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## **Function and application of the penalty in the Code of Canon Law\***

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**Summary: 1. Introduction. 2. Key concepts regarding the function of penalties. 3. Hermeneutical framework for understanding the function of penalties. 4. The 1967 Synod and the revision of the Code of Canon Law. 5. Application of penalties. 6. Understanding the legal structure. 6.1 Substantive matters. 6.2. Procedural matters 7. Restoration of justice as the fundamental goal. 8. Conclusion.**

### **1. Introduction**

The imposition or declaration of a penalty under the 1983 Code of Canon Law (hereinafter CIC or Latin Code) is one of the most significant expressions of the Church's power, and is therefore to be exercised with great care and pastoral attention. Legislators must, therefore, possess a sound understanding of both the function and application of the penalty, and how the two may be reconciled. However, the task of ensuring that the ultimate purposes of sanctions are reflected in their application requires both technical rigour and meta-legal knowledge. The purpose of this article is to decode the function and application of the penalty primarily through analysis of the principle of restorative justice, considering namely: the grounding of restorative justice in Book VI of the CIC, this principle's role in the function of the penalty, and the challenges and synchronicities encountered in upholding this principle in the application of penalties. The following reflections are enlightened by the

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notion of *Justice* which emerges in Holy Scripture and coincides with the idea of *saving the relationship*, as is explicitly evident from the use of the term *tsedāqāh* in the Old Testament<sup>1</sup>.

First, we will consider the most relevant normative text of the law for this analysis: canon 1341. This canon directly addresses not only the function but also the application of punishment in the Code of Canon Law. Its provisions must be read in light of the normal criteria for interpretation found in canon 17: “*the proper meaning of the words*”, considered in “*their text and context*”, referring to “*parallel places*”, “*the purpose and circumstances of the law*” and the “*mind of the legislator.*” The expressions used in canon 1341 are explicit in their attribution of the triple function of sanctions, which is that: “*the scandal be sufficiently repaired, justice restored and the offender reformed.*” The most generic composition of the same canon presents two methods of application for these functions, be it in the case of the infliction or declaration of sanctions: “*a judicial or an administrative procedure.*”

In our case, recourse to the hermeneutical criteria not only represents the principal mission of the jurist and the canonist<sup>2</sup>, but also aligns with the two motives derived from canon 1341. The first motive inherent to the function of penalties is to ensure that the restoration of justice is of primary consideration in the course of punishment<sup>3</sup>. The restoration of justice must not be separated from the two functions: the defence of the social order (repair of scandal) and the re-education of the faithful (reformation of the offender)—the former of which should also demonstrate the latter. The second motive, which is pertinent to the application of punishment, is to deepen the basis upon which to justify the choice of either the judicial or extrajudicial procedures. There is a further condition put in place by law stipulating that the application of sanctions may occur only after it is ascertained that it is insufficient to punish delicts “*by fraternal correction or reproof, nor by any methods of pastoral care.*” This is relevant not only to the application of a sanction but also to its function.

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<sup>1</sup> See E. Wiesnet, *Pena e retribuzione: la riconciliazione tradita* (translation by L. Eusebi), Milano 1987, p. 1.

<sup>2</sup> See P. Grossi, *L'Europa del diritto*, Roma-Bari 2007, pp. 254-255.

<sup>3</sup> See M. Riondino, *Justiça reparativa e sanções na Igreja: uma visão jurídica*, in *Scientia Canonica* 1 (2018), pp. 219-236.

Momentarily we will put aside the criteria to consider parallel places, which we will be revisiting with great utility after having first analysed the norms of the Code of Canons of Eastern Churches (hereinafter CCEO or Eastern Code), promulgated in 1990. This is the most evident parallel place<sup>4</sup> (though not the only one) to refer to when interpreting the norms of the CIC, particularly because the peculiarity of the Eastern Churches, in their dealing with posterior law, provides a subsidiary interpretative criteria potentially capable of addressing the imperfections raised after the promulgation of the CIC<sup>5</sup>.

We will turn our attention to the context, to which other interpretative devices are connected. The triple function of punishment, just like the dual manner of the application, cannot be fully comprehended without having in mind other norms of the same Book VI of the CIC, which is the immediate legislative context. The Vatican II Council—an event which, as we know, transformed the entire way to think and to act within the Church<sup>6</sup>—produced a particular doctrine on sanctions, which is clearly referred to in the apostolic constitution *Sacrae Disciplina Leges*, by which John Paul II promulgated the Code in 1983. This doctrine is contextually relevant to our purposes, containing crucial guidance which must be taken into consideration in the hermeneutical task before us<sup>7</sup>. The principles of the revision of the Latin Code, which some refer to as the penal law, emerged from the Conciliar renewal and render more concrete

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<sup>4</sup> For more details, see J. Abbass, *Le Code oriental: une ressource pour la révision du Code latin*, in *Studia Canonica* 44 (2010), pp. 369-397; Th. J. Green, *Penal Law in the Code of Canon Law and in the Code of Canons of the Eastern Churches: Some Comparative Reflections*, in *Studia Canonica* 28 (1994), pp. 407-451; see also I. Žužek, *Understanding the Eastern Code*, Roma 1997, pp. 224-238; Id., *Un codice per una "varietas ecclesiarum"*, in S. Gherro (a cura di), *Studi sul "Codex canonum Ecclesiarum orientalium"*, Padova 1994, pp. 3-31.

<sup>5</sup> See P. Gherri, *Canonistica, Codificazione e Metodo*, Città del Vaticano 2007, p. 415.

<sup>6</sup> See S. Dianich, *Diritto e Teologia*, Bologna 2015, pp. 7-18.

<sup>7</sup> Joannes Paulus II, const. ap. *Sacrae Disciplinae Leges*, 25.1.1983, in AAS 75 (1983-II), pp. VII-XIV. Such a conciliar context cannot be set aside if note is taken of the fact that it is the first time in history that an ecumenical council put aside the technique of "canones" to express its proper dispositions, which is set as the basis of a global reform of the entire previous legislation. It is also important to think of the "canones" of the Council of Trent, as well as successive decrees of actualisation, which were simply juxtaposed with the already existent *Corpus Iuris Cononici*.

the objectives and the circumstances of the law<sup>8</sup>. From the entire works of the revision, it is apparent that the consideration of the *mens legislatoris* (i.e. “mind of the legislator”) is the foundation of the legislative choices, without any type of prejudice to the value of the perennial intention of the canonical legislator in subjects relating to sanctions<sup>9</sup>.

## **2. Key concepts regarding the function of penalties**

In order to avoid excessively fragmenting the exposition of interpretative problems, we will distinguish only between the hermeneutical criteria of the legislative context and that which the significance of canon 1341 presents regarding the function of the sanction.

With this in mind, we now turn our attention to some principles regarding establishing and understanding the legislative context. With respect to the function of punishment, the interpretation of the objective to restore justice is rendered more complex by recourse to other dispositions towards Book VI of the CIC which throw shadow on the eventual prevalence of the socio-communitarian purpose of reforming a person. The norms that our analysis will retain as more significant, by order of importance, are the following canons: 1399; 1312; 1331, §1, n. 2; and 1332. Canon 1399 is the most prominent of the aforementioned canons because it is the last of the canons on the norms on sanctions and, in a certain

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<sup>8</sup> The Principles were elaborated and amplified by a commission, established on 28 March 1963, before the end of the Vatican II Council. After the update of this commission, and at the conclusion of the Council, a general consultation was held with bishops' conferences, after which the council declared the *Principia*, which was then presented and approved in the 1967 Synod. See G. Feliciani, *Le basi del diritto canonico*, 3<sup>rd</sup> edn., Bologna 2002, p. 22; for further details, see also P. Huizing, *Reflections on the System of Canon Law*, in *The Jurist* 42 (1982), pp. 239-276.

<sup>9</sup> See J. A. Renken, *The Penal Law of the Roman Catholic Church*, Ottawa 2015, pp. 18-23; M. Ventura, *Pena e penitenza nel diritto canonico postconciliare*, Napoli 1996, pp. 11-21; Th. J. Green, *Penal law: a review of selected themes*, in *The Jurist* 50 (1990), pp. 221-256; Id., *Penal Law Revisited: The Revision of the Penal Law Schema*, in *Studia Canonica* 15 (1981), pp. 135-198; P. Ciprotti, *Elementi di novità nel diritto penale canonico vigente*, in *Monitor Ecclesiasticus* 114 (1989), pp. 17-28; F. G. Morrissey, *El Nuovo Codice, ¿Avance para la legislación de la Iglesia?*, in *Concilium* 205 (1986), pp. 355-368; F. Coccopalmerio, *Per una critica riscoperta del diritto penale della Chiesa*, in E. Cappellini (a cura di), *La legge per l'uomo. Una Chiesa al servizio*, Roma 1980, pp. 305-334.

sense, a potential interpretative criterium and determinant of all other dispositions. On the intention of punishment, the above-mentioned norm unites the sanction not only to the repair of scandal (already included in canon 1341) but also to the prevention of scandal, and to the special gravity of the violation of a divine or canonical law. It seems important to place the primary purpose of sanctions as: safeguarding the common good of the community with a punitive intervention before the materialisation of scandal. The prioritisation of such an objective over the reform of the offender must be met with caution and an emphasis on the recall to the objective gravity of the violation, and the serious but subjective determination of imputability. Such an arbitrary determination—taking into consideration the norm under examination, which pertains to the infliction of punishment for the violation of a divine or canonical law, not after the commission of a delict (in light of canon 1321, as a violation of a penal law or penal precept)—poses a serious threat to the validity of the principle of legality in the canonical penal law<sup>10</sup>.

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<sup>10</sup> In this resides one of the main differences between the penal system of the Latin Church and the greater part of State criminal systems. Without negating Plato's affirmation that law is placed above those who govern (according to his notorious collection, *Le Leggi*, no. 6b), it is commonly held that the *principle of legality* finds its origin in the *Social Contract* by J. J. Rousseau, and that its main purpose is tentative—per the Enlightenment ideology—in order to eliminate possible abuses of an absolute state, and subjugate States to the law. German criminologist von Feuerbach is widely recognised as having formulated the *principle of legality* in its modern form, known as “*nulla poena sine lege*,” which is considered indispensable to the juridical heritage of the liberal state. In the Italian legal system, for example, the *principle of legality* is established in article 25, §2, of the Constitutional Charter and also in article 1 of the Criminal Code, in which it is stated respectively: “*Nessuno può essere punito se non in forza di una legge che sia entrata in vigore prima del fatto commesso*” and that which pertains to the penal norm: “*Nessuno può essere punito per un fatto che non sia espressamente preveduto come reato dalla legge, né con pena che non siano da essa stabilite*.” The *principle of legality*, as we know, is also one of the most important pillars for every juridical system, according to article 8 of the Declaration of the Rights of Man and of the Citizen, promulgated in 1789, where it states: “*La loi ne doit établir que des peines strictement et évidemment nécessaires, et nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit, et légalement appliquée*.” According to the French philosopher, Montesquieu, the *principle of legality* was already considered a guarantee of citizens' freedom within a society (see *De L'Esprit des Loix*, Genève 1748). For further details, particularly on the implementation of the *principle of legality* from the *Magna Charta Libertatum* throughout the centuries, see J. Hall, *Nulla poena sine lege*, in *The Yale Law Journal*

Canon 1312 establishes kinds of penalties as derived from the relative criterium of their principal objective, distinguishing between medicinal or censures and expiatory penalties. By so doing, it seems that the three-fold purpose of penalties (according to canon 1341) have been elevated to be understood as a constitutive and unique objective, to which it is integral that every sanction corresponds, relative to the application and remission of penalties. The purpose of medicinal penalties is, effectively, to reform the offender. Ultimately, the goal of these penalties is to cause the offender to desist from the contumacy—not only as a condition to allow the remission of medicinal penalties, but also as a condition which impedes the denial of such a remission, as established in canon 1358 §1—particularly so as to abrogate the risk that the contumacy poses to others, and thus pursue the objective of safeguarding the common good. Conversely, expiatory penalties aim to repair the scandal, and can be perpetual, with the risk that they can be inflicted on the offender even if

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47 (1937), pp. 165-193. For more details on the *principle of legality* in the Italian juridical system, see G. Fiandaca – E. Musco, *Diritto penale. Parte generale*, 8<sup>th</sup> edn., Bologna 2019, pp. 47-50. On the other hand, in the legal system of the Latin Church, there is an acceptance of the principle of indeterminateness, be it of the delict (canon 1399) or above all of the punishment, as demonstrated by the frequent recourse to the legislative expression “*just penalty*”, which is present also in the CCEO. Therefore, it is not only the law which establishes the violation and punishment; on the contrary, there is great discretionary faculty given to the Superior and the judge to be applied in a *fair and just* manner. For more details, see G. Di Mattia, *Il principio di legalità nel processo penale canonico*, in AA.VV., *Il diritto della Chiesa. Interpretazione e prassi*, Città del Vaticano 1996, pp. 171-195. For the goal of this study it is not necessary to linger further on the problem pertaining to the *principle of legality*, see also R. E. Jenkins, *Nullum crimen, nulla poena sine lege: tre principle of legality in modern canonical theory and practise*, in R. J. Kaslyn (ed.), *Essays in honor of Sister Rose McDermott. Institutiones Iuris Ecclesiae I*, Washington DC 2010, pp. 368-394; G. Dalla Torre, *Qualche considerazione sul principio di legalità nel diritto penale canonico*, in *Angelicum* 8 (2008), pp. 267-287; F. E. Adami, *Il diritto penale canonico e il principio “nullum crimen, nulla poena sine lege”*, in *Ephemerides Iuris Canonici* 45 (1989), pp. 137-172. For an historical approach, according to the canon law tradition, see O. Giacchi, *Precedenti canonistici del principio “nullum crimen sine praevia lege poenali” e il diritto penale canonico*, in AA. VV., *Studi in onore di Francesco Scaduto*, vol. I, Firenze 1936, pp. 433-449. Regarding the dispute surrounding canon 2222’s problematic nature in juridical system of the Church, considerations, which remain relevant, were put forward by: G. Feliciani, *L’analogia nell’ordinamento canonico*, Milano 1968, p. 167; L. Scavo Lombardo, *Il principio “nullum crimen sine praevia lege poenali” nel diritto penale canonico e la norma del can. 2222 par. 1 del c.i.c.*, in *Annali del seminario giuridico dell’Università de Catania*, vol. I, Napoli 1947, p. 5.

he/she has repented of the delict<sup>11</sup>. The difficulty of uniting these two aims poses the question: must the objective to restore justice, from which is derived a specific typology of sanction, be considered the unifying element between the reparation of the scandal and the reformation of the offender<sup>12</sup>?

