church and Christian community.[153] For marriage cases, a "pastoral inquiry" should be in place to establish the facts relative to the marriage consent.

Instead of a "judicial tribunal," Lesage suggests a "board of inquiry" which would study the validity of the marriage from a truly pastoral angle, while keeping its properly juridic character so as never to betray the rights of the parties, even those of a temporal nature. Such a service should be marked by a pastoral finality. It should reflect a commitment to justice, team work, and a minimizing of unnecessary formalities. Above all, this pastoral service should be dedicated to the detection of the truth and practice of Christian charity.[154]

This "pastoral board of inquiry" gathers and evaluates only the proofs, avoiding unnecessary formalities, streamlining the process to a rather administrative[155] than judicial process, to speed up the process and the final decision.[156] This process, similar to a summary process, is composed of two stages: the first being the preliminary inquiry, and the second is the gathering of evidence itself.

Lesage compares his proposed pastoral method to the "summary process" of the Code. In such a process the judge, with the defender of the bond, determines what is needed to establish the facts of the case. Generally, this would involve two types of documentation: (1) a simple summary of the facts ascertained through public or private documents, such as marriage and baptismal certificates, and (2) an integrated summary of proofs ascertained through the petition, medical records, testimony of the parties, witnesses and experts, and the observations of the defender of the bond and advocate.[157]

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153 "La recherche de la preuve ne doit être obscurcie ou retardée par aucune autre considération que celle de la vérité. Une fois que celle-ci est dûment établie, toute autre formalité devient une injustice, dès lors qu'elle retarde la décision finale ou accroît les charges financières des intéressés. Aussitôt que la vérité est suffisamment démontrée, selon la vérité catholique, la partie qui apparaît libre possède un droit, la plupart du temps urgent, à se voir reconnaître sans retard la possibilité de mener une vie humaine et chrétienne qui lui soit normale." G. LESAGE, "Rénovation de la procédure matrimoniale," 260.

154 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 264.

155 Lesage refers to the laicization process that has been revised in 1971: SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, "Norms for the Reduction to the Lay State," circular letter, January 13, 1971, English translation in *The Jurist*, 31 (1971), 672-680, Norm II, 2: "This investigation, however, does not have the character of a judicial process. For this reason the competent authority must not constitute a tribunal in the proper sense but, either personally or through a delegated priest, undertakes an investigation which pertains rather to the pastoral office."

156 "Il est possible de rénover la procédure judiciaire et de lui donner une tournure pastorale, sans sacrifier pour autant le sécurité et la garantie que présente la technique juridique. La récherche de la vérité, effectuée par un bureau d'étude ou service d'enquête, devrait certes se dérouler selon une méthode exacte qui assurerait : une plus grande accessibilité de l'étude des causes, une adaptation psychologique de l'approche, une rationalisation du processus d'instruction, une concentration sur l'établissement de la preuve, une modernisation de l'équipement et un allégement des dossiers." G. LESAGE, "Rénovation de la procédure matrimoniale," 271.

157 A.C. DIACETIS, *The Judgment of Formal Matrimonial Cases*, 266-267.

Lesage sees in his proposal the value of a preliminary inquiry to ascertain specific facts and to gather documentation necessary prior to a petition being accepted, and the formal beginning of the procedure itself. According to him, it is the judge and all other tribunal officers responsible for the preliminary inquiry. Similar to the Austrian Instruction that not only recognized a preliminary inquiry for marriage procedures but also highlighted its importance, Lesage proposes to have the entire marriage procedure in an extra-judicial manner in form of a pastoral inquiry with each tribunal officer investigating the proofs from different perspectives and for different reasons.[158]

3.2. The Preliminary Inquiry in the CIC/1983

During the revision process of the procedural norms several propositions are made with the regard to the process itself, the number of judges required, the appeal, etc.,[159] but in none of the draft documents the topic of a preliminary inquiry manifested itself in any canonical recognition. The documents highlight though the importance for the search of the truth and that the judge is to apply all licit means to discover and protect it.[160]

A major change came with the promulgation of the Instruction *Dignitas connubii*[161] in 2005, which will be discussed in a separate section of this study, and the motu proprio *Mitis Iudex Dominus Iesus*[162] with the *Ratio procedendi* in 2015, that changed the special marriage procedures of the Code of Canon Law.

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158 "Tout d'abord, c'est divergence des perspectives de travail qui entraine la multiplication des fonctions et donc de leurs titulaires. Il faut que des fonctionnaires différents s'occupent des droits du demandeur, des droits du défendeur et des droits de l'Église elle-même : de sa vérité et de son bien commun. Deux tribunaux, dont un collégial, entrent en plus sur la scène. Juges, avocats, défenseur du lien, promoteur de la justice doivent s'occuper des mêmes actes, des mêmes éléments de preuve, des mêmes secteurs du droit, mais selon des perspectives divergentes." G. LESAGE, "Rénovation de la procédure matrimoniale," 275.

159 See G. LESAGE, "Procédures matrimoniales," 221-223.

160 "Pour bien comprendre et bien appliquer le projet de revision de la procedure, qui ne fait d'ailleurs que confirmer le droit commun actuel, il faut tout d'abord s'inspirer de la fin poursuivre par le tribunal: la recherche de la verité historique dans le mariage en cause et le respect de l'authenticité doctrinale dans les démarches judiciaires. Ce que le juge veut servir avant tout, c'est la verité, et il peut et doit prendre tous les moyens licites qui sont à sa portée pour découvrir et protéger cette verité." IBID., 222.

161 See PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, instruction *Dignitas connubii*, January 25, 2005, Vatican City, Libreria Editrice Vaticana 2005; English translation of all references to the Instruction are taken from K. LÜDICKE and R.E. JENKINS, Dignitas Connubii: *Norms and Commentary*, Alexandria, Canon Law Society of America 2005,

162 See POPE FRANCIS, *Motu proprio Quibus canones* Codicis Iuris Canonici *de Causis ad Matrimonii nullitatem declarandam reformatur* Mitis Iudex Dominus Iesus, August 15, 2015, in *AAS*, 107 (2015), 958-967; English translation from http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_ 20150815_mitis-iudex-dominus-iesus.html

Just like the examination of selected sections of the 1917 Code of Canon Law, the focus in this section will be on the newly introduced preliminary inquiry and similar areas of the universal law, e.g.,

a) the petition,[163] and

b) the (extra)judicial proof[164] prior to the *litis contestatio* in (marriage) procedures.

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[163] COETUS STUDIORUM "De processibus," session from October 23, 1967, in *Communicationes*, 38 (2006), 122:
"Quoad n. 2 huius canonis Rev.mus sextus Consultor proponit ut amplificetur his verbis: "Indicetur causa petendi, seu fundamenta facti, designatis testibus, adductis … documentis atque propositis saltem in genere praesumptionum fundamentis…".
Rev.mus quintus Consultor vult quod libellus indicet: "facti et iuris fundamenta, quibus innitatur petitio".
Quoad propositionem Rev.mi sexti Consultoris Consultores opponunt quod non sit necesse illa omnia numerare, eo vel magis quod non in qualibet causa illa omnia exiguntur.
Quoad propositionem Rev.mi quinti Consultoris, Rev.mus Relator nollet illam admittere quia "iura novit Curia" et de facti fundamentis iam sufficienter dicitur in canone prouti iacet.
Rev.mus septimus Consultor tamen proponit quod dicatur: "… quo iure, seu quibus argumentis innitatur…".
Tandem n. 2 ita redigitur: "Indicare summatim et concinne, quibus argumentis innitatur actor…". Adhibitur verbum "*summatim*" ut in Cod. Orientali."
This change was incorporated in canon 1708 (See *Communicationes*, 38 [2006], 148) and led to Schema 1976: "Can. 140 (CIC 1708) Libellus quo lis introducitur debet: 2) indicare quibus argumentis et probationibus innitatur actor ad comprobanda ea quae allegantur et asseruntur;" In *Communicationes*, 41 (2009), 386.
The Coetus "De processibus" discussed this canon further and suggested to add "indicare summarie," but the proposal was rejected and seen as superfluous. The term "to indicate" would already refer to a brief description. Furthermore, although the introduction of the canon uses the term "debet," which would mean, that the brief description with the indications on how to prove the allegations is a "must," but with reference to this number, the consultors stated that it is in this context not a question of invalidity but rather illiceity if the petition does not include this brief outline. It was proposed: "Indicare quo iure innitatur actor et generatim saltem quibus factis et probationibus ad comprobanda ea quae allegantur et asseruntur." Many of the consultors agree to the new proposal and include "… quibus factis et probationibus ad evincenda ae quae asseruntur." The amended formula was adopted 7 placet, 1 non placet. See *Communicationes*, 11 (1979), 83.
Canon 1456 Schema 1980 (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Codicis Iuris Canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum*, Rome, Libreria Editrice Vaticana 1980) was adopted without change in canon 1504 Schema 1982 (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Codex Iuris Canonici. Schema Novissimum Iuxta Placita Patrium Commissionis Emendatum Atque Summo Pontifici Praesentatum*, Rome, Typis Polyglottis Vaticanis 1982): "Can. 1504 – Libellus quo lis introducitur debet: 2° indicare quo iure innitatur actor et generatim saltem quibus factis et probationibus ad evincenda ea quae asseruntur;"

[164] Canon 1749 text reads: "Iudex ad testificationum aliarumque probationum receptionem ne procedat ante litis contestationem nisi ob iustam et gravem causam." In: *Communicationes*, 38

The introductory stage of a process to obtain a declaration of nullity of marriage is reorganized with the motu proprio *Mitis Iudex*. Therefore, once one or both parties submit a petition (canons 1502 and 1504), the judicial vicar[165] has to verify "before he accepts a case, … that the marriage has irreparably failed, such that conjugal living cannot be restored" (canon 1675).

The role of the judge, i.e. judicial vicar, changed: according to canon 1965 CIC/1917 and canon 1676 CIC/1983 prior to the promulgation of *Mitis Iudex*, the judge is to seek a reconciliation of the parties[166] whereas after the promulgation of *Mitis*

(2006), 262. It was incorporate without change in the Schema 1976 as canon 170 (CIC 1730); in: *Communicationes*, 41 (2009), 393.
The Coetus further discussed the canon on October 27, 1978 and suggested to add "exclusis documentis quae adiiciat actor ad libellum litis introductorium, vel quae conventus in contestatione exhibeat, iudex, etc." The proposal was recognized by the consultors, who then proposed to change the wording of the canon from "testimonium" to "the gathering of evidence:" "Iudex ad probationes colligendas ne procedat ante litis contestationem nisi ob gravem causam." In: *Communicationes*, 11 (1979), 99.
Canon 1481 of the Schema 1980 (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Schema Codicis Iuris Canonici iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum*, Rome, Libreria Editrice Vaticana, 1980) erased the term "for a just cause:" "Iudex ad probationes colligendas ne procedat ante litis contestationem nisi ob gravem causam." On canon 1481, it was discussed that the traditional term "just cause" (iusta causa) was indeed to be replaced by "grave cause" (gravem causam); see PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis patribus commissionis ad novissimum schema codicis iuris canonici exhibitarum, cum responsionibus a secretatia et consultoribus datis*, Rome, Typis Polyglottis Vaticanis 1981, 319.
Canon 1529 of the Schema 1982 (PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Codex Iuris Canonici. Schema Novissimum Iuxta Placita Patrium Commissionis Emendatum Atque Summo Pontifici Praesentatum*, Rome, Typis Polyglottis Vaticanis 1982) reads: "Iudex ad probationes colligendas ne procedat ante litis contestationem nisi ob gravem causam."

165 Lüdicke is critical of the wording in c. 1675, which speaks of a judge (*iudex*) but should have referred to the judicial vicar, who may not even be the judge in this matter. The responsibility to "receive" a petition rests with him, not with "a judge." Lüdicke advises that the term "accipere" used in c. 1675 does not refer to an element of an admissibility check, but rather "receiving," "getting" the petition. K. LÜDICKE, commentary on c. 1675, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, 55rd edition, Essen, Ludgerus Verlag 2019, 1675/1-2, no. 2. On the term "accipere" see also P.A. MORENO GARCÍA, "El servicio de indagación prejudicial: aspectos jurídico-pastorales," in *Ius Canonicum*, 56 (2016), (= P.A. MORENO GARCÍA, "Indagación prejudicial") 70: "No se debe confundir este requisito legal exigido al juez para la admisión de la demanda con la indagación del servicio prejudicial (facultativo, a instancia de parte, con carácter orientativo.)"

166 The reconciliation effort was an obligation of the judge according to c. 1965 CIC/1917, whereas c. 1676 CIC/1983 prior to *Mitis Iudex* referred to an effort of the judge to see if there is hope for a possible reconciliation. In addition, art. 65 of the Instruction *Provida Mater* included a provision that the parish priest was to be involved in case of a convalidation. See K. LÜDICKE, commentary

Iudex, the judicial vicar is to be informed that the marriage in question has irreparably failed.[167] In this context, Lüdicke distinguishes between

a) the certainty[168] and

b) the presumption[169]

of a failed marriage and highlights that a (civilly) failed married is not *per se* a null marriage in the Church.[170]

The indication of a failed and probably null marriage needs to be outlined in the petition.[171] Canon 1504 reads: "The *libellus*, which introduces litigation, must: 2° indicate the right upon which the petitioner bases the case and, at least generally, the facts and proofs which will prove the allegations." Therefore, the petitioner is to outline how the allegation will be proven and ascertain that a means of argumentation exists.[172]

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on c. 1675, **in** K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, 55rd edition, Essen, Ludgerus Verlag 2019, (= K. LÜDICKE, "commentary on c. 1675") 1675/1, no. 1.

167 Referring to Ferro Canale, Lüdicke states: "Er beantwortet die Frage so, dass nicht das Scheitern der Ehe, sondern die Information darüber an den Richter verpflichtend sei." K. LÜDICKE, "commentary on c. 1675," 1675/2-3, no. 4. See also P.A. MORENO GARCÍA, "Indagación prejudicial," 70. See also G. NÚÑEZ, "La fase preliminar del nuevo proceso de nulidad," in *Ius Canonicum*, 57 (2017), (= G. NÚÑEZ, "La fase preliminar") 23.

168 "Es fragt sich, ob sich der Richter des Scheiterns der angefochtenen Ehe gewiss sein kann, wenn die Partner noch nicht nach staatlichem Recht geschieden sind. Nur im Ausnahmefall werden sie die Zivilscheidung von dem Ausgang des kirchlichen Verfahrens abhängig machen, während in der großen Überzahl der Fälle die Verschiebung der Ehescheidung andere Gründe hat als die Unsicherheit, ob die Ehegemeinschaft noch wiederhergestellt werden könnte. Selbst der ungewöhnliche Fall, das sein kirchliches Urteil die Entscheidung darüber bringen soll, ob ein Paar sich zivil scheiden lässt, schließt nicht aus, dass eine Wiederherstellung der Lebensgemeinschaft ausgeschlossen ist." K. LÜDICKE, "commentary on c. 1675," 1675/2, no. 3.

169 "Man wird im Ergebnis als Erfahrung der kirchlichen Gerichtspraxis sagen können, dass die (freilich widerlegliche) Vermutung für das endgültige Scheitern einer Ehe steht, wenn einer der Partner beim kirchlichen Gericht den Antrag auf ein Ehenichtigkeitsverfahren stellt." K. LÜDICKE, "commentary on c. 1675," 1675/2, no. 4.

170 Referring to Ferro Canale, Lüdicke states: "Er erinnert an das Prinzip, dass eine gescheiterte Ehe nicht auch *per se* eine nichtige sei. Da das auch umgekehrt gilt - die vermutete Nichtigkeit zwingt nicht zum Scheitern der Lebensgemeinschaft -, kann es kein rechtliches Hindernis für eine Ehenichtigkeitsklage sein, dass die Partner noch zusammenleben. Einem Paar, das noch zusammen lebt, wird die Frage zu stellen sein, warum es trotzdem die Nichtigerklärung der Ehe anstrebt. Möglicherweise wird die Ehegemeinschaft der Kinder wegen aufrecht erhalten, solange die Nichtigkeit der Ehe nicht feststeht." K. LÜDICKE, "commentary on c. 1675," 1675/3, no. 4.

171 "En segundo lugar, no basta constatar la imposibilidad de la reconciliación para admitir a trámite la demanda. Es necesario que la petición goce del requerido *fumus boni iuris* (can. 1505 §2, n. 4; [Dignitas connubii] 121 §1, n.4) o mínimo fundamento (can. 1676 § 1; [Dignitas connubii] 122)." See P.A. MORENO GARCÍA, "Indagación prejudicial," 71.

172 Lüdicke questions the intention of the Coetus studiorum "De processibus" when drafting c. 1504 which states that the petition must (*debet*) be rejected if the following elements mentioned in nn. 1-3 are not presented; and the Coetus' interpretation that the term *debet* is to be understood as *ad liceitatem* and not *ad validitatem* (see *Communicationes*, 11 [1979], 83). Rejecting a petition

The *Ratio Procedendi in causis ad matrimonii nullitatem declarandam*[173] of the motu proprio *Mitis Iudex* provides the information on who and how a preliminary (pre-judicial or pastoral)[174] inquiry can be conducted[175] so that the petitioner can outline how the allegations may be proven based on what ground(s):

> Article 2. The pre-judicial or pastoral inquiry, which in the context of diocesan and parish structures receives those separated or divorced faithful who have doubts regarding the validity of their marriage or are convinced of its nullity, is, in the end, directed toward understanding their situation and to gathering the material useful for the eventual judicial process, be it the ordinary or the briefer one. This inquiry will be developed within the unified diocesan pastoral care of marriage.

Morán Bustos comments that for these separated and divorced faithful[176] a major presence of specialized ministry is necessary,[177] offered by the local tribunals as well

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based on c. 1505, §2, 3° would still permit the resubmission of the previously rejected petition based on c. 1505, §3. Therefore, Lüdicke correctly concludes: "Es geht also nicht um eine Erlaubtheit – diese steht als Kategorie gar nicht zur Debatte –, sondern um die Zulassungsfähigkeit einer Klageschrift. Dazu allerdings sind die geforderten Inhalte notwending. (Ungültig wäre eine Klageschrift, wenn sie von einem mandatslosen Prozeßvertreter unterschrieben wäre.)" K. LÜDICKE, commentary on c. 1504, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, 55rd edition, Essen, Ludgerus Verlag 2019, 1504/1, no. 2.

173 See POPE FRANCIS, *Ratio procedendi in causis ad matrimonii nullitatem declarandam*, August 15, 2015, in *AAS*, 107 (2015), 967-970; English translation from http://w2.vatican.va/content/francesco/en/motu_proprio/documents /papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html

174 On the call for pastoral conversion in light of the reform with *Mitis Iudex*, see C. PEÑA GARCÍA, "Agilización de los procesos canónicos de nulidad matrimonial: de las propuestas presinodales al motu proprio *Mitis Iudex Dominus Iesus* y retos pendientes tras la reforma," in *Ius Canonicum*, 56 (2016), 49-51.

175 Núñez recognizes three main principles: "1. Principio de «información», de modo que los fieles tengan noticia y conocimiento fundados de la realidad de los procesos de nulidad, de su naturaleza declarative, de las condiciones de acceso a los mismos. 2. Principio de «acompañamiento» que ayude al discernimiento jurídico-pastoral del verdadero estado personal … 3. Principio de «coordinación» entre los distintos agentes y niveles de la pastoral familiar, de modo que se verifica una presencia real-efectiva de los expertos en las disciplinas jurídico-matrimoniales y de quienes ejercen la actividad judicial en la Iglesia." G. NÚÑEZ, "La fase preliminar," 11-12.

176 See also A.M. LÓPEZ MEDINA, "El Motu Proprio *Mitis Iudex* dos años después. Experiencias de su aplicación en España en materia de la investigación prejudicial o pastoral previa al proceso de nulidad matrimonial y la práctica del proceso *brevior*," in *Ius Canonicum*, 58 (2018), (= A.M. LÓPEZ MEDINA "Investigación prejudicial") 197-198.

177 Núñez also recognizes that the preliminary inquiry is not "algo estático y puntual al presentarse algún fiel separado o divorciado que desea un asesoramiento jurídico sobre la validez de su matrimonio, sino de una labor dinámica más o menos intensa en la atención pastoral de los matrimonios." In G. NÚÑEZ, "La fase preliminar," 13. López Medina proposes to also utilize diocesan family life centres to fulfill this function, see A.M. LÓPEZ MEDINA, "Investigación prejudicial," 195-196.

as parishes, "not only informing and guiding those who come, but 'going out to meet' those faithful who are in an objective situation in which they may need the attention of the judicial vicar or the court."[178] "The unified diocesan care of marriage" (article 2, *Ratio procedendi*) applies in the context of a preliminary inquiry[179] especially for those who work in any judicial function to provide information necessary to the party of the case.[180]

> Article 3. This same inquiry is entrusted to persons deemed suitable by the local ordinary, with the appropriate expertise, though not exclusively juridical-canonical. Among them in the first place is the *parochus* or the one who prepared the spouses for the wedding celebration. This function of counseling can also be entrusted to other clerics, religious or lay people approved by the local ordinary.
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> One diocese, or several together, according to the present groupings, can form a stable structure through which to provide this service and, if

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[178] C.M. MORÁN BUSTOS, "Retos de la reforma procesal de la nulidad del matrimonio," in *Ius Canonicum,* 56 (2016), (= C.M. MORÁN BUSTOS, "Retos de la reforma procesal") 12; English translation provided by the author of this study. Morán Bustos refers to "el n. 102 del *Instrumentum laboris* de la Asamblea extraordinaria del Sínodo de 2014, y es la idea que subyace al art. 1 de las Reglas de Procedimiento, y la que aparece también en el n. 78 de la *Relatio Synodi* de 2015; en este nivel, la actuación del párroco -completando así el can. 529 §1- resultará importante, pudiendo muy bien ser ayudado por aquellos fieles que tuvieran conocimientos en estas materias (por ejemplo, abogados, psicólogos o psiquiatras)." IBID., 13. See also F. HEREDIA ESTEBAN, "Relevancia procesal del fracas de las relaciones interpersonales en el matrimonio," in *Ius Canonicum,* 57 (2017), 728-730; see G. NÚÑEZ, "La fase preliminar," 13 and 21-23; see V. LÓPEZ MANCINI, "La reforma del proceso canónico para la declaración de nulidad del matrimonio. Algunas consideraciones sobre sus objetivos y las novedades introducidas para alcanzarlos," in *Revista Chilena de Derecho,* 44 (2017), 603; see A.M. LÓPEZ MEDINA "Investigación prejudicial," 196: "Ros Córcoles afirma que nada obsta a que el Vicario judicial sea el que realice esa investigación, al menos para los casos de proceso *brevior*, pues su mission se limita a dictaminar el seguir el proceso y nombrar a instructor y asesor, mientras que Gerardo Núñez opina, invocando el art. 113, 2 de la *Dignitas connubii* que podría dar la sensación, si se involucra el Vicario judicial (u otros jueces del tribunal) en la investigación prejudicial, que esta causa está avalada por el Vicario, o por el juez que ha intervenido. Se está considerando como solución que el tribunal cuente con una persona encargada de estas investigaciones prejudiciales."

[179] See C.M. MORÁN BUSTOS, "Retos de la reforma procesal," 25. On the term "prejudicial and pastoral inquiry," see P.A. MORENO GARCÍA, "Indagación prejudicial," 67-68. On the necessity of mediation during the preliminary inquiry, see G. NÚÑEZ, "La fase preliminar," 26-28.

[180] For the accomplishment, Morán Bustos outlines three criteria: "1. Un principio-criterio de 'información', de modo que los fieles tengan noticia y conocimiento fundados de la realidad de los procesos de nulidad, de su naturaleza declarative, de los condiciones de acceso a los mismos … 2. Un principio-criterio de 'acompañamiento' que ayude al 'discernimiento' jurídico-pastoral del verdadero estado personal … 3. Un principio-criterio de 'coordinación' entre los distintos agentes y niveles de la pastoral familiar, de modo que se verifique una presencia real-efectiva de los expertos en las disciplinas jurídico-matrimoniales y de quienes ejercen la actividad judicial en la Iglesia." See C.M. MORÁN BUSTOS, "Retos de la reforma procesal," 13-16.

appropriate, a handbook *(Vademecum*) containing the elements essential to the most appropriate way of conducting the inquiry.

The diocesan bishop himself should not exercise this function to avoid compromising his in judicial independence and recusal in case his intervention as judge is required, especially if a case is admitted to the abbreviated process before him.[181] The preliminary inquiry can and should be entrusted to persons suitable for this function.[182] Moreno García comments that the suitability and competency relies "not only the legal capacity to intervene in this prejudicial inquiry, granted by the mandate or approval of the diocesan bishop, but also on the suitability or ability necessary to carry out that specific function, based on the proper science and experience."[183] This would further require a proper formation of those that can assist the party during the preliminary inquiry, whether at a diocesan or parochial level.[184] A well prepared handbook (*Vademecum*)[185] at a diocesan or inter-diocesan level can outline specifically how this service in the context of a preliminary inquiry can be provided:[186]

1) "It consists of a personal interview (one or more) with the person designated for that function for the preliminary inquiry;"
2) "Exhaust avenues of reconciliation and, where appropriate, verify the viability of a possible validation or sanation of the marriage;"
3) "Explore the motivations of the person requesting the marriage annulment to ensure the existence of a legitimate interest;"
4) "Analyze the possible facts and discern whether or not there is a basis for requesting the marriage annulment and for what reason;"
5) "Prepare a memorandum where the most relevant facts for the marriage annulment are highlighted;"
6) "Based on the memorandum, a compile documents pertinent to the annulment process (medical certificates, letters, messages, emails, photos, videos, etc.);"
7) "Preparation of the list of witnesses who can attest to the most relevant facts about the marriage annulment;"

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181 See P.A. MORENO GARCÍA, "Indagación prejudicial," 72; see A.M. LÓPEZ MEDINA, "Investigación prejudicial," 200-205. See also *Dignitas connubii* art. 22, §2 and art. 113, §2.

182 See G. NÚÑEZ, "La fase preliminar," 28-34.

183 P.A. MORENO GARCÍA, "Indagación prejudicial," 73. English translation provided by the author of this study. See also G. NÚÑEZ, "El proceso brevior: exigencias y estructura," in *Ius Canonicum,* 56 (2016), (= G. NÚÑEZ, "Proceso brevior") 137.

184 P.A. MORENO GARCÍA, "Indagación prejudicial," 74 and 76.

185 See G. NÚÑEZ, "La fase preliminar," 34-36; see A.M. LÓPEZ MEDINA, "Investigación prejudicial," 205-206.

186 On 10 proposals for a possible *vademecum,* see P.A. MORENO GARCÍA, "Indagación prejudicial," 78-82; English translation provided by the author of this study.

8) "In case it was not done it yet, appointment of an advocate who will have to present the demand with the petitioner and who will carry out the other procedural steps;"

9) "Preparation of the petition, filling possible gaps in the memorandum and eliminating facts that are not related to the possible ground(s) for requesting the marriage annulment;" and finally

10) "The presentation of the libellus before the competent tribunal."

This proposal from Moreno García is in line with the provision of article 4 of the *Ratio procedendi*:

> The pastoral inquiry will collect elements useful for the introduction of the case before the competent tribunal either by the spouses or perhaps by their advocates. It is necessary to discover whether the parties are in agreement about petitioning nullity.

This prescript of article 4 becomes more relevant if both parties intend to submit a petition that would qualify for the abbreviated process before the bishop.[187] This "in agreement about petitioning nullity" "must not only be on the facts of the marriage in question, but also on the proposed grounds, otherwise there would be no *litis contestatio*."[188]

> Article 5. Once all the elements have been collected, the inquiry culminates in the *libellus*, which, if appropriate, is presented to the competent tribunal.

According to article 5, the preliminary inquiry concludes by submitting the *libellus* to the competent tribunal.[189] Núñez recognizes a twofold aim of a preliminary inquiry: first, a proper evaluation of the facts brought forward during this stage, and second,

> an estimation that these indications of nullity exist and, in this case, if the parties request the intervention of the investigator, he/she will help them to draft and present the libellus before the competent tribunal, giving way to the proper procedural phase with the exam of admission of the libellus by

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187 See A.M. LÓPEZ MEDINA, "Investigación prejudicial," 207-208.

188 "Obviamente, el acuerdo no solo debe versar sobre el hecho de que el matrimonio sea declarado nulo, sino también sobre el motivo o capítulo de nulidad (designados con el mismo *nomen iuris*), de lo contrario no existiría un verdadero litisconsorcio." P.A. MORENO GARCÍA, "El servicio de indagación prejudicial," 69.

189 See A.M. LÓPEZ MEDINA, "Investigación prejudicial," 208-209. On the competency of the tribunal, see P.A. MORENO GARCÍA, "El servicio de indagación prejudicial," 70. Núñez concludes: "Otra de las dudas que ha suscitado la normativa proviene de la formulación del art. 4 RP, y hace referencia a si las partes tienen la obligación de acudir a la investigación prejudicial como requisito previo a la introducción de un proceso; es decir, si constituiría un requisito *sine qua non* para acceder a los tribunales eclesiásticos. La repuesta que ha dado la doctrina es que un servicio facultativo para los fieles. Esta conclusion viene reforzada por lo dispuesto en el art. 5 RP que afirma que la investigación se cierra, si es el caso, con la presentación del libelo ante el tribunal competente." G. NÚÑEZ, "La fase preliminar," 22.

> the judicial vicar (cc. 1676 and 1684), who will verify if the necessary procedural requirements exist and that the libellus contains *fumus boni iuris*.[190]

Although her study was published 10 years before the promulgation of the Ratio procedendi, Wegan explains the responsibility of an advocate to assist the potential petitioner in drafting the petition, which is in line with articles 3 and 4 of the Ratio procedendi. She recommends that if a petitioner wishes to prepare a petition and speaks with an official of the tribunal or the parish priest, that this should be done with the assistance of an advocate (see article 113, *Dignitas connubii*). Not only might an advocate be better trained, but an advocate can also help a petitioner to prepare precisely the facts and proofs necessary. During this stage, an advocate can also ascertain upon which ground(s) the petitioner intends to seek a declaration of nullity of marriage.[191] Referring to Cardinal Jullien, she believes that the advocate becomes "the first judge of a nullity case."[192] In this context of a preliminary inquiry, the advocate also assists the petitioner in preparing and submitting documents necessary for the process as per article 4, Ratio procedendi.[193]

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190 G. NÚÑEZ, "La fase preliminar," 37; English translation provided by the author of this study.

191 M. WEGAN, "Zur Bedeutung der anwaltlichen Begleitung und vor allem Beratung für die Parteien im Vorfeld und im Rahmen des kirchlichen Ehenichtigkeitsverfahrens," in *De processibus matrimonialibus*, 12 (2005), (= M. WEGAN, "Zur Bedeutung der anwaltlichen Begleitung") 91: "Bei vorliegen mehrerer Ehenichtigkeitsgründe, muss der Anwalt eine kluge und kompetente Auswahl treffen. Es hat wenig Sinn, alle möglichen Nichtigkeitsgründe in der Klageschrift nebeneinander anzuführen, wie dies häufig geschieht, wenn die Partei keinen Anwalt konsultiert hat. Dies erschwert und verzögert nicht nur das Beweisverfahren, sondern auch die objektive Wahrheitsfindung durch den Richter. Ohne von der Wahrheit abzuweichen, wird der kluge Anwalt eher juristische als psychische Ehenichtigkeitsgründe vorlegen, da letztere oft von der belangten Partei nicht order nur schwer akzeptiert werden und diese auch mit einem erhöhtem … Zeitaufwand verbunden sind." See also J.M. MARTÍ SÁNCHEZ, "El abogado ante las causas matrimoniales canónicas. Ciertas cuestiones deontológicas," in *Ius Canonicum*, 57 (2017), 255-259. Núñez reflects: "Hasta la actual reforma, las demandas estaban redactadas por los abogados de las partes, ya sean de libre elección o escogidos de los patronos estables de la lista del tribunal, sin que la autoridad de la Iglesia o su personal judicial se inmiscuyera en los trámites anteriores a la presentación de la demanda, entre los que estaba la recopilación de las posibles pruebas (documentos, testigos, pericias, etc.) y la redacción y presentación de la demanda. Al diseñar esta nueva fase prejudicial y pastoral el Legislador ha modificado en parte esta posición: su *mens* es que los agentes pastorales se impliquen directamente, también en la parte propiamente jurídica, y, si fuera necesario, su ayuda deberá llegar hasta la presentación de la demanda." G. NÚÑEZ, "La fase preliminar," 37; see also A.M. LÓPEZ MEDINA, "Investigación prejudicial," 195.

192 M. WEGAN, "Zur Bedeutung der anwaltlichen Begleitung," 90.

193 See IBID.: "Die Partei muss, auch wenn es ihr schwer fällt, zum genauen Nachdenken über die Vergangenheit angeregt werden, zur Vorlage von Schriften, Briefen, ärztlichen Zeugnissen und anderen Dokumenten, die ihre Angaben bestätigen können."

Once prepared and submitted, the judicial vicar receives the petition and has to either accept or reject it. Canon 1676 § 1 reads:[194]

> After receiving the *libellus*, the judicial vicar, if he considers that it has some basis, admits it and, by a decree appended to the bottom of the *libellus* itself, is to order that a copy be communicated to the defender of the bond and, unless the *libellus* was signed by both parties, to the respondent, giving them a period of fifteen days to express their views on the petition.

