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Patrick Reed Reilley

NON-PENAL DISCIPLINARY MEASURES IMPOSED ON CLERICS

An Analysis in the Light of the Essential Norms of the United States Conference of Catholic Bishops and Published Jurisprudence from the Apostolic Signatura Regarding the Principle of Proportionality

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ABBREVIATIONS

§	paragraph
§§	paragraphs
AAS	*Acta Apostolicae Sedis*
art.	article
artt.	articles
can.	canon
cann.	canons
c.	canon
cc.	canons
CA	contentious administrative
CCEO	*Codex Canonum Ecclesiarum Orientalium*
CDF	Congregation for the Doctrine of the Faith
cf.	confer
cfr.	confer
CIC	*Codex iuris canonici*
CIC 1917	*Codex iuris canonici* 1917
CIC 1983	*Codex iuris canonici* 1983
cit.	cited
ed.	editor
eds.	editors
DDF	Dicastery for the Doctrine of the Faith
EN	*Essential Norms*
ibid.	ibidem
n.	number
nn.	numbers
NCCB	National Conference of Catholic Bishops
Prot. N.	protocol number
USCCB	United States Conference of Catholic Bishops
SSAT	Supremum Signaturae Apostolicae Tribunal
vol.	volume

INTRODUCTION

In the course of researching the topic of disciplinary measures imposed on clerics outside of a penal process, one particular principle, the principle of proportionality, was frequently invoked in the definitive sentences of the Supreme Tribunal of the Apostolic Signatura. It became apparent to me that the principle of proportionality, as expressed in the jurisprudence of the Apostolic Signatura, was of particular importance for understanding the purpose and nature of non-penal disciplinary measures and that the same principle of proportionality, although not unique to the administrative branch of canonical science, was of particular importance.

Since the vast majority of published jurisprudence on non-penal disciplinary measures has regarded acts issued with executive power regarding ministerial restrictions on clerics, the focus of this thesis will be on those acts. From research into those published decisions of the Supreme Tribunal, I believe that any future expansion or greater use of non-penal disciplinary measures will need to consider the principle of proportionality to respect the non-penal nature of these measures and their purpose for preserving the good function and order of ecclesiastical functions. This doctoral project considers the question of the difference between penal and non-penal disciplinary measures, their foundation in law, and the correct and legitimate application of non-penal disciplinary measures, with a particular focus on the situation of the Church in the United States of America.

In this thesis, I intend to provide a legal and historical analysis of non-penal disciplinary measures issued with executive power in the CIC 1983 and the relevant published jurisprudence of the Apostolic Signatura regarding the principle of proportionality. I aim to evaluate the law underpinning this critical element in the Church and formulate recommendations for the correct and legitimate application of non-penal disciplinary measures.

Chapter One explores the theoretical foundations of non-penal measures, using a comparative approach to non-penal sanctions in civil jurisdictions and non-penal responses to illicit actions in the Church. Next, we examine the role of the principle of legality as a control on administrative discretion and consider the role of indeterminate juridical concepts. Finally, the principle of proportionality used in the Apostolic Signatura jurisprudence is presented.

Chapter Two discusses the singular administrative act and classifies non-penal sanctions as coercive. Accordingly, we then present the general administrative procedure in the current law, highlighting those elements that deserve special mention for the imposition of coercive acts. After this, we focus on special administrative procedures involving non-penal restrictions on sacred ministry.

Chapter Three continues the focus on non-penal restriction on sacred ministry by presenting the history and development of theoretical and institutional responses to the crisis of sexual abuses of minors by clerics in the United States of America. A proposed project for the non-penal removal from the clerical state, the 1992 Draft of Special Norms for Administrative Removal of a Cleric from the Clerical State, is presented as a historical antecedent to many of the ideas expressed in the *Essential Norms*. Two norms, Norm 8 and Norm 9, from the *Essential Norms,* are treated in detail, paying particular attention to their relationship with non-penal sanctions. Finally, issues arising from the *Essential Norms* and their application are discussed in detail.

