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Penal Law in the Roman Catholic Church

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This article provides a general account of the universal law of sanctions in the Roman Catholic Church. The crisis of the Catholic Church caused by clergy sexual abuse of minors has revealed, among other things, the widespread well-intentioned but naïve inclination to resort to penal law as opposed to any theology of mercy and forgiveness. Although the author argues that penal law has a proper place in the Catholic Church, he considers that in a voluntary community that shares a homogeneous system of moral values without strong penalties involving deprivation of liberty – a community like the Catholic Church – moral and administrative sanctions could be more effective than penal sanctions. A distinction between administrative sanctions and penal sanctions, and therefore between administrative tribunals (should they be established) and penal tribunals, is highly recommended.

Keywords: penal law, Roman Catholic Church, sexual abuse, delicts, crimes, sanctions

This article surveys the general framework of the law of sanctions or penal law in the Roman Catholic Church, the largest Christian church. The recent and devastating crisis of clergy sexual abuses of minors has challenged the whole ecclesiastical penal system, which in our day is undergoing revision.[2] The first part of the article makes some relevant terminological clarifications to facilitate proper understanding of the scope of penal canon law in the Catholic Church. The second part explains the most important features of the current universal penal canon law system in the Code of Canon Law for the Latin Church (1983) and in the Code of Canons of the Eastern Churches (1990), as well as in subsequent legislation. The last part evaluates the system of penal law and offers some proposals for its improvement.

SOME TERMINOLOGICAL CLARIFICATIONS

Although the three institutions are deeply interconnected and the media often use the terms interchangeably, the Catholic Church is neither the Holy See

1 I am grateful to Professor José Bernal for his useful comments and suggestions.

2 On the abuse crisis, see National Review Board (ed), *A Report on the Crisis in the Catholic Church in the United States* (Washington, DC, 2004); John Jay College of Criminal Justice (ed), *The Nature and Scope of Sexual Abuse of Minors by the Catholic Priests and Deacons in the United States 1950–2002: supplementary report* (Washington, DC, 2006). On canon law and the sexual abuse crisis, see J Coughlin, *Canon Law: a comparative study with Anglo-American legal theory* (Oxford, 2011), pp 51–95. For an overview of the ecclesiastical penal system, with bibliography, see J Renken, *The Penal Law of the Roman Catholic Church* (Ottawa, 2015), pp 29–32.

nor the Vatican. Canon law, and therefore penal canon law, affects all three institutions, but with different intensities. The Roman Catholic Church consists of 22 autonomous (*sui iuris*) institutional churches in full communion with the pope, who is the Bishop of Rome and pastor of the universal Church. The Latin (or Western) Church is by far the largest autonomous church, with nearly 1.3 billion baptised Catholics in 2015;[3] about 16 million members (or about 1.5 per cent) of the Catholic Church belong to one of the other 22 institutional churches: the so-called Eastern Catholic Churches. The Latin church observes the Roman liturgical rite or a variation of it (for example, Ambrosian in Milan or Mozarabic in Toledo). The Eastern Churches show great diversity, since their rites originated from five different traditions (Alexandrian, Antiochene, Armenian, Chaldean and Constantinopolitan). The variety of Eastern rites is considered a patrimony of the whole Catholic Church.[4]

The Holy See (or Apostolic See) is the episcopal seat of authority in Rome, which dates back to early Christian times.[5] As the see of St Peter's successor, the Holy See is the pre-eminent see of the Catholic Church and the central organisational authority of the Church in the world. Internationally, the Holy See is recognised as a sovereign legal entity that can engage in diplomatic relations and enter into international concordats and agreements.[6] The Holy See is internally regulated and fully governed by canon law, while in external affairs it is ruled by international law. Although the Vatican City is intrinsically connected to the Holy See, it is not the same as the Holy See but a creation of it.

The Vatican City State was founded in 1929 by the Lateran Treaty between Italy and the Holy See to support the work of the Holy See. The Vatican is governed by its own law, for which canon law is the main source and Italian law is supplementary.[7] The Fundamental Law of the Vatican City, promulgated by John Paul II in 2001, is the current main governing law of the Vatican City State.[8] The head of the Vatican State is the pope, who has full legislative, executive and judicial powers (Article 1, section 1). So the Holy See is both an independent sovereign entity and the government of a state.[9] Moreover, the pope is both the

3 Information available at <http://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/04/06/170406e.html>, accessed 11 February 2018.

4 See G Nedungatt, 'Churches sui iuris and rites', in George Nedungatt (ed), *A Guide to the Eastern Code: a commentary on the Code of Canons of the Eastern Churches* (Rome, 2002), pp 99–128.

5 See Canon 361 CIC and Canon 48 CCEC. In both codes the term 'Holy See' or 'Apostolic See' applies to the Roman pontiff and to the institutions of the Roman Curia, which helps the pope in governing the universal Church.