If there is some merit, the judicial vicar accepts the petition.[195]

In the context of an abbreviated process before the bishop,[196] canon 1683 states:

> The diocesan bishop himself is competent to judge cases of the nullity of marriage with the briefer process whenever:
>
> 1° the petition is proposed by both spouses or by one of them, with the consent of the other;
>
> 2° circumstance of things and persons recur, with substantiating testimonies and records, which do not demand a more accurate inquiry or investigation, and which render the nullity manifest.

Required for this process is that both parties propose or at least the other party consents to it,[197] and that there is sufficient merit due to substantiating testimonies and

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194 LÜDICKE comments on the history of this canon: "§1 fasst in kurzen Sätzen zusammen, was in 1505 § 1 (Prüfung der Zulässigkeit), 1507 § 1 (Ladung und Aufforderung zur Stellungnahme) und 1508 §§ 1 und 2 (Zustellung der Ladung und Beifügung der Klageschrift) ausführlicher geregelt ist. In Umkehrung des Klageabweisungskriteriums nach 1505 § 2, 4° (Fehlen jedes Fundamentes für die Klage) ist eine positive Prüfung des Klagefundamentes aufgenommen worden. 1677 § 1 (alt) verwies auf den Ladungsvorgang nach 1508. Die Schritte waren in Art. 127 §§ 1 und 2 DC redaktionell einfacher zusammengefasst." K. LÜDICKE, commentary on c. 1676, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, 55rd edition, Essen, Ludgerus Verlag 2019, 1676/2, no. 1.

195 "En el praxis habitual hasta ahora de muchos tribunales, recibida la demanda, el vicario judicial constituía por turno el colegio que debía entender la causa correspondiendo al Presidente del mismo la tarea de admitir o rechazar la demanda. En opinión de algunos autores esta novedad supone una revalorización de la función del vicario judicial mientras que para otros necesita ser interpretada a la luz de la lógica procesal." J. ROS CÓRCOLES, "El vicario judicial y el instructor en los procesos de nulidad matrimonial tras el motu proprio *Mitis Iudex*, in *Ius Canonicum*, 56 (2016), 89.

196 On the personal and exclusive exercise of his decision-making jurisdiction in the abbreviated process, see M. DEL POZZO, "Chiarimenti pontifici sul 'processus brevior'. Riflessioni alla luce del Discorso del 25 novembre 2017," in *Ius Canonicum*, 58 (2018), 10-13.

197 See A.M. LÓPEZ MEDINA, "Investigación prejudicial," 212-214.

records that do not require a preliminary inquiry[198] since the evidence gathered renders the nullity manifest.[199] This determination is made by the judicial vicar who

> is not permitted to conduct an investigation or inquiry into the petition. If the circumstances presented, and the supporting proofs, do not manifest nullity then the ordinary process must ensue. And here, too, the judicial vicar is bound to make his decision with due consideration of the common jurisprudence of the Church.[200]

Jenkins questions if "the same persons engaged in the pastoral investigation are then to assist with the drafting of the petition,"[201] and, therefore, separates the preliminary (pastoral) inquiry from the assisting the petitioner(s) drafting a *libellus*. Interestingly though is the discrepancy in the commentaries presented: whereas some authors indicate that no preliminary inquiry is required for a possible abbreviated process before the bishop, others do indicate the necessity of a preliminary inquiry to actually determine if the merits and case presented warrants the admission to the abbreviated process.

Canon 1684 reads:

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198 See J. FERRER ORTIZ, "Valoración de las circunstancias que pueden dar lugar al proceso abreviado," in *Ius Canonicum*, 56 (2016), (= J. FERRER ORTIZ, "Proceso abreviado") 164. See also M.J. ROCA FERNÁNDEZ, "Criterios inspiradores de la reforma del proceso de nulidad," in *Ius Canonicum*, 57 (2017), (= M.J. ROCA FERNÁNDEZ, "Proceso de nulidad") 582-584. R.E. JENKINS, "Article 14 of Mitis Iudex Dominus Iesus," 260: "An initial, critical moment will be the presentation of the *libellus*, most especially if the petitioners wish to request use of the briefer process. The circumstances of things and persons must manifest nullity and be supported by the weighty proofs … Since all this must be in the petition – and not require further investigation or inquiry (but be immediately accessible)– a failure to produce a suitable petition will mean no access to the briefer process." On the necessity to still have a preliminary inquiry in case of a possible abbreviated process before the bishop, see A.M. LÓPEZ MEDINA, "Investigación prejudicial," 211: "Sabemos que la investigación prejudicial puede concluir demandando la nulidad del matromonio por el proceso ordinario o por el proceso más breve, pero ¿es imprescindible que se haya llevado una investigación prejudicial para solicitar el proceso *brevior*? En principio, si tenemos en cuenta que este tipo de proceso se contempla para causas en las que no se prevé la realización de más instrucción, la lógica indica que alguna indagación previa se habrá debido hacer, dado que no se planea hacer ninguna más y no hay otro tipo de investigación reglada excepto ésta que aparece en los arts. 2 a 5 de las Reglas de Procedimiento. Pero por otra parte los cánones 1683 y 1684 no la exigen como requisito para solicitar que se siga este proceso."

199 See M. GAS-AIXENDRI, "La dimensión jurídica del matrimonio canónico a la luz del magisterio reciente. Observaciones a propósito de la reforma del proceso de nulidad realizado por el Motu Proprio *Mitis Iudex*," in *Ius Canonicum*, 57 (2017), (= M. GAS-AIXENDRI, "La dimensión jurídica del matrimonio canónico") 117-118; see R.E. JENKINS, "Applying Article 14 of Mitis Iudex Dominus Iesus to the *Processus Brevior* in Light of the Church's Constant and Common Jurisprudence on Nullity of Consent," in *The Jurist*, 76 (2016), (= R.E. JENKINS, "Article 14 of Mitis Iudex Dominus Iesus") 233.

200 IBID., 261.

201 IBID., 260.

> The *libellus* introducing the briefer process, in addition to those things enumerated in can. 1504, must:
>
> 1° set forth briefly, fully, and clearly the facts on which the petition is based;
>
> 2° indicate the proofs, which can be immediately collected by the judge;
>
> 3° exhibit the documents, in an attachment, upon which the petition is based.

To admit the libellus, the judicial vicar[202] has to verify that the elements of canon 1504 are observed, especially the brief outline of the facts of the case and the supportive evidence.[203] There is a slight difference between the ordinary and the abbreviated process before the bishop: whereas for the ordinary process it suffices to indicate how the petitioner intends to prove the allegations, the abbreviated process before the bishop requires evidence that can easily be collected by the judge.[204]

> Article 14 of the *Ratio procedendi* states:
>
> § 1. Among the circumstances of things and persons that can allow a case for nullity of marriage to be handled by means of the briefer process according to cann. 1683-1687, are included, for example: the defect of faith which can generate simulation of consent or error that determines the will; a brief conjugal cohabitation; an abortion procured to avoid procreation; an obstinate persistence in an extraconjugal relationship at the time of the wedding or immediately following it; the deceitful concealment of sterility, or grave contagious illness, or children from a previous relationship, or incarcerations; a cause of marriage completely extraneous to married life, or consisting of the unexpected pregnancy of the woman, physical violence inflicted to extort consent, the defect of the use of reason which is proved by medical documents, etc.
>
> § 2. Among the documents supporting this petition are included all medical records that can clearly render useless the requirement of an *ex officio* expert.

Article 14 of the *Ratio procedendi*, therefore, offers an example what documents can be permitted that support and indicate the nullity of the marriage in question, and §2 indicates that medical documents can prove the existence of a reason for a null marriage. Any further examination of the case or additional testimonies are, in this case, no more necessary.[205] §1 also outlines examples that have been confirmed by

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202 "La nueva legislación de mayor protagonismo al vicario judicial en el inicio de los procesos; muchas de las decisiones que debía tomar el juez, ahora son tomadas por el vicario judicial. Ello abre algún interrogante en relación a la admission de la demanda." G. NÚÑEZ, "El proceso brevior," 139.

203 See P. BIANCHI, "Il servizio alla verità nel processo matrimoniale," in *Ius Canonicum*, 57 (2017), 95-96; see also J.I. BAÑARES, "El artículo 14 de las Reglas de Procedimiento del M.P. *Mitis Iudex*. Supuestos de hecho y causas de nulidad, in *Ius Canonicum*, 57 (2017), 51.

204 See G. NÚÑEZ, "El proceso brevior," 139.

205 See J. FERRER ORTIZ, "Proceso abreviado," 164-165.

jurisprudence for some time,[206] which are "identified as symptomatic elements of nullity of the matrimonial consent and that their existence can be easily proved."[207] But, Ferrer Ortiz is also critical of the examples used in article 14, since it would narrow the focus, and even though it might be applicable in today's times, it may not be in the future.[208]

Canon 1505 on the rejection of the petition states:

> §2. A libellus can be rejected only: …
>
> 3° if the prescripts of can. 1504, nn. 1-3 have not been observed;
>
> 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.

Cox comments that, according to canon 1676, §1 the judicial vicar

> assesses whether a *fumus boni iuris*, a sign that there is at least some basis for the claim, is present. Finally, the judge assesses whether there is at least some hope of bringing forward proof for the claim. If the formalities required for a *libellus* have not been observed or if there is no basis or potential proof of the claim, the judge rejects the *libellus*.[209]

If the petition does not indicate "at least generally, the facts and proofs which will prove the allegations," (canon 1504, 2°) the judge can either reject the petition or

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206 See APOSTOLIC TRIBUNAL OF THE ROMAN ROTA, *Subsidio aplicativo del Motu Proprio Mitis Iudex Dominus Iesus*, Vatican City 2016, 33. See R.E. JENKINS, "Article 14 of Mitis Iudex Dominus Iesus," 238-243; and a detailed explanation of each circumstance mentioned in art. 14, see IBID., 243-259.

207 J. FERRER ORTIZ, "Proceso abreviado," 165; English translation from the author of this study. See also M.J. ROCA FERNÁNDEZ, "Proceso de nulidad") 584-585; see M. GAS-AIXENDRI, "La dimensión jurídica del matrimonio canónico," 118.

208 See J. FERRER ORTIZ, "Proceso abreviado," 167-168: "Entiendo que cualquier causa de nullidad puede ser objeto del proceso abreviado, porque lo importante no es la causa en sí, sino los indicios de prueba existentes que deben presentarse junto con la demanda y que permitan emitir una primera valoración no solo de que la petición goza de un *fumus boni iuris*, requisito exigible en todo proceso; sino de que existe una base firme para entender que concurre una causa de nulidad bastante evidente y que, en consecuencia, el obispo podrá alcanzar la certeza moral que el matrimonio fue inválido, sin necesidad de pasar por una instrucción compleja, propria del proceso ordinario."

209 C.A. COX, "The Contentious Trial [cc. 1501-1670]," in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, commissioned by the Canon Law Society of America, New York, N.Y./Mahwah, N.J., Paulist Press 2000, (= C.A. COX, "The Contentious Trial") 1658. See also K. LÜDICKE, commentary on c. 1505, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, 55rd edition, Essen, Ludgerus Verlag 2019, 1505/4-5, no. 9.

postpone the decision and ask the petitioner to supply the information needed according to canon 1505, §3.[210]

Similar to the provision in the 1917 Code of Canon Law, the 1983 Code of Canon Law does not allow for an instruction of the parties or witnesses prior to the *litis contestatio*, unless for a grave cause:[211] "Canon 1529. Except for a grave cause, the judge is not to proceed to collect the proofs before the joinder of the issue." Not only does the *litis contestatio* determine the ground(s) of the case, but also affects the nature of the questions proposed, the appropriateness of witnesses, and additional proofs to be gathered. Cox also states that, to safeguard the right of defense of the respondent, the gathering of proofs should commence once the respondent was notified about the procedure itself and is given a possibility to respond and eventually challenge the accusations.[212]

Unlike canon 1730 of the 1917 Code of Canon Law, the current norm does not provide for list of grave causes, but keeping with the canonical tradition, danger of death and unavailability of witnesses can still constitute grave causes. Any other situation is for the discretion of the judicial vicar who

> must weigh the gravity of arguments for collecting any proof before the joinder of issue. While collecting proof prior to the joinder must never become the usual practice, the principle that justice should not be unduly delayed may sometimes provide a cause that is sufficiently grave.[213]

3.3. The Preliminary Inquiry in the Instruction Dignitas connubii (2005)

With the promulgation of the 1983 Code of Canon Law, the Instruction *Provida Mater* was abrogated (see canon 6). The lack of complementary norms to the new promulgated procedural law called for the need of a new instruction that, according to canon 34, serves to clarify the provisions of the universal law. Other than extensive outline of the ordinary contentious process, the 1983 Code of Canon Law offered only a few norms specifically for marriage procedures. The Instruction *Dignitas connubii*, which enjoyed the presumption of conformity to the law, was meant for marriage nullity procedures at diocesan and inter-diocesan tribunals. A decade after the Instruction, the motu proprio *Mitis Iudex* provided further changes for the marriage procedures, which calls for an update of *Dignitas connubii*. With regards to the ordinary marriage nullity process, there are only a few changes with the new legislation; the abbreviated process before the bishop is new, and a partial adaptation

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210 See K. LÜDICKE, commentary on c. 1505, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, 55rd edition, Essen, Ludgerus Verlag 2019, 1505/3, no. 8.

211 On the term "grave cause" in c. 1529 see S. RAICA, *A Historical and Canonical Study*, Rome, Pontificia Universitas Gregoriana 1996, 97-100.

212 See C.A. COX, "The Contentious Trial," 1670.

213 IBID.

of the articles of *Dignitas connubii* is possible in the context of this study on the preliminary inquiry.[214]

Article 113 refers to a preliminary inquiry is within the context of the introductory phase of a process:

> §1. At every tribunal there is to be an office or a person available so that anyone can freely and quickly obtain advice about the possibility of, and procedure for, the introduction of their cause of nullity of marriage, if such should be the case.
>
> §2. If this office should happen to be carried out by the ministers of the tribunal, they cannot have the part of judge or defender of the bond in the cause.
>
> §3. In each tribunal, to the extent possible, there are to be stable advocates designated, receiving their salary from the tribunal itself, who can carry out the function described in § 1, and who are to exercise the function of advocate or procurator for the parties who prefer to choose them (cf. can. 1490).
>
> §4. If the function described in § 1 is entrusted to a stable advocate, he cannot take on the defense of the cause except as a stable advocate.

This article 113 introduces an office or advisory function who will be in contact with a possible petitioner, capable of explaining the marriage procedure itself. The wording used in this article indicates that this office or function is not facultative, but obligatory.[215] Unlike the preliminary inquiry in the late 19th century, the preliminary inquiry envisioned in *Dignitas connubii* is not a pre-trial or summary trial, but a mandatory stage of consultation.[216] Núñez, referring to article 113 §1, identifies the person as assessor, and that "article 113 §2 applies to these assessors,"[217] so that the impartiality of a judge can be safeguarded. This opinion is not fully shared, since §3 refers to a stable, by the tribunal itself appointed advocate who, according to §4, is to fulfill in addition to the functions of an advocate those outlined in the new, mandatory preliminary inquiry according to §1. This advocate could also be appointed in these cases if they lead up to the submission of a petition[218] and proceed further.

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[214] On the normative value of *Dignitas connubii* in light of *Mitis Iudex* see C.M. MORÁN BUSTOS, "La vigencia de la Instrucción *Dignitas Connubii* a la luz del M. P. *Mitis Iudex*," in *Ius Canonicum*, 57 (2017), 613-626.

[215] Furthermore, Núñez states: "En todo caso, la norma no indicaba requisitos especiales en las personas que podían desarrollar esta labor consultiva, por lo que se debía entender en sentido amplio: no era necesario ni títulos especiales, ni el sacerdocio, aunque lógicamente era necesaria una adecuada preparación técnica, pastoral y humana." G. NÚÑEZ, "La fase preliminar," 19.

[216] See IBID., 18-19.

[217] "A estos asesores se les debe aplicar el art. 113 § 2." G. NÚÑEZ, "El proceso brevior," 138; English translation provided by the author of this study.

[218] "Como se ve, la labor de asesoramiento llevada a cabo primariamente tenía por finalidad informar de las posibilidades de actuación, y sólo posteriormente, si la parte lo veía oportuno y con la

Among other requirements necessary for a petition, article 116 states:

> §1. A *libellus* by which a cause is introduced must:
>
> 3° indicate at least in a general way the facts and proofs on which the petitioner is relying in order to demonstrate what is being asserted;
>
> §2. There should be attached to the libellus an authentic copy of the marriage certificate and, if need be, a document of the civil status of the parties.[219]

The petition outlines what is specifically challenged, e.g. the marriage in question that was attempted at a specific day and place. Other than a brief explanation on the suggested ground(s), the petition needs to outline at least in general terms the facts upon which its nullity is asserted and how the petitioner

> intends to establish his or her claim; that is, what proofs will be presented to the court (§1, 3°). A detailed indication of the proofs is not yet necessary. At this point the petition might indicate only general information concerning what proof will be adduced, most especially who will function as witness in the trial and what, in general terms, the witnesses will testify to.[220]

In this context, a copy of the marriage license and the civil decree of divorce are to be presented as proof of the specific marriage in question. This is also mentioned in article 116, §2, and, according to the commentary of Lüdicke/Jenkins, helps establishing the facts about when and where the exchange of marriage consent occurred. They further discuss the other "document of the civil status of the parties," but focus rather on civil marriage licenses if the marriage was contracted by non-Catholics or, for Catholics, contracted with proper dispensation in the civil forum.[221] Many tribunals require further documents, such as baptismal records and the proof that the marriage in question is divorced in the civil forum. The gathering of the information about the marriage and provision of documentation is done in the context of the preliminary inquiry. For example, article 117 reads:

> If proof through documents is being proposed, these, inasmuch as possible, are to be submitted with the petition; if however, proof through witnesses is being proposed, their names and domicile are to be indicated. If other proofs are being proposed, there should be indicated, at least in general, the facts or indications from which they are to be brought to light. Nothing however prevents further proofs of any kind from being brought forth in the course of the trial.

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intervención de un abogado (que podia ser el patrono estable que le había asesorado previamente), se debía realizar toda la labor jurídica necesaria con el fin de la presentación de la demanda ante el juez. Indudablemente, lo que parece claro es que estas indicaciones vienen integradas en el nuevo servicio de ayuda predispuesto en las actuales R[atio]P[rocedendi]." G. NÚÑEZ, "La fase preliminar," 19.

219 LÜDICKE/JENKINS, *Dignitas Connubii*, 206-207.

220 IBID., 208.

221 See IBID., 209.

It is up to the discretion and determination of the petitioner to decide, which documents are useful to the tribunal, depending on the type of process that can be attempted, e.g. a documentary process or a formal process. Furthermore, article 117 allows for the submission of other documents not mentioned in article 116, if deemed necessary and useful. If not presented at this stage (of the preliminary inquiry), the party concerned can bring them forward in the course of the trial itself "or of not actually requesting the admission of proofs mentioned in the introductory petition."[222]

Article 120 then refers to the preliminary inquiry itself:[223]

> §1. The *praeses* can and must, if the case requires, institute a preliminary investigation regarding the question of the tribunal's competence and of the petitioner's legitimate standing in the trial.
>
> §2. In regard to the merits of the cause he can only institute an investigation in order to admit or reject the *libellus*, if the *libellus* should seem to lack any basis whatsoever; he can do this only in order to see whether it could happen that some basis could appear from the process.

It is the first time that a Roman document, applicable to all local tribunals of first instance, speaks of a preliminary inquiry in the context of marriage nullity procedures. Article 120 allows for the presiding judge to call for the inquiry prior to accepting or rejecting the petition in order to establish facts and circumstances necessary for the acceptance or rejection of the petition: "The purpose of the investigation, a procedure not provided for in the code, is to verify that the requirements of the law have been met for the acceptance of a *libellus*: competence, procedural capacity, presence of a *fumus boni iuris*."[224] If the presiding judge is responsible, it means, that a petition has already been submitted and the judicial vicar has constituted the tribunal according to article 118, but the instance has not yet begun.[225] With the motu proprio *Mitis Iudex* this has

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222 IBID., 210.

223 The *Primum Schema a Commissione approbatum* from February 22, 1999 states: "Art. 120 - §1. Praeses potest et debet, si casus ferat, praeviam investigationem instituere quoad questionem de competentia tribunalis et de actoris legitima persona standi in iudicio. §2. Quoad meritum vero causaw eam tantum instituere potest in ordine ad libellum admittendum vel reiciendum, si libellus videatur quolibet carere fundamento, et quidem tantummodo ad videndum num fieri possit ut aliquod ex processu fundamentum appareat." This proposal was adopted for the *Primum Schema Recognitum "De processu ad nullitatem matrimonii declarandam* from July 2000. The *Novissimum Schema* from 2002 radically changed the proposed art. 120, thus reducing it to a single paragraph, placing it directly in the context of the admission of a petition: "Art. 23 - §2. Quodsi in perpendenda ipsa petitione tribunali visum fuerit, idem, mediis idoneis, circa petendi rationem inquirere profundius ne omittat." This change was reversed in the final text of *Dignitas connubii* and the version of the 2000 *Novissimum Schema* was published. See PONTIFICIA UNIVERSITAS GREGORIANA, *Instructionis* Dignitas Connubii *Synopsis Historica*, Rome, Gregorian and Biblical Press 2015, 126-129.

224 LÜDICKE/JENKINS, *Dignitas Connubii*, 213. See also P.A. MORENO GARCÍA, "Indagación prejudicial," 71.

225 See G. NÚÑEZ, "La fase preliminar," 17.

changed, and the tribunal is established after the *litis contestatio*, which means, the judicial vicar responsible for the preliminary inquiry.

According to *Dignitas connubii*, in a strict sense, the preliminary inquiry is the procedure of the judicial vicar to verify if the submitted *libellus* fulfills all requirements necessary according to canons 1504 and 1505. It is not the preliminary (pastoral) inquiry in the sense of articles 2-5 of the *Ratio procedendi* of the motu proprio *Mitis Iudex*, e.g. the collection of documentation, the preliminary inquiry form that is submitted prior to or with the petition itself, etc. As Lüdicke/Jenkins conclude:

> Provision for the investigation mentioned in §2 is based upon Art. 121 §1, 4°, which permits the rejection of a *libellus* if the petition itself indicates no basis for the nullity of the marriage, and no such basis would likely appear during the process itself. The preliminary investigation that would be allowed in such cases could, for instance, include questioning the petitioner.[226]

This means, that the interrogation at this stage is not the judicial examination itself, which is not permitted before the *litis contestatio*, except for a grave reason, according to article 160:

> Without prejudice to art. 120, the tribunal is not to proceed to collecting the proofs before the formulation of the doubts has been set in accordance with art. 135, except for a grave reason, since the formulation of the doubt is to delimit those things which are to be investigated (cf. can. 1529).

The term *probationes* refers to the probable evidence gathered to determine the alleged facts. The suitability of these proofs only becomes reasonable once the formulation of the grounds is established. Lüdicke/Jenkins state:

> The anticipation of the beginning of the probative phase of the trial can result:
>
> - in the collection of too few proofs; this would then have to be corrected by means of a second and more suitable instruction;
> - in the collection of too many proofs, something that would go beyond the mandate of the judge. In an extreme case, this could lead to a violation of the fundamental rights of c. 220.[227]

The judicial vicar can permit the submission of evidence through instructions between the submission of the petition and the formulation of the doubts only if a grave reason warrants it, e.g. to avoid a just judgment due to a unnecessary delay in the instruction due to "danger of death or the departure of a witness from the area such that a later attempt to question him would prove impossible or difficult."[228] Article 160 does not concern the investigation by the judicial vicar to verify the alleged facts and

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226 LÜDICKE/JENKINS, *Dignitas Connubii*, 214.
227 IBID., 276.
228 IBID., 276.

circumstances of the marriage in question as per article 120, and to accept or reject the petition. If no documents and/or indications of probable evidence are produced in the context of the petition, or they lack any basis and cannot establish a basis, the judicial vicar can or must reject the petition according to article 121:

> §1. The *libellus* can be rejected only:
>
> 3° if the prescriptions of art. 116, §1, nn. 1-4 have not been observed;
>
> 4° if it is certainly apparent from the *libellus* that the petition lacks any basis, and that it could not happen that some basis could appear from the process (cf. can. 1505, §2).

Lüdicke/Jenkins carefully distinguish between when a *libellus* must be rejected and when it can be rejected.[229] A petition must be rejected if

- it does not state what is being sought and from whom;
- it is not validly signed by the petitioner or a legitimately appointed procurator; and
- it does not contain information of the domicile or postal address of the petitioner or procurator.[230]

And a petition can be rejected if[231]

- it lacks, at least in general terms, an explanation for the claim that a specific marriage is null;
- no elements of supportive evidence are offered to proof the alleged nullity of the marriage in question; and
- it lacks any basis and it will not be possible to discover it during the trial itself.

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229 See IBID., 215-217.

230 "Art. 121 § 1, 3° … does not mention Art. 116 § 1, 5°, which stipulates that the petition must contain the domicile or quasi-domicile of the respondent. One might conclude from this that the petition must be admitted if it contains no defects other than a lack of the domicile or quasi-domicile of the respondent party. However, in such cases the court could not determine its competence if it is to be based on the respondent's domicile or quasi-domicile. In such a case, then, it would not be permissible to admit the *libellus*. Rather, the judge *must* require the petitioner to supply the missing information. Only then would the judge be able to reach a decision regarding the admission of the petition." IBID., 216.

231 "A practice has arisen in some tribunals by which so-called "informal" decisions are rendered against the claim of the petitioner. Even as a petition lacking a bais in law is rejected, the party is informed that the chance of a successful outcome to the plea is highly unlikely. In effect, the party is told that the nullity plea has received an "informal negative" decision. This manner of proceeding is obviously illicit. It not only strikes at the heart of the petitioner's exercise of his or her *ius agendi*, but it also renders a summary judgment concerning the validity of the marriage, a type of decision not provided for in the law of the Church. The Instruction expects that all possible assistance will be provided persons who wish to place a petition for nullity before an ecclesiastical tribunal (…). Assisting petitioners with the suitable preparation of a petition helps to alleviate the need to reject a petition in a summary fashion based on a perceived weakness in the merits of the cause. Rejection should occur only with regard to the merits of the petition as a preliminary document requesting further consideration of a plea." IBID., 217.

Conclusion

From its beginning until the late 19th century, a preliminary inquiry in the context of marriage procedures was not directly recognized in universal legislation. Local customs initially allowed for some preliminary inquiry, which was eventually recognized in different local instructions and particular legislation. The focus of this preliminary inquiry was the gathering of probable evidence in preparation of the *libellus*.

The 1917 Code of Canon Law does not recognize this inquiry, but commentaries on this Code and the Instruction *Provida Mater* indicate that the verification process by the judge whether or not to accept or reject a submitted *libellus*, can be considered a preliminary inquiry. This is a shift from a tribunal official assisting a possible petitioner to prepare a *libellus*, e.g., to support him gather information, documentation, etc. necessary to indicate how he intends to prove the allegations, to the judge's role assessing the *libellus*.

The 1983 Code of Canon Law, until 2015 silent on a preliminary inquiry, was followed in 2005 by the Instruction *Dignitas connubii* that recognizes for the first time at a universal level a preliminary inquiry; or one may argue "both preliminary inquiries:" whereas article 113, *Dignitas connubii* recognizes a customarily called "preliminary inquiry" – a tribunal minister gives advice to and gathers initial information and documentation from a possible petitioner who, with the help of an advocate drafts a *libellus*, and article 120, *Dignitas connubii*, that directly speaks of a preliminary inquiry – a (presiding) judge verifies the submitted *libellus* regarding competency, the petitioner's right to stand in trial, and merits of the case.

This partial dichotomy of a preliminary inquiry remains after the prescripts of the 1983 Code of Canon Law on marriage procedures were changed with the motu proprio *Mitis Iudex* and the *Ratio procedend*i, recognizing a "pre-judicial or pastoral inquiry" under the supervision of a tribunal minister, gathering information and documentation from a possible petitioner who is assisted by an advocate to draft the *libellus* (articles 2-5, *Ratio procedendi*), and, according to article 120, *Dignitas connubii*, the preliminary inquiry conducted by the judicial vicar, verifying specific aspects of a submitted *libellus*.

The novelty though is, that the preliminary inquiry is no more just a formality to verify a *libellus*, but, as indicated in *Amoris Laetitia*, that there is an additional pastoral approach to the party/parties through specialized ministry to guide and assist them in the hardship of a failed marriage. As Francis Morrisey states in a podcast on April 21, 2020:[232]

> There was another moment that sort of brought everything together for me and that was with Pope Francis, and particularly *Amoris Laetitia* … After I

[232] F. MORRISEY, "Canon Law and Becoming an Instrument of Peace," Podcast, recorded on April 21, 2020, posted on April 24, 2020 on https://clsa.org/members-only/clsa-podcast-series/

> worked on the Commission for revising marriage procedural laws, he came out in *Amoris Laetitia* with the principle: you start with the person, you don't start with the highest principle nobody will ever reach … Start with the person, see how you can lead them along. Now, you see a lot of people criticise the pope for this, say that he is saying the law is gradual. He never for a second said the law is gradual, the law is there. But my response to the law is gradual. It's just like the education of a little child; the situation is there but you have to bring the child along to see it. Now that for me conferred all that I was trying to do, by putting the person at the centre and not the institution … and not the law and it's just giving me a new … breath.

He continues:

> I was actually involved in the revision of the code and that was actually a fantastic learning experience … and that helped me. But also what it did is it gave me great insights into what was behind the written word in the canon, it's three or four words, but what did that mean? How did those words get there? And that was very helpful because … canon 17 says you interpret the canons according to the mind of the legislator. So, whoever is the pope at a given moment, it gives you the mind, and you try to work in that line …

He concludes: "I think what I am doing is trying to be consistent in the message … from that rule of law … trying to see what's the good of the person."

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Potestas incerta: The Ambiguity of the Ecclesiastical Law on Power with respect to Lay Leadership

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The legal framework underlying church governance is rooted in the concept of ecclesiastical authority, which the Second Vatican Council referred to as "*sacra potestas*".[1] Despite its obvious importance, it is striking to note that the law makes no mention of this term at all.[2] It does, however, specifically reference two powers, the power of orders ("*potestas ordinis*") and the power of governance ("*potestas regiminis*" or "*potestas iurisdictionis*"), which together constitute sub-forms of sacred power.[3] Ecclesiastical power is "sacred", the council taught, because it is derived from Christ. As *Lumen Gentium* holds, "The ministerial priest, by the sacred power he enjoys, teaches and rules the priestly people; acting in the person of Christ, he makes present the Eucharistic sacrifice, and offers it to God in the name of all the people."[4] According to current power theory, an individual's ability to wield Christ's power in the church accrues from ordination as an ontological change, which enables individuals to act as Christ the Head with respect to the liturgy and the sacraments as well as the teaching and governing of the church. Hence, the law tells us that the power of orders enables bishops and priests[5] to act as Christ the Head with regard to the administration of spiritual goods in the church (see canon 1009 §3 CIC/1983). Additionally, ordination is also a precondition for receiving the power to govern the church. Nevertheless,

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1 E.g. SECOND VATICAN COUNCIL, "Dogmatic Constitution *Lumen Gentium* on the Church," 21 November 1964, nos. 10, 18, 27, *Acta Apostolicae Sedis* 57 (1965), 5–71, at 14, 21, 32.

2 This omission was criticised even before the promulgation of the 1983 Code of Canon Law, e.g. Cardinal Ratzinger's animadversion as discussed in the 1981 Plenary Congregation of the Commission on the Reform of the Code, see PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio Plenaria Diebus 20–29 octobris 1981 habita* (Acta et Documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscendo), Vatican City, Typis Polyglottis Vaticanis, 1991, 38.

3 On the power terminology of current canon law, see Rik TORFS, "Auctoritas—potestas—iurisdictio—facultas—officium—munus: Eine Begriffsanalyse," *Concilium* 24 (1988), 209–215.

4 SECOND VATICAN COUNCIL, "*Lumen Gentium*," no. 10 (see note 1), *Acta Apostolicae Sedis* 57 (1965) 14.

5 I will briefly touch on the specific case of deacons in section 2.2.

power theory does not provide us with as clear an understanding of the connection between ordination and the power of governance as one might assume. In the following reflections, I will refer to obscure passages in the law of power to investigate what it states regarding the power of governance. I aim to elucidate the dubious conception of power in the law by focusing on laypeople and their participation in church governance. This example will reveal how inconsistent ecclesiastical theory and the law of power remain to this day.

In four steps, my article reconstructs the ambivalence of the law in relation to the laypeople's competence. First, it explores the connection between ordination and church governance as drawn by the council; second, it explicates the clergy-centred legal concept of power. Third, it examines how the law involves laypersons in ecclesiastical governance and sketches the contradictory interpretations that have been derived from the obscurity of the regulations on lay governance. Lastly, it concludes with an explanation for this striking ambiguity in the legal norms. I remain unconvinced that the vagueness of the law on power issues is simply a conceptual oversight; in fact, I generally believe it to be strategically motivated. The more ambiguity there is in the law, the greater the latitude there is for those in charge to apply it. By providing strikingly uncertain norms regarding the governing competence of laypeople vis-à-vis the church, the supreme legislator provides the ecclesiastical authorities with considerable leeway for determining if and how laypersons should be included in ecclesiastical governance issues.