Chapter Four presents the diocesan bishop's obligation to safeguard ecclesiastical discipline. It also presents and discusses various foundations in canon law for the imposition of non-penal sanctions. Following this, we present the multiple forms that non-penal restrictions of ministry may take, both voluntary and involuntary. Finally, we present what we retain as the four elements for the legitimate imposition of non-penal sanctions based on the published jurisprudence of the Apostolic Signatura.

1. State of the Art

The Church's response to illicit behavior has always been of great importance to the carrying out of her mission to make disciples of the whole world since illicit behavior, especially by her sacred ministers, impedes her witness before men and women. The historical shift after the Second Vatican Council and the reform of the Code of Canon Law away from penalties affected ecclesiastical authorities' response towards illicit behavior, whether delicts or not, above all regarding immoral behavior *contra sextum*.

The crises of sexual abuse of minors by clerics in the United States of America during the 1980s through the 2000s culminated in the United States Conference of Catholic Bishops meeting in Dallas, Texas, in 2002 and the creation of the *Dallas Charter* and *The Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons.* The *Essential Norms*, which combine elements of an instruction and norms on non-penal disciplinary measures, has been the object of considerable canonical study.

The ends of penal law (reparation of scandal, restoration of justice, and reformation of the offender; cf. can. 1341) can often be anticipated through non-penal disciplinary measures, especially if illicit situations are addressed sooner before they develop into true delicts.

Various authors have written on the subject and nature of non-penal disciplinary measures, but there is not a large body of literature directly treating this subject. Similarly, due in part to the relatively small number of published decisions by the Apostolic Signatura, commentaries on those same decisions are understandably limited.

2. Main research questions

This thesis seeks to answer the main questions regarding the foundation in the canonical system for non-penal disciplinary measures, the act by which they are imposed, the correct and just procedure for their application, and how the principle of proportionality guides their correct application according to the published jurisprudence of the Supreme Tribunal of the Apostolic Signatura.

3. Sub-research questions/objectives

The sub-research questions to be investigated by this research include:

1. What are non-penal sanctions?
2. For what purpose are they imposed?
3. How are they imposed?
4. Finally, what are the limits to their imposition?

4. Methodology

This study begins with two premises, one theoretical and the other practical. The study's theoretical foundation is that non-penal sanctions are an institutional response to a non-penal violation of some duty or function. The practical foundation is the existence of limited instances of non-penal responses to illicit actions in the Code of Canon Law.

From these two premises, we consider how the existing ecclesiastical laws and published jurisprudence of the Apostolic Signatura on this subject matter show the existence of non-penal sanctions and their correct application. Thus, the methodology used by this study will be principally juridical in its analysis of non-penal disciplinary measures but will employ a descriptive approach. Hermeneutically, this study will be guided by an attempt to illustrate how the principle of proportionality brings out many of the elements proposed for non-penal disciplinary measures. Source material will be drawn from the relevant canonical legislation and the published jurisprudence of the Apostolic Signatura. Recourse will be had as necessary to scholarly texts and recent articles.

Since this thesis is written in English, and the literature on non-penal sanctions is practically non-existent in English, much of the secondary material is taken from non-English language sources. The translations are the author's unless otherwise noted. To facilitate verification of the sense of the quotes and as a service to other researchers on this and related topics, the original text is included in the footnotes. This thesis also makes extensive use of published decisions from the Apostolic Signatura. Translations have been employed in the body of the work to facilitate comprehension of the material, with the original and official Latin text reported in the footnotes. Published English language translations have been exclusively used in the text wherever they exist for a particular decision. However, in the absence of a non-English

translation, the translation is the author's. The translations of the canons used in the body of the text have been taken from the translation of the Canon Law Society of Great Britain and Ireland unless otherwise noted.[1]