6 See M Shaw, *International Law* (sixth edition, Cambridge, 2011), pp 243–245.

7 See Law no 71 (Law on the Sources of Law), 1 October 2008.

8 The Fundamental Law is available at <http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/FundamentalLaw1.pdf>, accessed 11 February 2018. Information about the Vatican State is available at <http://www.vaticanstate.va/content/vaticanstate/en.html>, accessed 11 February 2018.

9 See J Crawford, *The Creation of States in International Law* (Oxford and New York, 2007), p 230.

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Bishop of Rome and shepherd of the universal Church on the one hand, and the head of the Vatican City State on the other. This distinction explains why Vatican criminal law is not properly canon law, the law of the Catholic Church, but the criminal law of a state.[10] Specifically, the Italian Criminal Code and the Italian Code of Criminal Procedure, which were made part of the Vatican legal system by the Law of 7 June 1929, no 2, are currently in force in the Vatican City State with some amendments.[11] The attempt to assassinate Pope John Paul II in St Peter's Square in 1981 was settled with Vatican law, not canon law. The two infamous Vatican leak scandals in 2012 and 2016 were likewise settled with Vatican law, not canon law. The police security force of the Vatican City, the so-called Gendarmerie Corps of the Vatican City State, is governed not by canon law but by Vatican law.[12] Nevertheless, the head of the Vatican City State, the pope, is elected in accordance with canon law.

Roman canon law, or simply canon law,[13] is the internal law of the Roman Catholic Church, including the Holy See, and the main legal source for the laws of the Vatican City State, although not the only source. The Latin or Western Church is governed in accordance with the 1983 Code of Canon Law (hereafter CIC or Latin Code),[14] which replaced the 1917 Code of Canon Law, promulgated by Benedict XV.[15] The Eastern Catholic Churches are governed by the Code of Canons of the Eastern Churches (hereafter CCEC or Eastern Code), issued in 1990.[16] Both the current Latin Code and the Eastern Code were promulgated by Pope John Paul II, the great reformer of Roman canon law at the end of the twentieth century. In 1988, John Paul II also promulgated the apostolic constitution *Pastor Bonus* on the organisation of the Roman Curia, the main organisation of the Holy See.[17] These three law bodies – the two codes and the apostolic constitution *Pastor Bonus* – constitute a unitary whole in the

10 See G Dalla Torre, 'Il diritto penale vaticano tra antico e nuovo', (2014) 2 *Quaderni di diritto e politica ecclesiastica* 443–460.

11 See Law no 8 (Supplementary Norms on Criminal Law Matters), 13 July 2013, and Law no 9 (Amendments to the Criminal Code and the Code of Criminal Procedure), 11 July 2013.

12 The Pontifical Swiss Guard differs in being a force maintained by the Holy See, not the Vatican City, and is responsible for the safety of the pope.

13 Canon law as such may also refer to the law of the Orthodox Churches or to the law of the Anglican Church.

14 See *Code of Canon Law: Latin–English Edition* (new translation, Washington, DC, 1999).

15 See E Peters (ed), *The 1917 Pio-Benedictine Code of Canon Law in English Translation with Extensive Scholarly Apparatus* (San Francisco, CA, 2001). The penal law of the 1917 Code was contained in book 5 on 'Delicts and penalties', which was composed of more than two hundred canons (Canons 2195–2214).

16 See *Code of Canons of the Eastern Churches: Latin–English Edition* (new translation, Washington, DC, 1999).

17 The apostolic constitution *Pastor Bonus* (28 June 1988) is available at <http://w2.vatican.va/content/john-paul-ii/en/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-index.html>, accessed 11 February 2018. It has been revised on a number of occasions, most recently by Pope Francis in 2016.

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government of the universal Church and are the pillars of the Church's canon legal system.[18]

THE MODERN PENAL LAW OF THE CATHOLIC CHURCH

The penal canon law (including procedural law) is basically contained in three documents:) book 6 on 'Sanctions in the Church' (Canons 1311–1369 CIC) and part 4 of book 7 on 'The penal process' (Canons 1717–1731 CIC) of the 1983 Code; (b) title 27 on 'Penal sanctions in the Church' (Canons 1401–1467 CCEC) and title 28 on 'The procedure for imposing penalties' (Canons 468–1487 CCEC) of the Eastern Code; and some Articles of part 4, on tribunals, in the apostolic constitution *Pastor Bonus*.

From a technical point of view, the penal system is deeply rooted in the civil law tradition law, not in the common law tradition. Basic elements and terminology of the common law tradition on criminal law – such as *mens rea*, *actus reus* and strict liability – are extraneous to canon law. Roughly speaking, secular criminal law is technically superior to canonical penal law, probably because penal law occupies the very last place in the priorities of an institution of voluntary membership based on love and charity, like the Catholic Church, while penal law has great relevance in communities of compulsory membership, like nation-states. As a result, the number of scholars involved in the development of canon penal law is very small in comparison to the thousands working on secular criminal law.