1. Ecclesiastical Power Theory

Power in church is frequently debated in the context of canon law. Yet over the course of church history, power has not always been considered a legal category, or at least not primarily. Canonist Ladislas Orsy reminds us that until the twelfth century, power in the church was largely associated with the work of the Spirit and only became a juridical category with the "invention" of canon law in the medieval period. The price to be paid for this, however, was the far-reaching loss of the pneumatological understanding of ecclesiastical power and authority. Orsy writes, "[I]n the twelfth century, the term 'power' lost its rich theological content and became identified with external domination, and was made equivalent to jurisdiction, a legal term borrowed from ancient Rome."[6] This development was a response to the Germanic patronage system, which had led to a gradual divergence between the ordination of clerics and their endowment with ecclesiastical offices. While ordination through bishops endowed clerics with spiritual gifts to serve the church, in many cases it was feudal lords who granted them offices and jurisdiction.[7] The concept of jurisdiction thus

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6 Ladislas M. ORSY, "Episcopal Conferences and the Power of the Spirit," *The Jurist* 59 (1999) 409–431, at 411.

7 E.g. Hubert SOCHA, "Commentary on canon 129," in Klaus LÜDICKE, ed., *Münsterischer Kommentar zum Codex Iuris Canonici*, 54th suppl. sheets, Essen, Wingen, November 2017, 2 nn. 3–4.

became increasingly relevant. In the power of governance, the connection between power and jurisdiction is inherent and continues to be present to this day.

1.1 Distinct Powers

Once the power of governance had become a distinct category in itself, it was more strictly distinguished from liturgical and sacramental powers. As a consequence of this distinction, medieval canonists came to conceive of the power of orders as a separate capacity. As a consequence, there are numerous examples throughout church history where ordination and church governance were not directly linked. Without being ordained, for example, abbesses of the Middle Ages and early modern times led their institutions and pastoral districts with a power of governance. Non-ordained prince-bishops led the dioceses under their jurisdiction while endowing their auxiliary bishops with those duties which required ordination. An echo of this practice is found in the 1917 Code of Canon Law, which understands bishops as capable of exercising jurisdictional functions immediately after their appointment and before receiving episcopal ordination. Papal theory of the Middle Ages similarly found the pope-elect to be capable of exercising his jurisdictional power before having received episcopal ordination. This last example is particularly noteworthy: although nineteenth-century power politics and the 1917 Code suppressed most other examples of laypeople exercising the power of governance in the church, it did not touch on the traditional canonical idea that non-ordained pope-elects receive their jurisdictional power through election.[8] Not even the current law on the election of the pope is entirely clear on the issue, as it reads, "After his acceptance, the person elected, if he has already received episcopal ordination, is immediately bishop of the church of Rome, true pope and head of the college of bishops. He thus acquires and can exercise full and supreme power over the universal church."[9] The text then adds that "[if] the person elected is not already a bishop, he shall immediately be ordained bishop." The law, therefore, is strikingly hesitant to mark the exact moment at which the non-episcopal pope-elect receives his papal power.

1.2 Papal and Episcopal Power

Despite these traditional distinctions between the two powers, the Second Vatican Council opposed a dualistic view of power. By insisting on there being *one* power in the church that serves as the source of all other ecclesiastical powers, it linked ordination to governance and in doing so united the power of orders with the power of governance. This decision was evidently based on the council's interest in clarifying the role of the bishops in order to counteract the ambiguities of episcopal office which

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8 See John P. BEAL, "The Exercise of the Power of Governance by Lay People: State of the Question," *The Jurist* 55 (1995) 1–92, at 8, relating to PIUS XII, "Apostolic Constitution *Vacantis Apostolicae Sedis* on the Vacancy of the Apostolic See and the Election of the Roman Pontiff," 8 December 1945, no. 101, *Acta Apostolicae Sedis* 38 (1946) 65–99, at 97.

9 JOHN PAUL II, "Apostolic Constitution *Universi Dominici Gregis* on the Vacancy of the Apostolic See and the Election of the Roman Pontiff," 22 February 1996, no. 88, *Acta Apostolicae Sedis* 88 (1996) 305–343, at 341.

were introduced by the First Vatican Council. By uniting the two powers, the council sought to increase the bishops' independence from the pope. It tried to overcome the dilution of episcopal power which had resulted from the First Vatican Council. The First Vatican Council clearly emphasised that episcopal power was "ordinary and immediate", but it was also overwhelmingly centred around the pope and his power.[10] It thus supported the idea of the pope as the source of all power of governance in the church. The centrality of papal power was the result of one particular reading of episcopal power theory because the Council of Trent, which had debated the connection between ordination and jurisdictional power with respect to the bishops' office, had not resolved the issue.[11] However, the stance taken by the First Vatican Council actually undermined episcopal authority and even weakened the bishops' political role in some of their home countries. In Germany, a famous example of this involved the late nineteenth-century *Kulturkampf* between the German bishops and Reich Chancellor Otto von Bismarck. Following the First Vatican Council, Bismarck described the bishops as the pope's "tools, his officials without responsibility of their own"[12]. He also believed, due to the papal primacy as defined in *Pastor Aeternus*, that

> the pope has become able to take over the episcopal rights in each individual diocese and to substitute the provincial episcopal power with papal power. The episcopal jurisdiction has dissolved into the papal jurisdiction; the pope no longer exercises certain specific rights of reservation, as was previously the case, but the entirety of episcopal rights rests in his hands; he has in principle taken the place of each individual bishop.[13]

We need not discuss here whether Bismarck's polemic was accurate. He nonetheless clearly perceived the imbalance of powers resulting from the First Vatican Council. The Second Vatican Council tried to address this imbalance. It focused on the bishops as the key figures of local ecclesiastical governance and formulated its theory of power accordingly.

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10 See FIRST VATICAN COUNCIL, "Dogmatic Constitution *Pastor Aeternus*," 18 July 1870, chapter 3, *Acta Sanctae Sedis* 6 (1870–1871) 40–47, at 43.

11 See COUNCIL OF TRENT, "Session XXIII, Canons and Decrees (Sacrament of Orders)," in *The Canons and Decrees of the Council of Trent*, translated by Theodore A. Buckley, London, George Routledge and Co., 1851, 156–160.

12 Translation by the author; original quote, "seine Werkzeuge, seine Beamten ohne eigene Verantwortlichkeit", Reich Chancellor Otto von Bismarck, "Circular-Depesche," 14 May 1872, *Deutscher Reichs-Anzeiger und Königlich Preußischer Staats-Anzeiger*, 29 December 1874, n. 304, 1–2, at 2.

13 Translation by the author; original quote, "der Papst in die Lage gekommen, in jeder einzelnen Diözese die bischöflichen Rechte in die Hand zu nehmen, und die päpstliche Gewalt der landesbischöflichen zu substituieren. Die bischöfliche Jurisdiktion ist in der päpstlichen aufgegangen; der Papst übt nicht mehr, wie bisher, einzelne bestimmte Reservatsrechte aus, sondern die ganze Fülle der bischöflichen Rechte ruht in seiner Hand; er ist im Prinzip an die Stelle jedes einzelnen Bischofs getreten", Otto von Bismarck, "Circular-Depesche" (see note 12)'.

1.3 Munus regendi, potestas regiminis

This view envisaged the episcopal power of governance not as deriving from papal power, but as based on the bishops' ordination and office. On this point, however, conciliar texts remain somewhat ambiguous. According to *Christus Dominus*, the bishops "exercise this episcopal office of theirs, which they have received through episcopal consecration"[14]. *Lumen Gentium*—and likewise canon 375 §2 CIC/1983, which directly quotes the conciliar text—state, "Through episcopal consecration itself, bishops receive with the function of sanctifying also the functions of teaching and governing."[15] Hence, both texts assert that bishops receive their *munus regendi* via ordination. It is unclear though what this *munus* entails. It is not identical to the power of governance, as the *Explanatory Note* on *Lumen Gentium* hastened to clarify. The latter expounded on the difference between functions (*munera*) and powers by explaining that bishops receive the full function to govern the church as their ontological destination through their ordination. However, as the *Explanatory Note* asserts, their received ontological power to govern the church is not "fully ready to act"[16] via ordination. To become fully effective, the episcopal function requires "a further canonical or juridical determination through the hierarchical authority. This determination of power can consist in the granting of a particular office or in the allotment of subjects, and it is done according to the norms approved by the supreme authority."[17] In the law, we find this provision for diocesan bishops in canon 381 §1 CIC/1983, where the legislator specifies that diocesan bishops possess all ordinary, proper and immediate power in their dioceses required for the exercise of their pastoral function.

As anticipated in the *Explanatory Note* on *Lumen Gentium*, to protect the bishops' "hierarchical communion with the head and members of the church"[18], the law also attempts to harmonise the exercise of episcopal power with the exercise of power by other ecclesiastical authorities. Canon 381 §1 CIC/1983 therefore excludes certain competences from episcopal power, ruling that a law or a decree issued by the supreme pontiff can reserve competences which would regularly be part of the episcopal authority for the supreme authority or another ecclesiastical authority. While this model of *reservation* of power to other authorities is certainly no longer the model of a *concession* of episcopal power by the pope (as derided by Bismarck), one can still note that the current model easily restricts episcopal power in favour of other authorities.[19] It may be further observed that the legal issues which are *de facto* reserved for other

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14 SECOND VATICAN COUNCIL, "Decree *Christus Dominus* on the Pastoral Office of Bishops in the Church," 28 October 1965, no. 3, *Acta Apostolicae Sedis* 58 (1966) 673–696 at 674.

15 No. 21 (see note 1), *Acta Apostolicae Sedis* 57 (1965) 25.

16 SECRETARY GENERAL OF THE COUNCIL, "Notificationes," 123rd General Congregation, 16 November 1964, no. 2, *Acta Apostolicae Sedis* 57 (1965) 72–75 at 73.

17 Ibid.

18 Ibid.

19 E.g. Georg BIER, *Die Rechtsstellung des Diözesanbischofs nach dem Codex Iuris Canonici von 1983* (Forschungen zur Kirchenrechtswissenschaft 32), Würzburg, Echter, 2001.

authorities—particularly the Apostolic See—are immense. Systematic theologian Richard Gaillardetz rightly alludes to the tendency of the "universal jurisdiction [to] turn the pope into a superbishop"[20], which still exists after the Second Vatican Council due to the law's tendency to amass competences in Rome. Based on this observation, the *munus regendi* as bestowed upon bishops in their ordination as a spiritual gift of governing their churches might seem abundant. However, the bishops' actual power of governance is fairly restricted by Roman rule.

1.4 Lay Power: A Blind Spot

The council fathers dealt intensively with the theology and theory of the episcopate and episcopal offices. They expounded the power of the bishops and defined the priests and deacons as dependent on the bishops.[21] Nevertheless, they remained largely silent on the topic of lay participation in church leadership and lay offices.[22] Canonist John Beal comments, "The council's treatment of the role of lay people in the mission of the Church is … devoid of explicit statement that lay people may participate in the exercise of *sacra potestas*—and, it must be added, of explicit denials that lay people can share in the exercise of this power."[23] This observation begs the question as to why the council widely shunned the issue of lay power. Church historian Hubert Wolf sees two reasons for why the council fathers had so remarkably little to contribute to the laity's role in governing the church. On the one hand, Wolf considers the conciliar focus on the bishops to be a reason for ignoring the laypeople. He notes, "The upgrading of the office of the bishop compared to the primacy of the pope resulted—intentionally or unintentionally—in the devaluation of all other church members."[24] On the other hand, Wolf also holds anti-modern impulses responsible for the laity's marginalisation. The reform of powers and offices of the Second Vatican Council was guided by an anti-modern rereading of the Council of Trent, following the hermeneutics of conciliar interpretation developed in the nineteenth century. The Council of Trent itself—as previously mentioned—had quarrelled about the connection between ordination and jurisdictional power with regard to the bishops' office, but had refrained from making a decision.[25] Wolf, interpreting Trent as a correction of the "medieval errors" of church leadership, claims that "anti-progressive

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20 Richard R. GAILLARDETZ, *Teaching with Authority: A Theology of the Magisterium in the Church*, Collegeville, MN, The Liturgical Press, 1997, 58.

21 E.g. SECOND VATICAN COUNCIL, "*Lumen Gentium*," nos. 28–29 (see note 1), *Acta Apostolicae Sedis* 57 (1965) 33–36.

22 On the manifold questions left open by the council see Hubert SOCHA, "Introduction before canon 129," in Klaus LÜDICKE, ed., *Münsterischer Kommentar zum Codex Iuris Canonici*, 54th suppl. sheets, Essen, Wingen, November 2017, 6–7 n. 11.

23 BEAL, "The Exercise of the Power" (see note 8), 15.

24 Translation by the author; original quote, "Die Aufwertung des Bischofsamtes gegenüber dem Primat des Papstes führte—absichtlich oder unabsichtlich—zu einer Abwertung aller anderen Glieder der Kirche", Hubert WOLF, "Frau Kardinal und die Macht der Geschichte: Reformideen aus der Tradition der Kirche," *Herder Korrespondenz* 69 (2015), 74–78, at 78.

25 See COUNCIL OF TRENT, "Session XXIII" (see note 11), 156–160.

Catholics in the nineteenth century, with the help of this 'invented' Council of Trent, succeeded in suppressing many realisations of Catholicism and let them sink into oblivion."[26] In the nineteenth century, the rich ecclesiastical tradition of lay leadership was abandoned to introduce the idea of a church led solely by clerics.[27] This laid the foundation for the theory of the one sacred power in the church, whereby only clerics could effectively receive and exercise both powers: the power of orders and the power of governance.

Most interestingly, in his analysis, Wolf identifies two rather contradictory reasons for the council's disregard of the issue of lay leadership. He first points to an unintentional neglect of laypeople due to the conciliar focus on bishops. However, he also suggests that the issue was actively quashed, as lay leadership was restrained for the purpose of rectifying "historical errors". One may ask how to reconcile these two momentums in conciliar behaviour: one passive (ignoring the history of lay leadership) and one active (suppressing the laity's role in governing the church). It is plausible that these contradictory dynamics stemmed from different groups among the council fathers. However, it is also possible to reconcile both views if we assume that the council was not only concerned with the bishops' power but also with creating a more distinct and more visible perception of clerical functions, roles and identity. If we understand the creation of identity as a process of demarcation from groups identified as "the other", then we may understand the identification of laypersons as "non-clerics" and those devoid of power as an effective identity-forming process of distilling a distinct clerical identity. In this case, clerical identity and authority were established through the very act of keeping silent about laypeople. The canon of the Code which defines who belongs to the church seems to point towards precisely this strategy. This norm, canon 207 §1 CIC/1983, reads, "By divine institution, there are among the Christian faithful in the church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons." The legislator does not say much about laypeople, except that they are "others" or non-clerics. The rest is silence. In light of this silencing of laypersons for the sake of building a strong clerical identity and power theory, it is perhaps unsurprising that since the council, the magisterium has contributed little to clarifying the theory of power and the question of what is to be made of the laity's undisputed share in the church's *munus regendi*. It is moreover only in this light that we can understand how canon law reflects this vagueness, namely by being largely inconsistent.

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[26] Translation by the author; original quotes, "mittelalterlichen Irrungen", "fortschrittsfeindlichen Katholiken im 19. Jahrhundert mithilfe dieses 'erfundenen' Konzils von Trient, viele Verwirklichungen des Katholischen zu unterdrücken und dem Vergessen anheimfallen zu lassen", WOLF, "Frau Kardinal" (see note 24), 74.

[27] On how to construct authority with the help of "invented tradition", see Eric HOBSBAWM and Terence RANGER, eds., *The Invention of Tradition*, Cambridge, Cambridge University Press, 1983.

2. Power to Govern the Church

The law attempts to implement the teaching of the Second Vatican Council on governing the church in the first book of the Code on "General Norms". It does this under two titles: the eighth on "The Power of Governance" and the ninth on "Ecclesiastical Offices". This classification is worthy of mention, because the 1983 legislation refrained from legally concretising the conciliar doctrine on *munus regendi* in a *separate* book of the Code, as it did with regard to *munus docendi* (see Book III "The Teaching Function of the Church") and *munus sanctificandi* (see Book IV "The Sanctifying Function of the Church"). We can take this reluctant integration of *munus regendi* into the current Code as a first sign of its conceptual weakness. From a legal point of view, this is all the more striking given that the power of governance must be regarded as a key pillar of the ecclesiastical constitution that buttresses the church as an institution. John Beal has alluded to this key function of power theory, stating that "sacred power has emerged as both a fundamental constitutional issue that touches on the theological nature of the Church and an eminently practical issue that determines the extent to which various persons can participate in the life and mission of the Church."[28] It is thus rather perplexing to find that the legislator has spread the issue across various topics of the "General Norms" instead of integrating it into his book on the ecclesiastical constitution (see Book II "The People of God").

2.1 Power by Divine Institution

Given the key function of power in matters of governance, it is unsurprising that the legislator still wishes to emphasise its importance for the church. He thus notes in the first canon of the eighth title of Book I on "General Norms", canon 129 §1 CIC/1983, that the power of governance "exists in the church by divine institution". The norm states that persons who have received ordination are qualified to receive the power of governance according to the rules of the law. Remarkably, the canon refers to both divine and human mandates. Though authority in the church is based on divine law and precedes ecclesiastical regulation, the question of how those capable of receiving the power of governance actually receive it is determined by human ordinances. This statement rather elegantly avoids responding to the issue that emerges from between those two predications, namely which value has the regulation of *who* is qualified to receive the power of governance. While the existence of governing power in the church is attributed to God's will, as the canon asserts, the question remains as to whether it is also a divine institution that merely those who have received ordination qualify to receive this power. This canon thus creates the first case of uncertainty by declaring that the existence of the power of governance in the church is based on divine institution and affirming that those ordained may receive it, albeit without clarifying the connection between power and ordination. However, it would be misleading to suggest that the canon has simply refrained from commenting on this relationship. Silence, as linguistic pragmatics explains, is in fact a powerful form of communication.

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[28] BEAL, "The Exercise of the Power" (see note 8), 1.

In the given case, the legislators' silence on the exact nature of the connection between power and ordination allows for interpreters to identify a subtext from what is not stated explicitly. By qualifying the power of governance to exist "*ex divina institutione*", canon 129 §1 CIC/1983 tacitly evokes the idea that power also requires ordination by divine law.

2.2 Power and Ordination

A second ambiguity arises from the wording that those ordained do not "own" the power of governance but are "capable of it". Some English translations also state that the ordained "are qualified" to receive the power of governance, corresponding to the original Latin, "*habilis sunt*". The power of governance therefore does not automatically come with ordination. Instead, ordination renders the ordained *capable* of receiving the power of governance. Thus, the ordinations of bishops and priests have a two-fold effect: they convey upon the ordained the power of orders and the *capacity* to receive the power of governance. Some arguments therefore assert that it is the power of orders which serves as the prerequisite for the power of governance. However, this is questionable in the case of deacons. According to the law, deacons have received ordination and are therefore capable of receiving the power of governance. Yet the law casts doubt on whether they in fact receive the power of orders with their ordination. The 2009 legislation *Omnium in Mentem*, which set the order of deacons apart from that of bishops and priests, can be viewed as the legislator's hint that they do not.[29] The law, nevertheless, does not say so explicitly. The revised canon 1009 §3 CIC/1983 states that bishops and priests "receive the mission and capacity to act in the person of Christ the Head, whereas deacons are empowered to serve the people of God in the ministries of the liturgy, the word and charity". This canon is another piece of the power puzzle which suggests that the legislator is unconcerned with clearly divulging the actual intended meaning of his norms. For the most part, canonists interpret the bishops' and priests' capacity "to act in the person of Christ the Head" as referring to the possession of the power of orders. At the same time, they are at a loss to suggest what it legally means "to serve the people of God in the ministries of the liturgy, the word and charity", as suggested for the deacons. However, while they do not know if the deacons' mission correlates with a legal effect, they infer the wording to mean that deacons in fact do not receive the power of orders. Therefore, if we conclude from the cryptic wording of canon 1009 §3 CIC/1983 that only priests and bishops have *potestas ordinis* but derive from canon 129 §1 CIC/1983 that *all* ordained persons are capable of receiving the power of governance, then the latter—or at least the deacons' power of governance—cannot be based on the power of orders but simply on the fact of ordination.

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[29] See BENEDICT XVI, "Apostolic Letter issued *Motu proprio Omnium in Mentem* on Several Amendments of the Code of Canon Law," 26 October 2009, *Acta Apostolicae Sedis* 102 (2010), 8–10, at 10.

The issue becomes even more complicated when considering that the 1917 Code did not connect the power of governance with ordination but merely with being part of the *clergy*, when stating, "Only clerics can obtain powers, whether of orders or of ecclesiastical jurisdiction" (canon 118 CIC/1917). This regulation, unlike the current norm, did not link the power of governance to ordination, but merely to being a cleric, which—according to the old law—applied to members of the faithful after the reception of their first tonsure (see canon 108 §1 CIC/1917). John Beal thus rightly remarks, "As a result, the link between the power of jurisdiction and sacramental ordination was somewhat looser in the 1917 Code than might appear at first glance."[30] In the old law, parts of the clergy clearly capable of receiving the power of governance had not received ordination, which makes the connection between ordination and power even more opaque. It might also be said, on a more positive note, that this gives us food for thought about whether laypeople today might also receive this power. I will return to this issue later.

2.3 Power and Office

A third observation about the uncertainty of canon 129 §1 CIC/1983 concerns what the law means when it states that only clerics "are capable of the power of governance". Translators of the Latin original into the world languages usually add words to explain the nature of this competence. The German translation, for instance, says that clerics are qualified "*[z]ur Übernahme von Leitungsgewalt*", that is, qualified to *take over* the power of governance, whatever that entails. Some translations qualify clerics as potential "bearers" of the power of governance.[31] These additions indicate the need to elaborate more fully on the way in which a person capable of receiving this power actually receives it. When reading of clerics "capable of the power of governance", one might ask how we are to understand the act through which a cleric acquires power. One answer lies in the connection between power and *offices*. Canon 131 §1 CIC/1983 states that ordinary power of governance is connected by the law to a certain office. As ordinary power of governance is the power of office, the formulation of canon 129 §1 CIC/1983 that only clerics are capable of the power of governance therefore also implies that only clerics are capable of assuming offices regularly endowed with this power. Canon 274 CIC/1983 consequently claims that "[o]nly clerics can obtain offices for whose exercise the power of orders or the power of ecclesiastical governance is required."

However, canon 131 §1 CIC/1983 goes on to elaborate that the power of governance also exists in a *delegated* form that is not connected with an office but is instead granted to a particular person. Unlike its explicit restriction of powerful offices to clerics, the law is silent about whether the capacity to receive delegated power is

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30 BEAL, "The Exercise of the Power" (see note 8), 8.

31 E.g. SOCHA, "Commentary on canon 129" (see note 7), speaks of "*Trägerschaft*" of the power of governance in the headline of his commentary.

also restricted to clerics. This ambiguity brings us to the next question, namely how the law defines—or fails to define—the ability of the laity to exercise power in church.

3. Laypeople's Competence

Some canonists have argued that it is possible for laypeople to participate in church governance by exercising delegated power.[32] They reconcile this idea with the formulation of canon 129 §1 CIC/1983 that only clerics "are capable of the power of governance" by interpreting this statement to mean that only clerics can "hold" this power—for instance by assuming ecclesiastical offices endowed with the power of governance—but can authorise another person to *exercise* their power. According to this model, whilst power lies with the cleric who holds an ecclesiastical office endowed with the power of governance, the officeholder can task others with performing acts that draw on his power. This model can be viewed as a subset of canon 129 §2 CIC/1983, which defines laypeople's competence regarding the power of governance, stating, "Lay members of the Christian faithful can cooperate in the exercise of this same power [the power of governance, addition by the author] according to the norm of law." As the law posits, laypeople are also attributed with a capability for power ("*possunt*"), much like clerics. Their competence to "cooperate" ("*cooperari*") in the exercise of power ("*in exercitio eiusdem potestatis*") is, in any case, different from the clerics' "capability *of* the power of governance". Canonists who argue that laypeople can exercise delegated power thus argue that such power is a subset of lay "cooperation" in the exercise of power, as indicated in canon 129 §2 CIC/1983.

3.1 Using Power without Having It?

Nonetheless, this reading is not entirely certain. In the reform process prior to the 1983 promulgation of the Code, this issue was already a matter of heated debate among those consulted in the reform. The animadversion submitted by Cardinal Ratzinger for discussion by the 1981 Plenary Congregation of the Commission on the Reform of the Code is illuminating. In his fierce criticism, Ratzinger commented that the idea that laypeople can exercise a power they do not possess is a "logical contradiction"[33]. He also called the construct—present today in canon 129 §2 CIC/1983 (and in canon 126 of the 1980 Schema of the Code of Canon Law), a bizarre theory of power, "a new

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32 E.g. Peter PLATEN, *Die Ausübung kirchlicher Leitungsgewalt durch Laien: Rechtssystematische Überlegungen aus der Perspektive des "Handelns durch andere"* (Beihefte zum Münsterischen Kommentar 47), Essen, Wingen, 2007.

33 Translation by the author; original quote, "Mit dem zweiten Halbsatz von can. 126 (in exercitio … ipsis concedit) wird eine abenteuerliche Gewaltenlehre in die Kirche eingeführt. Es ist ein logischer Widerspruch, da [sic] jemand eine Gewalt ausüben kann, deren Träger er nicht ist", in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio Plenaria* (see note 2), 39.

invention without a fundament"[34] (similar to Sydney Cardinal James Freeman[35]) and incompatible with the teaching of the council.[36] Cardinal Hume of Westminster submitted a similar concern, "It is a contradiction in terms to suggest that a person can exercise a power which, for theological reasons, he is fundamentally incapable of holding; and to a person thus '*inhabilis*' the power itself cannot be transmitted by any merely juridical act, not even by the '*auctoritas Ecclesiae suprema*'."[37] In the end, these opinions did not convince the Plenary Congregation, which followed the model of integrating laypersons into the exercise of the power of governance, albeit without clarifying how one is to understand the nature of their participation. The Plenary Congregation opted to accept the draft of the canon (identical in the 1980 and 1982 schemas), which described the participation of laypeople in governing the church using the term "participate" ("*partem habere*").[38] The final papal redaction then replaced that term with the slightly more opaque term "cooperate" before the promulgation of the Code.[39]

3.2 Lay Cooperation

Canonists have criticised this formulation for decades. John Beal, for example, called the regulations on the role of the laypeople in church governance "cryptic provisions"[40]. They are cryptic in particular due to the unclear nature of the laity's "*cooperari*" of canon 129 § 2 CIC/1983. As "cooperation" is not an established legal term, its meaning is debatable. We can see that the prefix "co-" connects the laypeople's competence to participate in church governance with the clerics' competence, as defined in §1 of the same canon. Hence, the law evidently relates the laypeople's competence to that of the clerics as a kind of "co-"competence. However, this does not clarify what laypersons can in fact achieve. The kinds of action, "*operari*", of which laypersons are capable remain unclear. One can assume, in line with the canonists who deem that laypeople can exercise delegated power, that "*cooperari*" means that laypersons may support clerical officeholders by exercising power on their behalf. Alternatively, one could argue that "cooperation" only pertains to tasks preparing the way for the actual exercise of power. This interpretation is consistent with Cardinal Ratzinger's 1981 animadversion. The participation of laypeople, he argued, could never be a participation in the power of governance itself, but merely a participation in the church's "*munus regendi*", which would allow laypeople to

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34 Translation by the author; original quote, "eine neue Erfindung ohne Fundament", in PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio Plenaria*, (see note 2), 43.

35 See PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio Plenaria*, (see note 2), 45.

36 See ibid, 41.

37 Ibid, 46.

38 See ibid, 35.

39 On the genesis of the canon, see SOCHA, "Commentary on canon 129" (see note 7), 4–5, 12–13 nn. 1, 13.

40 BEAL, "The Exercise of the Power" (see note 8), 68.

contribute to ecclesiastical decision making in the form of preliminary acts or consultations with the clerical decision makers.[41] In any case, neither the text nor the context of canon 129 §2 CIC/1983 helps to clarify this important question.

3.3 Powerful Offices

The law's ambiguity on lay power is exacerbated by regulations which do not merely seem to include laypeople in the clerical exercise of power, as implied in canon 129 §2 CIC/1983, but also seem to endow them with *offices* vested with the power of governance. The most recent example is the opening of leading positions to laypeople in dicasteries of the Roman Curia, as introduced by Francis in the March 2022 Apostolic Constitution *Praedicate Evangelium*.[42] Here we can read in number 5 of the principles preceding the norms, "[A]ny member of the faithful can preside over a Dicastery or Body, given their particular competence, power of governance and function." Other examples of lay offices in governing the church taken from the Code of Canon Law include the office of the diocesan finance officer (see canon 494 CIC/1983) or the finance officer of a religious institution (see canon 636 CIC/1983), the lay members of the diocesan finance council (see canon 492 CIC/1983), laypersons leading parishes according to canon 517 §2 CIC/1983, lay administrators of ecclesiastical goods (see canon 1279 CIC/1983), several offices of ecclesiastical adjudication including auditors (see canon 1428 CIC/1983), promoters of justice (see canon 1435 CIC/1983) and defenders of the bond (see canon 1435 CIC/1983). One prominent example, much debated in canonical literature, is the office of the ecclesiastical judge (see canon 1421 §2 CIC/1983). Cardinal Ratzinger called this provision a "stark contradiction"[43] to the regulation as contained today in canon 129 §2 CIC/1983. In light of canon 274 §1 CIC/1983—which, again, holds that only clerics can obtain offices whose exercise requires the power of governance—the existence of these offices has led to several different interpretations. Some canonists have interpreted the appointment of lay judges as an *express exception* to canon 129 §2 CIC/1983. This would clarify that the exclusion of laypeople from offices endowed with the power of governance is merely human law and thus open to exceptions and general revision. Others have argued that lay judges do not obtain an ecclesiastical office but are simply *part* of the "office of the collegiate tribunal", together with other

41 See PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio Plenaria* (see note 2), 41.

42 See FRANCIS, "Apostolic Constitution *Praedicate Evangelium* on the Roman Curia and its Service to the Church and the World," 19 March 2022, <https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2022/03/19/0189/00404.html> accessed 9 June 2022.

43 Translation by the author; original quote, "diese Aussage steht in krassem Widerspuch zu der Habilitätserklärung des can. 126 Schema", Pontificium Consilium De Legum Textibus Interpretandis, *Congregatio Plenaria* (see note 2), 43.

clerical judges. In this case, as one could argue, the lay judge within the tribunal would in fact merely be "cooperating" in the tribunal's exercise of judicial power.

3.4 Juridical and Factual Power

Some contemporary developments represent similar attempts to harmonise the factual presence of laypeople in leadership positions with the regulations of canons 129 §2 and 274 §1 CIC/1983. In some German dioceses, for instance, the bishops and vicars general have restructured the curia to enable it to be "led" by a team consisting of the vicar general and several other lay experts in fields such as management, human resources and finances. The semantics used to describe their collaborative responsibility suggests that the vicar general and his lay colleagues are equal as leaders in their respective fields. Speaking of "leadership teams" circumvents the tricky question of whether this shared responsibility is consistent with the canonical concept of governance. In the reality of many German dioceses, governance in a legal sense and governance in a practical sense are increasingly drifting apart.

The recent reform of the Roman Curia, *Praedicate Evangelium,* poses the very same problem of how to interpret laypeople's presence in offices evidently endowed with factual power to govern the church. The document attempts to minimise the problem of power theory which has been inherited from the council and manifested in the Code by concealing it behind a strong motif of papal power. Number 5 of the principles preceding the norms states that "[e]very curial institution fulfils its mission by virtue of the power received from the Roman Pontiff in whose name it acts with vicarious power in the exercise of its *munus primaziale*." In the context of this statement, canonist Gianfranco Ghirlanda—who was invited to comment on the new legislation during the press conference held about the new Apostolic Constitution—passed comment on how to interpret the document regarding the possibility of laypersons filling offices of church governance in the curia. He suggested that laypeople could fill these offices because the power associated with them is in fact papal power. Ghirlanda stated, "It is made clear that whoever is in charge of a department or other body of the curia does not have authority because of the hierarchical rank with which he or she is invested, but because of the power received from the Roman pontiff and exercised in his name."[44] Therefore, as Ghirlanda claims, power exercised by curial officials is power derived from the pope, and not power derived from the "hierarchical rank" of the office holder. Even bishops presiding over dicasteries, he notes, do not exercise their power of office based on their ordination, they do so by exercising vicarious power attributed to them by the pope. Ghirlanda consequently adds, "The vicarious power to carry out an office is the same if it is received by a bishop, a presbyter, a consecrated man or woman or a layman or

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[44] Gianfranco GHIRLANDA, "The Apostolic Constitution 'Praedicate Evangelium' on the Roman Curia," *La Civiltà Cattolica,* 6 May 2022, <www.laciviltacattolica.com/the-apostolic-constitution-praedicate-evangelium-on-the-roman-curia> accessed 9 June 2022.

woman."[45] As all church members can thus participate in the papal power, as Ghirlanda sees it, he also draws a more general conclusion from this finding, noting,

This confirms that the power of governance in the Church does not come from the sacrament of Orders, but from the canonical mission. … *Praedicate Evangelium* settles the question of the capacity of the laity to receive offices involving the exercise of the power of governance in the Church, provided that they do not require the reception of Holy Orders, and indirectly affirms that the power of governance in the Church does not come from the sacrament of Orders, but from the canonical mission; otherwise, what is provided for in the apostolic constitution itself would not be possible.[46]

Ghirlanda thus shuns the differentiation between the clerical and lay capacities to exercise the power of governance made in canon 129 CIC/1983, and he ignores the passage in canon 274 §1 CIC/1983 which restricts offices endowed with the power of governance to clerical officeholders. Unsurprisingly, his statement drew an immediate critical response. While the Society of St. Pius X spoke unkindly of "the Ecclesiological Paradoxes of Fr. Ghirlanda"[47], even canonists more sympathetic to his position marvelled at how easily Ghirlanda had disposed of the problem of the one sacred power which has consumed ecclesiastical power theory for decades, without providing a convincing answer about how to reconcile *Praedicate Evangelium* with conciliar teaching and the concept of power as indicated in the Code of Canon Law.