In effect, canons 1331, §1-2 and 1332 both establish that those Christian faithful whom have been inflicted with excommunication or interdict cannot receive the sacraments, among which is the sacrament of reconciliation, the maximum expression of forgiveness after a sincere repentance<sup>13</sup>. Being delicts which are attached to *latae sententiae* censures, the prohibition of receipt of the sacraments applies also in cases in which the censures have not been declared and the purpose of the conversion or reform appears to be compromised, if the sacrament of reconciliation is included among the spiritual goods denied to the offender. The norms being examined are subject to criticism for the possible confusion which they create between *internal* and the *external forum*<sup>14</sup>.

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<sup>11</sup> The principal objective of *expiatory penalties* consists, as we know, of the repair of scandal, besides their perpetual nature, from the content of each, according to the list provided in canon 1336. In contrast to what is said about medicinal penalties, there isn't a specific norm on the remission of an expiatory penalty with respect to the promise or effect to reform of the offender. The impact of such a circumstance is therefore reduced only to the sphere of the application of the sanction, the conversion of the offender (canon 1341) being one of the elements to evaluate before the application, taking into consideration that only the penalties in canon 1336, §1, n. 3 can be declared *latae sententiae*, therefore, susceptible not to be declared in the external forum in the cases in which the delict committed is to be punished *ipso iure* (the universal law contemplates the unique case in which expiatory penalty can be declared *latae sententiae*: the automatic deprivation of the faculty to ordain for a year of a bishop who ordains without the required dimissorial letters, canon 1383). For more details, see E. Baura, *L'attività sanzionatoria della Chiesa: note sull'operatività della finalità della pena*, in *Ephemerides Iuris Canonici* 59 (2019), pp. 609-627.

<sup>12</sup> See A. Borrás, *Les sanctions dans l'Église*, Paris 1990, pp. 87-95.

<sup>13</sup> See R. Botta, *La norma penale*, Bologna 2001, pp. 77-85.

<sup>14</sup> The scope of penalties upon *excommunication* and *interdict* constituted one of the major focuses of discussion during the revision of the Latin Code. For further details, see D. Cito – V. De Paolis, *Le sanzioni nella Chiesa. Commento al Codice di Diritto Canonico – Libro VI*, Roma 2008, pp. 51-52. A mitigation derived from canon 1357, which allows the confessor to remit in the internal forum, if it is difficult for the penitent to remain in the situation of grave sin till its remission in the external forum, to be carried out in one month (except in case of relapse) to the penitent, by confessor presenting the recourse without indicating the name of the offender. See also A. Borrás,

### ***3. Hermeneutical framework for understanding the function of penalties***

Having demonstrated the recourse to the norms, which must primarily elicit references to the purpose of penalties according to canon 1341, while facilitating an interpretation which renders it more complex than a simple reading of this canon, we now turn to further elements of the hermeneutical framework in order to shed more light on the problems evidenced thus far. These problems pertain to: the content of the function of the restoration of justice; the nature of the reconciliation of such a function with every type of penalty; the prevalence of the communitarian objective; the preventive function of sanctions; and the significance of the conversion of the offender<sup>15</sup>.

The remaining aspects of the hermeneutical framework appear to be linked in great measure to the context of the Vatican Council II<sup>16</sup>. In light of the principal contributions of successive doctrines to those of the Council, we will first identify the fundamental essence of the reforms, particularly those reforms which pertain to the function of canonical sanctions, and then refer to the subsequent legislative decisions, without omitting the contributions of classical doctrine<sup>17</sup>. Our objective is to outline the extent to which the recourse to compulsory interpretative criteria resolves the difficulties emerging from the analysis of canon 1341. As we know, the fundamental purpose of the reforms derived from the Vatican II is the elimination of any doubt about the prevalently medicinal character of canonical penalties. Indeed, such an interpretative key is widely accepted, though not without ambiguity (which will be seen). In the triple function of canon 1341, the reform of the offender is affirmed as the principal function of sanctions. In further support of this notion is the Vatican II Council's recall of three primary needs: to promote the fact that the salvific finality of every Christian faithful is the ultimate goal of the

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*L'excommunication dans le nouveau code de droit canonique*, Paris 1987, pp. 217-270; J. A. Renken, *The Penal Law*, cit., pp. 43-37.

<sup>15</sup> See M. Riondino, *Giustizia riparativa e mediazione nel diritto penale canonico*, 2<sup>nd</sup> edn., Città del Vaticano 2012, pp. 18-32.

<sup>16</sup> For a theological overview, see K. Rahner, *La disciplina della Chiesa*, in AA. VV., *Funzioni della Chiesa*, Roma – Brescia 1971, pp. 179-192.

<sup>17</sup> For more details, see P. Erdö, *Il peccato e il delitto*, Milano 2014, pp. 75-86.



legal system (canon 1752); to ensure that the pastoral nature of the juridical system of the Church is considered as the ultimate purpose in every sector; and finally, to organise in such a way that sanctions be considered only as *extrema ratio* (i.e. a last resort).

The promotion of *salus animarum* (i.e. the salvation of souls) of every Christian faithful indicates the centrality of the person in the canonical legal system. The ultimate goal of the Church and her legal system is that all the *christifideles*, and in general, all people of goodwill, may reach the destiny to which God has called them. For this reason, Canon Law (and the procedural measures put in place), though concerning the safeguarding of the social order, must be particularly sensible to the value of the human person and also cautious of the specific exigencies of every single offender<sup>18</sup>. This personal perspective, strictly understood, does not pose any threat to the identity of the Church, to whose defence it contributes as well as the defence of the penal system. The theoretical harmony between both instances does not hinder the renewed conscience on *personalism*, on the so called “*conciliar spirit*,” which seemed to be a source of dispute regarding the penal canonical law<sup>19</sup>. The principal result of this dispute was the employment of three guiding aspirations with respect to the function of the penalty in the development of the CIC<sup>20</sup>, which attracted significantly varied degrees of support and acceptance:

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<sup>18</sup> See G. Feliciani, *Le basi*, cit., p. 123; C. Cardia, *La Chiesa tra storia e diritto*, Torino 2010, pp. 311-319; G. Di Mattia, *Il diritto penale a misura d'uomo*, in *Apollinaris* 64 (1991), pp. 747-770; Id., *Pena e azione pastorale nel diritto penale della Chiesa*, in *Monitor Ecclesiasticus* 124 (1989), pp. 41 ff.; M. E. Alberti Casellati, *Sulla “salus animarum” come fine della norma giuridica*, in AA. VV., *Atti del III Congresso Internazionale di diritto canonico*, Pamplona 1979, pp. 683-700.

<sup>19</sup> The dispute has origins in the early 20th century, when the widely-recognised scholar Arturo Carlo Jemolo proposed that the idea of a penal system in the Church is not easy for all to reconcile with their understanding of the spirit of the Church. For further details, see A. C. Jemolo, *Peculiarità del diritto penale ecclesiastico*, in AA. VV., *Studi in onore di Federico Cammeo*, vol. I, Padova 1933, p. 724. The importance is founded on serious motivations, contrary to the superficial criticism of some authors and their proposal of suppression, raised after the Vatican II Council, among which are K. Walf, *Disciplina ecclesiastica e vita della Chiesa oggi*, in *Concilium* 11 (1975), pp. 61-75. After the CIC entered into force, some authors rightly lamented that the section of the penal law of the Church's legal system is less studied, yet more disputed. See, once again, A. Borrás, *Les sanctions dans*, cit., p. 9.

<sup>20</sup> See J. A. Coriden, *The Rights of Catholics in the Church*, Mahwah 2007, pp. 7-8.

the elimination of vindictive punishments<sup>21</sup>; an increase in depenalisation of some crimes<sup>22</sup>; the limitation of the function of the penalty to a kind of deviance from the values of the community, attributed to the person as his/her utmost end<sup>23</sup>.

The desire to ensure that the juridical dispositions are of a pastoral nature has been a source of innumerable misunderstandings in the years following the Council, which demonstrated the necessity to undertake soberly the continuity, and at the same time the discontinuity, between the main tenets of law and the positive law<sup>24</sup>. It is also critical to deepen education about lawfulness through a perspective of Justice which is permeated by Charity<sup>25</sup>, particularly a spirit of Charity which is congruent with the suppression of every kind of injustice<sup>26</sup>. The Magisterium has often recalled the need to have a balance between the law and the pastoral means<sup>27</sup>. In the penal sector, the affirmation of this pastoral nature, aside

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<sup>21</sup> Regarding the request which emerged in the 1967 Synod for the abolition of *poene vindicative*, from canon 2216 of the 1917 Code, see G. Concetti, *Bilancio e documenti del sinodo dei vescovi*, Milano 1968, pp. 342 ff.; O. Cassola, *Specimen partis primae Libri V CIC reformatae proponitur*, in *Apollinaris* 40 (1967), pp. 457-479. Some authors (see the first critique by Jemolo, in footnote 19) expressed in this sense prior to the Council, indicating other ideas of reflection for the reform of the 1917 Code; in this regard, see R. Castillo Lara, *Algunas reflexiones sobre la future reforma del libro V del C.J.C.*, in *Salesianum* 25 (1961), pp. 317-330.

<sup>22</sup> See G. Di Mattia, *La normativa di diritto penale nel Codex Iuris Canonici e nel Codex Canonum Ecclesiarum Orientalium*, in R. Coppola (a cura di), *Incontro fra canonici d'Oriente e d'Occidente*, Bari 1994, p. 523, where the author defined canon 1341 as *the gem of the penal law* of the entire juridical system of the Church.

<sup>23</sup> The doctrines which are expressed in such sense are varied and diverse, and have found a low degree of acceptance in the dispositions of the CIC, although, they meet in the difficulty to tackle with the adequate techniques between the internal and external fora, more lucidly in the CCEO; significant contributions of P. Huizing, *Problemas de derecho canónico penal*, in *Ius canonicum* 8 (1968), pp. 203-214; worthwhile noting is also L. Gerosa, *La scomunica è una pena?*, Friburgo 1984, *passim*.

<sup>24</sup> See M. Ventura, *Peine, conflit, et médiation*, in *Folia canonica* 7 (2004), pp. 225-237.

<sup>25</sup> About the principal misunderstanding in the recall of the pastoral principle, see E. Baura, *Pastorale e diritto nella Chiesa*, in Pontificio Consiglio per i Testi Legislativi (a cura di), *Vent'anni di esperienza canonica (1983-2003)*, Città del Vaticano 2003, pp. 161-180.

<sup>26</sup> See A. G. Cicognani, *Canon Law* (translation by J. M. O'Hara – F. J. Brennan), 2<sup>nd</sup> edn., Westminster 1949, p. 54.

<sup>27</sup> In the era of so-called “anti-legalism”, indication was made to the addresses of the Pontiffs to the Roman Rota of 1969, 1970, 1971 and 1979; and even after the two post-conciliar Codes entered into force of (especially that of 1990), the popes rightly felt the need to emphasise an easy consultation. For a collection of these addresses, see G.

from the frequency of the repetition of this principle, was often devoid of appreciable contents<sup>28</sup> with respect to the function of the penalty. Emphasis was placed on two kinds of objectives: to subdue the technique to practical functionality<sup>29</sup>, and; trusting the instruments of flexibility proper to canon law<sup>30</sup>, especially *aequitas*<sup>31</sup>.