Penal canon law applies many principles and standards in common with secular criminal systems, such as the standards of imputability or collaboration in delicts, presumption of innocence, minimum criminalisation and proportionality. The particulars and penalties, however, are in general different from those imposed by the secular system, since the purpose of the Catholic Church is mainly spiritual and not political. The structure of ecclesiastical penal law is primarily based on theological understandings and considerations, and it seeks to promote the salvific purpose of the Catholic Church (Canon 1752 CIC). It is a therapeutic, salutary, healing, merciful and pastorally oriented system.

Although different in style, both the Eastern Code and the Latin Code are fully rooted in these principles. Some examples are:

i. In the matter of penalties, the more benign interpretation is to be made (Canon 1404 CCEC);
ii. If the nature of the offence permits, the penalty cannot be imposed unless the offender has been warned to desist from the delict (Canon 1347 CIC; Canon 1407 CCEC);

18 See *Pastor Bonus*, n 2, and John Paul II, apostolic constitution *Sacri Canones* (18 October 1990).

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iii. The imposition of penalties on a cleric must allow him what is necessary for his adequate support (Canon 1350 CIC; Canon 1410 CCEC);
iv. If the law has changed, the most favourable law has to be applied (Canon 1313 CIC; Canon 1412 §2 CCEC);
v. The judge can temper the penalty in case of extenuating circumstance (Canons 1324 and 1345 CIC; Canon 1415 CCEC);
vi. It is possible to remit penalties (Canon 1357 CIC; Canon 1419 CCEC);
vii. If the penalty prohibits receiving sacraments, the prohibition is suspended when the offender is in danger of death (Canon 1351 CIC; Canon 1435 §1 CCEC);
viii. Public reprimand must be limited to the least possible loss of reputation of the guilty party (Canon 1427 §2 CCEC); and
ix. An imposed penalty is suspended during the process of appeal or recourse (Canon 1353 CIC; Canon 1319 CCEC).

Penal law in the Latin Code

The penal system of the 1983 Code is heir to the 1917 Code, which constituted the first relevant effort to systematise universal penal law. However, the penal law of the 1983 Code is considerably different from that of the 1917 Code, since the 1983 Code captured the spirit and reflects the ecclesiology of the Second Vatican Council (1962–1965). Although the Council did not expressly refer to penal law, it established a new pastoral framework that largely, though indirectly, influenced the whole criminal system. For instance, the Council promoted a clearer separation between external and internal forums; it emphasised the dignity, freedom and human rights of all faithful persons; and it especially approached canon law from a pastoral perspective.[19]

The 1983 Code starts the regulation of sanctions by confirming the 'innate and proper right' of the Church 'to coerce offending members of the Christian faithful with penal sanctions' (Canon 1311 CIC). To fulfil its mission, any native and autonomous community, whether political or religious, needs to be ruled under law. And an inalienable aspect of the law is its penal dimension, which tries to restore justice, peace and order by protecting fundamental institutional values from the most serious wrongs against the community and by trying to reintegrate the offending party within the community. As a native and autonomous community of believers, the Catholic Church is appropriately responsible for punishing these aggressive violations against ecclesiastical

19 For a good overview of the topic, see T Green, 'Penal law: a review of selected themes', (1990) 50 *The Jurist* 221–256; T Green, 'Penal law in the Code of Canon Law and in the Code of Canons of the Eastern Churches: some comparative reflections', (1994) 28 *Studia Canonica* 407–451.

communion.[20] This power of punishing is founded and derives from within, and not from any external power such as the secular nation-state.

The 1983 Code simplified the relatively complex 1917 penal law system, which emphasised other pastoral measures besides sanctions.[21] The 1983 Code reduced the number of penalties and established an easier way for bishops to remit penalties (Canons 1954–1956 CIC). To accommodate the ecclesiastical penal order to different pastoral circumstances and situations, the 1983 Code applied the principle of subsidiarity and granted more competence to diocesan bishops. It is the bishop who, usually after a preliminary investigation (Canon 1717 CIC), has the power to initiate penal procedure and even to decide what kind of procedure – judicial or administrative (extrajudicial) – is appropriate (Canon 1341 CIC). The judicial procedure is the ordinary penal procedure and assures the accused the greatest degree of legal protection. The judicial decision is issued by a judge, while the extrajudicial procedure ends with an extrajudicial decree issued by the bishop or other ordinary, not by a judge. Perpetual penalties can be imposed or declared only through a judicial procedure (Canon 1342 §2 CIC). The Latin Code also allows authorities with executive power (for example, a bishop, vicar general or episcopal vicar) to threaten with penalty or to actually impose some moderate penalties after carefully deliberation, by means of a penal precept (Canon 1319 CIC), that is, a personal and private command. (An example would be punishing a priest involved in the activities of a political party.)