3.5 Irreconcilable Interpretations

Whilst the decision to entrust laypersons with leadership positions in the papal and episcopal curias seems long overdue, the question remains as to how to reconcile it with ecclesiastical power theory and law. The "paracanonical" attempts to integrate laypeople into governance structures show that it is critically important to arrive at a clearer understanding of how their involvement in governance issues is theoretically founded and legally constructed. In canon law, this primarily entails clarifying what "*cooperari*", as it is used in canon 129 §2 CIC/1983, actually means. Nevertheless, the supreme authority of the church has thus far not condescended to shed further light on ecclesiastical power theory and law. We may interpret the power to delay clarification of the nature of ecclesiastical power as a power play in itself, following the renowned sociologist, Niklas Luhmann. He noted that it is the particular power of the powerful to postpone decisions. This power to cultivate uncertainty and delay clarification is in turn itself a source of power.[48] And it is a fascinating twist that the ecclesiastical legislator uses his power to delay the very clarification of what constitutes power in

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45 Ibid.

46 Ibid.

47 "The Reform of the Curia and the Ecclesiological Paradoxes of Fr. Ghirlanda," 24 March 2022, <https://fsspx.news/en/news-events/news/reform-curia-and-ecclesiological-paradoxes-fr-ghirlanda-72635> accessed 9 June 2022.

48 See Niklas LUHMANN, *Die Politik der Gesellschaft*, edited by André Kieserling, Frankfurt am Main, Suhrkamp, 2002, 19. I am grateful to Annette Langner-Pitschmann for bringing this argument to my attention.

church. We will see in a moment that the denial of this clarification is not only an act of exercising power in Luhmann's sense, but also a source of power, since it gives ecclesiastical authorities maximum autonomy in deciding how to distribute power in church.

Due to this lack of clarification, we have conflicting positions about the precise forms which a lay "cooperation" in governing the church can assume. Interpretations vary greatly. At one end of the spectrum we find the opinion that "cooperation" entails the option to endow laypersons with offices that exercise the power of governance, as canon 1421 §2 CIC/1983 plainly sets out for lay judges and as *Praedicate Evangelium* regulates with regard to leading positions in the Roman Curia. At the other end of the spectrum, we find arguments in favour of abolishing norms such as canon 1421 §2 CIC/1983 which contradict the canonical concept of one power in clerical hands.[49] Canonist Myriam Wijlens broadly identifies these positions as belonging to two distinct canonical schools, "The discussion has resulted in two (opposing) positions which may be identified as the Roman school and the Munich school."[50] In the following paragraphs, I quote her descriptions of these differing opinions at some length as they illuminate the scope of possible interpretations. Wijlens first describes the perception of the Roman school,

> The Roman school points out that the council did not really speak about the power of jurisdiction, but answered questions about the powers of the bishops and affirmed the oneness of sacred power for the episcopacy. The council neither intended, nor did it in fact speak about, the power of jurisdiction of the laity. This school refers to historical examples which testify to laity having exercised jurisdiction and concludes that, because Vatican II had no intention to break with history, laity can exercise the power of jurisdiction.[51]

This approach also seems to be the theory behind positions such as Gianfranco Ghirlanda's statement on *Praedicate Evangelium.* Wijlens then explains the perception of the Munich school,

> The Munich school, however, states that the council clearly decided on the oneness of sacred power which is indivisible. The only source of sacred power is ordination. Hence, laity cannot exercise power of jurisdiction.

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49 For Cardinal Ratzinger's vote of deleting the lay judge from the draft law, see PONTIFICIUM CONSILIUM DE LEGUM TEXTIBUS INTERPRETANDIS, *Congregatio Plenaria* (see note 2), 44; similarly Cardinal Hume, 48.

50 Myriam WIJLENS, "The Power of Governance," in John P. BEAL, James A. CORIDEN, and Thomas J. GREEN, eds., *New Commentary on the Code of Canon Law*, commissioned by The Canon Law Society of America, New York/Mahwah, NJ, Paulist Press, 2000, 183–194, at 184–185.
For an overview of some key representatives and their main arguments of the two schools (Wilhelm Bertrams and Klaus Mörsdorf for the Munich school and Jean Beyer for the Roman school), see BEAL, "The Exercise of the Power" (see note 8), 18–42.

51 WIJLENS, "The Power of Governance" (see note 50), 185.

> According to this school, the council restored the unity of the powers of orders and jurisdiction. To state that laity could exercise the power of jurisdiction would therefore be a break with the insight of the council.[52]

While most of the original protagonists of these schools are no longer alive, others have since followed in their footsteps. The current debate revolves around whether entrusting laypeople with positions of church leadership is possible.[53] Amidst the conflicting opinions, there are various ideas for how to involve laypeople in exercising the power of governance, such as by delegating the power of governance to them, be it on a case-by-case basis or more permanently. My contribution need not discuss the specific options in any greater detail. However, what we can derive from the myriad of ways of reading the canons on power is that these canons are strikingly unclear and even allow for contradictory interpretations of what lay "cooperation" means. John Beal has called the opposing positions "not easily reconcilable"[54], which is quite an understatement. After all, it is not a minor flaw if laws fail to provide their appliers with clear regulations: it is a fundamental problem of legal certainty, equality and justice. Canonists have therefore been demanding clarification from the legislator for decades, only to be ignored. As Myriam Wijlens has remarked, "now that the interpretation and application of these norms have been under way for some time, there is still no unified understanding."[55] Although she wrote this sentence more than twenty years ago, we are still none the wiser.

4. Conclusion

Canonist Hubert Socha tried to exculpate the legislator by stating that clarification might be difficult due to the magisterium's lack of theological knowledge about the inner structure of authority in the church. In Socha's estimation, "in order to take account of the theologically unanswered question of how this power is structured"[56], considerable legal ambiguity is unavoidable. Indeed, Socha may well be right that it is difficult to answer all of the questions that remain open regarding ecclesiastical power theory. Nonetheless, the theoretical challenge facing the legislator seems to be a fairly weak excuse for the law's uncertainty. It is hard to imagine a secular legislator refusing to legislate power and governance issues in a clear and reliable way due to theoretical doubts. Like all law, canon law is also confronted with the fundamental legal principle that legal norms must be as unambiguous as possible to provide legal certainty. This, of course, does not exclude the possibility that the application of the law transpires to be messier in practice than the legislator intended. However, such a result calls for

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52 Ibid.

53 For an overview over various well-known canonical disputants on that issue, see BEAL, "The Exercise of the Power" (see note 8), 68–85.

54 BEAL, "The Exercise of the Power" (see note 8), 92.

55 WIJLENS, "The Power of Governance" (see note 50), 184.

56 Translation by the author; original quote, "um der theologisch nicht geklärten Frage, wie diese Vollmacht strukturiert ist, Rechnung zu tragen", SOCHA, "Commentary on canon 129" (see note 7), 7 n. 5.

clarification, be it in the form of legislative development or instructive decisions taken in the course of adjudication or administration. In the case of the church, the legislator created a highly opaque law of power and offices in 1983, which was promptly met with universal confusion. At the time and in the intervening years, Catholics from around the world have inquired what the law in fact tells us about the participation of laypeople in ecclesiastical governance, but the legislator still refuses to give an answer. Günter Assenmacher, a former judicial vicar in one of Germany's biggest ecclesiastical tribunals, once observed that "[t]he legislator, with undeniable knowledge of both positions, preferred to retain the tension between canons 129 and 274 §1 on the one hand and canon 1421 §2 on the other hand."[57] John Beal agrees with this opinion, noting,

> Like the Second Vatican Council before it, the revised Code of Canon Law has declined the opportunity to resolve the knotty theoretical problems of a theologico-canonical nature about the nature and origin of sacred power in the Church. The failure of the Supreme Legislator to intervene to resolve these controverted issues definitively was not an oversight but a conscious decision that the issue was not ripe for resolution.[58]

While it seems true that the legislator's refusal to clarify the matter is not accidental, it is difficult to justify this indecision on the grounds of theoretical uncertainty. On the contrary, it is fair to assume that ambiguous norms on one of the most crucial constitutional issues of the church are part of a wider strategy. As the norms on the power of governance are thoroughly vague, they provide the ecclesiastical authorities with maximum freedom and flexibility of interpretation. In this light, it also seems to be no coincidence that *Praedicate Evangelium*, after stating that "any member of the faithful can preside over a Dicastery or Body", promptly adds the opaque restriction that this, of course, can only happen "given their particular competence, power of governance and function" (see number 5 of the principles preceding the norms). By introducing unclear restrictions for competence, power and functions, the legislator once again declined to clarify the circumstances under which laypersons can serve the church in governing positions. This gives appliers of the law nearly complete freedom to decide which cases concerning issues of competence and power require clerical officeholders. The pope is thus free to reserve key curial offices—such as the prefects of the Dicastery for the Doctrine of the Faith, the Dicastery for the Bishops or the Dicastery for the Clergy—for clerics without clarifying

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57 Translation by the author; original quote, "Der Gesetzgeber hat es in unbestreitbarer Kenntnis beider Positionen vorgezogen, die Spannung zwischen den cann. 129 und 274 § 1 auf der einen und can. 1421 § 2 auf der anderen Seite stehenzulassen", Günter Assenmacher, "Laien als kirchliche Eherichter: Die Situation in den Bistümern der Bundesrepublik Deutschland—Zur Diskussion einer Grundsatzfrage," in Klaus LÜDICKE, Heinrich MUSSINGHOFF, and Hugo SCHWENDENWEIN, eds., *Iustus Iudex: Festgabe für Paul Wesemann zum 75. Geburtstag von seinen Freunden und Schülern* (Beihefte zum Münsterischen Kommentar 5), Essen, Wingen, 1990, pp. 349–361, at pp. 360–361.

58 BEAL, "The Exercise of the Power" (see note 8), p. 89.

what distinguishes these offices from others in the curia. Bishops can make similar decisions for positions in their dioceses without stipulating the criteria for their choice. Based on this approach, ordinaries who are highly dependent on laypeople—including in leadership positions—can interpret laypeople's "*cooperari*" as their capacity to fill ecclesiastical positions autonomously and to act more-or-less independently in leading functions. Meanwhile, in contexts in which there is still a large of number of clerics available to fill leadership positions, lay leadership can be easily undermined. Consequently, ecclesiastical practices of incorporating or barring laypersons from church governance can vary strikingly across contexts and depending on the opinion of the ecclesiastical authority in charge. The law of the Code and the reformed law on the Roman Curia is therefore a mixed blessing with regard to the participation of laypeople in governing the church. The more these laws praise the laity's "*cooperari*" in opaque terms, the more striking the lack of clarity in ecclesiastical power theory and the inconsistency of involving laypeople in the exercise of power in the church become.

Constitutional scholar and political philosopher Carl Schmitt, himself a staunch Catholic, once characterised the Catholic Church as "*complexio oppositorum*". As "a complex of opposites", he wrote, "[t]here appears to be no antithesis it does not embrace."[59] This certainly seems to be true concerning ecclesiastical power theory, its laws and the ecclesiastical governance practices deriving from it. Schmitt found this quality to be admirable, for it demonstrated the church's flexibility in integrating even the most glaring inconsistencies. However, it is also possible to view it far more critically, for there is only a small divide between flexibility and arbitrariness. Inexplicit law enables those in charge to make arbitrary decisions, a problematic state of affairs for any legal system. In any case, what is particularly ironic, and Luhmannians may find this amusing, is that the ambiguity that empowers ecclesiastical authorities to decide arbitrarily actually derives from the law governing the use of ecclesiastical power.

[59] Carl SCHMITT, *Roman Catholicism and Political Form* (Contributions in Political Science 380), translated and annotated by G. L. Ulmen, Westport, CT/London, Greenwood Press, 1996, 7.

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Enhancing Trust in the Church: Protection of Privacy and Personal Information through Good Governance

Elizabeth Ong and Michael-Andreas Nobel*

Introduction

Modern information technology has improved the possibilities of processing personal data. The computer and the networks are strong tools with respect to information. The digitalized world shares information to an extent never known before. Many benefits derive from these developments but at the same time there is little doubt that privacy, in the meaning of keeping personal information secluded and controlled, is endangered. The societal need for personal information is huge, and it has become a difficult task to maintain boundaries of privacy. These observations are not new but have been known for at least 30 years. The technological pressure has, however, become still stronger. Legislative and moral responses are difficult.[1]

In his 2019 doctoral thesis, Mahmood discusses important aspects on technology and its relationship with transformation of government and citizen trust and confidence. He states:

> According to Hiller and Belanger (2001), adopting technology through IT services throughout government operations will help government fulfil their responsibility towards citizens in a more effective and transparent manner. Thus, technology plays a role in supporting citizen trust and confidence in government as it provides transparent service. This still leaves a gap unaddressed, which is the relationship between technology and citizen trust and confidence in government, without considering other factors that may also have an influence on trust and confidence.[2]

Similar principles must be observed in the Church if modern technologies are employed to collect and use personal information through IT services. One may concur that various IT services can indeed assist the Church in fulfilling her responsibilities

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1 P. BLUME, "Privacy as a Theoretical and Practical Concept," in *International Review of Law Computers and Technology*, 11 (1997) (= BLUME, "Privacy"), 196.

2 M. MAHMOOD, *Does Digital Transformation of Government Lead to Enhance Citizens' Trust and Confidence in Government?*, Brunel University London, UK, Springer Theses, 2019 (= MAHMOOD, *Digital Transformation*), 25.

effectively, but it also requires transparency on her part so that people, especially faithful, are confident in the Church's operational efforts. Mahmood concludes:

> Some researchers have argued that technology in government refers to IT and its impact on business management (Al Rub 2006). Other researchers (Bannister and Connolly 2011; Waller and Weerakkody 2016) have highlighted the need for technology in changing government policies by being a part of the policy design process. Thus, it can be argued that changing government policies could also be considered as transformation of government. Therefore, there is a need to investigate the relationship between technology, e-government and transparency, which may lead to citizen trust and confidence. Technology is expected to work closely with transparency and e-government, resulting in transformation of the government that is further expected to enhance citizen trust and confidence in government.[3]

Without doubt, applying these principles in the Church context, the impact of using modern technologies for the pastoral ministry and the mission of the Church as well as the need to establish appropriate policies becomes evident. Trust and confidence of the faithful will rely on the tripart relationship: modern technologies available, the Church's use of these modern technologies as established in appropriate policies, and transparency. The Church is not "free" in establishing policies on the use of modern IT services; in parts she is bound by civil regulations such as the revised New Zealand's civil privacy act from 2020. This study intends to outline various aspects regarding good governance in the protection of privacy and personal information which enhances trust and empowers the people of God.

What is Trust and Why is it Important to and in the Church?

The Cambridge Dictionary defines "trust" as follows:[4]

- belief that someone is good and honest and will not harm you, or
- to have confidence in someone or something, or
- that something is safe and reliable,
- as a noun, trust is belief.

Confido is the Latin root word for "to trust", or to have confidence in and to believe. Vargas-González, referring to the Oxford Learner's Dictionary, summarizes it as follows:

> The same happens to words in English (Oxford Learner's Dictionary, 2021), since *trust* goes through the belief in people and things, mentioning *rely* in its definition. *Confidence*, on the other hand, is the feeling that one can *trust*; and *rely* refers to dependency or trust in someone else. This approach to the terms using the definitions of recognized dictionaries

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3 IBID.

4 CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/trust.

highlights, once again, the need for hermeneutics to address the concepts in such a specific context as auditing.[5]

One can often hear people say, "Oh I would trust him/her with my life." What makes a person make this statement so freely? Trust does not develop overnight but is an accumulation of actions, over time, which helps a person bond, and helps them place their belief and confidence in someone or something which in turn results in trust.[6] Usually, trust is experienced in an organizational context through situations and experiences – it is through a series of constant, uniform responses to a situation occurring in an organisation that the person experiences positive or negative consistency, whereby trust is then either built or broken. Experiencing only positive responses to problems or situations may result in trust-confidence and trust-goodwill which may include "good intents, motives, friendliness, trustworthiness, honesty, and niceness."[7] If one experiences a series of harmful responses to a problem in an organisation, the rational expectation is that there will be a minimum level of trust.[8]

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5 C. VARGAS-GONZÁLEZ, "Hermeneutics to Read 'Confidence' and 'Trust' in Rely, Confidence and Trust in the ISAs Translation," in *Revista Contabilidade & Finanças*, 33 (2022) (= VARGAS-GONZÁLEZ, "Confidence and Trust"), 316.

6 Among identifying factors for trust Mahmood identifies competence, benevolence and honesty; see MAHMOOD, *Digital Transformation*, 19. Vargas-González identifies ability, benevolence and integrity as the three dimensions for trust; see VARGAS-GONZÁLEZ, "Confidence and Trust," 322. Confidence is distinct from trust: "It is necessary to know that the concept *confidence* is more oriented to the perception of an effective ability, i.e. when someone is able to achieve the objectives in the best way, and refers to individuals and not to organizations. Unlike *trust*, *confidence* does not have an ethical dimension (Aschauer, Moro, & Massaro, 2015), and the cognitive component has much more incidence than the affective one, up to the point that, for instance, the auditors' information choice triggers greater confidence in their judgment than when they acquire the same information with no explicit choice (Smith, Tayler, & Prawitt, 2016)." Ibid., 321.

7 IBID., 322. "As for trust-goodwill, there are few studies that evaluate it (Kerler & Brandon, 2010), with the exception of an empirical investigation by Kerler and Killough (2009), where the authors use a scale to measure an auditor's trust-goodwill regarding the client's management. They have found that auditors do develop trust-goodwill as a result of past interactions. Also, they have found out that it can affect auditors' overall fraud risk assessments after an unsatisfactory experience with the client's management. Indeed, trust-goodwill is considered a threat because it can violate objectivity and independence (Kerler & Brandon, 2010; Kerler & Killough, 2009). On the other hand, trust-competence does not affect objectivity so much, since this has more influence in areas assessing competence in the auditor-client relationship: 'in auditor-client relationships, assessing the interlocutor's competence is a critical part of the audit process' Maresch, Aschauer, & Fink, 2019, p. 340), and this affects the cooperation between both parties (Morais & Franco, 2019)."

8 For example, most of the population have at one point in time experience the exasperation of calling the telecommunications company to try and fix their internet connection but getting nowhere to the point where we decide to switch companies because we have lost faith and can get a better deal elsewhere.

Furthermore, the interlinked paradigms of trust and confidence cannot be viewed independent from appropriate communication, especially from the part of the Church towards those who want to "entrust" their personal information to Church institutions. Although referring to corporate responsibility communication in the banking sector, the principles outlined by Chiara *et aliae* apply also in the context of the mission and ministry of the Church:

> [R]esearchers have asserted that companies should, instead, strive for engagement of their customers—and broadly stakeholders—through an integrated approach, which avoids disequilibrium of judgments. As a matter of fact, situations of disequilibrium are reflected in the spectrum of customers' perceptions, along which [corporate responsibility] CR communications range from purely social to purely marketing oriented. When customers associate CR messages with a pure marketing logic, for instance, they can misjudge the veracity of the message, which eventually damages the effectiveness of CR and its perception (Pomering & Dolnicar, 2009). Conversely, when CR is undertaken through an integrated approach and communication is centered on results and coherence between promises and achievements, confidence and trust are created out of the virtuous impacts that CR has on business and society, without needing extensive communication to spread the "good" actions.[9]

To establish a level of trust, the Church's communication needs to establish confidence in the faithful through appropriate content information shared and identifying the purposes of its communication. This requires ecclesiastical authorities to develop policies and, consequently, communication strategies to impact confidence and trust in the faithful, finding the right balance between how it is shared, what is shared and the goals.

However, the communication of CR raises issues of credibility, confidence, trust, and perception when messages are spread through a disequilibrium of intents and contents. When CR messages are primarily focused on enhancing brand perception and achieving marketing goals, for instance, firms tend to spread unsubstantiated ethical messages without considering their strategic implications (Jahdi & Acikdilli, 2009). This, evidently, creates growing misperceptions among a target market which has, much more than in the past, access to information about companies' conducts and misconducts; in other words, these customers have greater awareness about the companies' real behaviors. Customers who have traditionally built their trust on business communication and marketing actions are now also affected by responsible business activities that are communicated transparently, show alignment between promises of CR and achieved performances in the field (de Ven, 2008; Hur et al., 2014),

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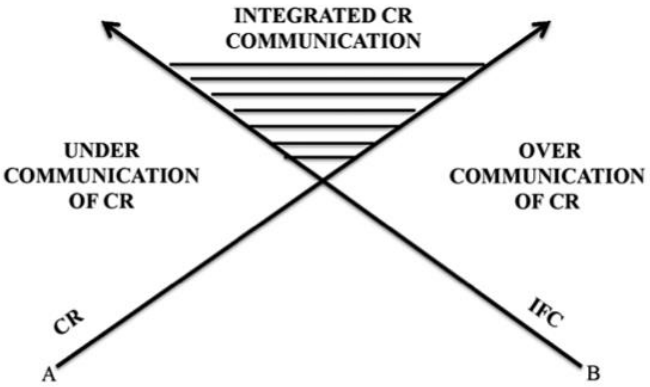
9 C. CHIARA, C. CASALEGNO, F. MOSCA and P. MAPLE, "Customer's Judgments and Misjudgments of Corporate Responsibility Communication: A Cross-Country Investigation of the Effects on Confidence and Trust Within the Banking Sector," 139.

and report clear actions and concrete achievements (Du et al., 2010).[10] Chiara *et aliae* outline the principle of over- and under-communication which can lead to a decreased level of confidence:



The model graphically describes the interlinks between CR (axis A) and integrated firm communication (IFC, axis B) and underlines two main scenarios, resulting from the prevalence of pure social intents and contents (prevalence of CR) or pure marketing goals and contents (IFC) in communications. It also highlights a situation of equilibrium between CR and communication, which the authors name *integrated CR communication*.[11]

The right part of the model outlines overcommunication, meaning "an excess of communication" "to defend and improve" one's reputation and perception "compared to real […] achievement." In other words, a great deal is said to improve one's image, but not much is accomplished.[12] In the context of the current crisis within the Church concerning sexual abuse cases, this means that a vast amount of press releases, statements, new policies, instructions etc. will not necessarily lead to an increase of confidence and trust of the faithful if these types of communication are not followed by accomplishments. The "accomplishment" is not just the release of communications, but to pursue the cases. The left part of the model highlights the undercommunication, which, at times, can even result in a non-communication itself, which, in turn, can be

10 IBID., 140.

11 IBID., 141.

12 IBID.: "On one hand, within the overcommunication of CR (right part of the model), any CR action is seen and communicated as a mere driver of marketing and communication intends to defend and improve brand reputation and customers' perceptions (Jahdi & Acikdilli, 2009), resulting in an excess of communication compared to real CR achievements. Accordingly, three main typologies of CR communication can be included in such definition: The communication of CR promises and intents that do not have concrete repercussions on firms' results and management or society; the communication of CR performances that are not yet achieved; and the *one shot* or *random* communication of CR activities that do not have any relation or few connections with the firm's core business and are, therefore, not part of a long-term CR plan."

perceived as hiding or denying facts and act upon them.[13] The Church needs to find the right balance that leads to the integrated communication, "where the communication of performances and promises is aligned… any message that does not meet this requirement is most likely to turn perception in a negative way and create misjudgments (…) with severe repercussions on [the faithful's] confidence, resulting in uncertain ineffectiveness."[14]

Pope Francis in recent times addressed the issue of trust in light of the revelations of sexual abuse in the Catholic Church. He warned that without more transparency and accountability the faithful would "continue to lose trust in their pastors, and preaching and witnessing to the Gospel will become increasingly difficult."[15] Public apologies have been made by Church leaders to survivors of church sexual abuse for the pain, hurt, and trauma they suffered and continue to impact them after experiencing abuse from the "people you should have been able to trust."[16] One can reasonably argue that the more people suffer an accumulation of bad experiences, it leads to a loss of trust.

Why then is trust important in the longevity, credibility, and life of the Church? The Church is not just a hierarchical structure, it is the people of God. Lumen Gentium speaks of the Church as "a people brought into unity from the unity of the Father, the Son, and the Holy Spirit.[17] As Christians, trust is experienced every day and it is the basis of faith in God and the Church. The essence of human life is imbued in it, from the moment of birth: children trust their parents to care for and love them. Christian faithful trust that the Church and one's faith will lead everyone closer to God: when we place our trust in God, we inspire and aspire to become one in holiness with Him. It is safe to say that as much as trust is placed in others, one would also like others to trust us; it is part of human relationships and social interaction.

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13 IBID.: "On the other hand, the undercommunication of CR (left part of the model) highlights a prevalence of CR against communication and may arise from the noncommunication of certain CR actions (even though they are implemented and create positive impacts) because the company fears that the communication will be perceived as a practice of greenwashing (Delmas & CuerelBurbano, 2011) and will jeopardize the good intentions. The main typologies of CR undercommunication are: hiding or denying the fact that some CR actions can and should have a commercial intent; communicating a new CR plan without reporting on performances that have been achieved; and communicating fewer CR actions than implemented out of the fear of creating false perceptions and judgments."

14 IBID.

15 N. WINFIELD, "Pope Warns of Lost Trust Without More Abuse Accountability," in *AP News*, 30th April 2022, https://apnews.com/article/pope-francis-europe-religion-sexual-abuse-by-clergy-73540b1b8df34a79e0bf1fe51c0 4c005.

16 J.A. DEW, "Apology to victims and survivors of Catholic Church Abuse," New Zealand Catholic Bishops Conference, from: https://www.catholic.org.nz/about-us/bishops-statements/apology-to-victims-and-survivors-of-catholic-church-abuse/.

17 LUMEN GENTIUM 4, from: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html.

The Latin word for "inspire" is *inspirare*, which has the meaning of "to breathe into" or "to inflame". God is the "breath of life,"[18] for He inspires us to be better. Through our trust and belief in Him, we are inspired to strive to live a purposeful, fulfilled, and meaningful life in hopes of one day being one with God in heaven eternal. This is why trust is fundamental to Church life and practice; it is not only experienced in human life, but also the imbued in our spiritual life.

Christians worldwide entrust to the Church not only their faith and belief, but also on a practical and temporal level, themselves and their personal information which identifies and defines who they are to enable them to participate in Church life. For example, when children are enrolled into Catholic Schools, parents have to provide the personal information of their children to enable them to be a part of that school community, like their name, age, ethnicity, medical issues, marital status of parents and other circumstances in cases where Domestic Violence Protection Orders are concerned. Seminary applicants are required to complete a psychological assessment "to provide greater clarity about an applicant, so that those responsible for the admissions process have a fuller understanding of the applicant besides the many other components of the application process".[19] Another example being an adult person joining the Rite of Christian Initiation of Adults (RCIA) to become a Catholic in a parish. In this context, if applicable, personal information like their conjugal status is collected to identify whether a Declaration of Nullity of Marriage application might be required prior to their acceptance into the Church, as it impacts on their reception of the sacraments. The Church thus has an obligation to reciprocate this entrusted personal information with the assurances that she will be responsible in the care, safekeeping, and prevention of harm from the loss of control of it, to be trustworthy.

What is Privacy and Why it is Important to Church Life?

The Cambridge Dictionary defines privacy as a person's right to keep their personal matters and relationships secret or the state of being alone.[20] The International Association of Privacy Professionals (IAPP) states that privacy is broadly the right to be let alone, or freedom from interference or intrusion. It further defines "Information

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18 GENESIS 2:7 "Then the Lord God formed the man of dust from the ground and breathed into his nostrils the breath of life, and the man became a living creature."; Job 33:4 "The spirit of God has made me, and the breath of the Almighty gives me life."

19 UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, Guidelines for the use of Psychology in Seminary Admissions, https://www.usccb.org/sites/default/files/flipbooks/cclv-guidelines-psychology-admissions/files/as sets/basic-html/page-1.html#, 2.

20 CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/privacy. See also J. RACHELS, "Why Privacy is Important," in *Philosophy and Public Affairs*, 4 (1975), 326-331; see R.B. PARKER, "A Definition of Privacy," in *Rutgers Law Review*, 27 (1974), 281-285.

Privacy" as the right to have some control over how your personal information is collected and used.[21]

> Privacy being the legal regime that governs the use of personal information is rapidly changing, especially in a world where personal information is a valuable sellable commodity.[22] International and national rules governing personal information protection will be inevitable:[23]

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21 INTERNATIONAL ASSOCIATION OF PRIVACY PROFESSIONALS (IAPP), "What is Privacy?" https://iapp.or g/about/what-is-privacy/.

22 E. BARENDT (ed.), *Privacy*, in: T.D. CAMPBELL (ed.), *The International Library of Essays in Law and Legal Theory (Second Series)*, Routledge, London, New York, 2017, xiv: "Helen Nissenbaum (…) contends that for the most part privacy theories have unduly concentrated on justifications for the protection *of private* or *intimate* information and conduct against publicity, observation and regulation. On those theories there is, however, no right to privacy against surveillance of conduct *in public*, it is not thought that we have a 'reasonable expectation' of privacy when we are in public. Nissenbaum challenges this distinction. She argues for the importance of contextual integrity in determining whether a privacy right has been violated. The crucial question is whether information has been requested, obtained, used or exchanged in a way which is appropriate to the context. For example, our doctor does not violate privacy if she asks questions about our sexual health - an intimate matter - or files our answer, but a credit card agency arguably infringes privacy if it lists on computer a record of our transactions and then sells this information to retailers and service suppliers. One argument against recognition of a right to privacy in public is that we freely consent to observation or publication when we appear in public or disclose information to the person with whom we are dealing. Nissenbaum replies that, in fact, our consent is much more limited; we do not consent to the sale or exchange of information by, say, credit agencies or supermarkets to which we give information only for a limited purpose. This is an important point. If valid, it would weaken the position of the media when they argue that information already published somewhere is then automatically in the 'public domain' and can no longer be regarded as covered by a privacy right."

23 Neil Richards & Woodrow Hartzog, Taking Trust Seriously in Privacy Law, 19 Stan. Tech. L. Rev. 431 (2016), 434. See also G. NEGLEY, "Philosophical Views on the Value of Privacy," in *Law and Contemporary Problems*, 31 (1966), 325: "The problem of the political and legal status of the individual in the increasingly corporate structure of all modern states can no longer be ignored. Conditions have thrust upon political and legal institutions the demand for definitions and policies of control. The nature of the political and legal decisions required (…) of the extent of the right to counsel, or of privacy invasion by electronic means, is a sharp demonstration that the most pressing demand upon our philosophy is for a consideration of the moral and political obligations, duties, and rights within a corporate social order that evidences none of the characteristics of a relatively simple, decentralized, face-to-face society. Our definitions and models of analysis must be appropriate to the facts, although this does not mean at all that they are derivable from those facts. Vague generalities will not suffice, nor will mere reference to 'constitutional guarantees,' although this is not meant in any sense as a depreciation of constitutional function. There must, for example, be some clear specification as to whether our political philosophy is to enjoin and enforce some degree of homogeneity and agreement in respect to morals and values. The analytic requirements imposed by the problems of privacy are therefore twofold: the definition of values and the specification of procedures. The first is the task of moral philosophy, reflected in the political function of legislation. The second depends upon legal process, especially as it operates to control the various administrative functions to which the individual is subject. Failure in or neglect of either of these tasks leaves only the alternative

> Although data protection law aims at preventing misuse of personal information, at the same time it promotes principles that can be viewed as part of privacy and justice in the information society. It is these principles that are of primary interest within the frame-work of this article. Probably the most important principle is transparency or openness. It must be possible for the data subject to know all the kinds of processing that his data undergo. Transparency is the tool to ensure that the information society is based on trust. As this society is extremely complex, substantive rules cannot in practice ensure sufficient legal protection. Rules of a procedural nature are more suited for this task and can easier be used by data subjects.[24]

We give much of ourselves away in today's world not just in the physical forum but also in the digital forum. Many of us would be accustomed to filling out online forms which require name, age, birthdate, email address, credit card details and perhaps on a more voluntary level, many would upload photos of themselves, their children and their loved ones on social media platforms like Facebook, Instagram and TicTok. Privacy in today's context will vastly differ from the inception of ecclesiastical norms, especially with the technological and digital advances of computers and Artificial Intelligence (AI) applications like ChatGPT, which generate a whole essay entirely written by the AI with one click of a button.[25] Recently, a civil judge in Colombia raised eyebrows when he announced he had use ChatGPT in preparing a ruling in a children's medical right's case citing that the chatbot, which trawls through all the data in the internet to generate answers posed to it, could be useful to "facilitate the drafting of texts"[26]. It begs the question of whether this is acceptable practice, how much personal information or data are we voluntarily or involuntarily putting out on the internet and who is accessing it, without our knowledge.