The urgency to establish suitable measures which ensure that recourse to penal sanctions is the last resort, can be expressed well by the commitment of the entire canonical legal system to the prevention of delicts or the avoidance of the infliction of penalties. This is evident in the provision of suitable alternatives to sanctions pertaining to the privation of goods<sup>32</sup>. It cannot be said that such a principle is a sign of weakness in the face of harm or damage caused to others or to the community. On the contrary, that penalties are considered as a last resort reflects the equilibrium of faith in the person (in the capacity to rethink his/her actions) and the intrinsic authority of the values of the canonical legal

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Erlebach (a cura di), *Le allocuzioni dei Sommi Pontefici alla Rota Romana (1939-2003)*, Città del Vaticano 2004.

<sup>28</sup> With some exceptions, among which are V. Del Giudice, *Nozione di diritto canonico*, Milano 1970, pp. 482-483; G. Di Mattia, *Riconciliazione e pastoraltà nel processo penale canonico*, in K. Ludicke – H. Mussinghoff – H. Schwendenwein (hrsg.), *Iustus Iudex*, Ludgerus – Verlag 1990, pp. 421-431.

<sup>29</sup> The entire system of the codification of the canonical penal law is characterized with respect to the previous one by a clear tendency towards simplification and synthesis, in line with eminent pastoral nature found in Book V of the CIC. See L. Musselli – M. Vismara Missiroli, *Il processo di codificazione di diritto penale canonico*, Padova 1983, pp. 112 ff.

<sup>30</sup> See P. Fedele, *Lo spirito del diritto canonico*, Padova 1962, p. 245.

<sup>31</sup> See F. J. Uruttia, *Aequitas canonica*, in *Periodica* 73 (1984), pp. 267-292 ff.; see also R. Coppola, *Epikēia et aequitas canonica: sources materiales de l'ordre juridique canonique*, in *Studia Canonica* 33 (1999), pp. 113-124; P. Erdö, "Aequitas" im geltenden Kirchenrecht, in *Folia Canonica* 2 (1991), pp. 109-118. As we shall see later, recall to a flexible application poses the risk of reducing the implementation of sanctions for only pastoral and salvific purposes, without substantial recognition of the theory of canonical sanctions. This seems to be a reflection of a conceptualisation of Canon Law as *rigid and unchangeable in its basic principles*, by virtue of having been instituted by Christ himself, while conversely endowed with great flexibility, allowing for sensitivity to diverse circumstances and needs. This idea is put forward by P. A. D'Avack, *Trattato di diritto canonico*, Milano 1980, pp. 143-144. For an analysis of the development of the idea of *equity*, particularly in the English heritage and in the Common Law system, see F. W. Maitland, *The development of equity*, in J. Hannold (ed.), *The life of law*, London 1964, pp. 30-37.

<sup>32</sup> See W. H. Woestman, *Ecclesiastical Sanctions and the Penal Process*, 2<sup>nd</sup> edn., Ottawa 2003, pp. 8-11.

system (the offenders' free assent to the legal system cannot be reduced or taken lightly). Though rich in effect, with respect to the previous measures of the application of penalties, the principle of their *extrema ratio* nature did not give rise to useful theoretical contributions about the function of penalties in itself<sup>33</sup>.

#### **4. The 1967 Synod and the revision of the Code of Canon Law**

A more authoritative interpretative framework may be elicited from the principles of the revision of the Code of Canon Law—approved by the Synod of 1967—which are drawn from the conciliar context and render adequate witness to the goal and circumstances of the law. The ninth principle pertains to the exigency to completely renew the penal law. Pertaining to the renewal of the entire legal system are these principles: with regard to penal law, the necessity to avoid conflict between *internal* and *external forum* (second principle<sup>34</sup>); the guarantee in the defence of rights consonant to the actual cultural sensibility (sixth and seventh principles); and the pastoral principles which must animate the laws (third principle); and with great concretion, the need to have in mind the

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<sup>33</sup> The Magisterium of Paul VI (which will be discussed at length in section 7, and also shall be the background of the greater part of theoretical proposition on the restorative function of penalties and mediation), expressed at the era of the revision, is enlightening about the implications that the nature of *last resort* can derive about the function of penalties. In synthesis, the function of *restorative justice* is made up of the good of the person and the identity of the Church (see Paolo VI, *Discorso al Tribunale della S.R.R.*, 29.1.1970, in G. Erlebach (a cura di), *Le allocuzioni*, cit., p. 116). Pertaining to the doctrine of the authors, though not linked only to the nature of the penalty as a last resort (but to sanctions in general), we do not believe that it is useful to refer to the scarce contributions about the possible preventive function carried out to dissuade from the commission of delicts which, without special emphasis some recognise also in the canonical sanctions; for further details, see D. Cito – V. De Paolis, *Le sanzioni*, cit., pp. 64-70. Omitting also the doctrine on the suppression of the coercive of penal law, because in the technical sense, to suppress implies not to contemplate, even as *extrema ratio*, the existence of the penalty. In this regard, see P. Huizing, *Delitto e castigo nella Chiesa*, in *Concilium* 28 (1967), pp. 306-307. Affirming the penalty as *extrema ratio*, the authors limited themselves to indicate the norms which, in the applicative phase, must be held present to arrive even to the avoidance of the sanction, to exhaust the reflection in general by resorting to mercy and the supernatural goal of the Church, or re-emphasising the function of the reform or conversion of the offender, which the authority must consider more useful to other means, see Z. Grochowski, *Ius canonicum et Caritas*, in *Periodica* 83 (1994), pp. 9-17.

<sup>34</sup> In this regard, see M. Ventura, *Pena e penitenza nel diritto*, cit., pp. 14-21 and 31-35.

virtues of justice, charity, temperance, humaneness and moderation with which *aequitas* is applied, not only in the application of the laws on the part of pastors, but also in the same legislation<sup>35</sup>. For this reason, the need arises to minimise elaboration on rigid norms, but rather to have recourse to exhortations and suggestions where there is no necessity to rigorously maintain the law for the common good and ecclesiastical discipline in general<sup>36</sup>.

The Conciliar context and the principles demonstrated by the Council led to the revision of the Latin Code—the direction of which, with regard to penal matters, is evident in the *Praenotanda*, drafted by the group of experts in charge of the revision of the new Book VI. The topic which we are occupied with, and its direction, must affirm the need that punishment must never cause harm. Such a general orientation perhaps was not able to provide the essential elements required to fully comprehend the “*mens legislatoris*”, the hermeneutical criterium in which it is possible to penetrate sufficiently, by individuating the legislative choices achieved thus far, without entering into the details of the discussions. It is worthwhile to refer to the objectives of the revision: to reduce norms; clarify the effect of the application of subsidiarity (fifth principle of the revision of the Code) in the penal sector; to limit penalties, particularly the excommunication *latae sententiae*<sup>37</sup>; to suppress canons which are not in consonance to the exigency of moderation in the use of sanctions; and the effort to translate in adequate norms the pastoral spirit of mercy<sup>38</sup>, *aequitas* and charity<sup>39</sup>.

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<sup>35</sup> See R. Mazzola, *La pena latae sententiae nel diritto canonico*, Padova 2002, p. 18-38.

<sup>36</sup> See *Communicationes* 1 (1969), pp. 79-84. For further details, see P. Gismondi, *Il diritto della Chiesa dopo il Concilio*, Milano 1973, pp. 48 ff. Regarding the system of the guarantee of the defence of rights, which aligns with modern sensibilities, and the most notable concerns regarding the application of sanctions, which we will address later, see also P. Huizing, *Crime and punishment in the Church*, in *Concilium* 8 (1967), pp. 57-64.

<sup>37</sup> See A. Borrás, *L'excommunication dans le nouveau*, cit., pp. 271-305.

<sup>38</sup> See M. Riondino, *El paradigma de la Justicia Restaurativa: manifestacion de misericordia en el derecho penal de la Iglesia*, in *Vergentis* 10 (2020), forthcoming.

<sup>39</sup> The reduction of canons led to the passage from 220 of the 1917 Code to 89 in the CIC. Also, there were 50 instances of excommunication *latae sententiae* in the 1917 Code, whereas in the CIC there are only 7, among which five are reserved to the Holy See. The territorial interdict was suppressed, which was not in consonance with the culture of personal responsibility of the contemporary world, and also other penalties (removal, degradation, perpetual suspension) which were contrary to the dignity of the

The new circumstances of the Church, with respect to those in which the former Code was promulgated, leads us to conduct a comparison between the two Codes. Regarding the function of penalties, the more relevant choices in the CIC, in relation to the former Code, are represented by three significant eliminations and the maintenance of a norm questionable in compliance to the principles advocated for in the Vatican II renewal.

The first choice, worthy of note, is the option to reduce the number of canons which fall principally on the norms of general character. Although such an endeavour may appear to facilitate pastoral activity, this leads also to an undeniable technical impoverishment<sup>40</sup>. The technical notions must have been useful to combat greater foresight of the challenges elicited previously, in relation to the function of penalties<sup>41</sup>.

Even if it is included in the elimination of the general nature, particular consideration must be given to the suppression of canon 2214, §2 of the 1917 Code, which was a reproduction of a Tridentine canon. This Tridentine canon clearly emphasised the objective of reconciliation inherent in penalties—an objective which must be maintained owing to its alignment with the interpretation of the function of sanctions in the Church, and the overcoming of conflicting purposes of various sanctions<sup>42</sup>.

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human person and theology about the sacraments. The proposal to eliminate *latae sententiae* penalties entirely was not accepted, but it was affirmed that the “*mens legislatoris*” intended that these penalties be few and applied only in serious and rare cases; “*poenae generatim sint ferendae sententiae et in solo foro externo irrogentur et remittantur*”, as in *Communicationes* 1 (1969), pp. 84-85. The effort to reduce the penal insight to discipline was rejected; see *Communicationes* 16 (1984), p. 38. For more details, see also P. Barbero, *Tutela della comunione ecclesiale e sanzioni canoniche*, Lugano 2011, pp. 20-34.

<sup>40</sup> See M. Riordino, *Giustizia riparativa*, cit., pp. 23-24.

<sup>41</sup> The general part of the penal law of the 1917 Code was the work, in greater part, of the German consultor J. Hollweck, who worked under “*the influence of a combination of the canonical tradition and German dogmatic criminality of his time*”; for more details, see L. Musselli – M. Vismara Missiroli, *Il processo di codificazione*, cit., pp. 112 ff.

<sup>42</sup> The admonition of the Council of Trent (Sess. XIII, Decr. De Reformatione, cap. I) cites: “*Meminerint Episcopi aliique Ordinari se pastores non percussores esse, atque ita praeesse sibi subditis oportere, ut non in eis dominantur; sed alios tanquam filios et fratres diligant elaborentque ut hortando et monendo ab illeciti deterreant, ne ubi deliquerint, debitis eos poenis coercere cogantur; quos tamen si quid per humanam fragilitatem peccare contigerit, illa Apostoli est ab eis servanda praeceptio ut illos*

The choice to eliminate the primary definition of a penalty—in canon 2215 of the 1917 Code—as well as definitions of each typology, is a clear indication of the desire to consider seriously the retributive element (punishment of delict) and negative aspect (privation of goods) of sanctions<sup>43</sup>. The commission in charge of the reform of Book VI removed many definitions from the former Code, in accordance with the core principle of the revision which affirmed that the provision of definitions is the role of expert interpretation and a function of subsequent recognised doctrine<sup>44</sup>. To limit the treatment of penalties only to the effects of each penalty does not allow for a full reflection of their significance, nor of the consequences of the limits of each sanction. There is a proof that derives from the question of the elimination of vindictive penalties, reduced almost totally to a nominal problem. This problem has little or naught to do with the possibility of assigning canonical penalties, also considered *extrema ratio*, which have a retributive function and an afflictive nature<sup>45</sup>.

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*arguant, obsecrant, increpent in omni bonitate et patientia, cum saepe plus erga corrigendos agat benevolentia quam austeritas, plus exortatio quam commination plus caritas quam potestas; sin autem ob delicti gravitatem virga opus erit, tunc cum mansuetudine rigor, cum Misericordia iudicium, cum lenitate severitas adhibenda est, ut sine asperitate disciplina, populis salutaris ac necessaria, conservetur et qui correcti fuerint, emendetur aut, si resipiscere noluerint, ceteri, salubri in eos animadversionis exemplo, a vitiis deterreantur”, in G. Alberigo (a cura di), Conciliorum Oecumenicorum Decreta, Bologna 1992, pp. 698-699.*

<sup>43</sup> See P. Ciprotti, *Qualche punto caratteristico della riforma del diritto penale canonico*, in AA. VV., *Studi in memoria di Mario Petroncelli*, Napoli 1989, pp. 127-141.