According to Canon 1312 §1 CIC, there are two kinds of sanctions: medicinal penalties, also called censures (Canons 1331–1335 CIC), and expiatory penalties (Canons 1336–1338 CIC).[22] The medicinal penalties deprive the offender from certain spiritual or temporal goods. They aim to correct the offender, while the expiatory penalties aim to restore order to the community. The two complement each other, however, and constitute an invitation to conversion and reconciliation. The Latin Code identifies three kind of medicinal penalties: excommunication, interdict and suspension. Excommunication is the gravest penalty, excluding the offender from most of the spiritual goods of the Church. An excommunicated person is forbidden to participate as a minister in any act of public worship, to celebrate and receive the sacraments and to

20 On the idea of seeing crimes not as public wrongs to a community but as wrongs that any community is duly responsible for punishing, see G Lamond, 'What is a crime?' (2007) 27:4 *Oxford Journal of Legal Studies* 609–632. See also A Ashworth and J Horder, *Principles of Criminal Law* (seventh edition, Oxford, 2013), p 2.

21 For a good overview, see T Green, 'Introduction to book VI: sanctions in the Church' in J Beal, J Coriden and T Green (eds), *New Commentary on the Code of Canon Law* (New York and Mahwah, NJ, 2000), pp 1529–1532.

22 For an overview of penal canon law, see the commentary on book 6 of the 1983 Code written by Green in Beal, Coriden, and Green, *New Commentary on the Code of Canon Law*, pp 1529–1605. See also Renken, *Penal Law of the Roman Catholic Church*.

exercise any ecclesiastical office, ministries, function or position in the Church (Canon 1331 CIC). Nevertheless, the excommunicated person remains in the Church, unless the very nature of the delict entails leaving the Church (for example schism: Canons 751 and 1364 CIC). The offender may attend the celebration of the Eucharist or other liturgical ceremonies, and may practise private prayers and devotions to stimulate personal conversion and restore communion.

The penalty of interdiction involves the same liturgical restrictions as excommunication but does not imply any restriction of governmental functions or personal privileges, including receiving income. Any Catholic can be excommunicated or interdicted, but only Catholic clerics – that is, bishops, priests and deacons – can be suspended. Suspension prohibits, either totally or partially, the authority of orders, the power of governance and the exercise of some functions of office (Canon 1333 §1 CIC), but the suspended cleric loses neither his office nor the right of residence connected to the office (for example, a suspended pastor could continue living in the rectory).

Penalties imposed through a legal procedure (judicial or extrajudicial) are called *ferendae sententiae* ('of a sentence to be passed'). Some penalties, however, can be incurred automatically just by the commission of the offence and without intervention of a judge or competent authority. These penalties are called *latae sententiae* ('of a sentence already passed'). The 1983 Code substantially reduced but did not abolish the number of automatic penalties (Canons 1314 and 1318 CIC). These automatic penalties, very few in number, are reserved for situations of grave scandal (heresy, apostasy or schism) or for when the offender could not be punished in a different way. Such cases include, among others, a priest who absolves in confession his accomplice in the sin of murder (Canon 1378 §1, in conjunction with Canon 977 CIC), a priest who directly violates the seal of confession (Canon 1388 CIC) or a priest who profanes consecrated species (Canon 1367 CIC). To protect life from the beginning, a person who procures a completed abortion incurs *latae sententiae* excommunication (Canon 1398 CIC).[23]

Without losing the general therapeutic character of any ecclesiastical penalty, expiatory penalties seek first to repair scandal and restore justice. As result, and unlike the censures, expiatory penalties cannot be remitted, even when the offender is not contumacious. Most expiatory penalties affect only clerics (for example, dismissal or residence restrictions) or religious persons (residence restrictions), but they could affect laity in ecclesiastical office. The gravest expiatory penalty is dismissal from clerical orders (Canons 291–293 CIC). According

23 In his apostolic letter no 12, *Misericordia et Misera* (16 November 2016), Pope Francis granted 'to all priests, in virtue of their ministry, the faculty to absolve those who have committed the sin of procured abortion, and therefore have incurred an automatic excommunication'.

to the statistics of the Holy See, over the past decade 848 priests who raped or molested children were defrocked and another 2,572 were sanctioned with lesser penalties.[24]

Penalties can be facultative (optional) or prescriptive (obligatory), determinate or indeterminate. If the law gives the judge the power to apply or not to apply a penalty, to temper it or to impose a penance in its place (see below), the penalty is called facultative (Canon 1343 CIC). In cases of prescriptive or obligatory penalties, the judge must impose some penalty, yet even in these cases, the judge has some discretion based on pastoral reasons (Canon 1344 CIC). When the code leaves the determination of the penalty to competent legal authority, penalties are called indeterminate. This is the case of Canon 1377 CIC, which establishes that unlawful alienation of church property 'is to be punished with a just penalty'. When the law itself specifies the penalty, the penalty is called determinate. According to Canon 1374, for instance, a person who leads an association that plots against the Church is to be punished with an interdict.