It is important to note from the outset that there are differences in terms used between the northern and southern hemisphere. In the northern hemisphere, the term personal data is used, however in the south, the term personal information is used; both

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of an increasing latitude of arbitrary administrative discretion that can actively circumvent any achievement of values by the individual. Legal control of administrative processes is mandatory, but if it is to be other than a sheer exhibition of force its procedures must be justified. That justification can be provided only by a value judgment as to what the moral and political rights of the individual *ought* to be. If privacy is defined as an essential requirement for the achievement of morality, then privacy is a right that the law must protect and provide. Modern man is born in chains; only the law can set him free."

24 BLUME, "Privacy," 197.

25 S. SHANKLAND, "Why the ChatGPT AI Chatbot is Blowing Everyone's Mind," Cnet, https://www.vatican.va/archive/cod-iuris-canonici/eng/documents/cic_lib2-cann208-329_en.html.

26 CBS News, "Colombian Judge Uses ChatGPT in Ruling on Child's Medical Rights Case," 2nd February 2023, https://www.cbsnews.com/news/colombian-judge-uses-chatgpt-in-ruling-on-childs-medical-rights-case/.

are synonymous and refer to the information belonging to and identifying a living person and is used interchangeably in this article.

We have seen in civil legislative history that privacy is an accepted international human right.[27] The most notable recent civil privacy is the European Union's (EU) General Data Protection Regulation (GDPR), which came to force on 25th May 2018 and is the toughest privacy and security law in the world.[28] It codified a litany of new privacy rights for EU citizens, these include the right to be informed, the right of access, the right to rectification, erasure, restrict processing, data portability, the right to object and the rights in relation to automated decision making and profiling. GDPR Article 5.1-2 listed seven protection and accountability principles which included some of the following, lawfulness, fairness and transparency, integrity and confidentiality, accountability, and the like.[29] It was a significant piece of legislation that triggered the rest of the world to review and update their own privacy legislations to be on par with the GDPR, giving it a global privacy standard status. Countries like Canada[30] and some American states[31] followed suit in updating its privacy laws.

In New Zealand, the privacy laws were revised in 2020 to bring New Zealand's civil privacy laws up to global standards. The Privacy Act 2020 (PA2020) legislates the right of every person in New Zealand to privacy[32] and the responsible handling and disclosure of entrusted personal information. Similarly in Australia, the Privacy Act 1988 (Cth) is the principal legislation protecting the collection, use, storage and disclosure of personal information in the federal public and private sector.[33] Australia recently experienced one of the country's biggest data breach on 22nd September 2022, when a cyber-attack on Optus revealed that about 10 million customers' personal

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27 S. D. WARREN and L. D. BRANDEIS, "The Right to Privacy," in *Harvard Law Review*, 4 (1890), 193-220; Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 8, European Convention on Human Rights, http://hrlibrary.umn.edu/instree/z17euroco.html; OECD Privacy Guidelines, https://legalinstrum ents.oecd.org/en/instruments/OECD-LEGAL-0188.

28 General Data Protection Regulation (GDPR), "What is GDPR, the EU's New Data Protection Law?". https://gdpr.eu/what-is-gdpr/.

29 GDPR, Art. 5 Principles Relating to Processing Of Personal Data, https://gdpr.eu/article-5-how-to-process-personal-data.

30 See OFFICE OF THE PRIVACY COMMISSIONER OF CANADA, Summary of Privacy Laws in Canada, https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/02_05_d_15/; The Personal Information Protection and Electronic Documents Act (PIPEDA), https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/; The Privacy Act, https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-privacy-act/.

31 See STATE OF CALIFORNIA DEPARTMENT OF JUSTICE OFFICE OF THE ATTORNEY GENERAL, California Consumer Privacy Act (CCPA), https://oag.ca.gov/privacy/ccpa.

32 See PARLIAMENTARY COUNSEL OFFICE. NEW ZEALAND LEGISLATION, Privacy Act 2020. Version as at 30 November 2022, Section 3, https://www.legislation.govt.nz/act/public/2020/0031/latest/LMS23227.html.

33 See AUSTRALIAN GOVERNMENT, Privacy Act 1988. Compilation No. 93. Registered 17 December 2022, https://www.legislation.gov.au/Details/C2022C00361.

information like, names, dates of birth, email address, Medicare cards, and passport numbers.[34] This data breach had put approximately 40% of the population, out of which roughly 2.8 million people's passport or license numbers were taken, at risk of their personal information being unlawfully disclosed in the public forum, or at a "quite significant" risk of identity theft and fraud, which caused real people, real harm, and at the very least emotional and mental distress with worry.[35] As a response, the Australian Parliament rapidly enacted the Privacy Legislation Amendment (Enforcement and other Measures) Act 2022 (PLA 2022) which amended the law in relation to privacy in an attempt to broaden and strengthen it.[36] This was a reactionary albeit rapid response from the Government, which it recognized, had put the country and the welfare of its people at risk and sought to protect the privacy rights of its citizens. We can only deduce that the reason that the government responded as such was because privacy was important, recognizing that organizations must take responsibility to protect the information they collect and use for lawful purposes and prevent unlawful access and how the information they collect is disclosed because the identities of real people and their livelihoods can be affected. We can reasonably observe that privacy is an important civil legal human right which secular government and legislation deems worthy to protect.

The Church as part of her tradition respects rights derived from natural law and the notion of the right to privacy in both ecclesiastical and civil law is entwined through the idea of the inviolable personality or as one of the core values of human dignity. The natural right to privacy can be found in ancient Roman law, in fontes like the *Decretum* of Gratian and the *Decretalia* of Gregory IX.[37] The Second Vatican Council incorporated and developed privacy rights of individuals through various documents[38] following the Encyclical *Pacem in Terris* which provided a comprehensive Catholic Charter of rights including the right to respect for persons and their good reputation.[39]

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34 See AUSTRALIAN GOVERNMENT, Optus Data Breach – Working with our reporting entities, 7th October 2022, https://www.austrac.gov.au/optus-data-breach-working-our-reporting-entities.

35 See T. TURNBULL, "Optus: How a Massive Data Breach has Exposed Australia," BBC News, https://www.bbc.com/news/world-australia-63056838.

36 See LANDER & ROGERS, "Major Reform to Australian Privacy Laws Calls for Privacy Prioritisation," December 2022, https://www.landers.com.au/legal-insights-news/major-reform-to-australian-privacy-laws-calls-for-privac y-prioritisation

37 See J. DIRAVIAM, The Judicial Penal Procedure for the Dismissal of a Diocesan priest from the Clerical State according to the 1983 Code of Canon law, JCD thesis, Ottawa, Saint Paul University, 2008, 43.

38 See M. BRADLEY, "The Evolution of the Right to Privacy in the 1983 Code," in *Studia canonica*, 38 (2004), 545.

39 See JOHN XXIII, Encyclical Letter *Pacem in Terris*, 11 April 1963, in *AAS*, 55 (1963), 257-304, Engl. transl. in http://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963pacem.html; see also SECOND VATICAN COUNCIL, Decree on the Media of Social Communications *Inter mirifica*, no. 5 and 8, 4 December 1963, Engl. transl. from http://www.vatican.va/archive/hist_councils/iivatican_council/documents/vat

Msgr. Ronny E. Jenkins in his Keynote Address to the Canon Law Society of America[40] also very clearly explains the canonical right to privacy and its application in the Church.

References to privacy can already be found in the scriptures. As man was the only creature made in the image of God, there is something of a divine gift in man's dignity, which is imbued into the core of human soul and is worthy of protection. Privacy is important in Church life because our faith has dignity and respect for the inviolable human personality where each soul has an individual intimate bond with God. We learn about the importance of privacy, or keeping confidence, as a virtue of a person for example in Proverbs 11:13, "A gossip betrays a confidence, but a trustworthy person keeps a secret.", or in Proverbs 25:9-10, "If you take your neighbor to court, do not betray another's confidence, or the one who hears it may shame you and the charge against you will stand." We can discern that if we were told something in confidence, we cannot disclose it unlawfully, for it will invade the person's privacy, betray their trust, and bring the one revealing it into disrepute along with a case against them. Privacy is necessary to us as Catholics at the end of the day, for it is in our most private spaces of both mind and body, where we can reflect, be in solitude without interference, contemplate and grow. For example, there are times we choose to say our prayers in silence, deep in the depth of our hearts and shared only intimately with God.

The right to privacy is incorporated in the provision of canon 220 of the 1983 Code of Canon Law 1983: "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." This canon protects two fundamental but distinct rights of the faithful: the right to good reputation and the right to privacy. Where there is a right, there is always a corresponding duty to protect. Fr. Frank Morrisey gave practical applications of the right to privacy being violated in Church life for example, forcing a candidate to priesthood or to religious life to reveal his or her sexual orientation, or concerns regarding the retention and distribution of psychological evaluations and reports without proper authority to release.[41]

The Church is not immune to technological advancement and readily embraces and flourishes with its progress. Privacy in today's world of transparency, where everything is possible at the click of a button, is as described in the Gospel of Luke

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ii_decree_19631204_inter-mirifica_en.html; It was also one of the rights the *coetus* of *De populo Dei* proposed, which also featured in the proposed draft of a *Lex Ecclesiae Fundamentalis* of 1971: "The Christian Faithful have the right that the good reputation they enjoy be respected by all, therefore no one may unlawfully damage it" (PONTIFICIA COMMISO CODICI IURIS CANONICI RECOGNOSCENDO, Schema Legis Ecclesiae Fundamentalis, Textus emendatus cum relatione de ipso schemate deque emendationibus receptis, Vatican City, Typis polyglottis Vaticanis, 1971, 19).

40 See R. E. JENKINS, "From Pope Alexander To Pope Francis: The Canonical Right to Privacy in an Age of Transparency," in *CLSA Proceedings*, 83 (2021), 10-19.

41 See F. MORRISEY, "Confidentiality and Records Management," in *Catholic Archives*, 26 (2006) 14-15.

12:2-3: "Nothing is covered up that will not be revealed, or hidden that will not be known. Therefore, whatever you have said in the dark shall be heard in the light, and what you have whispered in private rooms shall be proclaimed on the housetops." Various institutes of the Catholic Church store vast amounts of personal information, both physical and digital, kept in archives of parishes, dioceses, conferences of bishops, etc. and even at the various dicasteries and institutions of the Roman Curia. Information that may contain personal information is exchanged both within the Church institutions as well as other institutions in the civil sector. For example, requesting baptismal certificates from overseas parishes, sending secure pdf files to civil lawyers for submission to Royal Commissions of Inquiry, parishes that have Facebook pages which has pictures of local parish gatherings, priests having social media accounts and uploading both professional and personal content on their profiles. All this can involve an additional element of personal information or data. Often, breaches of privacy are unintended, caused by human error, for example, attaching the wrong file, sending an email to the wrong person etc. This although is a civil privacy breach with recourse in the civil capacity, but it still affects the Catholic person whose personal information was affected and could be harmed. This is why we as a Church community should care about privacy and the governance of it, for it affects each of us, the people of God who make up the Church, more than we realize.

What is Good Governance and What Does the Church Say About it?

Governance sets the tone of your organisation, how its character is guided and shaped; it is about how an organisation is run. Good governance is necessary for any organisation to function properly, successfully and ensuring longevity and constant growth. In the Light of the Southern Cross Report, it defined governance as the following:

> 'Governance' means the system of rules, relationships, and practices by which authority and control are exercised within organizations. 'Governance' as a concept is not restricted to commercial entities. It encompasses the systems, structure and policies that control the way in which any institution operates, and the mechanisms by which the institution, and its people, can be held to account.[42]

When an organisation ensures that it has the appropriate structures, the right people, organizational rules and codes of ethics, policies, and procedures in place, it ensures the possibility of good governance which is vital for long term sustainability

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[42] IMPLEMENTATION ADVISORY GROUP AND THE GOVERNANCE REVIEW PROJECT TEAM, *The Light From The Southern Cross Report: Promoting Co-Responsible Governance in the Catholic Church in Australia*, 1, May 2020, Public Release 15 August 2020, https://static1.squarespace.com/static/5acea6725417fc059ddcc33f/t/5f3f79e41aac2871be0fba5c/1597995610389/The+Light+from+the+Southern+Cross+FINAL+%2815+August+2020%29.pdf, 11.

and success. A Catholic perspective of this concept can be found in papal conciliar documents and also in Catholic Social Doctrines, which focuses on good governance being for the common good and the development of the person as a whole.

The conciliar documents clearly state the threefold function of the Church entrusted to Christ's Apostles and their successors: the teaching, sanctifying and governing functions, in which participation of the laity is not excluded. The governing function of the church is divided into the legislative, the judicial, and the executive.[43] Some magisterial documents that mention the concept of good governance include for example *Christus Dominus* 15 and 23(3), *Presbyterorum Ordinis* 35 and *Veritatis Splendor* 101 and 108. These documents lay out the foundations of good governance through Catholic Social Teaching.

In *Pacem in Terris* (PT), the document speaks of the purpose of governance is to attain the common good (PT 85), which is best achieved when human rights and duties are protected (PT 61 and 62), furthermore, government should not disregard the moral law (PT 51), and justice is to be administered impartially (PT 69). In *Gaudium et Spes* 25, it states:

> The social nature of man shows that there is an inter-dependence between personal betterment and the improvement of society. In so far as man by his nature stands completely in need of society, he is and ought to be the beginning, the subject and the object of every social organization. Through his dealings with others, through mutual services, and through fraternal dialogue, man develops all his talents and becomes able to rise to his destiny.[44]

Both, *Gaudium et Spes* 25 and canon 1752, stating that the "salvation of souls, which must always be the supreme law in the church is to be kept before one's eyes", identify that for the betterment of man's development,[45] good governance is required, and its core purpose must aim at the service of human development through respecting

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43 See c. 135, §1.

44 GAUDIUM ET SPES 25, https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html

45 See C. D. SHOK, "The Social Economics of *Gaudium et Spes* (The Constitution on the Church in the Modern World) of the Second Vatican Council," in *International Journal of Social Economics*, 13 (1986) (= SHOK, "Social Economics of *Gaudium et Spes*"), 30: "The Council recognised the growing interdependence of all, one to another, and advocated: 'Brotherly dialogue among men does not reach its perfection on the level of technical progress, but on the deeper level of interpersonal relationships. These demand a mutual respect for the full spiritual dignity of the person *(GS,* 23).' This dialogue was to take place at all levels of human life and human activities because the underlying principle is that human persons develop their gifts and are enabled to advance toward their true destiny through dialogue *(GS,* 25). Dialogue promotes the common good and becomes a means for human progress: 'Every social group must take account of the needs and legitimate aspirations of other groups, and even of the general welfare of the entire human family *(GS,* 26).'"

human dignity and rights. Pope Francis in his recent address to participants in a formation course organized by the Tribunal of the Roman Rota also highlighted the link between the mission of evangelization and canon law, as follows:

> We are accustomed to thinking that canon law and the mission of spreading the Good News of Christ are two separate realities. Instead, it is decisive to discover the link that unites the two within the single mission of the Church. One might say, schematically: there is no law without evangelization, nor evangelization without law. Indeed, the core of canon law regards the goods of communion, first and foremost the Word of God and the Sacraments. Every person and every community have the right – they have the right – to the encounter with Christ, and all the legal norms and acts tend to foster the authenticity and fruitfulness of this right, that is, of this encounter. Therefore, the supreme law is the salvation of souls, as affirmed by the final canon of the Code of Canon Law (cf. can. 1752). Church law thus appears intimately linked to the life of the Church, as a necessary aspect of it, that of justice in preserving and transmitting salvific goods. In this sense, evangelizing is the primordial juridical commitment, both of the pastors and of all the faithful.[46]

Rerum Novarum (RN) also promoted the development of Catholic social doctrines backed by social action, which led to the Church assuming a new moral and authoritative dimension with teachings from the magisterium on matters of good governance,[47] the common good, human rights and dignity[48], solidarity[49], justice and principle of subsidiarity[50]. Good governance must respect the principle of subsidiarity, whereby a higher authority allows for, and respects decisions made at a lower level.[51]

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46 POPE FRANCIS, Audience with participants in the formation court for legal practitioners, organised by the Tribunal of the Roman Rota, Holy See Press Office Summary of Bulletin, 18.02.2023, from https://press.vatican.va/content/salastampa/en/bollettino/pubblico /2023/02/18 /230218c.html (= POPE FRANCIS, Audience with participants in the formation court for legal practitioners).

47 See SHOK, "Social Economics of *Gaudium et Spes*," 25-27.

48 See POPE PAUL VI in *Populorum Progressio* states in no.14 regarding "Authentic Development" that "development cannot be restricted to economic growth alone. To be authentic, it must be well rounded, it must foster the development of each man and the whole of man." To be authentic meant that governance has to promote the good of every person and of the whole person. From https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_26031967 _populorum.html.

49 See POPE JOHN PAUL II, *Sollicitudo Rei Socialis*, https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis.html, No. 38 on solidarity.

50 See POPE LEO XIII, *Rerum Novarum*, https://www.vatican.va/content/leo-xiii/en/encyclicals /documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

51 See C. DODSON, "Subsidiarity: A Key Principle of Catholic Social Teaching, Diocese of Bismark", https://bismarckdiocese.com/news/subsidiarity-a-key-principle-of-catholic-social-teaching.

The common good of the individual and the community is also another key element of good governance and participation is not only confined to those governing, but contribution should be at all levels (RN 34).

There is a saying or *whakatauākī* of the first Māori King, King Potatau in 1858, "There is but one eye of a needle, through which white, black and red cotton are threaded. Hereafter, hold fast to charity, uphold the laws and be firm in the faith." The implications of this *whakatauākī* is both the making of connections and the collaboration that may ensue as the people work towards a common vision.[52] To ensure good governance, all peoples must work together for a common vision, for a common good. It is what unites every individual from a single thread, bonded together into a great tapestry, that is a strong society based on relationship, which requires trust.

Civil Ideas of Good Governance?

The reality is that the Christian faithful live in secular society and interact on a daily basis with civil laws more than it does with Canon law or church rules. This is not necessarily a bad thing as they can contribute to enhancing the communication between the law of the church and secular law through their experience and expertise. As Judith Hahn opined,

> This is of particular value for the development of canon law, as the gap between the fundamental reasoning of the secular law and that of ecclesiastical law should not grow too large if canon law is to be accepted in society and by the members of the church. As many faithful see themselves primarily as addressees of state law (and not of canon law), canon law struggles to find acceptance if it does not refer to arguments familiar to the faithful through secular discourses. So canon law – as a law that in modernity cannot be plausible without consulting secular legal thought – would be well advised to profit from the laypeople's legal knowledge by involving the laity in ecclesiastical legislation.[53]

As much as the Church provides theological guidance on what good governance might look like, we can look towards civil ideas of good governance to help further enhance and further support the idea of good governance in practical daily application for the Church and its entities.[54]

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52 See THE UNIVERSITY OF WAIKATO, *Whakatauākī*, https://poutamapounamu.org.nz/module-7a/1-whakatau%C4%81k%C4%AB#:~:text=Whakatau%C4%81k%C4%AB%3A%20Kotahi%20te%20kohao%20o,Potatau%2C%20the%20first%20M%C4%81ori%20King.

53 J. HAHN, *Church Law in Modernity. Toward a Theory of Canon Law between Nature and Culture*, Cambridge University Press, Cambridge, 2019, 180-181.

54 See T.R. PFANG, Management in the Catholic Church: Towards an Ecclesiastical Model of Corporate Governance, University of Surrey, Guildford UK, 2013, 78-128; see for example on the Dutch Reformed Church's self-understanding: C.J.P. NIEMANDT, "Together Towards Life and Mission: A Basis for Good Governance in Church and Society Today," in *Verbum et Ecclesia*, 36 (2015), 2-9.

The United Nations Economic and Social commission for Asia and the Pacific (UNESCAP) models good governance on eight major characteristics. They are the following[55]:

1. **Participation**
   There is an opportunity for everyone to voice their opinions, with freedom of association and expression.

2. **Rule of Law**
   There should exist fair legal frameworks that is impartial and independent in its protection of human rights.

3. **Transparency**
   Decisions follow prescribed processes and procedures, and information is available and accessible to those who will be affected by these decisions.

4. **Responsiveness**
   Responses to stakeholders is within a reasonable timeframe.

5. **Consensus Oriented**
   The decision-making process and the decision must be one that can be accepted by everyone and does not harm anyone.[56]

6. **Equity and Inclusiveness**
   Justice through inclusiveness and equal opportunities for every person is crucial for the improvement of the welfare community.

7. **Effectiveness and Efficiency**
   Good governance whereby daily decisions must meet the community's needs through economically efficient utilization of community resources.

8. **Accountability**
   This is a key requirement of good governance, responsibility to the public or the stakeholders. Accountability cannot be enforced without transparency and the rule of law.

Comparing these eight characteristics of UNESCAP's model of good governance, we can see striking similarities to Catholic principles based on Catholic Social Doctrines. It would not be difficult to translate and assimilate these characteristics into governance practices of the Catholic Church and its application in the protection of privacy and personal information to enhance trust.

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55 United Nations Economic and Social Commissions for Asia and the Pacific, *What is Good Governance,* https://www.unescap.org/sites/default/files/good-governance.pdf

56 There is some similarity here with Gratian's Roman principle, "*Quod omnes tangit, debet ab omnibus approbari.*", meaning "What touches all must be approved by all.", Political Representation, Classical Consent,

Good Governance in the Protection of Privacy and Personal Information Which Enhances Trust and Empowers the People of God?

Too often organisations in general are reactive when they should be proactive. This can be seen in cases of sexual abuse in the Church with regards to responses to victims and complaints.[57] The Church now recognises that it should be proactive[58] in its stance against the problem of sexual abuse and thus now implements safeguarding[59] procedures and protocols to ensure that complaints and victims' rights are met with proper care whilst working towards preventative measures. Fr. Hans Zollner SJ, Director of the Institute of Anthropology at the Gregorian University stated of safeguarding, "We must recover our understanding of what it means to be human and the good that is our end. Safeguarding is more than simply protecting."[60] We would agree with this and extend the same sentiment to the protection of privacy and personal information, privacy protection is far more than simply protecting.

The case for the safeguarding of privacy and the personal information of the people has not yet reached that mindset of proactivity. There are some countries which have implemented ecclesiastical laws around the protection of personal information or data as a response in compliance with incoming new civil legislation and the canonical is kept quite separate. For example, in Germany the Catholic Church is governed by the *Church Data Protection Act (KDG)*[61] which is based on the GDPR, and in Poland through the *Act on the Protection of Personal Data* and *The Guidelines on Personal Data Protection in the Activity of the Catholic Church in Poland*.[62] However, local

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57 See D. PHILPOTT, *Truth and Healing in the Church after Sex Abuse*, Christian Scholar's Review, https://christianscholars.com/truth-and-healing-in-the-church-after-sex-abuse/

58 See FACULTY OF CANON LAW, CENTRE FOR SAFEGUARDING MINORS AND VULNERABLE PERSONS, https://ust paul.ca/en/centre-for-safeguarding-minors-and-vulnerable-persons_7038_1109.htm: "The mission of the Centre for Safeguarding Minors and Vulnerable Persons is to help eliminate the threat and trauma of sexual abuse in society and in the Church by: Promoting prevention through formation; Offering healing assistance to victims/survivors, their families, and their communities; Striving for justice; Contributing to reconciliation."

59 It is great that there are now academic degrees offered for safeguarding and shedding importance on the subject. For example, the Gregorian University's Institute of Anthropology offering programs to be qualified in Safeguarding. https://iadc.unigre.it/. Another example is the Centre for Safeguarding Minors and Vulnerable Persons, Saint Paul University: https://ustpaul.ca/en/centre-for-safeguarding-minors-and-vulnerable-pers ons_7038_1109.htm. For a 15cr program see https://ustpaul.ca/en/safeguarding-minors-and-vulnerable-per sons_7031_419.htm.

60 H. ZOLLNER, Institute of Anthropology, Gregorian University, https://iadc.unigre.it/

61 See SEKRETARIAT DER DEUTSCHEN BISCHOFSKONFERENZ, *Kirchliches Datenschutzrecht*, Arbeitshilfen Nr. 320, Bonn, 2021, from: https://www.dbk-shop.de/de/publikationen/arbeitshilfen/kirchliches-datenschutzrecht.html.

62 For Germany see summary *Data Protection of the Catholic Church*, https://www.it-rechtsberater.de/en/data-protection-law-of-the-catholic-church-kdg/; For Poland, see A. ROMANKO, "Protection of Personal Data Processed by the Catholic Church in Poland," in *Teka Komisji Prawniczej*, 9 (2016), 166-182, https://tkp.edu.pl/wp-content/uploads/2020/03/TKP_IX_2016_166-182_Romanko.pdf.

churches in the world may face challenges to have proper understanding of what the protection of privacy and personal information really means.

There is the proverb that "charity begins at home," the idea of good governance for the common good, enhancing trust and empowering the people should not just be a concept, but a mindset and a practice. The Church and the faithful as individuals must see privacy and personal information as worthy and important of protection and good governance. Privacy and the protection of personal information should not be interpreted as an unnecessary administrative burden, but it must be considered whenever personal information is gathered or used. A reorientation of everyone involved in matters concerning privacy and the protection of personal information further requires a shift in mindset in the community as a whole. This should be the stance at each level of Church operations. For example, it can be as simple as a Bishop, Priest, or Manager, double checking their email address before pressing send to avoid sending potential files with personal information to the wrong recipient. Another example could be that there is a Youth Church event held where there will be photos taken by a photographer of the celebrations. Any unintended distribution of personal information will impact privacy and protection of personal information. Photos can identify a person, and a public photo is available and accessible to the public. However, not everyone in the event would like their photos taken, some for the simple reason of not liking their photos being published, but some for a more serious reason where perhaps a violent ex-partner might identify them through a photo that is published on a parish website and therefore be able to locate them. Event coordinators may be best advised to prepare waiver forms, or, those in attendance, need to make their concerns known to the event coordinators that they do not wish their image being used.

The principles of good governance could have a wider scope and deeper meaning if all persons, especially the marginalised, are encouraged and empowered to participate actively on various levels of governance, according to statutes, policies and other regulations applicable. Proactive management of privacy and personal information needs to permeate every individual, at every level, before the common good can be achieved. The main principles found in the Christian Social Doctrines and the UNESCAP civil model of good governance can be incorporated into a Privacy Programme Governance or Privacy Governance Framework for the Catholic Church, especially in areas where no policies are yet in place. This enables a Church organization to set its programme direction and manage its operations to achieve its intended outcomes.[63] The main purpose of this governance programme or framework is to enable the full lifecycle management of personal information from collection to deletion.[64]

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63 See DIGITAL.GOVT.NZ, *Privacy Programme Governance*, https://www.digital.govt.nz/standards-and-guidance/privacy-security-and-risk/privacy/manage-a-privacy-programme/privacy-programme-governance/.

64 IBID.

There are several governance models like centralised, local and hybrid versions[65] but are not limited to these options, all models of which will require the following steps:[66]

- **Involvement of senior leadership**
  Leading by example. If those in positions of authority do not give credence nor importance to what one is trying to protect, then those further down the ladder will also not see it as a priority. Privacy Champions like the CEO of a Bishops Conference or the Diocesan General Manager's support in championing the cause for privacy makes a big difference.
- **Involve interested parties and stakeholders**
  Involve everyone in the office when there is a privacy training or awareness session, educating everyone about the importance of privacy will imbue the person with a sense of purpose and understanding of the importance of their own information, and empower them to take steps to protect it.
- **Develop internal partnerships**
  If a Church organization has a designated Privacy Officer or someone in charge of privacy hygiene, develop professional partnerships with other departments to promote consultation, rapport and trust, so that when issues arise, parties will reach out and work together to resolve the problem together.
- **Provide flexibility**
  Not everyone, parish or church curial department will have enough resources and time to allocate to privacy protection, so there needs to be flexibility to be able to work with what one has in front of them.
- **Leverage communication**
  Encourage communication and consultation, and when in doubt, always consult. Communication should also be clear and well thought through, thus the concept of stop, strategize and recalibrate roles to suit the situation is important. Church life revolves around communication and discourse; thus it is crucial to practice leveraging communication.
- **Leveraging collaboration**
  The saying goes, two heads are better than one. Collaboration encourages teamwork, collegiality and working together towards a common purpose. It is the essence of one of the characteristics of good governance and should be encouraged where possible. For example, a Church Privacy Officer working with other curial departments, i.e. IT department to do a webinar together to teach the Diocesan office about cybersecurity and privacy, along with morning tea after the event is over. This

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65 See R. DE JESUS, "Privacy Program Framework: Privacy Governance," in R. DENSMORE (ed.), *Privacy Program Management. Tools for Managing Privacy Within Your Organisation*, Third Edition, International Association of Privacy Professionals Publication, Portsmouth NH, 2022, 28-33.

66 Ibid, 36.

enables teams to work together, an education portion, involving the community, and discourse and communication afterwards over a cup of tea.

- **Build in Privacy by Design from the outset**
  The principles of Privacy by Design[67]should be incorporated as part of best practice and good governance.

Adhering to the idea of good governance as outlined in Catholic social doctrines backed by social action, leads to the Church assuming a new moral and authoritative dimension with regards to privacy and protection of personal information: the common good, human rights and dignity, solidarity, justice, and principle of subsidiarity. Implementing an appropriate governance model with suitable policies and directives, the Church can fulfill its (ministerial) function for good governance and, by incorporating the civil best practices in privacy protection, further enhance and enrich the people involved. Collaboration on various levels of Church governance can ensure the safeguarding of the common good, the protection of human rights and dignity. In return, this collaboration and communication can create elements of solidarity and justice as people will be better aware of their rights, obligations, and methods of recourse through the creation of policies and procedures.

It also reiterates the principle of subsidiarity where higher level authority provides support but respects the decisions and autonomy of the authority at the local level. For example, the Bishops Conference can establish directives, ensuring its privacy governance model is set up properly. These documents developed can be passed down for adoption by each diocese, and similarly by each parish or other Church institution regarding privacy and protection of personal information. Thus, the Bishops Conference can confirm there is consistency and uniformity of process, policies and procedures, and the same experience at every level. There is also a similar standard at every level but flexibility through adoption to add and amend documents to suit the community which the governance model, policies and procedures serves for a more tailored approach.

When the people of God, which make up the Church and those who both serve and attend it according to canon 208, are aware through training in light of canon 231 §1, open honest conversations and information that is readily accessible, there is transparency and honesty in the relationship exchange. Consistency and similar approaches at each level will ensure that the people receive consistent responses wherever they go, and should there be an inconsistent response, then it is also easily identifiable as an anomaly rather than a norm. All these adds to the consistent and better experience, which in accumulation, enhances the trust between the people and the Church in terms of the protection of privacy and the handling of their personal information.

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67 See A. CAVOUKIAN, "Privacy by Design: The 7 foundational Principles," from: https://www.ipc.on.ca/wp-content/uploads/resources/7foundationalprinciples.pdf.

Conclusion

Eleanor Roosevelt once said, "Good leaders inspire people to have confidence in their leader. Great leaders inspire people to have confidence in themselves."[68] Through good governance for the protection of privacy and personal information, the Church and her leaders can enhance the trust between the people of God and the Church, which will ultimately develop a stronger bond between them. This would also require from the pastors in the Church an openness to listen to the advice of those who are subject matter experts[69]; as canon 212, §3 states:

> According to the knowledge, competence, and prestige which they possess, they [the Christian faithful] have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful, without prejudice to the integrity of faith and morals, with reverence toward their pastors, and attentive to common advantage and the dignity of persons.

This principle of canon 212, §3 is found also in canon 822, §3 on the use of modern instruments of social communication, since many administrative tasks that also concern privacy and protection of personal information are done electronically: "All the Christian faithful, especially those who in any way have a role in the regulation or use of the same instruments, are to be concerned to offer assistance in pastoral action so that the Church exercises its function effectively through these instruments." Collaboration and communication as principles for good governance will impact good governance in the Church: Pope Francis calls this synodality. Therefore, in the realm of privacy and protection of personal information, the Church would also not only promote and practices what it preaches, but also inspire and imbue greater purpose in its members through their faith in the Church of Christ, whose ultimate mission is the salvation of souls.[70]

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68 Goodreads, Eleanor Roosevelt quote, from: https://www.goodreads.com/quotes/8342399-good-leaders-inspire-people-to-have-confidence-in-their-leader#:~:text=%E2%80%9CGood%20leaders%20inspire%20people%20to%20have%20confidence%20in%20their%20leader,to%20have%20confidence%20in%20themselves.%E2%80%9D.

69 See POPE FRANCIS, "Audience with participants in the formation court for legal practitioners:" "To arrive from the universal to the concrete universal and the concrete: here is a way of judicial wisdom. A judgement or a judicial help are not done with balances or imbalances, they are done through this wisdom. It takes sciences, it takes the capacity for listening; above all, brothers and sisters, it takes prayer to judge well. In this way, neither the common needs for the common good inherent in laws, nor the due formality of the acts are neglected, but the whole is placed within a true ministry of justice."

70 See IBID: "Therefore, the supreme law is the salvation of souls, as affirmed by the final canon of the Code of Canon Law (cf. can. 1752)."