<sup>44</sup> The reason for the neglect of the definitions was indicated explicitly by the *coetus* as “*ad doctorum magis quam legislatoris pertinent officium*”, as in *Communicationes* 2 (1970), p. 101. The authors seemed to have sustained the good of the choice, arguing that the abandonment of the definitions corresponds with what is happening in most state penal laws, see G. Di Mattia, *Sostanza e forma del nuovo diritto penale canonico*, in AA. VV., *Utrumque Jus. Il nuovo Codice di Diritto Canonico*, Città del Vaticano 1983, pp. 416 ff.; F. E. Adami, *Continuità e variazioni di tematiche penalistiche nel nuovo Codex Juris Canonici*, in *Ephemerides Juris Canonici* 90 (1984), pp. 55 ff.; F. M. Morrissey, *Il nuovo Codice migliora la legge della Chiesa Cattolica*, in *Concilium* 22 (1986), pp. 60-70; for a more critical approach, see L. Musselli, *1917-1983. Per un raffronto tra le due codificazioni del diritto penale canonico*, in *Monitor Ecclesiasticus* 114 (1989) pp. 29-34.

<sup>45</sup> The same *coetus* reduced the problem to the negative resonance “*in vindictam rei*” which was usually attributed to the term “*poenae vindicativae*”, as if the law did not respect the reform of the offender in such a typology of the sanction. Therefore, the change in terminology, availing itself to the Augustinian concept of ‘expiation’: “*nomen poenarum vindicativarum mutatum perspicitur in ‘poenas expiatorias’, quae locutio ex Sancti Augustini De civitate Dei 21, 13 desumpta est.*”; see *Communicationes* 2

The majority of the authors agreed without significant objections, and clarified the various motives which should drive the application of sanctions: the specific coercive force of the canonical legal system<sup>46</sup>; the need to coordinate retribution and affliction with the salvific purpose of the entire Code<sup>47</sup>; the more decisive assertion of the prevalence of the corrective aims<sup>48</sup>, and; the capacity of the sanctions to arouse

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(1970/I), p. 101. In reality St. Augustine uses the term expiation without a penal connotation: “*Qui hoc opinatur, nullas poenas nisi purgatorias volunt esse post mortem, ut, quoniam terris superior sunt elementa sunt aqua, ignis ex aliquot istorum mundetur per expiatorias poenas, [...] Nos vero etiam in hac quidem mortali vita esse quasdam poenas purgatoria confitemur, non quibus affliguntur, quorum vita vel non inde fit melior vel potius inde fit peior, sed illis sunt purgatoriae quis eis coerciti corriguntur.*” (see *De civitate Dei*, 21, 13 in J. P. Migne (ed.), *Patrologia Latina* (PL), Paris 1844-1891, 41, 7, p. 727). For further explanation regarding the update of terminology, particularly the use of *expiation*, see J. Arias, *Sub canon 1312*, in *Codice de derecho canónico. Edición anotada*, Pamplona 1983, p. 792. Thus, the impression that the authors have reduced the change in terminology to pure nominalism: “*Si mutò [...] il nome di pena vindicativa in pena espiatoria, a togliere un senso deteriore di vendetta, ed evidenziare invece il significato di espiazione*”, as in V. De Paolis, *Aspetti teologici e giuridici nel sistema penale canonico*, in AA. VV., *Teologia e diritto canonico*, Città del Vaticano 1987, p. 184. It does not mean that the corrective function was left out, that may seem a little serious leaving it out in the definition of vindictive penalties, which the 1917 Code established as the principal element, in that their remission does not depend on conversion. About the nature and double finality of the penalties (to correct and punish who commits a delict) in the codification of 1917, see P. Ciprotti, *De correptione delinquentis*, in *Apollinaris* 8 (1935), pp. 445-446; O. Cassola, *Natura e divisione del delitto: osservazioni “de iure condendo”*, in *Apollinaris* 34 (1961), pp. 332-352; see also R. Metz, *Il diritto penale nel codice di diritto canonico del 1917*, in *Concilium* 7 (1975), pp. 49-60; J. Provost, *Revision of Book V of the Code of Canon Law*, in *Studia Canonica* 11 (1975), pp. 135-152.

<sup>46</sup> The coercibility of the canonical legal system is unique because it does not enlist physical coercion nor to the deprivation of the liberty of movement. The authors insist that it does not take away the penal nature, a compulsory measure in a sphere where Canon Law must be operating, that is to say, not only in the measure in which a faithful want to participate in the goods which the Church offer for his or her salvation, as deduced in a manner in which the commission for the revision asserted that must be understood as the legal grounds of the Code, being the first among the principles. For further details, see M. Ventura, *Pena e penitenza*, cit., p. 186 ff.

<sup>47</sup> For a different view pertaining to the salvific objective, see G. Urru, *Punire per salvare*, Roma 2001, *passim*.

<sup>48</sup> In certain cases, affirming the medicinal orientation, effort is made to orient towards the ensurement of the afflictive content of the penalty. In this regard, see F. Coccopalmerio, *Il diritto penale della Chiesa: riflessioni e proposte*, in AA. VV., *Problemi e prospettive di diritto canonico*, Brescia 1977, p. 267. In other cases, effort is made in the direction to demonstrate the weight of the corrective function in whatever case, though without negating the retributive and preventive functions, as in L. Gerosa,



internalisation of the values of the legal system<sup>49</sup>.

To conclude, notwithstanding the opposition to canon 2222, §1 of the 1917 Code<sup>50</sup>, in contrast with the principle of legality, the Latin codifiers decided to maintain the above-mentioned norm, considering it a necessary instrument of government to reach the ultimate goal of the ecclesiastical legal system. In reality the current canon 1399, with respect to the principle of legality, represents a certain depletion of the formula used in the equivalent norm in the 1917 Code, since it does not foresee the prior admonition of the offender, in an expressed manner; besides, the effect of the scandal is now not limited to the repair, but also to prevention. On the other hand, is the urgency of the intervention, which, absent in the prevision of the 1917 Code, is now established as the proper condition<sup>51</sup>. The maintenance of this prevision, though only an exception, has not earned the favour of the greater part of doctrine<sup>52</sup>, and in any case, risks the attribution of the support of the action of government as a function of penalties.

Notwithstanding the choices made during the development of the CIC,

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*voce Delitto e pena nel diritto canonico*, in *Digesto*, vol. IV, Torino 1989, p. 22. Among those who accept the existence of the penal law in the Church, rarely can they question the eventual typicality of canonical penal instruments, characterised more on the project of the good than of deprivation. On these facts see F. Marini, *È carità dare una pena canonica? Il male nell'esperienza giuridica*, in G. Canobbio (ed.), *Il male, la sofferenza, il peccato*, Brescia 2004, pp. 299-326.

<sup>49</sup> See E. Colagiovanni, *Devianza e istituzione ecclesiastica*, in *Monitor Ecclesiasticus* 114 (1989), pp. 105-112.

<sup>50</sup> For a detailed analysis of canon 2222, see I. Sole, *De Delictis et Poenis*, Romae 1920, pp. 60-72.

<sup>51</sup> According to certain authors, for example Pio Ciprotti, rather than the special gravity of the infringement (which must rather be presupposition common with delicts), that would justify the exceptional prevision of this canon is only the urgency to prevent or repair scandal. For further details, see P. Ciprotti, *Elementi di novità nel diritto penale canonico vigente*, in *Monitor Ecclesiasticus* 114 (1989), p. 26-28.

<sup>52</sup> With respect to the norm, negating that the principle of legality has its foundation from natural law, see V. De Paolis, *Le sanzioni*, cit., pp. 367-369; prudently, affirming the natural source of the principle of legality, but negating that this prevision leads to real risk with respect to the substantial law, see G. Dalla Torre, *Qualche considerazione*, cit., p. 275. Clearly opposite, is to maintain that the norm creates a distortion in the penal system, with great risk to give space to the referee, seeing the possibility to use penal precept as an instrument (capable to arrive at the same objectives within the sphere of the law); see J. Sanchis, *Sub canon 1399*, in A. Marzoa – J. Miras – R. Rodríguez-Ocaña (eds.), *Comentario exegético al Código de derecho canónico*, Pamplona 1996, pp. 597-598.

consideration was given in certain cases to questionable interpretations with regard to translations in technical and adequate choices. This was despite the fact that the Conciliar doctrine did not sufficiently resolve the hermeneutical problems of canon 1341 regarding the function of the sanction in the canonical juridical system. It must be recognised that these choices are in line with tradition and the perennial principle in the penal sector. Concerning this principle, the elaboration of useful concepts per the reflections of the science of Canon Law cannot be overlooked, as if it were licit to be content of the mere current positive formulae, or to start afresh the drafting of concepts which have a long and consolidated tradition. There is a recognised difficulty in this tradition concerning the coordination of various profound dimensions of the response of the legal system in the face of evil<sup>53</sup>, because strong recourse is made to New Testament<sup>54</sup>, Patristics<sup>55</sup>, Classical doctrine<sup>56</sup> and the teaching of the

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<sup>53</sup> See G. Michiels, *De vera natura poenae in specie ecclesiastica*, in *Apollinaris* 22 (1959), p. 234, where the author affirmed: “*Inter elementa peculiar ad redintegrationem ordinis juridici socialis laesi essentialiter necessaria, ideoque inter fines peculiare ad quos naturaliter ordinatur poena, primum locum indubitanter occupat retributio mali specifici per delictum qua tali injuste causati, satisfaction a delinquente societari reddenda pro malo eidem injuste illato, seu quod idem est, vindicta deordinationis socialis, qua socialis est et non mere moralis*”, adding that “*in quibuslibet poenis infligendis ab Ecclesia semper plus minusve directe intenditur duplex finis peculiaris cuiuslibet poenae essentialiter intrinsecus et proxime ad ordinis publici redintegrationem ordinatus, vindicativus scilicet seu retributivus et medicinalis, et hic quidem sub duplici aspectu, quatenus scilicet exemplari est seu generaliter praeventivus et quatenus est ipsius delinquentis emendativus*”.

<sup>54</sup> It is worth noting that among the Gospels are two seemingly opposed signs: Mt. 5:38-39 (NIV): “*You have heard that it was said, ‘Eye for eye, and tooth for tooth.’ But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also*”; and Mt. 18:15-18 (NIV): “*If your brother or sister sins, go and point out their fault, just between the two of you. If they listen to you, you have won them over. But if they will not listen, take one or two others along, so that ‘every matter may be established by the testimony of two or three witnesses.’ If they still refuse to listen, tell it to the church; and if they refuse to listen even to the church, treat them as you would a pagan or a tax collector. Truly I tell you, whatever you bind on earth will be bound in heaven, and whatever you loose on earth will be loosed in heaven.*” See A. Schenker, *Elements pour une theologie biblique de la peine*, in *Le Supplement* 151 (1984), pp. 89-106; M. Thieffry, *La justice doit-elle cesser de juger et de punir?*, in *Nouvelle Revue Théologique* 13 (1961), pp. 466-482. Among the Pauline texts, besides the warning to the Romans, “*Do not be overcome by evil, but overcome evil with good*” (Rom 12:21 NIV), we notice that the warning to the Corinthians appears quite different to that of I Cor 5:7-8 (NIV): “*Get rid of the old yeast, so that you may be a new unleavened batch—as you really are. For Christ, our Passover lamb, has been*

different Pontiffs<sup>57</sup>. All these instances, even if they do not agree to the absolute improvisation of the juridical theoretical study about the function of the sanction, they do not reject the possibility of subsequent developments, hiding behind the limit of the law, which is not insurmountable, even in case of Canon Law<sup>58</sup>.

### **5. Application of penalties**

Having already outlined the points which raise major concerns about the function of penalties, now we can point out certain critical questions about their application. Such a task reveals a point of contention in every

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*sacrificed. Therefore let us keep the Festival, not with the old bread leavened with malice and wickedness, but with the unleavened bread of sincerity and truth.*" Regarding the view of the Apostle Paul on the idea of Law and Justice in his teachings, see P. Ciprotti, *San Paolo e il diritto*, in *Studi Romani* 16 (1968), pp. 417-430.

<sup>55</sup> Regarding the complex thinking of St. Augustine and Gratian and certain dispositions of the decretals, where elements such as the importance of the corrective finality emerge, and also a model of the sanction, the lawfulness of retribution, made with love and the zeal of the justice is important as affirmed by G. Michiels, *De delictis et poenis. Commentarius libri V Codicis Juris Canonici: De Poenis in genere*, vol. II, Romae 1961, p. 33.

<sup>56</sup> Considering the doctrine of St. Thomas regarding the educational value of chastisement, for the single individual and collectivity (see *Summa Theologiae*, I-II 105, 3 ad 1; II-III 43, 7 ad 1), but also concerning the idea that the sanctions inflicted and voluntarily accepted should be considered ad medicinal rather than retributive (see *Summa Theologiae*, IIa-IIae, q. 66, 6 ad 2; IIa-IIae, 68, 1).

