

Any decision regarding the exercise of ministry by clerics who have been accused of and/or have admitted abuse of minors or other misconduct must be motivated by concern for the good of the community as well as for the rights of the cleric. The processes established by law have at their heart this latter concern. As long as we are meticulous in observing the prescriptions of these processes, it would seem that the decisions and actions cannot be challenged and the good of the community will be protected. Instances in which decisions are overturned by the Signatura usually have procedural errors as the reason. All of these matters are somewhat complex procedurally and I may be providing you with far more than you wanted in these notes.

There are several kinds of actions that can be taken when the diocesan bishop judges that there is a need to restrict the ministry of a cleric. Each involves a different process. The bishop may declare a priest impeded from the exercise of orders, may issue a penal precept, or may initiate a penal process. All of these processes are separate from the fact that a bishop is not required by law to assign a priest to a specific office or ministry. He is required to provide for his sustenance, however. I will try to outline each of these three processes relying on the canons as well as the latest in procedural manuals.

#### A. Irregularities and Impediments to the Exercise of Orders:

The declaration of the cleric as impeded from the exercise of orders is emerging among canonists as the preferred method in dealing with cases involving pedophilia or other forms of sexual abuse. The fact that true pedophilia involves a psychological impairment may limit the use of the penal process. Psychological impairment results in diminished imputability and may preclude the imposition or declaration of a sanction. The process of declaring the cleric impeded from the exercise of orders involves an investigation into the facts, a judgment of whether the impediment exists, and then the law itself prevents the exercise of orders.

Canon 1044 lists the only impediments and irregularities to the exercise of orders already received. With the exception of the first irregularity listed, all of them are related to post-ordination behavior. The second paragraph of the canon is relevant to the issue at hand: Impeded from the exercise of orders already received is the person who suffers from "amentia" or some other psychic defect that, in the judgment of experts, renders him incapable of rightly carrying out ministry (c. 1044, §2, 2°). Of note is the requirement that consultation with one or more experts in the field of psychology precede the judgment by the bishop.

The declaration of the impediment to the exercise of orders must be based on fact. Therefore, the process involved is basically a fact-finding one. The Code does not provide a detailed process for this investigation but one can be construed from parallel procedures. The

declaration of an impediment to the exercise of orders is not the same as the penal process and the declaration is not the imposition of a penalty. The same precautions regarding the rights of the cleric must be kept in mind, however. The following issues are applicable:

- I. There should be a process by which the facts are surfaced and the accused cleric has the opportunity to participate.
- II. The presumption in law is that there is no impediment and the burden of proof rests in overturning that presumption. (cf. c. 1526, §1: "The burden of proof rests with the one making the allegation" for the foundation of this principle.)
- III. The cleric's right of defense must be clearly and fully protected. Such protection would include the provision of appropriate canonical counsel in the form of a qualified advocate. (As a side issue, it may be advisable that the advocate not be someone connected with the diocese lest a conflict of interest exist or accusation of such be raised at a later time. In some regions in the U.S. canonists have agreed to establish a network of advocates. In other instances, canonists from outside the diocese can be contacted and used on a per case basis. Inability to afford the services of counsel should not stand in the way of the cleric's access to such. The diocese may need to pay the expenses of the canonist and/or reimburse the diocese which pays the person's salary.)
- IV. The diocesan bishop must have moral certitude about the existence of the impediment before he makes a declaration.
- V. The cleric should be given an opportunity to remedy the situation if that is possible.
- VI. While being impeded from the exercise of orders, the cleric still has the right to support and care in his infirmity (c. 281).

The process for declaring a cleric impeded for the exercise of orders has two parts to it: the investigation into the facts  
the judgment and declaration

The process may be conducted in either a judicial or administrative fashion. The judicial process could follow the lines of an oral contentious process (cc. 1656-1670) or the ordinary contentious process (cc. 1501-1655). The administrative process would follow the general norms for administrative acts (cc. 35-58).

The determination to proceed in either fashion would come only after there has been sufficient evidence to point to the possibility of the existence of the impediment. This prior investigative stage would be taken care of in those instances in which the priest admits to

behavior which could point to a psychological condition, or in which the civil authorities have conducted an investigation which results in the same conclusion. During the time of the investigation the cleric would be asked voluntarily not to function in the exercise of ministry or the bishop could issue a penal precept restricting ministry (see below under Penal Precepts). The cleric's right to his reputation (c. 220) must be kept in mind.

When the case involves the suspicion or accusation of psychological impairment, as in the pedophilia or abuse cases, the use of an expert is required. Failure to employ these services could result in the invalidity of the process, either judicial or administrative.

The accused must be given access to the services of a canonical advisor who can serve as his advocate. Advocates who function within the diocese must have the approval of the diocesan bishop (c. 1483). If the case involves a priest, the notary in the judicial or administrative process must be a priest (c. 483, §2).