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The *Investigatio Praevia* and the Role of the Ordinary for Criminal Procedures

Giorgio Giovanelli*

In order to address this issue, with regard to pre-trial activity in the criminal sphere, it is appropriate to start from the legislative perspective, highlighting both its main features and also, using comparison, its critical points; I will try to formulate, at the end, some proposals to realise the importance of pre-trial activities on which the subsequent decisions up to and including the final one depend; one often approaches such activities in a perhaps superficial manner, thinking, then, of the trial as a fundamental tool for shedding light on the matter; while this is true, it is not less true that pre-trial activities give their direction both on the eventual commencement of a trial as well as on its continuation.

We shall thus try to understand how, given the limited legal data - at least in the criminal sphere - persons, *first and foremost*, the suspect, are or are not afforded those necessary guarantees of protection that must be reserved for them from the earliest moments of the proceedings, prior to the trial itself.

Investigatio praevia: the current legislative situation

Canon 1717, § 1 states that: "Whenever the Ordinary has news, at least probable, of a crime he is to investigate with prudence, personally or through a suitable person, the facts, circumstances and imputability, unless this investigation seems absolutely superfluous". It follows from the text just quoted that in order to initiate this pre-trial phase, at least suspicious of a crime has required. The *notitia criminis* may come to the knowledge of the Ordinary by direct way, through the pastoral visit, by direct learning of the facts from the persons concerned, for example; or by indirect way when the complaint is presented to the parish priest, the chancellor, or the episcopal vicars who are obliged to transmit it to the Ordinary.

With regard to the criterion of competence of the Ordinary for the preliminary investigation, we have the criteria of territorial and personal competence. According to the territory, the Ordinary of the place[1] where the suspect is domiciled or almost

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domiciled or, if not, where he is actually located, according to canons 1408-1409, will be competent to initiate the preliminary investigation; the Ordinary of the *forum delicti*, that is, the place where the crime is presumed to have occurred - we are in the preliminary investigation phase - canon 1412. On the basis of the personal criterion, for Religious belonging to Clerical Religious Institutes of Pontifical Right and for members of Clerical Societies of Apostolic Life of Pontifical Right, the competent Ordinaries are their Major Superiors, canons 134, § 1 and 1427, § 1) even if not exclusively, canon 1427, § 3. For the sake of completeness, let us mention the cases which fall within the absolute jurisdiction of the Roman Pontiff according to canon 1405, § 1 concerning Heads of State, Cardinals, Papal Legates and Bishops in criminal cases. § 3 of the same canon determines the jurisdiction of the Roman Rota for other particular matters.[2]

The Code states that the prior investigation can be conducted by the Ordinary personally or by a person delegated by him; there are, however, acts that cannot be delegated: it is up to the Ordinary to evaluate the acts which, in the case of delegation, are transmitted to him and it is up to him alone to decide whether there is sufficient motivation to initiate an investigation or whether to order the archiving; the Ordinary therefore cannot delegate this weighing and decision. Certainly he will have to take into account what is required by canon 1717, § 1, which calls for the avoidance of unnecessary investigations; to assess this the Ordinary may, if he deems it appropriate, take advice from legal experts.

From what has just been said it is clear that the prior investigation can be carried out personally by the Ordinary or by a person delegated by him; although he has all the power to conduct such an investigation it is preferable that it be delegated; in this case the Office of Investigator can be taken on by a man or a woman, lay or clerical provided that the general requisites of suitability established by law for the assumption of ecclesiastical offices are present; special treatment is given to the *delicta reservata* which we will see later. The investigator receives from can. 1717, § 3 'the same powers and obligations that the hearing officer has in the trial; the same cannot, if a judicial proceeding is subsequently initiated, act as judge in it'. As regards these faculties, we recall how canon 1718, §1 reiterates that the investigator is not called upon to gather *evidence* in the technical sense but, the canon states, *elementa*, certainly using the

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1 This expression refers to the Roman Pontiff, the diocesan Bishop, the Vicar General, the Episcopal Vicars, *ex* can. 134; also those who are in charge of a community *ex* can. 368 are Ordinaries of the place, i.e. the territorial Prelate, the territorial Abbot, the Apostolic Vicar, the Apostolic Prefect and the Apostolic Administrator of a permanently erected administration. Canon 134, § 2 states that the Major Superiors of Religious Institutes and Societies of Apostolic Life are not Ordinaries of *the place* but *Ordinaries.*

2 The Rota Romana judges Bishops in contentious cases except for the provision of can. 1419, § 2, the Abbot Primate or the Abbot Superior of a monastic congregation, the Supreme Moderator of Religious Institutes of pontifical right; dioceses and other ecclesiastical persons both physical and juridical that do not have a Superior below the Roman Pontiff.

faculties that canon 1428, §3 recognises for the hearing officer but with different specificities[3] .

Regarding the subject matter of this investigation, Canon 1717, §1 provides that one must investigate - with prudence[4] - the facts, circumstances and imputability. In practice, one must investigate whether the report of the crime is sufficiently well-founded, what the circumstances are, and, finally, whether the action is imputable to the suspect.

The first step is to verify the actual occurrence of the facts; whether these facts, which fall within the scope of the offence, were actually produced, 'acted upon' by the suspect; this will not be sufficient because the Ordinary or the delegated person will have to ascertain the circumstances of the facts that affect the subjective responsibility of the suspect and, last but not least, the imputability must be investigated, that is, whether the facts are legally imputable to the suspect. The investigator will also check the date of the alleged offence, which is decisive for the statute of limitations and the avoidance of criminal actions that are time-barred *pursuant to* Canon 1362.

Once the investigation has been completed, the documents are handed over to the Ordinary, who is responsible for assessing whether or not they can be proceeded with, and, *pursuant to* can. 1718, §3, whether to proceed through the judicial or administrative channels, taking into account, of course, can. 1342, §1, verifying the presence or absence of the just causes of impediment required for the administrative channels to be used[5] .

The investigation, states Canon 1717, §2, must be conducted in such a way as not to harm anyone's good reputation, thus recalling the provisions of Canon 220 concerning the right of each member of the faithful to see his good reputation and intimacy protected.

It emerges from the aforementioned provisions that the Ordinary is the *dominus of the* entire prior investigation: it is up to him, before any commencement, to decide on the completeness or otherwise of the information received, assessing it together with the extent of the fact complained of; to assess the quality of the complainant, his position in relation to the complainant[6] ; it is then up to him to decide whether to conduct the investigation personally or to delegate another person he trusts; the

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3 Sanchis, on this subject, states that the investigator, although having the faculties of the hearing officer, 'is not a hearing officer in the strict sense; (...) since it is not a phase of the trial, the juridical nature of the investigator's activity, although analogous to that of the hearing officer, is not identical', in J. SANCHIS, *L'indagine previa al processo penale (cann. 1717-1719)*, 246.

4 We refer this expression to §2 below where it is stipulated that no one's good name shall be harmed.

5 Cf. G. GIOVANELLI, *Quoties iustae obstent causae. From the administrative criminal process to the extraordinary judicial criminal process*, LUP, 2016.

6 The 1917 *Codex* urged, in can. 1942, §2, not to consider denunciations coming from a *manifest enemy*, from a vile and unworthy man, and also anonymous denunciations lacking sufficient elements to make the accusation improbable.

Ordinary must then make another discernment, at the end of the investigation: he will have to assess whether or not to commence the trial and this on the basis of the data collected and, if the *notitia criminis* is plausible, he will have to decide on the opening of the trial and the path to follow, judicial or extrajudicial.

2. Analysis and Suggestions

Having analysed the normative data, we would now like to offer some observations with a view to an ever possible improvement of an order with strongly anthropocentric characteristics, with the supreme goal of *salus animarum*[7] .

The first remark certainly concerns the small number of canons devoted to this very important phase. If we look at, for example, the Code of Criminal Procedure of the Italian State we see the preliminary investigations regulated with a rich and meticulous production as well as the provision of the difference - which guarantees the third party status - of the functions: the Public Prosecutor, the Judge for Preliminary Investigations, the Judge for the Preliminary Hearing. The number of Articles dedicated to the subject, with the solemnities indicated and the related procedures certainly offer guarantees of protection of all those involved in the proceedings and, not least, of the suspect.[8] Again: the same Code provides for the presence of the defence lawyer, with also the possibility of investigation, again to protect his client already at the Preliminary Investigation stage[9] .

The Canonical Order does not mention the possibility of being assisted by a trusted Patron at this stage. Even if one is not yet in the trial, it would instead be appropriate to provide for the presence of a Patron who can assist the suspect in this delicate phase when, in the course of the investigation, a confrontation with him becomes necessary; the suspect, in fact, may have neither the expertise nor the lucidity necessary to deal with delicate issues; even in our legal system, the defence lawyer could be given the opportunity to gather *elements* in support of the defence thesis and to present them to the Ordinary together with the Acts of the prior investigation so that, already from here, the suspect is guaranteed the opportunity to express his version of the facts.

The Ordinary is offered the possibility by the Code to investigate even personally; this will not make him sufficiently free to decide in a possible subsequent administrative process since he will already be involved in the facts and will have

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7 Cf. Canon 1752: the Supreme Lawgiver here states that the supreme law of the Church is the salvation of souls. It constitutes the supreme end of our Ordinance. This peculiarity constitutes the presupposition, along with others, of the differences between canonical and state Ordinances.

8 Let us think, for instance, of Article 240 of the Italian Code of Criminal Procedure, which regulates in an analytical manner the scope of anonymous reports, wiretapping and the acquisition of various materials in an illegal manner; how they must be acquired by the Public Prosecutor, who becomes the guarantor by secreting them and then asking the Judge for Preliminary Investigations (G.I.P.) to destroy them. This does not detract from the fact that anonymous reports may trigger special attention on the behaviour of certain persons.

9 See Art. 327 *bis* Code of Criminal Procedure of the Italian State.

formed *in his mind* an idea about the facts and persons. In our legal system, third party status is not guaranteed at this stage as it is in our state system. For this reason, it is suggested to Ordinaries that they do not conduct the prior investigation themselves, but delegate it; in this regard, Canon 1717, §3 lays down the clause, for the reasons explained so far, that the delegate may not act as a judge in any trial that may be set up[10] .

Regarding the object of the investigation; we ask ourselves: what, concretely, is to be investigated, by what means, with what formalities? Canon 1717 offers some indications but leaves open questions that may produce some confusion in its concrete application[11] . The problem arises because the investigation of the facts concerns the same elements that characterise the preliminary investigation phase; one wonders, then, what is the proper characteristic of the prior investigation?

This investigation must proceed with caution, in a provisional form[12] and discreetly, not to provide the Ordinary with moral certainty about the commission of the crime - which is to be achieved through the criminal trial - but with the elements to decide whether or not to proceed.

To summarise: the purpose of the prior investigation is not to determine whether or not a crime has been committed, which corresponds to the subsequent trial, but to verify the presence of plausible, reasonable clues as to the facts, circumstances and imputability; 'it is only a matter of gathering the elements, the components of the crime, and seeing whether they are present with the possibility of being assembled by answering the question: 'can these elements form a crime?', only in the trial will we be able to ask the different question: 'to what extent is Tizio the author?'[13] . The prior investigation looks for *plausible clues* and not for *evidence*[14] . The 'certainty' required to start the trial is not the same certainty required to pass sentence. Thus, the object does not change, but where, then, is the difference? Allow me to make an analogy with Moral Theology with reference to the system of *probabilism*[15] : an opinion proposed

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10 The question arises in the literature as to whether the prohibition in can. 1717 §3 is irritating or not. In this regard, see: G. P. MONTINI, *Il soggetto che conduce l'indagine previa e il giudice del collegio nel processo penale: la valenza del can. 1717, §3, seconda parte*, in *Periodica*, 103 (2014), 629-662.

11 Cf. F. J. RAMOS, *La investigación previa en el Código de derecho canónico (CIC, CANN. 1717-1719)*, in J. KOWAL - J. LLOBELL, *Iustitia et Iudicium.* Studi di diritto matrimoniale e proceduale canonico in onore di Antoni Stankiewicz, Vol IV, Coll. *Studi Giuridici* LXXXIX, LEV, 2010, 2111.

12 Cf. *Idem*, 2114.

13 See D. ASTIGUETA, *Previa survey: issues.* Retrieved from electronic source: www.casi.com.ar/sites/default/files/ASTIGUETA%20la%20Investigazione%20Alcune%20problematiche.pdf

14 It must 'test the grounds for suspicion of the commission of the crime', in C. PAPALE, *Il processo penale canonico. Commentary on the Code of Canon Law. Book VII, Part IV,* 2007, 47.

15 The system of Probabilism has its origins in Bartolomé Medina's statement in 1577, when he affirmed the famous principle: *si est opinio probabilis (quam scilicet asserunt viri sapientes et*

by *probati auctores*, based on *reasonable arguments, was* defined as *probable*; by analogy we could say that the prior investigation must verify the probability or otherwise of the news of the crime, based on the authority of the persons involved as well as on the reasonableness of the arguments put forward regarding the *fumus delicti*.

The above is not of secondary importance because, as stated in the literature, while the legislation is clear in this regard, which does not mean, however, that it is not perfectible, its application is not always clear and unambiguous due to the lack of preparation that can be found in practitioners who, despite the fact that we are in the preliminary investigation phase, conduct a proper preliminary investigation without guaranteeing the suspect what the fundamental principles of law, including natural law, require[16] .

As already stated, the investigation must be conducted in such a way as to ensure good reputation and good name; I believe that this is the first protection to be offered to the suspect. That is why it is not always necessary to hear the suspect himself; our legislation, unlike the CCEO[17] , does not make it compulsory; it would not make sense to cause the suspect anxiety, fears and apprehension for reasons that are not reasonable. If, owing to the seriousness of the matter to be investigated or the course of the prior investigation reveals the need for a confrontation with the suspect, then, as mentioned above, he may be heard by having him assisted by a trusted patron. If the material collected is such that the report of the crime is plausible and therefore the trial will have to proceed, it would be advisable to make the suspect aware of the two avenues provided for by our legal system with their respective risks and to ask him or her for his or her preference.

Moreover, we cannot fail to consider canon 1446 § 1, which calls for trials to be avoided as far as possible; certainly one could listen to the suspect and agree with him on a review of his conduct, without necessarily envisaging criminal measures and considering restorative measures towards the possibly injured party; think of the use of penal remedies and penances with which, in certain cases, one could achieve and obtain the same effects as canonical punishment.

Why not also envisage in our legal system the legal institution of *probation*, offering the suspect the opportunity to show his willingness to redeem himself and to accept the educational programmes that will be established even with his participation?

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confirmant optima argumenta), licitum est eam sequi, licet opposita probabilior sit, in G. GIOVANELLI, *La Gravidanza ectopica nella tradizione e nel dibattito bioetico contemporaneo,* 2006, 134.

16 For more on the subject of due process, see: M. J. ARROBA CONDE, *Giusto processo e peculiarità culturali del processo canonico,* Aracne, 2016. May I also refer to G. GIOVANELLI, *Quoties Iustae obstent causae. Dal processo penale amministrativo al processo penale giudiziale straordinario,* LUP, 2016, 81-143.

17 Canon 1469, § 3 CCEO: "Before deciding anything on the matter, the Hierarch shall hear the accused of the crime and the Promoter of Justice (...)".

This would be corroborated by Canon 1341, which calls for the adoption of all possible measures before reaching the criminal trial.

I believe that, in this respect, a fruitful comparison with state criminal law is possible from which we can draw valuable suggestions.

We know about Law No. 67 of 28 April 2014 and the relevant regulations governing *probation* in the Italian state.

In the light of these state regulations, we can say that, given the current canonical legislation on prior investigation, greater participation by the suspect is desirable. A similar institute could also be envisaged for our legal system, obviously for certain categories of crime - certainly not for *delicta reservata.*

This could be done in this way: in view of Canon 1341, an attempt will be made, where possible, to achieve the proper purpose of the sentence by other means and with the full participation of the suspect and the injured party. Only in the case of *lesser* offences, which must be typified by our legal system, a probationary period may be envisaged at the request of the suspect and with the opinion of the injured party. For the purpose of this decision, which is up to the Ordinary, the opinion offered by the Promoter of Justice in his own *votum* must also be taken into account.

How can the principle of *nemo tenetur se detegere be* reconciled with the person's request to be put on trial? Such a request, in fact, constitutes an indirect admission of guilt and we know that we cannot demand this of the suspect. To obviate this difficulty, the institution of probation can only be envisaged for notorious offences from whose eventual trial the verification of the commission of the act will not be sought but only but the measure to be taken.

Having received the defendant's request, considering the notoriety of the crime, the Ordinary, having acquired the *votum of* the Promoter of Justice and heard the injured party, may issue a decree for the admission to trial. This trial will have to involve rehabilitation programmes that will necessarily involve both the offender and the victim, using the mediation typical of restorative justice[18] .

Even in this pre-trial and administrative phase, one could think, without leaving the Ordinary in the solitude of a decision, of involving the competent participatory councils such as, for example, the presbyteral council or the college of consultors, at the discretion of the Ordinary himself. This would be a collegial confrontation, with the tone of a juridical opinion, through which the Ordinary can be helped in taking a decision not so much on the judicial or administrative route, but on *how* to avoid judgement and identify the draft amendment that is the fruit of true ecclesial discernment.

After hearing the public and private parties involved, the Ordinary may decide on admission to probation. Here too, by analogy with the Italian legal system, at the end

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[18] Cf. M. RIONDINO, *Restorative Justice and Mediation in Canonical Criminal Law,* LUP, 2012.

of the probationary period the Ordinary must receive the report of the bodies that have been in charge of the offender; the Ordinary will also summon the private parties and grant them a hearing on the positive or negative outcome of the probationary period. Once this information has been obtained, he will hear the opinion of the Promoter of Justice to obtain his opinion on the outcome of the probation. Subsequently, the Ordinary, having reached moral certainty as to the outcome of the probation, may issue a formal decree declaring the crime extinct or refer the case back to the ordinary criminal trial, opting, in view of the defendant's *wishes, for the* judicial or administrative route or even the extraordinary judicial criminal trial as proposed in other venues[19] .

If the crime was not known, proposing the suspect for probation would be tantamount to asking him to admit guilt, which is contrary to natural law itself. In that case, I would not propose *probation* at this pre-trial stage but at the end of the trial: there it could be verified whether the objectives of punishment can be achieved with such an institution.

Even in the case of a non-notorious crime, I believe that we should adopt, in practice, what the CCEO stipulates, i.e., listen to the suspect as to his or her preference for the procedural route to be taken.

Particular attention should also be paid to the *manner in which* the investigation proceeds: we are not in the trial but in a pre-trial phase of an administrative nature[20] and, therefore, there is no need for the formalities and solemnities that the trial instead requires; specifically I would avoid formal acts of summoning the persons to be heard; summonses are not required and thus avoid the risk of seeing photographs of written summonses for pre-trial investigations published on *social networks*; it would immediately violate what has been said above about the good reputation and good name of the persons; they can be summoned informally, through a telephone call or in person, avoiding, in my opinion, the written form of the summons.

In order to better respond to the need to safeguard the person's good reputation, as well as the manner in which people are summoned, we must pay particular attention to the places where people are heard: not necessarily in formal places such as Curia offices, which could also induce awe or fear in the person; the hearing could be done, for example, at the person's home, so as to ensure psychological comfort, or in the investigator's canonical home, if a cleric: we should try not to create in the person the perception of *extraordinariness,* because doing so could have the undesirable effect of the disclosure of the initiation of the investigation against a person, thus prosecuting them in the media and only creating discomfort and suffering that can be avoided.

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19 Cf. G. GIOVANELLI, *Quoties iustae obstent causae*.

20 Cf. M MOSCONI, *L'indagine previa e l'applicazione della pena in via amministrativa*, in GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (curr.), *I giudizi nella Chiesa. Processi e procedure speciali,* XXV Incontro di Studio Villa S. Giuseppe, Turin, 29 June - 3 July 1988, Glossa, 192.

I also think it appropriate, at this stage, if the suspect is involved, that he should be assisted in his spiritual and psychological needs by ensuring the presence of a priest who can assist him, as well as of a psychologist and, if necessary, of a psychiatrist for an appropriate approach, including a pharmacological one, to contain the feelings and the strong and, at times, distressing emotions that can arise in such cases in the suspect; suicidal thoughts are not uncommon in cases of particularly delicate preliminary investigations.

Finally, with reference to cases of *delicta reservata* the m.p. *Sacramentorum Sanctitatis Tutela* currently in force, in Art. 16 reads as follows: "Whenever the Ordinary or Hierarch has news, at least probable, of a more serious crime, having carried out the previous investigation, he shall make it known to the Congregation for the Doctrine of the Faith, which, if it does not refer the case to itself because of particular circumstances, orders the Ordinary or Hierarch to proceed further (...)"; the subsequent Art. 17 thus states: "If the case is referred directly to the Congregation, without conducting the preliminary investigation, the preliminaries of the process, which by common law are the responsibility of the Ordinary or Hierarch, can be carried out by the Congregation itself".

Procedural errors[21] are also reported on the subject of our study. Art. 16 is clear: the Ordinary is reached by the news of a crime, carries out the prior investigation and communicates the acts of the investigation carried out to the competent Congregation. In these cases, the Ordinary acts as a *filter* or *intermediary*; he is deprived by current legislation of the possibility recognised by the Code for other cases, namely that of deciding whether to initiate the trial, in what form or whether to file it; in *delicta reservata the* Ordinary, let us say, is the Congregation and it is she who decides on what to do and how. In delicta reservata the Ordinary, let us say, is the Congregation and it is you who decide what to do and how to proceed. Therefore: even if it is evident from the acts of the previous investigation that the crime was *probably* not committed, the local Ordinary does not have the power to archive the acts in the secret archive of the diocesan Curia; he will always be obliged to transmit them to the Congregation, referring them to your decision, which may be to archive them or to carry out a further investigation or even to initiate a possible criminal trial.

Article 16 of the *SST* stipulates that the documents to be transmitted to the Congregation must contain all the basic information and the information that can be deduced from the acts of the prior investigation, to which the Ordinary's opinion or *votum* on the context, the measures to be envisaged, and also on the advisability and possibility of continuing in the exercise of the ministry must also be attached[22] . It often happens, however, that the Ordinary's *votum* is not attached, thus putting the

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21 Cf. C. PAPALE (ed.), *I delitti riservati alla Congregazione per la Dottrina della Fede. Norme, prassi e obiezioni*, coll. *Quaderni di Ius Missionale* (5), UUP, 2015, 122-124.

22 Cf. C. J. SCICLUNA, *Delicta Graviora. Ius processuale*, in *I delitti riservati alla Congregazione per la Dottrina della Fede*, Coll. *Quadreni di Ius Missionale* (3), UUP, 2014, 115.

Congregation in the position of having to request it, lengthening the length of the procedures and, therefore, not guaranteeing the persons involved in the due manner[23] .

Taking our cue from Art. 19 of the *Normae*, which provides for the possibility of the imposition of precautionary and urgent measures *pursuant to* Canon 1722 for such matters as early as the preliminary investigation stage, we offer a further reflection.

According to canon 1722, these measures are temporary and must be revoked when the cause ceases to exist. Some observations must be made in this regard. As for revocation *ceasing to exist, there* is no particular problem of interpretation. With regard to cessation, when *the cause ceases to exist*, the possibility of their indefinite duration is raised for two reasons: the only judge who can make these measures cease is the author of the administrative act that ordered them, the Ordinary who is a party to the case[24] ; moreover, they can remain effective until the end of the trial, which sometimes lasts indefinitely, and once they have been put in place, they no longer induce the Authority to review them since, with their imposition, a certain result has already been achieved[25] .

Another aspect that deserves attention concerns *the moment* in which these measures can be applied. There are those who argue[26] *at any time*, including the phase of prior investigation, even for matters not reserved to the Apostolic See, again to safeguard the above-mentioned purposes. This interpretation would be based on the consideration, which I do not agree with, of canon 17, which would see the possibility, in this case, of an extensive interpretation and therefore, for the achievement of the purpose of canon 1722 - which is to prevent scandals, protect the freedom of witnesses and guarantee the course of justice - their applicability also in the phase of the prior investigation.

Against this interpretation is the text of canon 1722 itself, which speaks of a process that has already begun, as well as canon 18, which requires a strict interpretation for laws that establish a penalty or restrict the exercise of the rights of the faithful. Bearing in mind, moreover, can. 1717, § 2, which requires that no one's good name be compromised by the prior investigation, it would be difficult to avoid this with the application of the measures *ex* can. 1722 during the phase of the prior investigation[27] .

Art. 19 of the *Normae* allows such application even at the pre-trial stage; I wonder, when the crime is not notorious, when no investigation has been carried out even by

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23 See C. PAPALE (ed.), *I delitti riservati,* 123-124.

24 Cf. C. GULLO, *Le ragioni della tutela giudiziale in ambito penale,* in D. CITO, *Processo penale e tutela dei diritti*, 158.

25 *Idem,* 149.

26 Cf. B. F. GRIFFEN, *Can. 1722 Imposition of Administrative Leave against an accused,* in W. A. SCHUMACHER - J. JAMES CUNEO (curr.), *Canon Law Society of America, Roman replies and CLSA advisory opinion 1988,* 103-108.

27 Art. 19 of the *Normae* in case of *Delicta Reservata expressly* provides for the possibility of the application of can. 1722 even at the stage of prior investigation.

the State Authority, *how* does all this fit in with the presumption of innocence until proven guilty also reaffirmed in the speech given by the Holy Father Francis for the opening of the 91st Judicial Year of the Tribunal of the Vatican City State?[28]

I believe, in a nutshell, that there is work to be done on this administrative phase prior to the criminal trial; risks, as we have seen, there are; something, however, we can do through a healthy comparison, through recourse to parallel venues, with the intention of bringing - without violating it - improvements to the canonical order that is continually called upon to deal with new cases, we can in our practice ensure that these risks, if not entirely eliminated, are removed and minimised as much as possible.

[28] The Pope explicitly recalls that the 'principle of the presumption of innocence of persons under investigation' must be held 'firm', in FRANCIS, *Address for the Opening of the 91st Judicial Year of the Tribunal of the Vatican City State,* 15 February, 2020.

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Mandatory Reporting of Abuse within the Catholic Church

Brendan Daly *

Sexual abuse is defined in *Vos Estis Lux Mundi* (VELM) art. 1 §1a as "forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts"[1]. To force someone is **"**to compel [the person] by physical, moral, or intellectual means".[2]

In his Address to the Irish Bishops on 28 October 2006, Pope Benedict XVI gave a succinct and compelling account of the response which the Catholic Church needed to give to the problem:

> In your continuing efforts to deal effectively with this problem, it is important to establish the truth of what happened in the past, to take whatever steps are necessary to prevent it from occurring again, to ensure that the principles of justice are fully respected and, above all, to bring healing to the victims and to all those affected by these egregious crimes.[3]

In 2019, Pope Francis in *Vos Estis Lux Mundi*[4] introduced mandatory reporting of sexual abuse by clerics and religious within the Church. Article 3 stated:

> §1. Except as provided for by canons 1548 §2 CIC and 1229 §2 CCEO, whenever a cleric or a member of an Institute of Consecrated Life or of a Society of Apostolic Life has notice of, or well-founded motives to believe that, one of the facts referred to in article 1 has been committed, that person is obliged to report promptly the fact to the local Ordinary where the events are said to have occurred or to another Ordinary among those referred to in canons 134 CIC and 984 CCEO, except for what is established by §3 of the present article.

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1 https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html.

2 https://www.merriam-webster.com/dictionary/force

3 BENEDICT XVI, Letter to the Church in Ireland, 19 March 2010, https://www.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html.

4 FRANCIS, motu proprio, *Vos Estis Lux Mundi*, 7 May 2019 (=*VELM*); http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html.

§2. Any person can submit a report concerning the conduct referred to in article 1, using the methods referred to in the preceding article, or by any other appropriate means.

§3. When the report concerns one of the persons indicated in article 6, it is to be addressed to the Authority identified based upon articles 8 and 9. The report can always be sent to the Holy See directly or through the Pontifical Representative.

§4. The report shall include as many particulars as possible, such as indications of time and place of the facts, of the persons involved or informed, as well as any other circumstance that may be useful in order to ensure an accurate assessment of the facts.

§5. Information can also be acquired ex officio.[5]

Most importantly the person submitting the report was guaranteed protection:

Art. 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.[6]

This mandatory reporting has been taken into account with the changes in Book VI of the Code of Canon Law. All clergy and religious brothers and sisters must report sexual abuse by clergy and religious brothers and sisters to the Local Ordinary (usually a diocesan bishop). They must report even suspicions that abuse is happening. This includes a cleric or religious abusing their authority by having sexual contact with anyone. This requirement is now reinforced by canon 1371 §6 in the revised penal law which provides penalties for clergy and religious who fail to report an offence as required by canon law:

> 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 canon 1336 §§ 2-4, with the addition of other penalties according to the gravity of the offence.

5 *VELM.*
6 *VELM.*

All Major Superiors (including provincials, leaders of Societies of Apostolic Life) must report to the Local Ordinary (usually a diocesan bishop) all allegations of sexual abuse that have happened in the past, including who the victim and perpetrator were, and what action was taken as a result.

1. Anonymous complaints

Reports might be anonymous or only suspicions that sexual abuse is taking place. The Congregation for the Doctrine of the Faith explained:

> 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.
>
> 12. Likewise, when a *notitia de delicto* comes from sources whose credibility might appear at first doubtful, it is not advisable to dismiss the matter *a priori*.[7]

Experience teaches that anonymous complaints often have a basis in fact, especially when the complaint specifies an exact time and place when the alleged offence occurred. Investigations of these anonymous complaints must also be reported to the Congregation for the Doctrine of the Faith including those that the Ordinary decides lack a semblance of truth.[8]

> *Vos Estis Lux Mundi* Article 3 states concerning the requirement to report:
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> §1. Except as provided for by canons 1548 §2 CIC and 1229 §2 CCEO, whenever a cleric or a member of an Institute of Consecrated Life or of a Society of Apostolic Life has notice of, or well-founded motives to believe that, one of the facts referred to in article 1 has been committed, that person is obliged to report promptly the fact to the local Ordinary.[9]

The local Ordinary means the diocesan bishop, apostolic or diocesan administrator.[10] Pope Francis has reinforced this obligation of religious to report abuse by telling

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7 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, 11-12, (=*VADEMECUM)* *https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html.*

8 *VADEMECUM* , 19.

9 *VELM*, Art. 3.

10 Canon 134 §1 In law the term Ordinary means, apart from the Roman Pontiff, diocesan Bishops and all who, even for a time only, are set over a particular Church or a community equivalent to it in accordance with Can. 368, and those who in these have general ordinary executive power, that is, Vicars general and episcopal Vicars; likewise, for their own members, it means the major

religious priests and brothers "not be ashamed to denounce" one of their confreres if an abuse is known because they must "protect the others" and then said to them:

> "Please remember this well: Zero tolerance on abuse against children or disabled persons; zero tolerance". We are religious men, we are priests who bring people to Jesus, not 'eat' people with our concupiscence. And the abuser destroys, he 'eats' - so to speak - the abused with his concupiscence".[11]

Protecting abusers is the worst outcome of clericalism and this culture must change.

While the obligation to uphold the seal of confession is not stated explicitly, the seal is included by mentioning canon 1548 which cites canon1550 and the inability to report. Canon 1550 §2 states that among those deemed incapable of being witnesses are:

> Priests regarding all matters which they have come to know from sacramental confession even if the penitent seeks their disclosure; moreover, matters heard by anyone and in any way on the occasion of confession cannot be accepted even as an indication of the truth.

A priest cannot report sexual abuse that is confessed to him by a perpetrator in confession. However, the priest can and should help a victim to report or complain about the abuse when they come to him in confession seeking help.

If a complaint involves a bishop or religious superior personally abusing someone or failing to act on abuse complaints, then the report would go to the metropolitan,[12] the papal nuncio, or directly to the Holy See. Persons making complaints are protected in canon law, and any discriminatory action against them is a crime in canon law. There is no requirement in *Vos Estis Lux Mundi* that the acts of the investigation be shared with the accused bishop or religious leader before notifying the Congregation for the Doctrine of the Faith about the complaint or accusation.

Superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right, who have at least ordinary executive power.

§2 The term local Ordinary means all those enumerated in §1, except Superiors of religious institutes and of societies of apostolic life.

§3 Whatever in the canons, in the context of executive power, is attributed to the diocesan Bishop, is understood to belong only to the diocesan Bishop and to those others in Canon 381 §2 who are equivalent to him, to the exclusion of the Vicar general and the episcopal Vicar except by special mandate.

11 "Pope Francis tells religious orders: Do not be ashamed to denounce abusive priests and brothers," *America Magazine,* July 14, 2022.

12 The term "metropolitan" goes back to the early days of the church when a roman organisational model was borrowed by the Church. The word "metropolitan" comes from the Greek words for "mother city." The original metropolitan diocese normally had other smaller dioceses divided off from it, so it was in a sense the mother diocese.

2. Religious Leaders failing to act

Following the revelation of the extent of the problem of clerical sexual abuse in North America and in many other countries, Pope John Paul II issued *motu proprio* the apostolic letter, '*Sacramentorum Sanctitatis Tutela*,' (*SST*) on April 30, 2001.[13] Pope John Paul II was conscious that a priest who sexually abused a child had not only harmed the victim but the whole Church. He appointed the Congregation for the Doctrine of the Faith to supervise investigations into credible complaints of sexual abuse of children and how they were handled. The Congregation was authorised to order penal trials for accused priests. Effectively the Apostolic See established a system of accountability. Now when any Ordinary (provincial or diocesan bishop) receives a complaint of sexual abuse of a minor, he must notify the Congregation for the Doctrine of the Faith that he has received a complaint. The Congregation will then instruct the bishop about how the complaint is to be handled and will appoint a tribunal of its own or appoint a local tribunal to carry out a penal trial.