<sup>57</sup> It is good to recall the teaching of Pius XII about the theological foundation and the traditional flexibility of the penal canonical system: "*In Gratiani Decreto, ob ipsa varia, quae ibidem proferuntur, auctorum documenta, perquam solido inveniuntur consociate foedere theologia et ius canonicum: hoc nempe illic in profundum christianae revelationis agit radices, inde almos haurientes lattices, qui sunt temperantia, humanitas, asperitatis, remissio, caritas. Quibus virtutibus et temperamentis iam ab initio iuri canonico proprius inductus est color et, quasi sigillum cera impressum, applicata est aequitas christiana, quae brevi in aequitas canonicae formam transivit [...] Apud Gratianum catholica doctrina numquam hoc spoliatur temperamento, quo destrictum ius materna et ad miserandum propensa caritas lenit ac mitigat, temperamentum inquam, quo Romani Pontifices at Sancti Patres ecclesiastici iuris auctoritatem imbuerunt*", Pio XII, *Discorso al Tribunale della S.S.R.*, 22.4.1952, in *AAS* (1952), p. 376.

<sup>58</sup> In affirming such scope strictly proper to law, properly due to the absolute need to support technique adequate for penal law, astonish the insistence in reducing the recalls strictly canonical to the sphere of the application of sanctions, renouncing to consider them useful in the interpretation itself of the concept and the function of the sanction, see A. Marzoa, *Sub canon 1311*, cit., p. 251.

penal system, because it entails a concrete confrontation of the various subjects involved in the delict: the offender and the victim, who are protagonists, but also the authority liable for imposing sanctions. According to Canon Law, the inescapable exigencies inherent to the various personal dimensions of the offender must always be considered in determining the sanctioning measure<sup>59</sup>. The offender's exigencies prioritised above those of the victim and the ecclesial community, whose security can be found in canon 1341, which provides the foundational criterium for the ecclesiastical authority's initial decision-making process to determine whether to declare or inflict the sanction<sup>60</sup>.

What has just been said above can be considered a certain peculiarity of the penal canonical system, generally a point in opposition to Civil State systems, and in some ways exclusive to the Latin Church. The principal peculiarities of the Latin system include the lack of exactitude of the cases of offense because of the margin provided for the application of the principle of legality<sup>61</sup>, provided in canon 1399, and the automatic nature of certain sanctions – the penalty *latae sententiae* – which one incurs for the mere fact of the commission of the delict, according to canon 1314. Peculiarities within the penal canonical system include the non-obligatory nature of the penal action and the certainty of the sanction, be it in the substantial prevision or the outcome of the procedure, notwithstanding the fact that for some delicts the law establishes a mandatory penalty, determinate or indeterminate. It can be seen with clarity that the *extrema ratio* concept applied to penalties in the canonical legal system is given particular weight in decision-making processes, which is a concept present in many State legal systems, even if it is rarely attributed with the same level of gravity<sup>62</sup>.

In circumstances where there is a lack of certainty of the offense, we draw

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<sup>59</sup> See G. J. Woodall, *A Passion for Justice*, Leominster–Herefordshire, 2011, pp. 477-484; R. Torfs, *La retroactivite des peines canoniques*, in *Revue de droit canonique* 56 (2006), pp. 185-195; L. Gerosa, *Canon Law*, London-New York 2002, pp. 158-167; W. H. Woestman, *Ecclesiastical Sanctions*, cit., pp. 67-70.

<sup>60</sup> See J. A. Renken, *The Penal Law*, cit., pp. 141-145.

<sup>61</sup> See B. Serra, *Osservazioni sul principio di legalità come idea e come metodo nell'esperienza giuridica della Chiesa*, in *Stato, Chiese e pluralismo confessionale*. Rivista telematica ([www.statoeChiese.it](http://www.statoeChiese.it)), 28 (2012), pp. 1-19.

<sup>62</sup> In this regard, see M. Riondino, *Connessione tra pena canonica a pena statale*, in AA. VV. *Questioni attuali di diritto penale canonico*, Città del Vaticano 2012, pp.199-226.

from the provisions of canon 1399. The equilibrium between the various exigencies in play seem to disappear to the detriment of the rights of the offender, emphasising the needs of the community, inferred from the assessment of the “gravity” and the need for prevention and repair of the scandal. It is worth noting that a more acute analysis of this provision in fact compromises communal exigencies, with respect to the certainty of the legal system and the function of the safeguard provided by the same. The implementation of this safeguard function is paradoxical in that the time taken to ensure the proper establishment of an offence may result in the failure to provide a timely intervention, whereas the invocation of canon 1399 presents the possibility of excessive risk of the arbitrary imposition of sanctions<sup>63</sup>.

In the immediate imposition of sanctions, there is the insistence of the *latae sententiae* penalties, but only theoretically can it be said that the equilibrium between the exigencies of the offender and the community is compromised. This is not directly involved up to the declaration of the penalty, unless it is intended to affirm that the provision in itself of the *latae sententiae* penalties, for the severity of the mechanism concerning sanctions connected to it, be it the indirect safeguard of the community<sup>64</sup>. Before the declaration of the referred penalties which are principally aimed at the conversion of the offender<sup>65</sup>, an objective which can never be considered foreign to proper personal exigencies. The possibility to remit

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<sup>63</sup> Furthermore, canon 1399 is difficult to align with canon 221, which is considered the point of reference for the safeguard of the right of defence—also translated in most legal systems as the need of the certainty of the offense and rule of law. In the penal sphere in general, the specific provision is not strictly incompatible with the provision of canon 1399, despite the fact that the reasoning is redundant, and it is tautological to sustain that such a provision is inclusive in the law. See G. Di Mattia, *Pena e azione pastorale nel diritto penale della Chiesa*, in *Monitor Ecclesiasticus* 124 (1989), pp. 35-67; V. De Paolis – D. Cito, *Le sanzioni*, cit., pp. 209-213; R. Coppola, *Diritto penale e processo. Caratteri distintivi nel quadro delle peculiarità del processo canonico*, in Z. Suchecki (ed.), *Il processo penale canonico*, Città del Vaticano 2003, p. 46; M. Ventura, *Pena e penitenza*, cit., p. 27; C. Papale, *Il processo penale canonico*, Roma 2012, pp. 160 ff.; R. Botta, *La norma penale*, cit., pp. 25-34.

<sup>64</sup> See A. Bettetini, *Responsabilità personale e responsabilità collettiva nel diritto penale canonico*, in *Diritto e Religioni* 2 (2016), pp. 342-353.

<sup>65</sup> Such a principal objective, after the declaration, cannot perhaps be said to be exclusive; only in this sense can there be an agreement with the affirmation by which the difference with the *ferendae sententiae* penalties regards only the modality of the application and not so much to their nature. For further details, see J. Sanchis, *La legge penale e il processo penale*, Milano 1993, p. 97.

in the internal forum, before the declaration, is obedient besides, the eventual severity which can represent for the faithful who remains hit by the penalty (canon 1357).

The non-compulsory nature of the penal intervention reduces the community's options for pursuing answers in merit to: the culpability of the offender<sup>66</sup>; the latest motivations which led the offender to commit a crime; to the modality put in place to repair scandal, and; to the methods used to restore the social order infringed<sup>67</sup>. Such exigencies of the community can be considered safeguarded, though weakened, in the duty of the Ordinary to initiate the preliminary investigation, without perhaps the referred expectations of conveying information to the community, and, in case of not initiating the resulting process, guaranteeing the employment of different provisions from those which lead to the decision in itself. Thus, it demands a rigorous evaluation by the Ordinary in the meeting of apparently opposing expectations: the pursuit of the good of the *christifideles* and the protection of the entire community from scandal.

The lack of certainty of the penalty, due to its substantial prevision, derives from the indeterminateness of the same in the great number of delicts. In respect to the effectiveness of its application, and even when the Code of Canon Law provides some obligatory determinate sanctions, the canonical norm attributes to the judge the faculty of a kind application, be it the transfer of the penalty to a more opportune time, or the suspense of the penalty's obligatoriness. Such measures, clearly beneficial to the faithful, are not in conflict with the needs of the community, being the safe fulfilment of the latest condition put in place so that the judge or the authority responsible can make use of the measure referred to. The judge and the authority perhaps will have the same role, before referred to the Ordinary, to act with equiopoise.

In the stage of application of the penalty, recall is made to the condition put in place in the canonical system for the constitutive stage of penalties in the eyes of particular legislators. Such conditions are the foundation for the interpretation of the penalty as the last resort, so that in an analogy

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<sup>66</sup> See J. M. Serrano Ruiz, *Cuestiones actuales de derecho procesal penal canónico*, in *Anuario argentino de derecho canónico* 17 (2011), pp. 119-146.

<sup>67</sup> For some details, see M. J. Arroba Conde – M. Riondino, *Introduction to Canon Law*, Milano 2019, pp. 176-178.

with the provisions of canon 1317, the authors maintained that the penalties must be applied only if “*really necessary for the better maintenance of ecclesiastical discipline*”<sup>68</sup>.

In this sense, penal sanctions in the canonical legal system are never an end in themselves, but are rather a means to resort to only after the Ordinary has ascertained the failure or insufficiency of other means, referred to as “*pastoral solicitude*”. To attain the medicinal purpose (reform of the offender) and the expiatory purpose (repair of scandal and restoration of justice), the Ordinary is called upon to use other means, without the necessity of the penal means as *extrema ratio*, demands an elaborate, just and balanced judgment which attests to the insufficiency of the employment of other means mentioned in the law<sup>69</sup>. This affirms that the legal system of the Church places excessive trust in the ability of the Ordinary to choose which of the means to follow. However, such a trust is a reflection of the pastoral *munus* (duty) which is proper to Ordinaries in the mission of the Church<sup>70</sup>. The pastoral character of the penal canonical law can be confused with a sort of impunity of the delinquent and, in consequence, with a weak recognition of the legitimate interest of the community.

An Ordinary’s excessively gentle attitude can occur as a result of their lack of awareness regarding the available and appropriate procedures and assessments, or because of an underestimation of the gravity of the consequences of a delict. This has incurred the intervention of the Holy

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<sup>68</sup> The authors reduce the character of *extrema ratio* in the applicative stage to the fact that the choice to initiate the process is to be employed only if the authority has exhausted all the extra-penal modalities, especially that of the reform of the offender; see R. Botta, *La norma penale*, pp. 93-99. Indeed, several scholars consider the penalty as *extrema ratio* in secular juridical systems as well, which is evident in the ideas of K. Lüderssen, *Il declino del diritto penale* (a cura di L. Eusebi), Milano 2005, p. VIII.

<sup>69</sup> It must be underlined, moreover, that the CIC does not indicate which means are to be used, nor if they exist, amongst them, a hierarchical scale to be respected. The norm is limited, quite exclusively to the recourse of methods such as *fraterna correptione* or, more generically, the *correptio* which, as shown in canon 1399, §2, is counted among penal remedies. There is the possibility of recourse to many other instruments or pastoral methods such as *monitio*, *penitentiae*, penal precept; part of doctrine maintains the possibility to resort to vigilance, a case foreseen in canon 2311 of the 1917 Code; for more details, see A. Borrás, *Le sanctions dans*, cit., p. 106.

<sup>70</sup> See R. Botta, *La norma penale*, cit., p. 100; see also E. Corecco, *L’amministrazione della giustizia nel sistema canonico e in quello statale*, in AA. VV., *Amministrazione della giustizia e rapporti umani*, Rimini 1988, p. 136.

See, in an endeavour to make up for the fault and neglect incurred by the Ordinaries<sup>71</sup>.

It is also important, at this stage, to mention the m.p. *As a loving mother*, in which Pope Francis, on 4 June 2016, reaffirmed juridical and moral principles proper to the Magisterium and to canonical system. The Pontiff, after having recalled the love that the Church nurtures towards everyone, especially those who are smaller and vulnerable, crystallises some concepts which now assume a more precise legal meaning. As it is well known, the protection and care of *children and vulnerable persons* is the responsibility of every Christian faithful<sup>72</sup>; this commitment, however, is particularly fundamental for those who hold greater responsibilities within an ecclesial community. Indeed, in article no. 1 of the aforementioned m.p., *As a loving mother*, it is envisaged that a diocesan bishop can be legitimately removed when he has negligently committed serious injuries, be they to the detriment of a natural person or of the entire community<sup>73</sup>. For this to occur, however, it must be shown that the Ordinary has very seriously lacked the due diligence *demande*d by his *pastoral office*, although it is not required that this occurred following a *serious moral fault on his part*. The body delegated to undertake this procedure is the department of the Roman Curia that has competence in this matter. The *motu proprio* of Pope Bergoglio therefore intends to strengthen the criteria for the procedure to be followed in the event that there is a serious negligence committed by a Bishop; gravity may force him to be removed from office, a hypothesis that is also consistent with

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<sup>71</sup> In this regard, see Congregation for Bishops, *Directory for the pastoral ministry of Bishops: Apostolorum Successores*, approved by John Paul II on 24 January 2004, available at [http://www.vatican.va/roman\\_curia/congregations/cbishops/documents/rc\\_con\\_cbishops\\_doc\\_20040222\\_apostolorum-successores\\_en.html](http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20040222_apostolorum-successores_en.html). Particularly, focus attention on: no. 62, where the *Directory* outlines the *principle of justice and legality*; no. 63, regarding the power of every bishop in his Particular Church; and finally, nos. 67, 68 and 69, on the criteria for exercising the legislative, judicial and executive functions in his diocese.