The decision whether to use the judicial or administrative process rests with the diocesan bishop but he should consult the cleric concerned. The judicial process has as the object of the trial the declaration of a juridic fact (c. 1400, §1, 1°). The purpose is to determine the existence of the impediment and make a declaration of this fact. The ordinary, the promotor of justice, or a designated vicar or delegate can initiate the process before the appropriate tribunal. There is no requirement that the case be heard before a collegiate tribunal but it may be advisable to do so. The oral contentious process would be the preferred method but the cleric may insist on the ordinary contentious process. The Tribunal would handle either case in accord with usual procedural norms.

The administrative process has the same goal in mind, the verification and declaration of a fact. There are no detailed procedural norms as in the case of the judicial process. The following steps have been suggested:

- 1) establishment of a board of inquiry to assist the bishop in his investigation and decision making
- 2) informing the cleric that the process has been initiated; this should be done in writing stating the nature of the matter, the process to be used, his rights, availability of canonical counsel, the substance of the allegations and sources being used for proof
- 3) any information gathered in the initial investigation stage may be introduced; other proofs (written documentation, witnesses, etc.) may be gathered by the board of inquiry or introduced by the cleric in his own defense (the norms for proofs in the judicial process may serve as a good guide in the administrative process)
- 4) upon completion of the gathering of proofs, all of which must be accessible to the accused cleric and his advocate, the defense will be presented and the board will determine whether or not there is sufficient evidence to proceed to a decision or if additional investigation is needed

5) the decision must be made by the diocesan bishop based on the information provided in the process; he basically has three choices:

- a) the existence of the impediment has not been proven and he issues this finding in writing with a statement of the facts and reasons;
- b) the existence of the impediment has been proven with moral certitude and he issues this finding in writing with the facts and reasons stated;
- c) the existence of the impediment has not been proven but there are still concerns about the exercise of ministry by cleric so he issues his finding with a list of recommendations for addressing the problems.

6) when the decision is reached it must be communicated in writing to the cleric.

7) the effect of the declaration is that the cleric is prevented from the exercise of sacred orders by the law itself; this inability remains in effect until the impediment is dispensed or the cause of it ceases; a precept could also be issued to the cleric regarding the cessation of his exercise of orders.

8) the right to appeal remains in effect; the appeal does not automatically suspend the decree which declared the impediment in the administrative process.

Once the cleric is declared impeded, by either the judicial or administrative process, he may not exercise his orders. If he does so he may be subject to further process under c. 1371, 2° (failure to obey a legitimate precept or command). A process for the imposition of suspension could be begun in such a case with a guardian having been appointed if the cleric labors under psychological impairment which renders him incapable of his own defense.

#### B. Penal Precepts:

Because the imposition of formal penalties is so serious, it is only used as a last resort when other means of alleviating a serious problem, both pastoral and disciplinary, have not been effective. One of the legal means which can be used to alleviate a problem in the community is the issuance of what is called a "penal precept." The basic definition of a precept is as follows: "An individual precept is a decree directly and legitimately enjoining a determined person or persons to do or to omit something, especially concerning the urging of the observance of a law" (c. 49).

A precept is only issued after the facts have been gathered and necessary information about the case obtained. A penal precept can be issued by a diocesan bishop in a particular case.

Basically a penal precept is an order given to an individual (or a community) to do something or cease doing something under threat of imposition of a formal penalty. The CLSA Commentary on the Code gives this illustration: "For example, a bishop might threaten a priest with suspension if he does not attend continuing education sessions or if he does not withdraw from certain partisan political activities." A penal precept takes into account the individual circumstances of a given case and the order or injunction is directly related to those particular circumstances. Whereas a formal penalty arises when a serious offense has been committed and proven and a penal process completed, a precept is

issued in order to avoid further harm to the community through possible commission of a serious offense. It is the prerogative of the bishop to determine under what circumstances a penal precept is to be issued and the manner of observance of the precept.

#### C. Imposition of Penalties through the Penal Process:

In the Church's legal system there is provision for the issuance or application of penalties in order to protect the community and its values. When an individual does something which adversely affects the community he or she may be punished by means of penal discipline. Penal law is probably the most complex and carefully circumscribed section of canon law. It is not sufficient merely to look in the Code for lists of offenses which can be punished and their accompanying penalties. The general principles of culpability, imputability, etc. must be taken into account in each instance. Some penalties are automatically incurred (*latae sententiae*) by the mere commission of the offense. Others are imposed or declared (*ferendae sententiae*) by means of a formal process.

The formal penal process is set forth in canons 1717-1731. The strict observance of the procedural norms is an absolute necessity and is related to the right to due process stated in canon 221, §3. Penalties cannot be imposed without canonical process. Unlike the 1917 code which allowed the bishop to impose a penalty of suspension on a priest with no warning and no process, based only on his "informed conscience," the 1983 code requires a process. The basic elements of the process include the priest's knowing of the accusations and being able to defend himself. The process is undertaken in three stages: the prior investigation, the formal process including the defense and the determination whether the facts warrant the imposition of a penalty, and the assessment of damages.

(cf, NCCB booklet on delicts and penal process for more details.)