In addition to penal sanctions (medicinal and expiatory penalties), canon law provides quasi-penal or precautionary measures to protect the ecclesiastical community against public wrongs. These measures are called penal remedies (Canon 1339 CIC) when they are warnings or rebukes intended to preclude potential delicts (for example, to a cleric who habitually attends a night club), or external forum penalties when they are used to replace or increase a penalty (such as works of religion, charity or piety). These penalties cannot be confused with the penance imposed in the internal forum to the penitent in the sacrament of penance, nor with the fasting and abstinence imposed on most of the faithful during days of penance. To protect an offender's reputation, public penance is to be imposed only for public transgressions, never for occult transgressions (Canon 1340 §2 CIC). Penal remedies and penance can always be applied by a decree without judicial process.

The 1983 Code fixes the offences (and subsequent penalties) recognised by the universal law of the Latin Church. These specific offences are the following:

i. Delicts against religion and the unity of the Church (Canons 1364–1369 CIC), such us heresy, apostasy, schism, blasphemy or profanation of the Holy Eucharist;
ii. Delicts against ecclesiastical authorities and the freedom of the Church (Canons 1370–1377 CIC), such as physical attack on the pope, bishops or clerics, doctrinal violations, membership in forbidden societies or alienation of ecclesiastical goods without permission;

24 Info available at <https://www.cbsnews.com/news/vatican-reveals-how-many-priests-defrocked-for-sex-abuse-since-2004/>, accessed 11 February 2018.

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iii. Usurpation of ecclesiastical functions (Canons 1378–1389 CIC), such as simulation of the celebration of the sacraments, consecration of a bishop without pontifical mandate, solicitation in confession or violation of the confessional seal;
iv. The crime of falsehood (Canons 1390–1391 CIC) by violation of reputation or falsification, alteration or destruction of documents;
v. Delicts against special obligations (Canons 1392–1396 CIC), such as prohibition of business activities or violation of celibacy; and
vi. Delicts against human life and freedom (Canons 1397–1398 CIC), such as physical violations, homicide and abortion.

Three fundamental weaknesses have been attributed to the 1983 system: the excessive discretionary power in the hands of ecclesiastical authorities in applying sanctions; the understanding of the principle of subsidiarity as synonymous with decentralisation; and the complexity of the penal judicial procedure.[25] The excessive discretionary power of ecclesiastical authorities allows the punishment of some violations of divine or canonical law even if no canon punishes the violation expressly (Canon 1399 CIC). In cases of prescriptive penalties, the Latin Code also allows the deferral of a penalty to a more opportune time, abstaining from imposing the penalty, moderating the penalty when the offender commits several delicts, and suspending the obligation to observe the penalty (Canon 1344 CIC). This canon is a double-edged sword. On the one hand, it embodies the pastoral aspirations of the penal canon law and the idea that penal canon law cannot be applied mechanically. On the other hand, it opens the door to potential inapplicability of the penal law by diocesan authorities, especially in cases of sexual abuse when judicial evidence is difficult to obtain because of the nature of the offence. Unfortunately, this inapplicability of the law was a common practice until the sexual abuse crisis exploded.

The second weakness in the system arose because the principle of subsidiarity was understood as decentralisation, that is, the transfer of authority from central to local governments, without recognising that consistency, accuracy and fairness are intrinsic to subsidiarity but not necessarily to decentralisation. The realm of secular criminal law, in contrast, acknowledges that serious crimes must be addressed centrally, through investigation by selected prosecutors and decisions by judges with the highest level of expertise. The special norms for the more serious delicts reserved to the Holy See partially ended this inadequate application of the principle of subsidiarity; improvement occurred rapidly.

25 It was Cardinal Ratzinger who strongly recommended the revision of the penal law system in 1988. See J Arrieta, 'Cardinal Ratzinger and the revision of the canonical penal law system: a crucial role', available at <http://www.vatican.va/resources/resources_arrieta-20101202_en.html>, accessed 11 February 2018.

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Finally, the complexity of the penal process (Canons 1717–1731 CIC) has been criticised as a weakness, especially in relation to the initiation of preliminary investigations, for which formal responsibility rests with ecclesiastical authority and not with private individuals (Canon 1717 §1 CIC).