<sup>72</sup> It is important to stress that the term “*vulnerable person*” is present in the m.p. *Vos Estis Lux Mundi*, promulgated by Pope Francis on 7 May 2019. For an analysis of this juridical document, see B. Daly, *Vos Estis Lux Mundi: New Procedures for Dealing with Complaints of Sexual Abuse*, in *The Canonist* 10 (2019), pp. 144-163; D. G. Astigueta, *Lectura de Vos estis lux mundi*, in *Scientia Canonica* 2 (2019), pp. 21-53.

<sup>73</sup> For further details, see L. Eusebi *Pena canonica e tutela del minore*, in AA. VV., *Il diritto canonico nella missione della Chiesa*, Città del Vaticano 2020, pp. 185-209.



what is contemplated in canon 193 of the CIC<sup>74</sup>.

The onus is on the Ordinaries to decide if to proceed or not, according to the presence of the required elements outlined in canon 1718, §1, as well as to determine whether to follow either a judicial or administrative process<sup>75</sup>. Since the application of *latae sententiae* penalties is automatic and coincides with the moment of the commission of the delict, the decision to initiate the process on the part of the Ordinary can fall within the judicial or extrajudicial process. The Bishop must act without any kind of prejudice to the fact that the sentence or the decree which concludes both processes<sup>76</sup> hypotheses of opposed signs unconvincingly advocated by some authors<sup>77</sup>.

The penal process does not have the primary goal to impose or declare a penalty; but rather to achieve the triple goal of the penalty itself. The *restoration of justice*, which encapsulates also the *repair* and the *compensation for damage*, is our ultimate objective and begs the question of which modalities are more congruous for arriving at this goal, which favours the good of the individual as well as the good of the community harmed by the delinquent behaviour of the offender.

Canon 1342, in leaving to the Ordinary the choice to impose or declare a penalty by extrajudicial decree<sup>78</sup>, demands that there be the existence of just cause, which is opposed to the use of the judicial process. This allows the entire canonical system to sustain an implicit preference for the

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<sup>74</sup> For a comparative analysis regarding the protection of the children and the vulnerable person in the Church and in the State, see M. Riondino, *Il superiore interesse del minore nell'ordinamento della Chiesa e degli stati*, in *Commentarium pro Religiosis* 100 (2019) pp. 271-295.

<sup>75</sup> See D. G. Astigueta, *L'investigazione previa*, in A. D'Auria – C. Papale (a cura di), *I delitti riservati alla Congregazione per la Dottrina della Fede*, Città del Vaticano 2014, pp. 79-108; L. Graziano, *La previa investigatio e la tutela dei diritti nell'ordinamento penale canonico*, in D. Cito (a cura di), *Processo penale canonico e tutela dei diritti nell'ordinamento canonico*, Milano 2005, pp. 491-510.

<sup>76</sup> See M. J. Arroba Conde, *Diritto processuale canonico*, 6<sup>th</sup> edn., Roma 2012, pp. 59-61.

<sup>77</sup> Such is the case of J. Sanchis, in *La legge penale e il precetto*, cit., p. 96.

<sup>78</sup> With respect to the present formulation of the 1917 Code (canon 1933, § 4) there is a preference to avoid the term *decree*, a terminological confusion linked to the use of the term *precept*, understood to be in the sense of penal normative source, or as a means to impose—in the administrative way—penalties, see B. F. Pighin, *Diritto penale canonico*, Venezia 2008, pp. 236-239; R. Coppola, *Diritto penale e processo: caratteri distintivi nel quadro delle peculiarità dell'ordinamento canonico*, in *Il processo*, cit., pp. 59-60.

judicial process, on the part of the legislator, without perhaps giving a rise to a compulsory manner nor clear preference; the meaning of the just cause engenders in effect diverse interpretations, whose discriminating point is if it is to be understood only as a cause which hinder the judicial process, as the tone of the law seem to demand, or causes which favours the extrajudicial process<sup>79</sup>. Besides, the inexistence of just causes, paragraph two of canon 1342 establishes other exceptions when the extrajudicial process is used: firstly, the impossibility to inflict perpetual penalties by decree (whose gravity require great caution in the applicative stage), for example, the dismissal for the clerical state which can only be established by universal law, according to canon 1317, and; secondly, when the law or precept forbids the application of the penalty through a decree.

There is the need to note that, though regulated with the aforementioned exceptional limitations, recourse to the extrajudicial penal decree can be possible, overcoming such limits, put in place that is to say besides, the extraordinary measures typical of the canonical system, which is to be applied generally case by case. In this manner, obtaining a special faculty, it would not be impossible to impose by the extrajudicial decree perpetual penalties of the dismissal from the clerical state.

On the other hand, the measures taken into consideration when a decree is to be emitted are regulated by canon 50, where it provides for the only procedure the necessity to listen to those whose right can be harmed, but also “*as far as possible*”, that is to say with a real guarantee that the prior listening of the recipient of the penal decree be materialised.

The imperfections of the Code on the mechanism to apply penalties are relatable to the guarantees of the offender and the adequateness of the procedure modalities. In view of this, it may be favoured that the imposition of the penalty may help they who commit an offence to internalise the values of the legal system and be reconciled with the victim. Such imperfections can respond to the need of the Church to act with efficiency and not remain indifferent or inert in the face of delicts

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<sup>79</sup> ‘*Just reasons*’ cannot be understood as those pertinent to a greater rapidity of the administrative process, nor those which pertain to the urgency to punish the offender and not even to the lack of qualified personnel; as in P. Ronzani, *La pena ecclesiale*, Padova 2004, pp. 151-152; V. De Paolis, *Il processo penale amministrativo*, in Z. Suchecki (a cura di), *Il processo penale canonico*, Roma 2003, pp. 215-234.

which are committed within; it would be a betrayal of her mission and on the part of the pastors, coincide with the failure of their responsibility. For this reason, canon 1341 is not translated as indifference when it pertains to delict, or simply as inertia in the attempt to restore justice in helping a *christifideles* who has committed a delict to conversion. The problem, on which we will be focusing, is to determine the best option to eliminate the ill consequences (on the individual and on the community) of offensive acts. The choice to undertake the procedural way, as seen, is possible even if it does not always prove to be the more suitable to embank that which is created by the commission of the delict. If the penal canonical purpose is *sufficiently* achieved, the Ordinary must renounce to initiate the entire process<sup>80</sup>.

## ***6. Understanding the legal structure***

Now that we have analysed the legislative structure of the Latin Code on the aspects of the function and application of the penalty, we turn our focus to the problems which emerged according to the double objective. Firstly, we consider the difficulty in reconciling the ultimate goals of the legal system with the imperfections apparent in the legislative purposes—the negative effects of which can be aggravated at the point of interpretation and in practice, with respect to the necessary agreement of penalties with such goals. Secondly, there is the matter of ensuring the necessary technical support for the penal material, which cannot be compromised in the eventual imposition of a sanction<sup>81</sup>.

Considering the penal canonical system in its entirety, as a single normative body, we will indicate, first of all, the problems which are still unresolved in the substantial aspect, which relate back to the question of the attribution of a unitary function to the penalty. We will then deal with the procedural problems, which are dependent on the surety of the efficient participation of the various subjects involved, in order that the imposition of the penalty is coherent with the said function. Finally, we will deal with the theme of restorative justice, to consider it a central

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<sup>80</sup> For further analysis, see J. A. Renken, *The Penal Law*, cit., pp. 145-147 and 402-427.

<sup>81</sup> On this point, we share the concerns expressed by A. Marzoa, in *Introducción*, cit., p. 226.

element for the unification of both substantial and procedural aspects.

### **6.1 Substantive matters**

The difficulty in attributing a unitary function to the penalty with sufficient clarity is owing to the intentional omission of a definition of the sanction. The point of contention is whether the deprivation of some good is essential in the classification of a sanction as a penalty. The rationale for the affirmative is based on the strength of the definition contained in the former Code<sup>82</sup>. However, the same Code established effects of certain penalties and penance from the positive content, insisting thus in the imposition of behaviour—which does not necessarily imply that the recipient be deprived of a right or some good. A similar position is maintained in the current Code<sup>83</sup>. The most compelling reasons to consider the penalty as a scheme to achieve good include, for example, the qualification found in the CCEO where penance is clearly classified as a penalty according to the express prevision in canon 1413 of the Eastern Code<sup>84</sup>.

In this sense, it appears necessary to yield to a technical formula which does not compromise the canonical tradition nor the penal nature of any ecclesiastical interventions, which are oriented towards the good of all the subjects and elements involved. This approach reduces confusion between

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<sup>82</sup> The *privative* contents of the penalty continue to be underlined by the actual doctrine, while more shade (for the choice of modifying the qualification of the vindictive penalties in expiatory) emerge in the second element of the definition of the penalty of canon 2215 of the 1917 Code.

<sup>83</sup> Among the penalties of the 1917 Code, it can be sustained that that which is pecuniary (canon 2291, n. 12), inasmuch as potentially intended to works of piety (canon 2297) may not be characterised exclusively in the deprivation of some good; the same can be said of the penalty of compulsory residence of which canon 1336, § 1, n.1, CIC. In both Latin Codes, penance consists of positive works of piety and charity; for further details, see R. Borrás, *Les sanctions*, cit., pp. 97-99.

<sup>84</sup> G. Mori – D. Salachas, *Ordinamenti giuridici delle Chiese cattoliche orientali*, Bologna 1999, p. 137 ff. On this point the commission more often expressed itself, see *Nuntia* 2 (1976), pp. 9-19; 4 (1977), pp. 73-75; 13 (1981), pp. 63-64. For an interesting analysis on this regard, see R. Metz, *Le droit canonique oriental*, in *Revue de droit canonique* 45 (1995), pp. 167-169; J. Abbass, *Two Codes in Comparison*, Roma 1997, pp. 64-67.

the penalty and other interventions which are not of a penal nature<sup>85</sup>. Regarding this point, there have been useful hypotheses advanced in the extra-canonical field. A more distinguished doctrine cautions that a sanction which must be meted out upon the commission of a delict, must be consistent with the offender's actions; not in the sense to reproduce the delict's negativity, but to express in the sanction's contents the value of the goods infringed, within the limits of the guarantee of the law. Where such an expressive force of the sanction can be reached, it employs restorative practices and conciliative procedures. These practices and procedures, put in place in certain situations, promote the active and reformative behaviour of the offender above the notion of retributive suffering<sup>86</sup>.

The attribution of a unitary objective to the penalty is made equally difficult by its residual nature: a formula not used in both Codes but established in the reports by the commissions in charge of the revisions of the Church's legal system. This was a clear reflection of the Church's tradition of engagement and response in front of negative actions committed by the Christian faithful. The problem is in relation to the substance and application of a sanction. In determining that which renders inevitable the penalty, the doctrine seems to infer that the justification of the penalty must include the exhaustion of all prior means to its imposition<sup>87</sup>. Thus, this would reduce the functional incidence of the penalty's *last resort* nature, granting greater freedom to the offender to reform themselves, while, according to the law, the inevitability of the sanction remains inextricably tied to the impossibility of achieving the

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<sup>85</sup> A habitual example of this risk of terminological ambiguity is the discussion seen in the title of book VI up to the last moment of time of the revision, settled by the commission alerting that the object should have been only penal and not disciplinary, see *Communicationes* 16 (1984), p. 84.

<sup>86</sup> See L. Eusebi, *Le forme della verità nel sistema penale e i loro effetti. Giustizia e verità come "approssimazione"*, in G. Forti – G. Varraso – M. Caputo (a cura di), *Verità del precetto e della sanzione penale alla prova del processo*, Napoli 2014, pp. 155 ff.; Id., *Cristianesimo e retribuzione penale*, in *Riv. it. dir. e proc. pen.* 1 (1987), pp. 275 ff.; Id., *Giustizia e salvezza*, in G. Visonà (a cura di), *La salvezza*, Assisi 2008, pp. 192-195; F. Botturi, *Rendere giustizia*, in L. Eusebi (a cura di) *Una giustizia diversa. Il modello riparativo e la questione penale*, Milano 2015, pp. 29-35.

<sup>87</sup> Only some minority view is pushing to affirm that respect to other means of solicitude to obtain the objectives of the sanction, the penalty, though seen as *last resort*, paradoxically must be retained as the privileged means for salvation; see G. Urru, *Punire*, cit., p. 24.

function of the defence of the social order in other ways. This more meaningful condition for the constitution of a penalty, put in place by particular legislators, is necessary to safeguard ecclesiastical discipline. It also allows us to consider that the function of the penalty could be understood in reference to the same objective as the preventative function of sanctions.