Article 16 of *Sacramentorum Sanctitatis Tutela* states:

> Whenever the Ordinary or Hierarch receives a report of a more grave delict, which has at least the semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch how to proceed further, with due regard, however, for the right to appeal, if the case warrants, against a sentence of the first instance only to the Supreme Tribunal of this same Congregation.[14]

This requirement to report more grave crimes to the Congregation for the Doctrine of the Faith is reinforced by its *Vademecum* in 2020:

> 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. Together with the copy of the acts and *the duly completed form* found at the end of this handbook, he is to provide his own evaluation of the results of the investigation (*votum*) and to offer any suggestions he may have on how to proceed (if, for example, he considers it appropriate to initiate a penal procedure and of what kind; if he considers sufficient the penalty imposed by the civil authorities; if the application of administrative measures by the Ordinary or Hierarch is preferable; if the prescription of the delict should be declared or its derogation granted).[15]

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13 *AAS*, 93(2001), 737-739.
14 *SST*, 16.
15 *VADEMECUM*, 12, 13, 16, 18, 19, 37.

The Congregation for the Doctrine of the Faith directs that a report lacking a semblance of truth is when the alleged crime is impossible:

> 18. Given the sensitive nature of the matter (for example, the fact that sins against the sixth commandment of the Decalogue rarely occur in the presence of witnesses), a determination that the *notitia* lacks the semblance of truth (which can lead to omitting the preliminary investigation) will be made only in the case of the manifest impossibility of proceeding according to the norms of canon law. For example, if it turns out that at the time of the delict of which he is accused, the person was not yet a cleric; if it comes to light that the presumed victim was not a minor (on this point, cf. no. 3); if it is a well-known fact that the person accused could not have been present at the place of the delict when the alleged actions took place.
>
> 19. Even in these cases, however, it is advisable that the Ordinary or Hierarch communicate to the CDF the *notitia de delicto* and the decision made to forego the preliminary investigation due to the manifest lack of the semblance of truth.[16]

The media have reported many instances from all over the world of bishops and other religious leaders failing to investigate or adequately deal with complaints of sexual abuse. In response Pope Francis promulgated the motu proprio "You are the Light of the World", (*Vos Estis Lux Mundi; VELM*) on May 10, 2019.[17] The definition of abuse in *Vos Estis Lux Mundi* article 1 b) also included religious leaders failing to act on complaints of sexual abuse of minors. Article 6 states:

> The procedural norms referred to in this title concern the conduct referred to in article 1, carried out by:
>
> a) Cardinals, Patriarchs, Bishops and Legates of the Roman Pontiff;
>
> b) clerics who are, or who have been, the pastoral heads of a particular Church or of an entity assimilated to it, Latin or Oriental, including the Personal Ordinariates, for the acts committed *durante munere*;
>
> c) clerics who are or who have been in the past leaders of a Personal Prelature, for the acts committed *durante munere*;
>
> d) those who are, or who have been, supreme moderators of Institutes of Consecrated Life or of Societies of Apostolic Life of Pontifical right, as well as of monasteries *sui iuris*, with respect to the acts committed *durante munere*.[18]

The provisions of articles 1 b), c) and d) are a dramatic change in approach by the Church. It is now a crime for religious leaders to fail to observe civil law on reporting

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16 *VADEMECUM*, 16-17.
17 *VELM.*
18 *VELM*, Art, 6 d).

crimes and failing to cooperate with or obstructing civil investigations.[19] Effectively the Church is canonizing aspects of civil law regarding what constitutes sexual abuse and grooming, as well as civil procedural laws on reporting.[20] This has significance in many countries because of civil laws regarding grooming, obtaining the phone numbers of children, photographing children without parental consent, etc.

Historic failures of bishops and other religious leaders not dealing properly with complaints are now encompassed by the legislation in *Vos Estis Lux Mundi.* Article 1 b), c) and d) includes previous leaders by stating "who have been in the past leaders", referring to moderators of institutes of consecrated life societies of apostolic life and monasteries concerning acts or omissions while they were in office. They can now be held accountable for their failures to act properly.

Bishops have a duty to act on complaints:

> Canon 392 §1. Since the Bishop must defend the unity of the universal Church, he is bound to foster the discipline which is common to the whole Church, and so press for the observance of all ecclesiastical laws.
>
> §2. He is to ensure that abuses do not creep into ecclesiastical discipline.

The bishop has an obligation to ensure that universal law is observed and if necessary to issue particular law concerning matters such as celibacy and continence as provided for in canon 277.

Vos Estis Lux Mundi clarified canon law such as canon 1389 (now c. 1378) which had already categorised acts or failures to act crimes when they constituted an abuse of an office or position:

> Canon 1389 §1. A person who abuses ecclesiastical power or an office, is to be punished according to the gravity of the act or the omission, not excluding by deprivation of the office, unless a penalty for that abuse is already established by law or precept.
>
> §2. A person who, through culpable negligence, unlawfully and with harm to another, performs or omits an act of ecclesiastical power or ministry or office, is to be punished with a just penalty.[21]

The provisions of *Vos Estis Lux Mundi* removed any doubt about the application of this canon concerning sexual abuse cases. Failure to act constitutes an abuse of office.

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19 *VADEMECUM,* 50. Whenever civil judicial authorities issue a legitimate executive order requiring the surrender of documents regarding cases, or order the judicial seizure of such documents, the Ordinary or Hierarch must cooperate with the civil authorities.

20 Canon 22. Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.

21 In the 1917 Code, canon 2404 "Abuse of ecclesiastical power, in the prudent judgment of the Legitimate Superior, shall be punished according to the gravity of the fault, with due regard for the prescriptions of those canons that establish certain penalties for various abuses."

When religious superiors fail to act in a case of sexual abuse, the diocesan bishop must insist that the religious superior act.

> Canon 678 §1. In matters concerning the care of souls, the public exercise of divine worship, and other works of the apostolate, religious are subject to the authority of the Bishops, whom they are bound to treat with sincere submission and reverence.
>
> §2. In the exercise of an external apostolate towards persons outside the institute, religious are also subject to their own Superiors and must remain faithful to the discipline of the institute. If the need arises, Bishops themselves are not to fail to insist on this regulation.

The bishop has a clear obligation to act concerning sexual abuse in Catholic Schools:

> Canon 805. In his own diocese, the local Ordinary has the right to appoint or to approve teachers of religion and, if religious or moral considerations require it, the right to remove them or to demand that they be removed.

Moral considerations would include sexual abuse or misconduct. If the religious superior still fails to act, the diocesan bishop must inform the Holy See:

> Canon 679. For the gravest of reasons, a diocesan Bishop can forbid a member of a religious institute to remain in his diocese, provided the person's major Superior has been informed and has failed to act; the matter must, however, immediately be reported to the Holy See.

A bishop or a religious superior failing to act properly on a complaint of sexual abuse is committing a canonical crime or delict. The *Vademecum* reminds bishops that they can be removed for negligence, failing to act, or failing to deal properly with a complaint:

> 21. According to canon 1717 CIC and canon 1468 CCEO, responsibility for the preliminary investigation belongs to the Ordinary or Hierarch who received the *notitia de delicto*, or to a suitable person selected by him. The eventual omission of this duty could constitute a delict subject to a canonical procedure in conformity with the Code of Canon Law and the Motu Proprio *Come una madre amorevole*, as well as art. 1 §1, VELM.[22]

The motu proprio "As a Loving Mother"[23] contained the procedures to remove a bishop for negligence, and *Vos Estis Lux Mundi* in 2019 informed bishops they could be removed for failing to deal with complaints of sexual abuse.

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22 *VADEMECUM*, 21.

23 FRANCIS, motu proprio, "As a Loving Mother", 4 June 2016, http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html

Canon 12 provides for a person who has been harmed by a failure to act to be recompensed for the harm[24] they incurred as a result: "Whoever unlawfully causes harm to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage done".

Myriam Wijlens points out that "canon 128 is not only directed to individuals who might cause damage, but includes damage caused by ecclesiastical officials."[25] Therefore, a bishop or religious superior who fails to act can be held accountable for their failure(s) to act especially when these actions lead to other persons being harmed or abused.

3. Canon on sexual abuse

There was a canon concerning the sexual abuse of minors in the 1983 code, in the section under "Offences against Special Obligations" i.e. as an offence against the obligation to observe celibacy. Victims and the Australian Royal Commission recommended that in the revised penal law there should be a canon specifically relating to sexual abuse.[26] Pope Francis has responded to this recommendation with a new canon 1398 in the section of the Code appropriately entitled "Offences against Human Life, Dignity and Liberty":

> Canon 1398 §1. A cleric is to be punished with deprivation of office and with other just penalties, not excluding, where the case calls for it, dismissal from the clerical state, if he:
>
> 1° commits an offence against the sixth commandment of the Decalogue with a minor or with a person who habitually has an imperfect use of reason or with one to whom the law recognises equal protection;
>
> 2° grooms or induces a minor or a person who habitually has an imperfect use of reason or one to whom the law recognises equal protection to expose himself or herself or to take part in pornographic exhibitions, whether real or simulated;
>
> 3° immorally acquires, retains, exhibits or distributes, in whatever manner and by whatever technology, pornographic images of minors or of persons who habitually have an imperfect use of reason.
>
> § 2. A member of an institute of consecrated life or of a society of apostolic life, or any one of the faithful who enjoys a dignity or performs an office or function in the Church, who commits an offence mentioned in § 1 or in can.

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24 Cf. Margaret Sharbel POLL, *A Reparation of Harm: A canonical Analysis of Canon 128 with reference to its common law parallels,* Ottawa, Saint Paul University, 2002.

25 Myriam WIJLENS, *New Commentary on the Code of Canon Law, Washington DC, Canon Law Society of America, 2000, 183.*

26 The Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report*, 2017, https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_16_religious_institutions_book_1.pdf (=RCIRCSA, *Final Report*).

> 1395 § 3 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.[27]

Pope Francis had used the term "sexual acts" in *Vos Estis Lux Mundi* rather than "delicts against the Sixth Commandment" which is used in *Sacramentorum Sanctitatis Tutela*. This change makes a significant difference to what crimes are encompassed by the legislation. The term "sexual acts" is in accord with secular legislation and the terminology of the United Nations. However, "delicts against the Sixth Commandment" is the traditional term in canon law and encompasses the intention to commit a crime. The revised Book VI returns to the use of the traditional term of "offence against the sixth commandment". This term is also used by the Catechism of the Catholic Church[28] where it is made clear that these offences include adultery, rape and the accessing of pornography.

The meaning of "Sexual acts with a minor or vulnerable adult" is clarified by the Congregation of the Doctrine of the Faith in its *Vademecum:*

> 1. The delict in question includes every external offense against the sixth commandment of the Decalogue committed by a cleric with a minor (cf. canon 1395 § 2 CIC; art. 6 § 1, 1º SST).
> 2. The typology of the delict is quite broad; it can include, for example, sexual relations (consensual or non-consensual), physical contact for sexual gratification, exhibitionism, masturbation, the production of pornography, inducement to prostitution, conversations and/or propositions of a sexual nature, which can also occur through various means of communication.[29]

"Sexual Abuse" includes "forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts". By including "abuse of authority" in this description, the cases of people such as Cardinal McCarrick (US) are encompassed. Jurisprudence of the Congregation for the Doctrine of the Faith will interpret exactly what this "abuse of authority" means in its decisions on individual cases.

Any ordained cleric or religious has significant spiritual authority over lay people. If a cleric had a ministerial relationship with a person he has sex with, the cleric would be guilty of sexual abuse because he is abusing his authority. This would mean a sexual relationship between a bishop and a member of the faithful from his diocese; a priest and a parishioner; a priest-lecturer and a student; and a seminary staff member with a seminarian would all be crimes of sexual abuse.

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27 *Book VI*, 2021; Revised Book VI of the Code of Canon Law (vatican.va) hereinafter all translations of the changed Book VI from this source.

28 *Catechism of the Catholic Church* 2351-2356. https://www.vatican.va/archive/ENG0015/_INDEX.HTM.

29 *Vademecum*, 1.

4. Vulnerable People

Pope Francis legislated that abuse of vulnerable people was a crime in *Vos Estis Lux Mundi*:

> Article 1§1. These norms apply to reports regarding clerics or members of Institutes of Consecrated Life or Societies of Apostolic Life and concerning:
>
> a) delicts against the sixth commandment of the Decalogue consisting of:
>
> i. forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts;
>
> ii. performing sexual acts with a minor or a vulnerable person.[30]

There is criticism that there is no mention of "vulnerable" in the revised penal law. Bishop Arrieta, the secretary for the revision process, said at the press conference after the promulgation of the changed penal law, that vulnerable people were encompassed by the phrase "one to whom the law recognises equal protection" in canon 1398, acknowledging that vulnerable" is not accepted in many countries as a legal category of persons who should receive special protection.[31]

Canon 1398 §1 states:

> A cleric is to be punished with deprivation of office and with other just penalties, not excluding, where the case calls for it, dismissal from the clerical state, if he:
>
> 1° commits an offence against the sixth commandment of the Decalogue with a minor or with a person who habitually has an imperfect use of reason or with one to whom the law recognises equal protection.

Cardinal Gracias, who was involved in the drafting of the 2021 changes in Book VI, acknowledges that the law will have to be improved over time:

> We have something new called vulnerable adults. This is added to the minors. We will need to define it. It refers to one who is mentally not strong. Would a professional superiority mean a vulnerable adult? How far can you go without exaggerating? We will have to study and analyse this law and improve it surely.[32]

A vulnerable person was defined in *Vos Estis Lux Mundi* as "any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist

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30 *VELM.*

31 BISHOP ARRIETA: How Book VI of Canon Law has changed - Vatican News.

32 CARDINAL GRACIAS, interview, https://cruxnow.com/vatican/2021/06/cardinal-says-church-law-on-abuse-will-need-continuous-updating/

the offence".[33] Cases of vulnerable people are not within the competence of the Congregation for the Doctrine of the Faith. The Vademecum of the CDF states:

> 5. The revision of the Motu Proprio *SST*, promulgated on 21 May 2010, states that a person who habitually has the imperfect use of reason is to be considered equivalent to a minor (cf. art. 6 § 1, 1º *SST*). With regard to the use of the term "vulnerable adult", elsewhere described as "any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally limits their ability to understand or to want or otherwise resist the offence" (cf. art. 1 § 2, b *VELM*), it should be noted that this definition includes other situations than those pertaining to the competence of the CDF, which remains limited to minors under eighteen years of age and to those who "habitually have an imperfect use of reason". Other situations outside of these cases are handled by the competent Dicasteries (cf. art. 7 § 1 *VELM*).[34]

This would mean that cases of allegations of clerics abusing vulnerable people would be handled either by the Congregation for Evangelisation of Peoples for mission countries or the Congregation for Clergy. Allegations against religious brothers and sisters would be handled by the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life.

5. Abuse of Authority

The revised penal law reiterates that abuse of authority as a cleric is a crime. It is recognised that many so-called "consenting adult" relationships are not ones with equal consent and often vulnerable people are manipulated by people with positions of power and authority. In the revised Book VI, canon 1389 has become canon 1378 which states:

> §1. A person who, apart from the cases already foreseen by the law, abuses ecclesiastical power, office, or function, is to be punished according to the gravity of the act or the omission, not excluding by deprivation of the power or office, without prejudice to the obligation of repairing the harm.
> §2. A person who, through culpable negligence, unlawfully and with harm to another or scandal, performs or omits an act of ecclesiastical power or office or function, is to be punished according to the provision of canon 1336 §§ 2-4, without prejudice to the obligation of repairing the harm.

Abuse of authority includes culpable negligence and failing to act. The revised canon points directly to penalties that may be imposed on an offender and makes

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33 *VELM*.
34 *VADEMECUM*, 5.

explicit mention of their obligation to repair the harm they have caused.[35] A penalty is not to be remitted until there has been reparation of harm:

> Canon 1361 §4. Remission must not be granted until, in the prudent judgement of the Ordinary, the offender has repaired any harm caused. The offender may be urged to make such reparation or restitution by one of the penalties mentioned in can. 1336 §§ 2-4; the same applies also when the offender is granted remission of a censure under can. 1358 §1.

This provision gives Church authorities real power to demand restitution or reparation for offences causing harm to others. The Ordinary must not remit a penalty before he prudently judges the offender has repaired any harm caused.

6. Life of Prayer and Penance

A priest has the dignity of being a public person, bringing privileges and respect from the faithful. If authority and dignity is lost because he has committed crimes, the abovementioned privileges must be removed.

The website of the United States Catholic Bishops Conference has a document containing question and answer information concerning the treatment of allegations of child sexual abuse by a priest. Page 5 of 6 of the document has the following question and answer:

> **Q&A: What does a life of prayer and penance mean?**
>
> Q: Some priests have been assigned what is called a "life of prayer and penance". What does this mean?
>
> A: The Essential Norms recognise that there might be cases where a priest or deacon has either admitted to a past act of abuse or has been found guilty of one, but dismissal from the clerical state does not occur. This could happen, for instance, when a priest is seriously ill or of advanced age. So a life of prayer and penance is imposed on the priest instead. In these cases, too, he is forbidden from all public ministry and from otherwise presenting himself as a priest. He is expected to dedicate his life to praying for victims and repenting of his past offences. In this way the Church seeks even here to prevent any future abuse and to repair the injustice that has already taken place.[36]

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35 Canon 128. Whoever unlawfully causes harm to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage done

36 http://www.usccb.org/uploads/FAQs-canonical-process-sexual-abuse.pdf

7. Paying for lawyers

A diocese should not be paying for lawyers for clergy charged with sexual abuse or other crimes such as stealing. A priest who is not guilty in a civil or Church process or innocent in a Church penal process would be entitled to a refund of expenses from the diocese, but there should be a policy of using his own money and/or legal aid when he is charged with an offence.

8. Particular Law Proposals

These proposals are offered as a possible format for establishing particular law in regard to the following issues.

Vulnerable persons (c.1398)

A vulnerable person is defined in *Vos Estis Lux Mundi* as "any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offence".[37]

a) Vulnerable can also apply when someone is living in a vulnerable situation: for example, a person who has recently had a bereavement, a person who has had a seriously ill child and all other similar situations.

b) Vulnerable can also apply if there is an imbalance of power or a dependent relationship: an employee, a person being counselled, a young parishioner aged 19-20.

Grooming (c.1398)

Grooming is any prolonged, unjustified contact with a minor or vulnerable adult that prepares a potential victim for sexual or other abuse. Grooming includes having a minor or vulnerable adult with a cleric: stay overnight alone; spend significant time alone; be alone on trips; be given special gifts, engage in sexting; receiving or being provided with money, alcohol, or drugs; being photographed without parental consent; supply mobile phone numbers without parental consent and other similar activities.

Abuse of authority (c.1378)

Abuse of authority is a cleric's improper use of power and authority inherent in his position as a cleric to obtain financial gain, and/or sexual gratification or take advantage of another. Any ordained cleric or religious has significant spiritual authority over lay people. Abuse of authority includes a cleric having an intimate relationship or

37 *VELM.*

sex with someone he has or had a ministerial relationship with including a parishioner or any other similar relationship.

Prayer and penance

A life of prayer and penance requires a cleric:

- to spend a significant amount of time praying for victims each day, and
- to be ineligible to receive any form of remuneration if he receives a pension or retirement income, and
- not to present himself as a cleric, and
- not to celebrate the Eucharist with any other person present, (i.e. a private mass), and
- not to dress as a cleric, and
- to be supervised and accountable for his use of the internet and who he has contact with at home or anywhere else, and
- to be ineligible to be provided with a car by the diocese, and
- to have a simple lifestyle that is not a scandal to the faithful or the community in general. e.g., not going to a casino.
- to live at an approved address. The written approval of the Ordinary (usually a bishop or provincial) is required to travel outside the diocese or to stay a night at another address.
- The written approval of the Ordinary is required for someone else to stay with the cleric overnight.

Mandatory reporting of Sexual Abuse

Apart from knowledge obtained under the seal of confession, all clerics, religious, diocesan and parish employees must report to the local Ordinary any sexual abuse **by** clerics, religious, diocesan or parish employees they know of, or suspect is happening, or has happened.[38]

[38] This particular law would make reporting mandatory for diocesan and parish employees. It is not yet required by universal law.

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Spiritual Abuse: A Case Study of the Servants of God's Plan

Rocio Figueroa and David Tombs*

Introduction

This study proposes that the term 'spiritual abuse' clarifies the systemic mistreatment experienced by six former nuns belonging to the community Servants of God's Plan (*Siervas del Plan de Dios*, or SPD) in Peru, Chile, Colombia, and Ecuador. In the existing research in Latin America, there is relatively little focus on spiritual abuse and almost no research on the impact of abuse on women in religious orders. This is particularly significant since the abuse of nuns and women in religious orders has received global attention in recent years. This article seeks to identify the issues that communities of women in religious orders need to address if they are to address this problem in a positive and informed manner.

As revelations continue to come out on abuse in religious settings the need for appropriate language to talk with sensitivity and precision about the destructive impact of abuses has become ever more pressing.[1] In this article we argue that the term 'spiritual abuse' offers a useful category for identifying and understanding distinctive elements of abuse in religious settings that might otherwise be unacknowledged or minimized. Some Christian leaders claim the term spiritual abuse is vague and indiscriminate.[2] It has never been easy to talk about abuse within Christian

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1 This article is based on Rocío Figueroa and David Tombs, 'El Abuso Espiritual de Religiosas. Caso Estudio: las Siervas del Plan de Dios', in *Teología y Vida*, 63 (3), (October 2022) pp. 273-304; http://teologiayvida.uc.cl/index.php/tyv. A shorter version is in preparation as Rocío Figueroa and David Tombs, 'Obeying God's Plan?: The Spiritual Abuse of Nuns', in Daniel J. Fleming, James F. Keenan SJ, and Hans Zollner SJ, (eds.), 'Doing Theology and Theological Ethics in the Face of the Sexual Abuse Crisis', (Eugene, OR: Wipf and Stock, forthcoming).

2 For example, the Evangelical Alliance Theology advisory group suggest that the term spiritual abuse is vague and incoherent, and more likely to be damaging than helpful. They argue that the term could be potentially discriminatory against religious communities and raise particular difficulties for hierarchical patters of authority. Evangelical Alliance Theology Advisory Group, *Reviewing the Discourse of 'Spiritual Abuse'. Logical Problems & Unintended*

communities and there is no question that when terminology is vague or open to divergent interpretations the discussion of abuse becomes even harder. The value of spiritual abuse as a term therefore deserves appropriate examination. In this article, we suggest that recent work on spiritual abuse by Lisa Oakley in the United Kingdom, and Doris Reisinger in Germany, offers valuable insights for examining systemic abuses in religious institutions.[3] To illustrate this, we draw on interviews with a group of nuns in Peru, Chile, and Ecuador to show how the category of spiritual abuse sheds light on both the patterns of abuse they experienced and the way these patterns were supported, sanctioned, and sustained.

1. The term 'Spiritual Abuse'

The term spiritual abuse initially emerged in the USA and in more recent years has also become more common in Australia and the United Kingdom.[4] The initial literature focused primarily on what authors called "cults" or new religious movements.[5] Over time, the term started to be used more broadly and applied to a wider range of church contexts. Because of this history, there is no single agreed definition of the term. Definitions have evolved over time and the distinctive features of spiritual abuse have been framed in different ways in accordance with the methodology and focus of different researchers.[6] One early definition focused on the vulnerability of the person abused, In *The Subtle Power of Spiritual Abuse* (1991), David Johnson and Jeff van Vonderen state: 'Spiritual abuse is the mistreatment of a person who is in need of help, support, or greater spiritual empowerment, with the result of weakening, undermining, or decreasing that person's spiritual empowerment'.[7] This definition is useful in some instances but the limitation of scope to those 'in need of help, support, or greater empowerment' is unduly restrictive. Spiritual abuse can operate in a more systemic way, and its use should not be limited to those with special needs. Another potential drawback in this understanding is that it

Consequences, (2019), https://www.eauk.org/resources/what-we-offer/reports/reviewing-the-discourse-of-spiritual-abuse.

3 Lisa Oakley and Justin Humphreys, *Escaping the Maze of Spiritual Abuse* (London: SPCK Publishing, 2019).

4 David Ward, 'The Lived Experience of Spiritual Abuse', *Mental Health, Religion and Culture* 14.9 (2011), 899-915; Yvonne Davis-Weir, *Spiritual Abuse*, (Bloomington, IN: West Bow Press, 2015); F. Remy Diederich, *Broken Trust: A Practical Guide to Identify and Recover from Toxic Faith, Toxic Church and Spiritual Abuse* (The Overcoming Series, Spiritual Abuse Book 4 CreateSpace Independent Publishing Platform, 2017).

5 For example, notwithstanding the title to Enroth's book *Churches that Abuse*, the primary focus was on new religious movements rather than traditional churches; Ronald Enroth, *Churches that Abuse* (Grand Rapids, MI: Zondervan, 1992).

6 Ward, 'The Lived Experience of Spiritual Abuse', 901.

7 David Johnson and Jeff van Vonderen, *Subtle Power of Spiritual Abuse: Recognizing and Escaping Spiritual Manipulation and False Spiritual Authority within the Church* (Minneapolis, MN: Bethany House Publishers, 1991), 20.

can reinforce a negative perception of the victim as someone who was exposed to abuse because they are initially 'needy'.

As with all forms of abuse, spiritual abuse must be addressed in relation to the dynamics of power. Demaris Wehr explains that spiritual abuse happens in a spiritual context and it involves a misuse of social power (status conferred through one's gender, race, or class) and or political power (status and authority because of one's position at the top of a hierarchy).[8] For example, when a religious leader uses God, or their own special relationship with God, to control people's behaviour.[9] Likewise, Yvonne Davis-Weir, quoting Van Vonderen, stresses that spiritual abuse is always a power issue. Abuses rest on an imbalance of power. A person with greater power abuses someone with less power. People in lower positions cannot abuse people in higher positions in the same way.[10] Weir also points out that spiritual abuse can be passed down from one leader to another. And sometimes tradition is involved when rules and regulations might not be questioned.[11] For example, if sexist or misogynist interpretations of Scripture become part of the tradition of the Church and this is passed down through generations it would constitute a structural spiritual violence against women in which women are at risk of a distorted spiritual formation.

This type of spiritual abuse is what Theresa Tobin names as 'structural gender based spiritual violence in the Catholic Church'.[12] The term 'violence' is usually linked in common usage to an act of force. However, if violence is only seen as an act of force in narrow terms, then it would be very difficult to comprehend the significance of spiritual violence, since physical force is rarely required. It is useful to use the broader concept of violence in terms of a violation of rights.[13] Vittorio Bufacchi notes the connection between violence and the verb to 'violate'. He argues that there are two kinds of rights that can be violated, it is not just a person's physical body but also their dignity which can be violated. However, many kinds of violations against the dignity of the person are not immediately visible. Spiritual violence can be perpetrated without being observable in the way that physical violence is observable. It is a quiet violence and the ones who suffer it may not even be able to recognize it or accurately name it when they experience it. Tobin works on the notion of spiritual violence and her

8 Demaris S.Wehr, 'Spiritual Abuse: When Good People Do Bad Things', in Polly Young-Eisendrath and Melvin E. Miller (eds), *The Psychology of Mature Spirituality: Integrity, Wisdom, Transcendence* (New York: Brunner-Routledge, 2000).

9 Diederich, *Broken Trust,* p. 15.

10 Davis-Weir, *Spiritual Abuse,* p. 125.

11 Davis-Weir, *Spiritual Abuse,* p. 140.

12 Theresa W. Tobin, 'Religious Faith in the Unjust Meantime: The Spiritual Violence of Clergy Sexual Abuse', *Feminist Philosophy Quarterly* 5.2 (2019), p. 9. Miranda Fricker speaks of 'hermeneutical injustice' for when a group of people do not have the appropriate interpretive resources and are therefore at an unfair disadvantage; Miranda Fricker, *Epistemic Injustice. Power and The Ethics of Knowing* (Oxford: Oxford University Press, 2007).

13 Vittorio Bufacchi, 'Two Concepts of Violence' *Political Studies Review* 3 (2005), p. 196.

definition describes both the means of the violence and its target as distinctively spiritual:

> Spiritual violence is distinctively spiritual both in terms of its means and its target. It occurs when churches or their agents use religiously significant symbols, texts, teachings, rituals, prayers, or religious leaders to violate or threaten a person's spiritual self, including their experience of or capacity for relationship with God.[14]

One of the most nuanced and helpful definitions of spiritual abuse is offered by Lisa Oakley:

> Spiritual abuse is a form of emotional and psychological abuse. It is characterized by a systematic pattern of coercive and controlling behavior in a religious context. Spiritual abuse can have a deeply damaging impact on those who experience it. This abuse may include: manipulation and exploitation, enforced accountability, censorship of decision making, requirements for secrecy and silence, coercion to conform, control through the use of sacred texts or teaching, requirement of obedience to the abuser, the suggestion that the abuser has a 'divine' position, isolation as a means of punishment, and superiority and elitism.[15]

Oakley explains that this definition has evolved over time and her earlier definitions framed spiritual abuse more as a separate category in its own right. She now incorporates spiritual abuse within emotional and psychological abuse, but still recognizes distinctive features in spiritual abuse which deserve special attention.

Oakley frames spiritual abuse as happening in a religious environment, whereas Demeris Wehr uses the more inclusive category of 'spiritual context' rather than the religious context. The latter includes both a God-centred environment and a non-God-centred environment such as an experience in Buddhism or psychotherapy. For her, 'spiritual abuse is a misuse of power in a spiritual context'.[16]

Both Oakley's and Wehr's definitions focus on the actions of the perpetrator. Doris Reisinger offers an important supplement to this because she defines spiritual abuse from the perspective of the one who suffers the abuse. For Reisinger, spiritual abuse is:

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14 Theresa W. Tobin, 'Religious Faith in the Unjust Meantime: The Spiritual Violence of Clergy Sexual Abuse', p. 6.

15 Oakley and Humphreys, *Escaping the Maze of Spiritual Sbuse. Creating healthy Christian cultures*, p. 31. This definition builds on Oakley's definition in Lisa Oakley, 'Understanding Spiritual Abuse', *Church Times* (16 Feb 2018).

16 Demaris S. Wehr, 'When good people do bad things' in Polly Young Eisendrath and Melvin. E. Miller (eds), *The Psychology of Mature Spirituality: Integrity Wisdom Transcendence,* (London: Routledge, 2000), p. 49.

> … a violation of a person's spiritual freedom, in terms of *Gaudium et Spes.* A violation of the 'the most secret core and sanctuary' where a person 'is alone with God, whose voice echoes in her depths'.[17]

Reisinger identifies freedom and free-will as criteria for identifying abuse from genuine acts of faith.

By its very definition, any act of faith must be free. If an act does not originate from the free will of a person, but simply from her of lack of alternatives, or worse, from manipulation, coercion, or violence, it is quite plainly not an act of faith. For it to be an act of faith, it needs to be freely performed, in the first place.[18]

In Catholic settings some studies have been done regarding the abuse of conscience and its gravity.[19] Cristián Borgoño and Cristián Hodge define abuse of conscience as a type of spiritual abuse and distinguish it from abuse of power. For example, the abuse of conscience in a congregation violates the internal forum of the person. The authors highlight a gap in Canon Law which means this type of abuse is not addressed.

In the study of the Servants of God's Plan discussed below the understanding of spiritual abuse that we use draws on the work of both Oakley and Reisinger. It can be summarised as the violation of a person's spiritual self through significant symbols, texts, teachings, rituals, prayers, or leaders operating in a religious context. It can be difficult for an outsider to judge whether a specific act viewed in isolation is the result of abuse or an example of free faith. However, as we show below, the recognition of abuse can become much more obvious when attention is given to wider patterns and not just individual acts.

2. The Spiritual abuse of Nuns

Policies on spiritual abuse have been developed in a number of Protestant churches, but so far very little has been done in a Catholic context.[20] However, in recent

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17 Joyce Meyer, 'Q & A with Doris Reisinger, theologian at the forefront of the #NunsToo movement', *Global Sisters Report* (28 April 2021); https://www.globalsistersreport.org/news/qas/news/q-doris-reisinger-theologian-forefront-nunstoo-movement.

18 Joyce Meyer, 'Q & A with Doris Reisinger, theologian at the forefront of the #NunsToo movement'.

19 Cristián Borgoño and Cristián Hodge, 'El abuso de conciencia. Hacia una definición que permita su tipificación penal canónica', *Veritas* 50 (2021), pp. 173-195.