5. Limitations

The primary limitation of this work is the continued evolution of non-penal sanctions in the current praxis of the Church. Sanctions are, by their nature, occasioned by some dysfunction or illicit action and, consequently, often involve elements that are not widely publicized. Furthermore, non-penal sanctions frequently come to light to the public through the publication of those decisions as a result of contentious administrative recourse before the Supreme Tribunal of the Apostolic Signatura. These definitive sentences and decrees are, by nature, a limited selection of the total number of recourses brought to the attention of the Apostolic Signatura. Since this research involves looking at the jurisprudence of the Apostolic Signatura as a guide to the correct and legitimate application of non-penal disciplinary measures, the relative lack of published or publicly available decisions and sentences by the Apostolic Signatura constitutes a limitation on the completeness of the perspective available in regards to all the cases the Apostolic Signatura has examined.

6. Relevance

This project seeks to respond to an ongoing and evolving situation. After more than twenty years of the *Essential Norms* in the United States of America, the universal law regarding penalties and their application has continued to evolve. Successive changes to *Sacramentorum sanctitatis tutela* have strengthened the role of the administrative procedure in inflicting penalties in *graviora delicta* cases. The importation of many safeguards from the judicial process has been a kind of resurrection of the chief elements of the *lex de procedura administrativa*, albeit regarding the gravest of delicts. This partial reform of administrative procedures in *graviora delicta* cases is one of the most essential parts of this stage in how the Church deals with criminal or illicit behavior.

As articulated by the Apostolic Signatura, the principle of proportionality has been an essential development in the interim protection of rights. The jurisprudence of the Supreme Tribunal has established that the legitimacy of a measure is determined, in part, by its correct application and use. The illegitimate use of non-penal administrative measures to impose what amounts to perpetual penalties is not proportional to the established rights of the faithful.

As canon law continues to change in response to controversies in the Church, the diverse procedures available to Ordinaries will require careful attention. The illegitimate use of a procedure constitutes a violation *in procedendo* that opens the measure to hierarchical recourse and eventual use of the contentious administrative procedure. Most importantly, the desire to resolve

[1] J. I. Arrieta (ed.), *Code of Canon Law Annotated*, Wilson & Lafleur, Chambly 2022[4th edition].

controversies expeditiously and at any cost, without careful attention to the rights of all parties involved, contradicts the *lex suprema* of the Church. Such actions undermine the Church's mission and credibility to address future controversies.

Chapter I

NON-PENAL SANCTIONS

This first chapter identifies the nature of non-penal sanctions and divides them into two types: disciplinary and administrative. Since non-penal sanctions involve a restriction of rights, it is necessary to discuss what "right" means in this thesis and relate that to the principle of legality. After discussing the principle of legality, we will discuss how indeterminate legal concepts guide administrative discretion. Finally, this chapter will introduce the principle of proportionality and discuss, in general, how published decisions of the Apostolic Signatura have impacted administrative law and, more specifically, non-penal sanctions.

1. NON-PENAL SANCTIONS

In 1993, J. Sanchís wrote, "Although it is not always easy to establish the borders of the different legal concepts and institutes, it can be said that, in principle, canon law should distinguish between the criminal offense (crime in the true sense) and the disciplinary offense, and, consequently, also distinguish between the sanction of a criminal nature and the sanction of a disciplinary nature, to be applied according to the respective nature of the offending behavior. Surrounding these basic concepts revolve other concepts, institutions, and principles, some of which are common to both criminal and disciplinary law: the "principle of foreseeability" or the constitution of the offense by legal norm before the application of the sanction, the principles of "non-retroactivity," "strict interpretation" and "prohibition of analogical extension" of the rules establishing sanctions, etc. For its part, penal canon law should embrace the principle of "reservation of law," i.e., that only by formal law can crimes be established and punishments be imposed, which should be inflicted only by judicial process, etc. In turn, disciplinary law, characterized by its executive nature, could also establish the offenses through administrative acts or rules whose penalties would be enforced by extrajudicial decree, etc."[1]