Further points of contention in interpreting a unitary function of the penalty emanate from the source of the repair of scandal and damages, as attributed by the Codes of Canon Law. It can be argued that the two concepts coincide in the exigency to satisfy the victim. Firstly, a physical person may be identified as the victim of a delict. Secondly, the community may be either an additional victim or the sole victim, particularly in the case of a scandal—a concept primarily relating to delicts put in place for the faithful who hold an office of responsibility<sup>88</sup>. Since both Codes agree that the question of damages to the physical person is resolved without imposition of sanctions, a risk remains that the repair of damages to the community may be a motive for the attribution of the penalty functions of exemplarity, dependent on the objective gravity of the delict<sup>89</sup>. The extracanonial doctrine cautions that

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<sup>88</sup> No. 2285 of the Catechism of the Catholic Church (CCC) affirms that: “*Scandal takes on a particular gravity by reason of the authority of those who cause it or the weakness of those who are scandalized [sic]*”. No. 2284 of the CCC also emphasises the particularly significant gravity inherent in a scandalous behaviour carried out by those who, by nature or by function, receive the *munus docendi*: “*Scandal is an attitude or behavior [sic] which leads another to do evil. The person who gives scandal becomes his neighbor's [sic] tempter. He damages virtue and integrity; he may even draw his brother into spiritual death. Scandal is a grave offense if by deed or omission another is deliberately led into a grave offense.*”; for further details, see D. G. Astigueta, *Lo scandalo nel CIC: significato e portata giuridica*, in *Periodica* 92 (2003), pp. 589-651. The CIC prioritises the repair of scandal over the exigencies of sacred ministers, and those who have roles of governance in the Church, by virtue of their respective functions and the resulting elevated danger posed to the social and ecclesiastical order in the occurrence of any illicit conduct by these figures. This can be seen through careful analysis of the way the penal canonical system assigns importance to the scandal, in both the substantive and procedural laws. Even on a superficial level this is evidenced in the use of the term *scandal* twenty-eight times in the CIC, in contrast with the expression *scandalum reparari*, which appears only three times; see X. Ochoa, *Index verborum ac locutionum Codicis Iuris Canonici*, Città del Vaticano 1984, p. 430.

<sup>89</sup> Such consideration of exemplarity could arouse the qualification of certain offences as ‘*delicta graviora*’ which are regulated by a special process, see D. Cito, *Las nuevas normas sobre los ‘delicta graviora’*, in *Ius canonicum* 51 (2010), pp. 629-658; K. Martens, *Les délits les plus graves réservés à la Congrégation pour la doctrine de la*

the duty to express the gravity of the offence committed cannot be ascribed to the penalty, as this is the task of the penal trial<sup>90</sup>. Emerging in canon 1399 is the augmentation of such risk and promotion of the passivity of the ecclesial authority in the sphere of prevention, with the inevitable perception of the penalty as a tardy instrument of government, and the clarification that this same authority is not complicit in any subsequent delict.

Finally, regarding the role assigned to the instruments employed to initiate the decision procedure, especially admonition, the function of the penalty cannot be separated from the safeguard of the values of the legal system, whose authority may not always be coherent to make it depend solely on the severity of the penal reactions. On the contrary, the mandatory instruments of persuasion of the offender—at least, pertaining to delicts which include habitual behaviour—require the consideration of the consent of the recipients of the norms. This reflects the principal source of authority according to the values protected by the penal point of view, and the free adherence to the same on the part of the person who is found in the occasion to have committed a crime. Such a consensual arrangement, besides aiding in the prevention of delicts, also influences this authority's effects in the period of the application of the penalty.

## **6.2 Procedural matters**

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*foi*, in *Revue de droit canonique* 56 (2009), pp. 201-221; Ch. J. Scicluna, *Procedura e prassi presso la Congregazione per la Dottrina della Fede riguardo ai Delicti Graviora*, in *Il Processo penale*, cit., pp. 279-288; Th. J. Green, *Clerical sexual abuse of minors: some canonical reflections*, in *The Jurist* 63 (2003), pp. 360-435; F. G. Morrissey, *The Application of Penal Law in Cases of Sexual Abuse of Minors*, in *Easter Legal Thought* 2 (2003), pp. 82-102; M. Mullaney, *Graviora delicta: the duty to report clerical sexual abuse to the Congregation for the Doctrine of the Faith*, in *Irish Theological Quarterly* 68 (2003), pp. 291-295. Before the 2001 reform (m.p. *Sacramentorum Sanctitatis Tutela* updated in 2010), see J. Provost, *Offences Against the Sixth Commandment: Toward a Canonical Analysis of Canon 1395*, in *The Jurist* 55 (1995), pp. 632-663. For an overview about the protection of children in the 1917 Code, see Th. O. Martin, *Minors in Canon Law*, in *Marquette Law Review* 49 (1965), pp. 87-107. For an analysis on the abuse of children and their protection in the Church, also according to some international documents, see M. Riondino, *La Convenzione di Lanzarote. Aspetti giuridici e canonici in tema di abuso sui minori*, in *Apollinaris* 86 (2013), pp. 149-176.

<sup>90</sup> See L. Eusebi, *Fragilità, crimine, giustizia. Contributo al IV Convegno Ecclesiale Nazionale*, in *Il Regno – Documenti* 17 (2006), pp. 564 ff.

The previous distinction between the function of the penalty and the function of the penal process, be it in relation to the damages which follow on the commission of the delict, or be it in respect to the objectives of the re-education of the offender towards the values of the legal system, permits us to delve into the procedural aspects where the essential problem becomes most apparent. In particular we must consider the efficacy of the guarantees offered by the norms concerning the participation of all the subjects involved, and also carefully evaluate all the elements and objects used to determine the imposition of the sanction.

With respect to the participation of the subjects involved, the analysis conducted has demonstrated a great defence of intervention for the offender in the CCEO, be it for the subjection of the offender to the extrajudicial process, to the general condition of the prior certainty about the proofs of the offence, or above all for the assurance of the obligation to listen before issuing the extrajudicial penal decree. The object of the listening must be on the sphere of imputability, though placed among the objects of the prior investigation<sup>91</sup>. The active participation of the offender in the preliminary investigation is not regulated in detail. As such, for which it is reasonable to consider that the obliged certainty of the proofs, which consent to the extrajudicial process, though established about the delict in itself, may reach with certainty only to the external event.

The Code does not specify particular details regarding the active participation of the victim of the delict, which may be a physical person. The victim's participation is limited to the matter of compensation for damages suffered, be it relating to a contentious case in the penal judicial process, or through the availability of a solution according to equity. In either case, this participation by the victim is not only a type of extrajudicial trial, but must be properly considered as entirely extraprocedural, in as much as it is not dictated by administrative nor

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<sup>91</sup> About imputability, it is explicitly mentioned in canon 1321 § 3; differently envisaged in canon 1468, CCEO, in that the Eastern Code leaves aside the explicit mention of the concept of imputability. For further details, see A. Józwiowicz, *L'imputabilità penale nella legislazione canonica*, Città del Vaticano 2005, pp. 155-158; A. D'Auria, *L'imputabilità nel diritto penale canonico*, Roma 1997, pp. 39-73; O. Échappe, *L'imputabilité de l'acte délictueux. Du droit romain au droit canonique*, in *L'année canonique* 30 (1987), pp. 115-132.



judicial penal processes in the Code. The committal of the penal action to the promotor of justice—who represents the community, which may be either the primary victim of the delict or additional to an individual victim—entails that the participation of the victim (whether a physical person or not) is not regulated in direct relation to the penalty's principal objective: the reform of the offender.

The medicinal scope of the penal canonical system, integrally understood, is not exhausted, but not even set aside the horizon of the reform of the offender. This notwithstanding, it can be maintained that reform is the principal duty of the penalty, and to a lesser extent this can also be said of the penal process<sup>92</sup>. The extracanonial penal doctrine values the conciliative nature of the procedural direction, which orients to not separate, upon the commission of an offence, the proper exigencies of the State or the law in itself, and the exigencies of the victims of the criminal activity. In the canonical field, the more authoritative doctrine emphasises the dialogical nature of both the means of reconciliation alternative to the process, and the procedural<sup>93</sup> instrument in itself. In the penal sphere, the dialogical character of the process is oriented suitably to ensure that the law aptly functions as a motivation for future observance, by conviction, of the violated norms, to strengthen their authoritativeness. Furthermore, to integrate the objectives of the recovery of the dialogue between the agent of the offence, the legal system and the victims<sup>94</sup>.

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<sup>92</sup> As expressed by R. Botta, *La norma penale*, cit., pp. 93-96.

<sup>93</sup> We can find this systematic orientation in an outstanding study, where the author includes the dialogical dimension of the process in the ecclesiastical process, proposing to consider it the general principle of the legal system in the sense of canon 19. See M. J. Arroba Conde, *Corresponsabilità e diritto processuale canonico*, in *Apollinaris* 87 (2009), pp. 201-225.

<sup>94</sup> About the attribution of the referred advantages to the dialogical dimensions and reconciliation in the penal process, see I. Marchetti – C. Mazzucato, *Le pena in castigo. Un'analisi critica su regole e sanzioni*, Milano 2006, *passim*; L. Eusebi, *Quale prevenzione dei reati? Abbandonare il paradigma della ritorsione e al centralità della pena detentiva*, in M. L. De Natale (a cura di), *Pedagogisti per la giustizia*, Milano 2006, pp. 65-114; see also G. Manozzi, *Toward a 'humanism of justice' through restorative justice: a dialogue with history*, in *Restorative Justice: An International Journal* 5 (2017), pp. 145-157; Id., *La giustizia senza spada*, Milano 2004, pp. 23-39; J. Shapland, *Forgiveness and Restorative Justice: Is It Necessary? Is It Helpful?*, in *Oxford Journal of Law and Religion* 5 (2016), pp. 94-112; C. Mazzucato, *Capolavoro di giustizia. Appunti su esemplarità e perdono nella giustizia penale*, in S. Biancu – A. Bondolfi (a cura di), *Perdono: negazione o compimento della giustizia*, Trento 2015, pp. 69-90; L. Walgrave, *Restorative Justice, Self-interest and Responsible Citizenship*,

## **7. Restoration of justice as the fundamental goal**

We now turn to the central hermeneutical problem, from which we can ascertain the source of the difficulties concerning the function and application of the penalty and from which can be derived a profitable key of interpretation. In particular, we hope to confront the various tensions emerging at the point of the application of the penal laws. The restoration of justice may be such a key, as either a function of canonical sanctions or as a guiding principle at the point of application.

The primary foundation of this proposal is derived from the norms and doctrine of some authors, as we have sought to demonstrate in the analysis thus far, even if they are not compelling<sup>95</sup>. The basis of a positive sign, though foreign to the legal formulae, is revived in some pronouncements of the Magisterium over the last fifty years. Of this doctrine, focus will be placed now on four sources: an official address by Paul VI during the period of the revision of the Code; various interventions of John Paul II before and after the promulgation of the CIC; the Lenten message of Benedict XVI in the year 2010, which has the specific objective of justice as its theme; and finally, the very recent address delivered by Pope Francis to the Plenary of the Pontifical Council of Legislative Texts, 21 February 2020.

In his address in 1970 to the members and workers of the Roman Rota, Paul VI recalled that the exercise of the coercive power of the Church is for the unique purpose of service to the moral and spiritual integrity of the entire Church, and of the same good of the person who commits a delict. To support this assertion, we refer to the testimony of the experience of the primitive Church by St. Paul in the letter to the Corinthians, where severe actions and processes are employed<sup>96</sup>. There is

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Devon 2008, pp. 11-43. For a general overview on the basic principles of mediation, see L. Boule, *Mediation. Principles, Process, Practise*, Chatswood 1996, pp. 31-63.

<sup>95</sup> We recall in synthesis that the norms of the CIC, the express mention of this function quite different from the reform and restorative, does not origin to a typology of the sanction. In the norms of the CCEO it is not the object of explicit mention, permitting thus to interpret it as a unitary objective, comprised of at least the repair of damages and the defence of the legal system also in the preventive way.

<sup>96</sup> See Paolo VI, *Discorso al Tribunale della Rota Romana*, 29.1.1970, in *Le Allocuzioni*, cit., p. 116.

therefore no purview to separate the good of the person from that of the community. If the offender continues to be part of the entire Church, there is no risk to maintaining the unitary function of the penalty as the restoration of justice, which is founded on the identity of the Church.

Such a formulation is equivalent to the understanding of the penalty as an instrument of communion, as conveyed by John Paul II<sup>97</sup>. To consider the penalty as an instrument to restore justice, which is based on the identity of the Church, appears to be a more incisive approach, as it expresses not only the objectives of the sanction but also the contents and criteria for the application of the sanction.