A deep revision of book 6 of the 1983 Code is now in progress at the hands of the Pontifical Council for Legislative Texts.[26] Its date of completion is still uncertain. The aim of the revision is to remove the intrinsic limitations of the current penal system and to promote an ecclesiastical culture in which the law of sanction is considered an instrument of pastoral charity whose application cannot be blocked. The revision also seeks to develop an easier application of penalties by way of administrative decree while protecting all guarantees of the right of defence. It will also aim to reduce the discretion of ecclesiastical authorities in applying penalties. The reform develops more deeply the sanctions against pastors in cases of omission as well as cases of lack of responsibility in the application of penalties. The revision includes within the Code the offences established after 1983, as well as newer offences such as breach of duty to execute a judicial decision, violation of the pontifical secrecy and sexual offences by laypeople, among others.[27]

Penal law in the Eastern Code

More elegantly than the Latin Code, Canon 1401 CCEC opens the title on penal sanctions with the biblical image of the sheep (Luke 15:1–7) and the advice of the Apostle Paul to 'reprove, rebuke and exhort with all long suffering and doctrine' (2 Timothy 4:2):

> Since God employs every means to bring back the erring sheep, those who have received from Him the power to loose and to bind are to apply suitable medicine to the sickness of those who have committed delicts, reproving, imploring, and rebuking them with the greatest patience and teaching. Indeed they are even to impose penalties in order to heal the wounds caused by the delict, so that those who commit delicts are not driven to the depth of despair nor are restraints relaxed unto a dissoluteness of life and contempt of the law.[28]

The Eastern Code proposes the betterment of the offender as the main aim of ecclesiastical penalties.[29] In this sense, it is more medicinal than the Latin Code.

26 On the revision, see J Arrieta, 'El proyecto de revisión del libro VI del Código de Derecho Canónico', (2013) 2 *Anuario de Derecho Canónico* 211–221; J Sánchez Girón, 'El proyecto de reforma del derecho penal canonico', (2014) 54 *Ius canonicum* 567–602; J Renken, *Penal Law of the Roman Catholic Church*, pp 29–32.

27 For an overview of the revision, see Renken, *Penal Law of the Roman Catholic Church*, pp 29–32. See also Sánchez Girón, 'El proyecto de reforma del derecho penal canónico'.

28 *Code of Canons of the Eastern Churches*, Canon 1401.

29 See also C Fürst, 'Penal sanctions cc. 1401–1467', in Nedungatt, *Guide to the Eastern Code*, pp 787–800.

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The Eastern Code does not make any distinction between medicinal penalties and expiatory penalties. As result, there is no category of expiatory penalties as such. The Eastern Code also abolishes the *latae sententiae* penalties as contrary to Eastern legal traditions. The categories of penal remedies and penance also disappear. The Eastern Code considers penalties not only as privation of a good but also as the imposition of a positive act that can contribute to improving the offender (for example, certain prayers, a pious pilgrimage, a special fast and spiritual retreat). This aspect is also very medicinal, since the medicine has to be taken and cannot just consist of abstention. The Eastern Code uses a different terminology for penalties. The Latin penalty of excommunication is equivalent to the Eastern penalty of major excommunication. The Latin penalty of interdict is equivalent to the Eastern penalty of minor excommunication. A specific penalty of the Eastern Code is the demotion of a cleric. The penalty consists of prohibiting him 'from exercising those acts of the powers of orders or governance that are not consonant with this grade' (Canon 1433 §1 CCEC). The Eastern Code has no place for perpetual penalties. Some offences of the Latin Code have no parallel in the Eastern Code, such as the Latin Canon 1372 CIC, which, to protect the supremacy of the pope, punishes 'a person who makes recourse against an act of the Roman Pontiff to an ecumenical council or the college of bishops'. The offence of trafficking in mass offerings (Canon 1385 CIC), sexual abuses committed by clergy with a minor or by force (Canon 1395 §2 CIC)[30] and the violation of residence obligation (Canon 1396 CIC) have no counterparts in the Eastern Code.

Another important feature of the Eastern Code in relation to the Latin Code is that it is more effective in protecting against potential arbitrariness. For instance, the Eastern Code contains no canons like the above-mentioned Canon 1399 CIC, which in some circumstances of special gravity allows punishing a violation even if no canon explicitly penalises the wrong. The principle of legality (*nulla poena sine lege*: no offence without law) is taken more seriously in the Eastern canon law than in the Latin. The Eastern Code is more consistent in separating internal forum and external forum, even with regard to remission of penalties. So, for instance, Canon 725 CCEC allows any priest to absolve from any sins any penitent in danger of death, and Canon 976 CIC allows any priest to absolve not only sins but also censures against all penitents in danger of death. The term 'imputability' has been omitted in the Eastern Code, with the aim of keeping the separation between internal and external forums and avoiding the more-than-questionable presumption of imputability of Canon 1321 §3 CIC.[31]

30 The new rules for the very serious delicts reserved to the Congregation for the Doctrine of the Faith affected both the Latin and the Eastern Codes.

31 See Canon 1321 §3 CIC: 'When an external violation has occurred, imputability is presumed unless it is otherwise apparent.'

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The same criticism of the Latin Code for allowing wide discretion based on pastoral reason can also be made of the Eastern Code. The judge can defer imposition of a penalty to a more opportune time, abstain from imposing the penalty, moderate the penalty when the offender commits several delicts, and suspend the obligation of observing the penalty (Canon 1409 CCEC). This discretion is also present in indeterminate penalties, which allow punishing with an appropriate penalty that is not determined, although limited (see Canons 1439, 1440 and 1444 CCEC).