20 See, for example, the policy for protecting children, young people and adults in the Church of England (The Archbishops' Council, 'Promoting a safer Church', 2017) and policy for the Methodist Church (2020). In England, the Churches Child Protection Advisory Service (CCPAS) has worked hard to campaign against this type of abuse. They conducted a survey and received 1591 responses from Christians, 1002 of which said that they had personally experienced spiritual abuse. One third of respondents stated that their church or Christian organization had a policy that included spiritual abuse, and two-thirds said that they knew where to go to find help or support. But only one quarter of respondents had received any training on the topic of spiritual

years, discussion of spiritual abuse in the Catholic Church has started to be seen as a pressing issue especially in relation to women in religious orders. In October 2017 the #MeToo movement raised public awareness of different forms of harassment and abuse experienced by women and showed the urgent need for systemic social changes to address this. A number of women argued that change was also needed within the church. On the eve of Women's Day, March 2018 the magazine *Women Church World* described how some nuns were treated as unpaid servants.[21] Several nuns came forward to describe how they lived under unfair economic, psychological, and social conditions. They explained that they were on their feet from dawn until late at night to prepare breakfast and dinner while also ironing, washing, and keeping the house in order for priests, bishops and cardinals. Sister Marie, one of the interviewees described the long hours worked by nuns to cook and clean for cardinals and bishops, without being asked to break bread at the same table. She also added that many nuns did not have registered employment contracts, so they were paid little or nothing at all.[22]

In November 2018 'Voices of Faith' convened an 'Overcoming Silence' event in Rome. Former nuns spoke about the abuse they had experienced in religious orders and criticised the institutional culture of silence that prevented it from being discussed. Doris Wagner, theologian and survivor spoke about the spiritual abuse she had suffered:

> when my superiors told me that the way to perfection was to obey orders even if I did not understand them; when they told me not to read books; not to speak with my fellow sisters about personal matters; not to contact my family without permission; when they told me not to ask any questions about my future; when they told me always to smile, I trusted them and it destroyed me. I lost my self-confidence, I became insecure and apathetic. (…) It was purely and simply the consequences of spiritual abuse that I suffered at the hands of my superiors.[23]

In November 2020, the German Bishops' Conference and Catholic Academy organised a conference on Spiritual Abuse. Bishop Heinrich Timmerevers suggested that it was necessary to create interdiocesan standardized mechanisms for reporting,

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abuse. The study concludes that clearer policies and greater understanding of the characteristics of spiritual abuse are needed, and that better training should be given to church leaders on the subject. See Lisa Oakley and Justin Humphreys, 'Understanding Spiritual Abuse in Christian Communities', *Spiritual Abuse Resources* (7 January 2018); https://www.spiritualabuseresources.com/e-news-archive/2018-01-07-understanding-spiritual-abuse-in-christian-communities.

21 The magazine is published by the Vatican and had Lucetta Scaraffia, Italian and feminist historian, as its director.

22 Marie-Lucile Kubacki, 'Il lavoro quasi gratuito delle suore', *Donne, Chiesa, Mondo* (March 2018).

23 Doris Wagner, 'Overcoming Silence Women's Voices in the Catholic Crisis' (*Voices of Faith Conference* November 2018) Retrieved from: https://www.youtube.com/watch?v=zE-ApnCXL4E

documenting and compensating victims of spiritual abuse at an institutional level, in the same way as sexual abuse should be reported.[24] Pope Francis released a video on 1 February 2022 urging religious women to push back when they are mistreated, including when they are mistreated by the Church. Referring to the rising awareness of the abuse that nuns have suffered he contrasted service with servitude. Speaking in Spanish, he said: 'I invite them to fight when, in some cases, they are treated unfairly, even within the Church; when they serve so much that they are reduced to servitude—at times, by the men of the Church'.[25]

3. The Servants of God's Plan

This study explores the value of the term spiritual abuse for any understanding of the systemic mistreatment suffered by six ex-nuns who belonged to the community *Siervas del Plan de Dios* or 'Servants of God's Plan' (SPD). Luis Fernando Figari, founded the community in 1998. Figari had previously founded the Sodalicio Society (SCV) in Lima, Peru in 1971. SCV is a society of Apostolic Life within the Church in which the majority of members are lay consecrated men; there are also a small number of priests. In 1991, Figari also founded the Marian Community of Reconciliation (MCR) which is a female branch made up only of lay consecrated women. The mission of these two foundations was to serve young people, the poor and evangelize the culture. The community of nuns, the Servants of God's Plan was therefore the third community founded by Figari: they used the traditional habit and their charism was to serve the poor and ill people.[26]

In 2010 the Peruvian journalist Pedro Salinas, a former Sodalicio member, accused Figari and other leaders of physical, psychological and sexual abuse. In 2015, after five years of investigation, he wrote the book '*Mitad monjes, mitad soldados*' (*Half Monks, Half Soldiers*) which contained victims' testimonies. [27] In response, Sodalicio appointed a special commission interviewing more than fifty of their former and current members. On the 16 April 2016 the commission published a ten-page report that affirmed: 'the damage was perpetrated in a situation in which the superiors assumed a dominant position asking for perfect and absolute obedience achieved by the practice of extreme discipline. (…) This way of exercising power was an attempt

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24 Cf. Heinrich Timmerevers, 'Need to increase our concern for spiritual abuse', *Katholisch.de*, Dresden (9 November 2020); https://www.katholisch.de/artikel/27521-timmerevers-muessen-uns-verstaerkt-um-geistlichen-missbrauch-kuemmern?utm_source=aktuelle-artikel&utm_medium=Feed&utm_campaign=RSS

25 Pope Francis, https://www.youtube.com/watch?v=oyvNF03EfTE (1 February 2022); Maite Fernández Simon, 'Pope Francis asks nuns 'to fight' against sexism within the Catholic Church', *Washington Post* (3 February 2022).

26 Cf. Elise Ann Allen, 'Peruvian ex nuns report abuses of power, conscience inside order' in *Crux* (27 November 2021). Retrieved from: https://cruxnow.com/church-in-the-americas/2021/11/peruvian-ex-nuns-report-abuses-of-power-conscience-inside-order

27 Pedro Salinas, *Mitad monjes, mitad soldados: Todo lo que el Sodalicio no quieres que sepas* (Lima: Planeta, 2015).

to destroy their individual will'.[28] Figari was sanctioned by the Vatican in 2017 and is now barred from having any contact with the communities he founded. Sodalicio recognized 66 victims and set aside a fund of nearly 2.6 million US dollars for reparations.[29]

In this special commission, none of the nuns were interviewed. Alejandra, one of the ex-nuns we interviewed, said: 'We did not have access to the commission. The authorities of the Servants of God's Plan did not communicate with us about the commission or whether we could ask to be interviewed. We were told by them that the Servants of God's Plan did not replicate the viciousness that occurred in Sodalicio and that is why we were the joy of the spiritual family in the middle of a crisis'.

This naive view of life in the Servants of God's Plan was misplaced. A formal complaint about life in the congregation had been made by a group of former Servants of God's Plan nuns in 2016. In 2018 new complaints were sent to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life but no answer was received. The same complaint was sent to Juan Luis Cipriani, who at that time was the Cardinal of Lima. Cipriani opened a canonical visit to the congregation led by Jose Taminez and Ma. Elena Camones. In the middle of the visitation Cipriani retired, and the new-auxiliary bishop of Lima José Salaverry was tasked with carrying out the visitation alongside Camones. However, the nuns were told by their authorities not to talk to the delegates. Those that met the delegates were advised how to respond, and after their meeting they were spoken to by leaders of the community. The canonical visit finished in 2019. The same year, twenty ex-nuns from the community sent complaints to the new Archbishop of Lima, Carlos Castillo. In 2021 complaints were also sent to OPADE, the office in the Archdiocese of Santiago of Chile. At the time of writing this article, the Servants of God's Plan are under a second canonical visitation.

Dr. Figueroa, lead researcher for the study, was previously a member of the Marian Community of Reconciliation (MCR), one of the female branches of Sodalicio. Dr. Figueroa served as the MCR General Superior for 9 years (1991-1998). Since 2006 victims from Sodalicio and its branches have contacted her for support following sexual and spiritual abuses perpetrated within the communities. During this time, Dr. Figueroa developed a relationship of trust with the victims.

In 2021, a number of former nuns from SPD approached Dr Figueroa with reports of mistreatment within the congregation. They requested that further research be undertaken into the SPD congregation.

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[28] Comisión de Ética para la Justicia y la Reconciliación, 'Informe Final' (16 April 2016). Retrieved from: https://comisionetica.org/blog/2016/04/16/informe-final/

[29] For further information, see Rocío Figueroa Alvear and David Tombs, 'Lived Religion and the Traumatic Impact of Sexual Abuse: The Sodalicio Case in Peru', R. Ruard Ganzevoort and Srdjan Sreman (eds), *Trauma and Lived Religion. Transcending the Ordinary* (Cham, Switzerland: Palgrave 2019) pp. 157-159.

Six former-nuns participated in our study. They belonged to the community for a period ranging from 6 years to 17 years and now range in age from 29 to 40 years old. After receiving approval from the University of Otago Human Ethics Committee, we developed and conducted structured personal interviews with each of them.[30] Each interview was conducted in Spanish and generally lasted for about an hour. The interviews were recorded on a digital audio system and all information was transcribed verbatim in Spanish and then translated into English and analyzed. The transcription of the interviews has been anonymized to maintain the confidentiality of the participants, these pseudonyms are: Jessica, Maricarmen, Gabriela, Rosanna, Alejandra and Rosa.

The six women describe mistreatment that took place from their novitiate to their temporary vows. The goal of this study is to give voice to the women about their experiences and to the patterns of spiritual abuse they encountered in their religious community. How were religious symbols, texts, teachings and rituals used in ways that violated their spirituality and human dignity? The second goal is to consider the main factors that enabled the spiritual abuse according to our participants.

4. Spiritual Abuse within the Servants of God's Plan

We asked each interviewee about their experiences in the community that might amount to spiritual abuse. We present these below in accordance with some of the main themes which emerged.

a) *Perfection, Holiness, and God's Plan*

Rosa explained that the ideal of the Servants of God's Plan was to become saints, and this holiness was understood as perfectionism: 'I had to be perfect' Rosa said, 'in everyday life, there was an enormous pressure to do things correctly and to achieve perfection. There were rigorous and millimetric demands that generated a huge inner tension in me. I had a very exaggerated fear of the slightest mistake and of being mistreated afterwards.' This perfectionism was instilled by an almost military regime. Gabriela recalls how the authorities constantly mentioned the importance of being tough: 'they wanted to make us strong women—a characteristic that was highly esteemed in the Servants'. Rossana gives us an example: 'I did not know how to swim. My formators would ask me to jump into the pool and if I held on to the edges, they would dislodge my fingers with a stick. When I expressed my concern to another superior, I was told that if I wanted to serve God, I should be a strong woman and never question the formators. Because of this instruction in my head I let it continue'.

For Gabriela the goal to 'love the charism was above everything else'. 'I think that the way the order presented themselves attracted me: their use of the habit and

[30] Ethics Committee Otago University, Ref. 21-125, Ethical Approval 29 October 2021. We are grateful to the participants for their willingness to take part. We are also grateful to our project consultant Dr Tess Patterson, Department of Psychological Medicine, University of Otago, and the University Ethics Committee, for their support for this research.

their style of life was a very radical option. They made us love the charism as being better than any other charism around: we were radicals, we prayed, we were perfect. In our collective unconscious, we considered that we were the best; and to achieve that goal the community had an excessive care for appearances: the authorities would tell sisters who were overweight to eat less and exercise in the evenings. For example, a sister was sent after dinner to do exercises at 11pm at night during Chile's winter because she was too fat. It was just considered inconceivable to be fat'.

Closely linked to the idea of holiness, frequent appeals to 'God's plan' could also become a means of abuse. Whilst a shared commitment to God's plan is hardly surprising, and is in keeping with the name of the community, the way that God's plan was presented could become abusive. Within SPD discerning God's plan was not something that had room for a nun's own sense of direction or discernment. Gabriela explained: 'they decided what was God's plan for you: according to what I was taught by the sisters who guided my vocational discernment, God's plan was ONE, one vocation, one path, and it was directly related to my happiness. I believed that if I did not become a Servant of God's Plan I would never be happy'.

When Maricarmen remembers her years in the community she said: 'a problem is the way the vows were lived. The obedience was lived in a very repressive way, without freedom, without freedom of thought'. This lack of freedom was also manifested during the vocational discernment. Jessica claimed that she was manipulated by the nuns in her discernment process: 'in the community they never told me about discernment. On the contrary, they always repeated that they were confident that I had a vocation, and that my doubts were due to my anger and rebellion, but that deep down they saw that I had a vocation'.

Some of the participants revealed that they did not even have spiritual freedom and control over their own personal relationships with God. Jessica was obliged to pray what the authorities asked: 'they sent us to pray but they gave us the specific texts of the Gospel which they wanted us to meditate on, and they also gave us specific commentaries of the Gospels. We never prayed or read anything that we wanted to. We never prayed to other saints: for example, Mother Theresa of Calcutta was forbidden'. Alejandra remembers: 'we would pray at our desks. Some of us had a holy card or a picture of St. Theresa of the Child Jesus. We were told to remove that saint because she was not from our charism'.[31] Maricarmen mentioned a similar prohibition: 'I was singing a song to the heart of Jesus. The superior told me it was too sentimental and I was forbidden to sing that song'. [32]

Particular phrases were also used to make the nuns identify with the community. Examples were: 'be holy', 'obey God's Plan', or 'love the charism'. Jessica stated: 'you arrived and they taught you catch phrases from the moment you woke up'. Rosa

[31] St. Theresa of the Child Jesus is a name for the widely venerated French Carmelite nun Thérèse of Lisieux (1873-1897).

quotes some of the phrases: 'other favourite phrases of the sisters were 'she who obeys is never wrong', 'a servant does not set limits to love', 'authority is the voice of God'. It is impressive to see how all the sisters constantly repeated the same phrases'.

According to Jacques Poujoloi, spiritual abuse happens when the individual's very expression of self is changed and a type of auto-identification with the group is demanded.[33] According to him, in a dysfunctional group the community becomes the necessary and only intermediary between God and the person. All relationship between God and the person is evaluated or mediated by the community. In this de-personification, spiritual freedom to create their own identity and spiritual self is denied and lost.[34]

b) *Absolute Obedience*

Strict obedience and absolute submission are two of the most important values in an abusive system. For Oakley one of the requirements of spiritual abuse is the obedience to the authority with the suggestion that the abuser has a divine position.[35] Dysmas de Lassus argues that spiritual abuse happens when distortion of the vow of obedience occurs and unconditional compliance is expected even when it goes against personal conscience.[36]

Regarding this sacralization of authority Gabriela explained: 'we were told that in the house the superiors were God'. And because the superiors had this divine position the person has no say and the authority had no limits. She continued: 'They taught me not to question the authorities; we were forbidden to think badly regarding authorities. So, the point of departure was that I was wrong and that I was not seeing reality. I was the one who had to make the effort to change my thoughts. Authorities were simply beyond any opinion we could have about them'. She continued: 'I got used to the fact that an authority had my life in her hands. The authority became a kind of confessor and she would always be right about me; in this way I lived obedience, which was nothing else than an absolute submission of my being'.

According to Jessica the obedience lived in the community implied obeying absurd orders 'we were requested to do things that made no sense: such as picking leaves from a bamboo or to disassemble six beds and then reassemble them again for no reason, many days of fasting and everything in the name of obedience'. Rosanna described an accident when she obeyed an absurd order from her superior: 'I did not like to go down some stairs because it was dark. My superior obliged me to go down those unlit stairs to overcome my fear. I fell down them and fractured my tibia and fibula. That was the first of 15 surgeries I had in the community. When they asked me how I fell I said they forced me down those stairs. The superior corrected me and made

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33 Jacques Poujol, *Abus spirituels. S'affrancir de l'empreinte, (*Paris: Editions Empreinte, 2015*)*, p. 24.

34 Jacques Poujol, *Abus spirituels,* 33.

35 Oakley and Humprheys, *Escaping the Moral Maze,* 22.

36 Dysmas de Lassus, *Risques et derives de la vie Religieuse*, p. 40.

me write 100 times that she who obeys is never wrong. She told me that I could not question, and that God had allowed that accident.'

For Rosa the need to always obey meant living in a very 'demanding way', 'they wanted to test how far we would go for the love of Jesus'. She remembers: 'one day we were asked to go for a run and we had to do it with our arms outstretched for half an hour. Then we were asked to do more exercises. I have asthma and I needed to get my inhaler but the superior would not let me. Afterwards we went to pray the Stations of the Cross. While I was praying, I fainted and then I vomited. The superior shouted at me: why are you waiting to get up? A Servant is prompt, and you should clean what you did. I was not able to get up, nor to clean up, I had no strength; I was hyperventilating'.

The participants were taught that the 'the superior represents God' and actually 'was God in the house' so for them to obey authorities, to adhere to all the rules and values of the community, was the way to 'test how far they could go for the love of Jesus'. Jessica considered also that 'your brain gets moulded as they wished and we began to normalize things that were not normal'. It was a blind obedience without limits or conditions. Gabriela stated 'those who were not authorities were very passive. They taught us that the authorities were the ones who set the pace'. Maricarmen believed that one important factor that enabled abuse was the way the vows were lived in practice, and especially how the vow of obedience was understood: 'they annul your capacity to think. This generates all type of abuses because you are not critical, you will not communicate'.

c) *Coercive control*

In order to achieve this blind and absolute obedience leaders resort to coercive control within the community. Everything is done to control people's behaviour.[37] Our participants reported high-levels of control in community life. According to Rossana the authorities tracked and monitored the daily activities of the nuns. She remembers: 'if we watched films in the community evenings and one of us fell asleep, we had to get into the pool late at night and swim until the superior told us to stop. We were also woken up in the early hours of the morning for exercise; it was said that this would make us stronger to be Servants of God's Plan'.

The control expanded to everyday life and the superiors scrutinized the nun's activities and their use of time in all its details. Rosanna explains: 'the superior had a total military regime: nine minutes for the shower, extreme discipline for the fulfilment of the timetable, not a minute more, not a minute less, and if one arrived late the punishments and corrections exceeded the limits of charity with shouts and insults towards the person who arrived late'.

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[37] David Johnson and Jeff Van Vonderen, *The Subtle Power of Spiritual Abuse*, 57. See also Evan Stark, *The Entrapment of Women in Personal Life* (Oxford: Oxford University Press, 2007).

Coercive control was not limited to the nuns' external activities but also shaped their inner life. Rosa recalls how she could not complain about her tiredness or show any emotion:

> The spiritual abuse was violent. I could not complain about any suffering. You know that we consecrate ourselves to the Sufferer... A question of the examination of conscience was did I show my tiredness to others? If we were tired we could not show it or express it. If the sisters saw me with a grumpy face, they called it the bump face. To express any kind of emotion was seen as a sin; we were repeatedly told that we had to let the old man die and let the new man be born. I ended up blocking and freezing any emotion or feeling. Not having a healthy space to express my emotions ended up making me sick.

Coercive control often induces anxiety and undermines a person's sense of self-confidence. Alejandra speaks about the loss of her subjectivity and the loss of her emotional and spiritual freedom: 'when I shared something personal and I was moved by it, I was always told that I had to be tougher. In this way I learned to keep to myself and not to express my emotions, whether they were of joy or sadness. So I came to a kind of a state of emotional anaesthesia.' Rosa reported: 'they made us do a daily examination of conscience. They asked you: have you been moved by your emotions? Have you wasted your time instead of loving the mission? Have you had an emotional disorder seasoning the food? Did you eat what you like? It was a constant pressure. I lived 8 years controlling and evaluating my eating: did I eat more? Did I put too much salt on?'. Participants described how little by little this constant pressure eroded their sense of well-being in different ways. Alejandra's speaks of 'emotional anaesthesia', and Rosa states clearly that it 'ended up making me sick'.

Coercive control in an abusive community often puts limits on disagreement, or raising concerns, or discussing certain topics. The participants talked about the repression of their emotions and the erosion of their critical thinking and reasoning. For Rosa, obedience was understood in the community as always agreeing with the authority of superiors: 'to say what I felt or to express any kind of disagreement was to be against authority and it was seen as a sin and a betrayal of the community'. She says that the devil was used to discredit and reject other person's ideas or reasoning: 'we were constantly told that having doubts came from the devil; many things bothered me inside, but it was very difficult for me to express them.' Rosanna remembers that anyone who left the community 'was demonised'. The comments were: 'she is a traitor; whoever puts her hand to the plough and looks back is not worthy of the kingdom of heaven'.

Maricarmen was not allowed to raise questions: 'I was very curious and during some classes I always wanted to understand better. One day I began asking questions and my superior got upset by my questions and said to me: "Are you silly? You are worse than my little nephew"'. Maricarmen added: 'In the Servants there were no

discussions. There were no different points of view. Perhaps about your favourite colour but for other topics that required thought you had to adhere to the superior'. Jessica remembers that when she was told what her new mission would be: 'the superior asked my opinion (although it was not for discernment, since the decision was already made) and because I said what I thought, she corrected me saying that I should be a woman of God and trust the authorities because they know what God wanted for me'.

Differences of opinion, variety of gifts and diversity of experiences were not accepted. Rather than being seen as a strength—in the manner described in Paul's image of church as the body of Christ in which each member is different but is important in its own right, and works together with other members (1 Cor. 12:12-27)—diversity is seen as a threat to the cohesion of the group. These are signs of an unhealthy community. Homogeneity is valorised and anyone who thinks differently faces sanction.[38]

d) *Secrecy and isolation from family and friends*

For Johnson and Van Vonderen the most powerful rule in an abusive system is what they call the 'no-talk rule' in which the problems cannot be exposed because 'if you speak about the problem out loud, you are the problem'.[39]

Maricarmen spoke of 'secrecy and impenetrability' within the community. She said, 'They teach you that. There is no air or light that enters the community. You feel that there are some strange things but you don't have anyone to talk to about them'. Sharing concerns with those outside the community is prohibited, 'you cannot tell them to your family. Nothing is allowed'. According to Gabriela, the culture of silence was pervasive even when there were good reasons for the nuns to share their thoughts: 'we were living the worst crisis: the accusations of sexual abuse against the Founder. No one talked about it. I was amazed by how the crisis was hushed up and you would only talk in secret with your closest friends. They gathered us to give us the news of our new statutes and we had a big celebration. This was the *modus operandi* of the community: to silence voices by diverting attention to what was good and what was shining, and silence the crises'.

Secrecy was at a premium particularly with respect to the people closest to the nuns. Rosa reported: 'my formators and superiors were very insistent in this sense. I could not trust anyone else. I could tell my family absolutely nothing about what was happening to me. Several times my formator listened to my conversations with my family. She asked me to put the call on speaker. On one occasion I told my parents that I was ill and afterwards my superior told me that I don't have to tell my family about it'. When Rosanna needed a surgery, because she broke her leg following the order to go down the stairs, she wanted to call her family. Her counsellor told her: 'remember

[38] Jacques Pujoi, *Abus Spirituels,* p. 30.
[39] David Johnson and Jeff Van Vonderen, *The Subtle Power of Spiritual Abuse,* p. 67.

that dirty laundry is washed at home. Don't give details to your family, why worry them when you are so far away, you have 10 minutes to talk to them'.

A widely discussed feature of spiritual abuse is to distance a person from their family and circle of friends making the person more dependent on the community. Rosa was told that she could not trust anyone, apart from the institution, and she should not even trust her own family. Gabriela was isolated from her family and expected to break contact with her friends including even friends in the community. Gabriele explains 'my best friend was also a nun in the community and she was a year ahead of me. I was not allowed to share anything with her'. Gabriela commented that she could rarely speak with her family: 'the few conversations with the family lasted less than ten minutes and I was generally accompanied by a sister. On one occasion I visited my family and I was not in good health (...) my family was concerned when they saw me and they wanted to take me to the doctor, an action that was flatly rejected by the community that did not want my family's intervention; this was inexplicable for my family, why couldn't they participate in my affairs? Why couldn't they take part when they saw my health at risk?'

The isolation included restrictions on interests and educational activities. Maricarmen for example described how the first years they were not allowed to read the newspapers or to go online. Jessica, after her formation period was never allowed to study what she wanted: 'I was 30 years old and I did not have a university degree since I was never allowed to study in the community. I wanted to study special education and they did not let me. They made me study philosophy that I never liked and my family had to pay for it. I only did one semester'.

Isolation promoted a culture of secrecy which made it less likely that abuses would be challenged. Anything that might lead to scrutiny or questioning was not allowed to be shared outside the congregation. At the same time, access to external information was restricted and controlled by the authorities.

e) Emotional, Psychological and Physical Abuse

Spiritual abuse is closely connected with emotional and psychological abuse and can contribute to other forms of abuse including physical and sexual abuse. One of the dynamics in community life that was mentioned was frequent humiliation and shaming in public. Over time this eroded self-confidence and undermined self-esteem. Maricarmen recalls examples of verbal abuse: 'the general superior continuously yelled at me. She always made me feel stupid. (...) and when I entered, I had the perception of myself as a clever woman; I had good marks at school and my parents always said that I was ahead of my age. I left the community feeling that I was silly and stupid. My superior humiliated me regarding my intelligence: "move your intelligence, use the only neuron that you have"'. These humiliations sometimes involved public shaming. Rosanna often stammered if she got nervous and she was punished for this by her formators: 'When I tried to speak, they would automatically start banging the table and

chanting throughout the house: “she’s shy, she is going to cry”. This would go on until I managed to hide the tears that this humiliation caused me’.

Gabriela remembers that the public humiliations were daily: ‘the dialogues at meals were very tense: they were used to making public corrections and we learned to be humble, accepting that the others were right because the opposite was a sign of pride. I was corrected many times and afterwards the authority and the sisters reprimanded me. I had to accept that they were right and ask for forgiveness, even though I was sure that the situation was not as they saw it’.

When Jessica was in charge of the kitchen, she told the lady who cooked to mix two different types of noodles: ‘My superior in front of all the community said: “you are useless, everything you do is wrong, the sisters always have to cover your faults and negligence”’.

Alejandra said that her superior criticised her severely in what amounted to verbal abuse: ‘You are useless. You do not do anything right. Many times, she slammed the door on my face when I did something wrong and she said that she did not want to talk to me. (...) When I moved to another community in Colombia the superior was the same as my former superior. She shouted at me as she shouted to the dogs. Once some keys were lost and she threw the rubbish in front of me to find them. I had to search in the middle of the rotten food’.

The strict regime could also impact on physical well-being. Jessica told us that she was never a thin person and the superior imposed a strict diet on her: ‘I became so thin that my mother wanted to complain. I gained weight again and the superior told me in front of the community: “you are fat, and you will not eat rice, nor desserts and before you go to sleep you will do half an hour of sports, and you will wake up half an hour before the others to do sport”’.

Sometimes the health of the nuns was put at risk. Rosa went to the doctor who prescribed medicines for her asthma: ‘My superior told me that I was exaggerating and she forbade me to take the medicines that the doctor prescribed me’. ‘I also asked to go to a psychologist to treat my anxiety and they told me that it was not necessary because I was fine’.

Rosanna also suffered physical abuse: ‘they physically abused me. Between my surgeries (for my broken foot) my superior made me walk excessive distances because I had to be ‘tough’ but I was still recovering and was not supposed to walk so much’. She continued: ‘There was a training course and I was using an orthopaedic boot. I asked my superior not to go because I had to go up four floors without elevator. She said that I could not behave like a spoiled woman: “you have to be tough”. Throughout the course I had to climb stairs and drag myself up with my arms everyday’.

Jessica was required to remain in a family relationship that was unhealthy and potentially dangerous. She explained the emotional impact of this requirement: ‘my dad was a violent man. He tried to kill my brother and he had a restraining-order not to

approach us. I was scared of him. My superior obliged me to contact him. They obliged me to go to my dad's house ... and I had to go and I always came back and I was absolutely broken. They obliged me to be in contact with the one who was my abuser in the name of forgiveness'.

f) Serving Superiors

Sometimes the nuns were asked to take on roles that went beyond reasonable service and felt more like a form of subservience. Alejandra remembers how she was asked to take on a role serving her superior: 'my formation stage was interrupted (against Canon Law) and I had to be the superior's maid. They told me to do it without saying anything. I had to wake up earlier than the community to prepare the superior's breakfast. She had a different breakfast from the rest of nuns. She had breakfast in her bedroom and I had to take another path so no one could see me. I was her maid with everything. I did her assignments at the University. She did not care about plagiarism and putting her name to the work that I did'. Likewise, during Rosa's novitiate she had to take a different schedule from the other sisters in formation so as to exclusively serve the superior: 'I became her personal servant. I was treated like a servant: I had to tidy her room, pick up her laundry, bring her breakfast, wash her clothes, because she did not have time to do it'.

5. Discussion

Spiritual abuse is a relatively new topic in the Catholic context and there is therefore very little literature currently available on spiritual abuse within female Religious Congregations. This applies not just in Latin America but also more widely. There has, however, been some discussion on the prevalence of spiritual abuse in female congregations as opposed to male congregations. Giovanni Cucci suggests that spiritual abuse is more of a problem in female congregations.[40] There are a number of factors which might contribute to this. First of all, most of religious consecrated life in the Catholic Church is made up by women. Statistics for 2019 show that there were 50,295 male religious and 630,099 women religious, which is twelve times as many.[41] The vast majority of those who live religious life are women. A second reason also pointed out by Cucci is that male Congregations allow religious men more autonomy from the community and more opportunity for self-direction as they live out their religious vows. In many male religious congregations, men are not just consecrated but also ordained as priests. This gives them more institutional authority and freedom. Those who are not priests usually have pastoral leadership roles which allow them opportunities for independence and growth.[42] A third factor is the systemic

40 Giovanni Cucci, 'Abusi di Autorità nella Chiesa. Problemi e sfide della vita religiosa femminile', *Civiltà Cattolica* 3 (2020).

41 Carol Glatz, 'Vatican Statistics show continued growth number Catholics worldwide', *National Catholic Reporter* (26 March 2021); https://www.ncronline.org/news/vatican/vatican-statistics-show-continued-growth-number-catholics-worldwide

42 Giovanni Cucci, 'Abusi di Autorità nella Chiesa. Problemi e sfide della vita religiosa femminile', *Civiltà Cattolica* 3 (2020).

undervaluing of women within the Church. The place of nuns within patriarchal church structures is fraught with ambivalence. On the one hand they are valorised as pure and holy, yet at the same time they are frequently marginalised and undervalued. Women are insufficiently involved in the decision-making processes of the Church. This inequality can contribute to an interiorised inferiority, which disempowers women preventing them from maturing and growing in their own autonomy and leadership. [43] The experiences reported by the nuns reinforce the belief that spiritual abuse is more likely to affect female congregations rather than male congregations. This is not just because there are more women in congregational life but because of the inequalities that women experience within the church.

Another area of discussion the research might contribute towards is the way in which Mary serves as a role model for women in a religious community. The characteristics traditionally associated with Mary—obedience, silence, service, and humility—are idealised as a template for women religious. Catholic theology has highlighted 'the image of female as the principle of passive receptivity in relation to the activity of the male gods and their agents, the clergy'.[44] It is expected that any religious woman who has taken a vow of obedience should be submissive, but insufficient attention has been given to the appropriate limits on submission and the safeguards that are required to prevent obedience from being abusive.

Literature on spiritual abuse has discussed different patterns of abuse. One pattern is associated with a specific individual or individuals, especially when the leader(s) is narcistic and manipulative. The other pattern is more collective and shows how an abusive system can arise from a group. It can also be a combination of both.[45] For the Servants of the Plan of God, it seems that both individual leader and wider systemic factors have been at work. The leader and founder, Luis Fernando Figari, created a culture of abuse in Sodalicio and this was adopted by leaders of the Servants. Rosanna thought that the factor that enabled the abuse 'was our blind love to Figari' and the fact that 'the authorities were the same for twenty years'. Alongside this, there are a number of more systemic elements many of which are related to expectation for strict obedience. It is therefore necessary to look at how the vow of obedience has been understood in the teachings of the Church. The Second Vatican Council invited those in religious life to 'subject themselves in faith to their superior who hold the place of

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43 Cf. Rocío Figueroa and David Tombs, 'Living in Obedience and Suffering in Silence: The Shattered Faith of Nuns Abused by Priests'. *Sexual Violence in the Context of the Church: New Interdisciplinary Perspectives*, ed. by Mathias Wirth, Isabelle Noth and Silvia Schroer, (Berlin and Boston: De Gruyter, 2021), p. 65.

44 Rosemary Radford Ruether, *Mary: The Feminine Face of the Church* (London: SCM Press, 1979), p. 3.

45 Dysmas de Lassus, *Risques et dérives de la vie religieuse* (Paris, Les Éditions du Cerf, 2020), 40. Cf. Pujoi, *Abus Spirituels.*

God'.[46] Over the centuries, the Catholic Church's concept of religious obedience has been determined by men. It is troubling that even though women represent the bulk of consecrated life in the Church they have had little to do with the theological and spiritual reflections on how the vows they take should be understood and lived out

In the Servants of the Plan of God, a nun's loyalty to her vows could make her vulnerable to mistreatment. There is no reason to think that this problem is limited to just this community. The demand on nuns to see the community's authorities as representatives of God and always submit to them does not do enough to protect either the nuns themselves or those in authority. A redefinition of the vow of obedience ought to be modeled on Jesus's own example in the Gospels, in which Jesus consistently said he was obeying his Father's will. The obedience in the Gospel is an act of trust, an act of following God's commandments, and following his love. It is an obedience marked by love and trust in a relationship between the Son and the Father. At the heart of this perspective is obedience to God. The rules and statutes of the community are a means to achieve this obedience rather than ends in their own right. The vow of obedience entails obedience to the one who leads the community but not as a representative of God but as a leader who cares for both the common good and the dignity of the individual. Obedience would take on a stronger connotation of co-operation, and members could voice concern if they have questions about an instruction they receive. This would help to desacralize the insistence on absolute obedience and propose a more horizontal type of obedience made up of dialogue, coordination and discernment in serving God's plan.

[46] *Perfectae Caritatis*, Decree on the Adaptation and Renewal of Religious Life (1965), §14; https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_perfectae-caritatis_en.html

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