The abovementioned deduction strengthens that which was affirmed by the commission for the revision in their presentation of the scheme of the Latin penal law. On that occasion, the commission made an explicit reference to the address of Paul VI, who maintained that the Church seeks the integral good of the Christian faithful, not only communicating to them the typical goods but also preserving them in the journey of salvation. Paul VI also emphasised the Church's role in using helpful means to prevent the Christian faithful from abandoning it, or to aid their reintegration if they become distant from the Church. The usefulness of the means to such objectives of salvation must illuminate on the fact that the Justice which must be restored with the penalty is Salvific Justice, based on the mystery of the cross. This Justice is essential to the identity of the Church, as well as constitutive of the ultimate good which it bestows on every member and announces to the whole world, with its proper witness.

There are perhaps, other interpretations of justice whose definition of restoration competes with the penal sanction. Among these, if we draw theoretical support strictly among canonists, we must give attention to the retributive interpretation of justice and its reduction to the sphere of legal justice, one of which would be licit for the law to invest in. The two orientations are rooted in the imperfections of the legislative formulations

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<sup>97</sup> The expression was used by John Paul II (see *Discorso al Tribunale della RR*, 1979, in *Le Allocuzioni*, cit., p. 166), referring to the penalty as the means to salvage deficiencies of the individual and the common good resulting from the anti-ecclesial conduct.

already indicated<sup>98</sup>, which can lead to a retributive vision, and relate to the generic objective to repair of scandal and to the norms of canon 1399 in the Latin Code, and canon 1406 in the Eastern Code, where there is an equalisation between admonition and the penal precept. The two aforementioned orientations are not congruous with the doctrine of the Magisterium and do not give sufficient enlightenment of the ultimate goals of the legal system. However, they do legitimise the more radical connotations of the existing analogous orientations outside of the science of canon law<sup>99</sup>.

Thus, with respect to the restoration of a solely retributive justice, it is sufficient to refer to the Lenten letter of Benedict XVI, in which he recalls that justice is understood as “*dare cuique suum.*” This leaves unresolved what may *be assured to each person* and gives weight to the idea that evil and injustice are realities external to the heart of every human being. Confronting these realities is sufficient to remove the exterior motives in order to respond to the others<sup>100</sup>. As such, efforts to resolve the tension on the basis of the distinction between delict and offender, for which the penalty is annexed to the delict, must be typified as the efficient reaffirmation of the that which the delict negates. This idea can be enriched by the doctrine of the Magisterium. Therefore, the restoration of justice and the expression of the penal response of the juridical system of the Church—in accordance with its objectives, contents and methods—cannot be neglected from the exigency to structure itself by a logic which trusts in love<sup>101</sup>, by a piety which gives relief to misery, and by a

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<sup>98</sup> The legal imperfections which can lead to a retributive vision are referable to the generic of the objective to repair of scandal and in the Latin case, to the norms of canon 1399; in the case of the Eastern Code, there is equalization between admonition and the penal precept (canon 1406). For further details, see J. Abbass, *Canonical interpretation by recourse to “parallel passages”: a comparative study of the Latin and Eastern Codes*, in *The Jurist* 51 (1991), pp. 293-310.

<sup>99</sup> The retributive and legal vision of penal justice is translated in the exigency which respond to the negative which represents the delict with analogous measures; some authors derive such a vision from the metaphysical and absolute exigencies, not subjected as such to the discourse of the empirical nature; on this point, see F. D’Agostino, *Sanzione e pena nell’esperienza giuridica*, Torino 1987, *passim*.

<sup>100</sup> See Benedict XVI, *Message of His Holiness Benedict XVI for Lent 2010*, Vatican City 2010.

<sup>101</sup> A vision of delict, as manifestation of injustice, can be (using the words of the Pope emeritus) the logical substitution which trust in love and to receive in trust from the other that of the suspicion, the competition, to grasp and to do it by oneself. The

gratuitousness of expiation modelled on that already accomplished by Christ, not produced by human sacrifices. This cannot be actualised by means which are derived from the objective of the infliction of suffering, nor by means employed according to their capacity to arouse indignance towards others and elicit forgiveness and friendship in the form of positive gestures of love.

According to the assertion that it is impossible to attribute to penalties the objective of restoring a justice greater than legal justice, the constant direction of the Magisterium is derived from numerous interventions, following the promulgation of the CIC. All of these interventions solicit every effort to facilitate the convergence of real and legal justices, yet within the inevitable limits of the instruments of human justice<sup>102</sup>. The doctrinal constructions which are founded exclusively in the consideration of the delict as legal injustice are therefore limited. They neglect other dimensions of injustice and induce us to consider that the imposition of the penalty only needs to repair the just social order. Consequentially, this neglects the imposition of those penalties which only stimulate a change in conduct by the offender, which may lead to a restoration of a more perfect idea of justice, but perhaps without adding to the restoration of social order. Therefore we understand that in one case, reform is not realised; in the other case, justice may be considered incomplete in a different way<sup>103</sup>.

In a recent address to the plenary session of the Pontifical Council for Legislative Texts, 21 February 2020, Pope Francis stressed the pastoral nature of any sanctioning intervention within the Church, after also recalling the main pillars of any kind of canonical penal intervention. A sanction cannot be separated from “*salus animarum*” as the ultimate goal and principle. The Pope, focusing his attention particularly on canon 1341, recalled how the reparation of the evil resulting from a crime, together

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penalty, therefore, cannot reproduce such negative logic, but must result antithetical to them in its configuration.

<sup>102</sup> These recalls emerge in the discourse of John Paul II to the Roman Rota, in recalling the exigency to make the procedure truth and the real truth to meet. Such an exigency is the concretion of the direction of the magisterium prepared to distinguish between substantial and procedure justice, in which emerged the discourses of Pius XII in 1942 (about moral certainty), of Paul VI in 1965 (about the rapport between primordial and earthly justice) and of John Paul II in 1979 (about justice, charity and *aequitas*).

<sup>103</sup> This is an opinion put forward by A. Marzoa, *Sub canon 1312*, cit., p. 256.

with the good of the same offender, are fundamental purposes for any penal intervention, and must be read and implemented in a unitary way. Lastly, the Pontiff points out that the role of every Bishop, who is judge and pastor of their Christian faithful, must be aimed at promoting the real and full communion of all the faithful within the Church, even if there have been breaches in a community resulting from a delict<sup>104</sup>.

## **8. Conclusion**

To conclude this analysis on the function and application of penalties within the Church, I would like to emphasise some key points regarding perspectives on restorative justice from extracanonial fields. Our analysis thus far has aligned with the widely-held view that every penal system must be constructed on the basis of Justice, and not *revenge*<sup>105</sup>. To this end, we must consider that the two orientations to penal justice indicated above (retributive justice and legal justice) are not gratuitous manifestations of the closed positions impressed by the Magisterium. On the contrary, they are a reflection of a genuine difficulty, which emerges as a particular burden of the penal canonical system. As such, there is the exigency to ensure that the system is provided with the necessary technical support, which is a surety of the obligatory legality of both the law and the canonical system. The solidity of the latter would be at risk if the informative principles of the legal system of the Church were transformed to the demolition of the typical cardinals of every coercive system. In an effort to resolve this conflict, the more common approach is

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<sup>104</sup> Even before this particular message from Pope Francis, he previously stressed that this caution, regarding the application of any given sanction, should be the basic principle in every juridical system. For the English translation of the address which Pope Francis delivered to the International Associations of Criminal Law, see [http://www.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco\\_20141023Associazione-internazionale-diritto-penale.html](http://www.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023Associazione-internazionale-diritto-penale.html). For further details on the conceptualisation of the penalty in the Magisterium of Pope Francis, see the recent article by N. Fiorita – L. M. Guzzo, *La funzione della pena nel magistero di Papa Francesco*, in *Stato, Chiesa e pluralismo confessionale*. Rivista telematica ([www.statoeChiese.it](http://www.statoeChiese.it)), 6 (2020), pp. 34-58.

<sup>105</sup> Even if it is no longer new, we consider this idea still relevant in our challenging times, per the reflections put forward by G. Bettiol, *Sullo spirito del diritto penale canonico dopo il Concilio Vaticano II*, in *Riv. it. di dir. e proc. pen.* 4 (1971), p. 1093-1110.

to create a clear distinction between the absolute technical rigour of the penal law of the Church, according to more secure and tested models, and its effective application. It is cautioned however that the inviolable nature of the juridical rigour of the penal law does not grant license for this distinction.

While sharing the point of origin of this position, we believe that its conclusions may neither be inevitable nor unique. Therefore, it would be devoid of meaning, as well as contrary to the canonical tradition and the penal system of the Church, to consider the function and the application of sanctions in light of an ambiguous and confused use of key concepts. The foundational concepts are: every delict is an unlawful conduct; damage is derived from the relevant effect on the offender and the community; and the penalty is a coherent coercive reaction, in its proportion as well as in its application. We also maintain that attempts to avoid a rigorous approach to these and other concepts, even if they are intelligible for the peculiar instances of the law of the Church, may be neither adequate for nor beneficial to the purpose which they serve, that is, the pastoral objective. On the contrary, it seems that such approaches which appear in pastoral form, and not rigorous, are at the root of an arbitrary and authoritative mode of operation in the juridical sphere.

It seems instead that the legal and unavoidable technical rigour required to strike a balance between informative principles of Canon Law and the hinges of the penal system, can have only one outcome. It would cause a kind of disjointed incoherence between the rigidity of the technical system and the reality of its application, to the point that the system could remain devoid of effective realisation. In other words, we do not believe that it is necessary to have recourse to the peculiarity of the penal canonical law to enrich its technical dimension, least of all that the referred peculiarity be resolved by leaving aside the penal law in the process of its application<sup>106</sup>. Valid contributions to some matters, matured in the extracanonial field, can be offered to the technical rigour of the system. Thus, with respect to the function of the penalty, it seems that discourse on so-called *restorative justice* is relevant; in the applicative sphere, materials on the

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<sup>106</sup> See L. Eusebi, *La Chiesa e il problema*, cit., pp. 111-121; A. Iaccarino, *La pena canonica tra relazione interrotta e restaurata. Una riflessione sul diritto penale canonico*, in *Paradoxa* III (2009) pp. 45-55.

techniques of *mediation* may prove most beneficial<sup>107</sup>. The contents of either, aside from the fact that they converge at points, are expressed in technical concepts of great utility. Thus, the pursuit of the values of restoration and reconciliation is not left devoid of necessary and adequate support. For this reason it is not unsound to connect the techniques of restorative justice and mediation to the penal canonical law, *to the measure* in which the aforementioned values may be suitable to the values and the objectives of the canonical legal system. This should of course be conducted with consideration for the diverse purposes of the penal systems, and should not allow for a reduction in the level of legality required by these systems.

Such an approach, to our point of view, cannot be exhausted by the exchange and eventual appropriation of some technical aspects matured outside the walls of Canon Law, having seen the diversity of the objectives which give direction to the penal system of the Church and to that of other societies. It is therefore necessary that such an approach be subjected to the scrutiny of theological and historical approaches. Necessary recourse is made to theology to uncover and review the foundations of the penal system, and to historical penal experience in order to avoid radical change to the implementation of the perennial tradition. In this sense, we maintain that perspectives of *restorative justice* and *mediation* may find adequate consolation in: a theology more cautious about the theme of salvific justice and reconciliation, and; the jurisdiction exercised by the Church in history concerning penal and penitential materials, and elemental experiences of the practice of reconciliation.

Only in this way can any penal intervention within the Church, enlightened and guided by the principles of justice<sup>108</sup>, which tend to save more than they sink, contribute to the promotion of a real and deep *theology of reconciliation*<sup>109</sup>.

**Abstract:** After decades of oblivion, penal law is now a source of renewed interest, particularly in its two aspects: substantial and procedural. The announcement by Pope

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<sup>107</sup> See M. Riondino, *La “mediazione” come decisione condivisa*, in *Apollinaris* 84 (2011), pp. 607-631.

<sup>108</sup> See C. M. Martini, *Cultura della pena e coscienza ecclesiale*, in A. Acerbi – L. Eusebi (a cura di), *Colpa e pena. La teologia di fronte alla questione criminale*, Milano 1998, pp. 251-269.

<sup>109</sup> M. Riondino, *Giustizia riparativa e mediazione*, cit., p. 185.



Francis of the imminent reform of Book VI, last February during the plenary session of the Pontifical Council for Legislative Texts, is further proof of this resurgence. The following study intends to deepen the juridical and meta-juridical principles that are at the basis of the function and application of the penalty, without neglecting the consideration of the historical context (Vatican II) and the most recent Magisterium of the Church, which are essential for a correct interpretation of the data. The starting and landing point is the paradigm of restorative justice, a goal to which all ecclesial sanctioning interventions must aim, as states in canon 1341 of the Code of Canon Law and according also to the secular tradition of the Church.

**Keywords:** Canon Law, Sanctions in the Church, Restorative justice, Application of the penalty, Function of the penalty.