New legislation on penal law

Important universal legislation on penal law has been issued since the promulgation of the Latin and Eastern Codes. In 1998, John Paul II issued, *motu proprio* (that is, on his own initiative), the apostolic letter *Ad tuendam fidem*, by means of which certain norms were inserted into the Latin Code and Eastern Code to 'impose the obligation of upholding truths proposed in a definitive way by the magisterium of the Church, and which also establish related canonical sanctions'.[32] Three years later, also *motu proprio*, John Paul II issued the apostolic letter *Sacramentorum sanctitatis tutela*, which permitted the Congregation of the Doctrine of the Faith to deal with and judge the most serious offences according to canon law (*delicta graviora*).[33] The reason for issuing these statements *motu proprio* was to protect the sacraments, especially the Eucharist (against profanation of the sacramental species or simulation of the Eucharistic celebration, among others) and penance (against absolution of an accomplice in sin, solicitation or violation of the sacramental seal), as well as the observance of the sixth commandment (seventh in the Protestant tradition) of the Decalogue ('you shall not commit adultery'), punishing clergy sexual abuses against minors.

In 2010, Benedict XVI approved a systematic revision of those *Norms on the most serious offences* to simplify and accelerate procedures, making them more effective.[34] Article 21 of the *Norms* allows the Congregation for the Doctrine of the Faith to use extrajudicial process for these serious offences and to mandate the bishop to impose perpetual penalties through the extrajudicial process. This regulation has been of the utmost importance in solving the problem of sexual abuse within the Catholic Church. It was also Benedict XVI who granted special faculties to the Congregation for the Evangelisation of

32 See introduction to *Ad tuendam fidem*, available at <http://w2.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_30061998_ad-tuendam-fidem.html>, accessed 11 February 2018.

33 Available at <http://w2.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_20020110_sacramentorum-sanctitatis-tutela.html>, accessed 11 February 2018.

34 The revision is available at <http://www.vatican.va/resources/resources_norme_en.html>, accessed 11 February 2018.

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Peoples (2008) and the Congregation for Clergy (2009) to deal promptly with serious cases of scandal caused by priests, deacons or religious (excluding cases of sexual abuse of minors – cases already under special previously mentioned rules).[35]

In 2016, Pope Francis promulgated, *motu proprio*, the apostolic letter *As a Loving Mother*.[36] This new apostolic letter allows the competent Congregation of the Roman Curia to begin investigations of local bishops, eparchs or heads of religious communities when the Congregation suspects a leader's negligence has caused physical, moral, spiritual or patrimonial harm. As Pope Francis reminded readers in the short preface, canon law already provides for the possibility of removal from ecclesiastical office 'for grave reasons' (see Canon 193 §1 CIC; Canon 975 §1 CCEC), but he wanted to specify among these reasons 'the negligence of a bishop in the exercise of his office, and in particular in relation to cases of sexual abuse inflicted on minors and vulnerable adults'.[37]

Besides this law for the universal Church, important particular laws have been promulgated for one or a group of particular churches, such as the so-called *Essential Norms* approved by the United States Conference of Catholic Bishops to deal with allegations of sexual abuse of a minor.[38] In this article, however, we have limited ourselves to exploring the universal penal law of both the Latin and the Eastern Churches.

CONCLUDING REFLECTIONS

The crisis of the Catholic Church caused by clergy sexual abuse of minors has revealed, among other things, the widespread well-intentioned but naïve inclination to resort to penal law as opposed to any theology of mercy and forgiveness.[39] Mercy, however, as Pope Francis pointed out, is not opposed to justice, since the mercy of God does not deny justice.[40] In other words, justice is a necessary (but not sufficient) condition for mercy. During the crisis of sexual

35 An English translation of the documents is available at Renken, *Penal Law of the Roman Catholic Church*, pp 485–509.

36 Available at <https://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_lettera-ap_20160604_come-una-madre-amorevole.html>, accessed 11 February 2018.

37 See *As a Loving Mother*, preface, para 3.

38 Essential norms for the diocesan/eparchial policies dealing with allegations of sexual abuse of minors by priests or deacons, available at: <http://www.vatican.va/roman_curia/congregations/cbishops/documents/rc_con_cbishops_doc_20021216_recognitio-usa_en.html>, accessed 11 February 2018.

39 This tendency was firmly rejected and criticised by Benedict XVI, *Pastoral Letter of Pope Benedict XVI to the Catholic of Ireland* (19 March 2010), no 4, available at <http://w2.vatican.va/content/benedict-xvi/en/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland.html>, accessed 11 February 2018: 'In particular, there was a well-intentioned but misguided tendency to avoid penal approaches to canonically irregular situations.'

40 See Pope Francis, *Misericordiae Vultus*, Bull of Indiction of the Extraordinary Year of Mercy (11 April 2015), no 21, available at <https://w2.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_bolla_20150411_misericordiae-vultus.html>, accessed 11 February 2018.

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abuse, critical issues have become evident in canonical penal law, but not in the merciful, medicinal and pastoral framework that inspired the whole system.

Penal law has a proper place in the Catholic Church as long as it is deeply rooted in the teachings of Jesus and is applied and developed in accordance with the nature and ends of the Church instituted by him. In this sense, penal law should be inspired by divine mercy, not merely human justice. This is probably one of the most important features that distinguish penal canon law from secular criminal law. Mercy is at the heart of the gospel message.[41] Jesus appears in the Gospels eating and drinking with sinners (Matthew 11:19), commanding his followers to be merciful as his Father is merciful (Luke 6:36) and demanding 77 times forgiveness to others (Matthew 18:21–22). One of the most beautiful and endearing passages of the Gospels is the story of Jesus' meeting with the woman taken in adultery (John 8:1–11). This merciful love of Christ should shine in the face of the Church. As the bride and mystical body of Christ, the Church has to reflect, proclaim and manifest the mercy God feels for human beings. Therefore, when the Church has to restore justice and communion through penal law, it should always do so impelled by merciful love.

The penal canon law system will be instrumental for maintaining order, justice and peace within the Roman Catholic Church only if it continues having a medicinal purpose, illuminated by mercy and pastorally oriented to the salvations of souls. Unlike criminal secular law, penal canon law is auxiliary, not essential, since the Catholic Church is not a community of compulsory membership, as the nation-state is. For this reason, a deeper justification for penal canon law and an articulation of the key values underlying the system will help the ecclesiastical authorities to apply it.

Although Church and State are different realities, canon penal law can learn from the techniques of secular criminal law, since secular criminal law in our day is technically superior to penal canon law. Some basic principles of secular criminal law must be taken more seriously by penal canon law. Pastoral reasons cannot justify a relaxed application of these principles. Otherwise, the pastoral approach can easily lead to arbitrariness. For instance, the excessive discretionary power in the hands of ecclesiastical authorities in applying sanctions and the needless indeterminacy of penalties is opposed to the principle of maximum certainty, or void for vagueness in the US law. It is true that some degree of vagueness is necessary to avoid extreme rigidity, but it is also true that a vague law in practice could operate as a retroactive law,[42] and that canon penal law is sometime too vague. Canon 1399 CIC is paradigmatic in this sense. Paternalistic (not pastoral) attitudes must be avoided in penal canon law.

41 See Pope Francis, *Misericordia et Misera*.
42 In the same vein, see Ashworth and Horder, *Principles of Criminal Law*, p 63.

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Automatic penalties (*latae sententiae*), which are used in the Latin Code but not in the Eastern Code, are opposed to the principle of legality, and they inevitably challenge the separation between internal and external forum. Automatic penalties demand revision under canon law since the law, whether secular or religious, must punish only through a trial (*ex iudicio lex punit*).[43] More than a penalty, automatic excommunication should be considered as the moral status of a Catholic who voluntarily breaks the ecclesiastical communion at its heart. This breaking would have automatic moral implications and sanctions, but not automatic penal sanctions in the strictest sense. Penal sanctions always require a previous procedure (*nulla poena sine iudicio*). The application of an appropriate legal technique is critical in the realm of penal canon law and penal procedural law to adequately protect the basic rights of the faithful.

Although there is not a strict complete separation of powers in the Catholic Church, as there is in the democratic nation-state, a clear separation of functions is at the heart of post-Vatican II canon law (Canon 135 CIC).[44] This separation of functions should avoid any excessive entanglement between executive power and judicial power. Executive power should not operate in the penal domain, as it does now in imposing penalties by precept (Canon 1319 §1 CIC) and in imposing or declaring a penalty by extrajudicial decree (Canon 1342 CIC).[45] Penalties must be outside the realm of executive power. However, all prerogatives of mercy belong to the domain of the executive and therefore must remain outside the judicial function. A distinction between administrative sanctions and penal sanctions, and therefore between administrative tribunals (should they be established) and penal tribunals, is highly recommended. In a voluntary community that shares a homogeneous system of moral values without strong penalties involving deprivation of liberty – a community like the Catholic Church – moral and administrative sanctions could be more effective than penal sanctions. Administrative procedure has to fully protect the fundamental rights of the faithful.

43 Thomas Aquinas, *Summa Theologiae* I–II, q 100, a 9c.

44 Ecclesiastical authorities with legislative power also have executive power, but those who have executive power ordinarily do not have legislative power (see Canon 30 CIC).

45 See also Canon 1348 CIC, which allows the bishop with executive power to provide penal remedies for the welfare of the person or the public good if the matter warrants when an accused is acquitted of an accusation or when no penalty is imposed.

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