The subject matter at hand, non-penal sanctions, is frequently confused, on one hand, with administrative law in general and, on the other, with penal

[1] J. Sanchís, *La legge penale e il precetto penale*, vol. 7, Giuffrè, Milano 1993, p. 7. Italian original: "Benché non sia sempre facile stabilire i contorni dei diversi concetti e istituti giuridici, si può affermare che, in linea di massima, il diritto canonico dovrebbe distinguere tra l'illecito penale (il delitto in senso vero e proprio) e l'illecito disciplinare, e, di conseguenza, distinguere anche tra la sanzione di natura penale e la sanzione di natura disciplinare,

law.[2] As the name implies, non-penal sanctions are not penalties; they are not formal punishments for criminal delicts. Like penalties, they respond to a violation of a norm, but unlike penalties, they are a less severe response to a breach of the juridical order. The previous title of Book VI regarding penal sanctions, *De Sanctionibus in Ecclesia*, may have encouraged the thinking that the only kinds of sanctions in the Church are penal ones since Book VI exclusively deals with penal law.[3] However, the equivalent section of the CCEO, Title XXVII, *De Sanctionibus poenalibus in Ecclesia*, and the current Book VI, also now titled *De Sanctionibus poenalibus in Ecclesia*, permit a broader view of sanctions as both penal and non-penal.[4]

J. Alesandro writes, "The fundamental difference between the two approaches lies in the fact that the penal process represents a decision about how

da applicare a seconda della rispettiva natura del comportamento illecito. Attorno a questi concetti basilari ruotano gli altri concetti, istituti e principi, alcuni dei quali sono comuni al diritto penale e a quello disciplinare: il «principio di prevedibilità» o di costituzione dell'illecito mediante norma giuridica previa all'applicazione della sanzione, i principi di «irretroattività», di «interpretazione stretta» e di «proibizione dell'estensione analogica» delle norme che stabiliscono le sanzioni, ecc. Da parte sua, il diritto penale canonico dovrebbe accogliere il principio di «riserva di legge», vale a dire, che solo mediante legge formale si possano costituire i delitti e comminare le pene, le quali dovrebbero essere inflitte soltanto mediante processo giudiziario, ecc. A sua volta, il diritto disciplinare, caratterizzato dalla sua natura esecutiva, potrebbe anche costituire gli illeciti mediante atti o norme amministrative le cui sanzioni venissero applicate con decreto extragiudiziale, ecc."

[2] P. Malecha, *Il processo penale amministrativo nella giurisprudenza della Segnatura Apostolica. Alcune considerazioni*, in D. Salvatori – R. Palombi – A. Catta (eds.), *Diritto penale canonico: dottrina, prassi e giurisprudenza della Curia Romana*, Libreria editrice vaticana, Città del Vaticano 2023, p. 666. Malecha states that cases are frequently protocolled at the Apostolic Signatura as penal, but later, after study, are reclassified as non-penal; Cf. N. Schöch, *L'applicazione di misure disciplinari a membri di un instituto di vita consecrata o di una società di vita apostolica accusati di un delitto contro il sesto comandamento nella recente giurisprudenza della Segnatura Apostolica*, in D. Salvatori – R. Palombi – A. Catta (eds.), *Diritto penale canonico: dottrina, prassi e giurisprudenza della Curia Romana*, Libreria editrice vaticana, Città del Vaticano 2023, pp. 640–642; Cf. A. Zappulla, *El «derecho disciplinar» en la Curia Romana y en el Estado de la Ciudad del Vaticano. Análisis comparado de los Reglamentos de las respectivas Comisiones disciplinarias, convergencias y divergencias*, «Ius Canonicum», 62 (2022), p. 221.

[3] J. Canosa, *L'articolazione dinamica della distinzione fra diritto penale e diritto amministrativo nella Chiesa*, «Ius Ecclesiae», 32/1 (2020), pp. 204–205.

[4] The new *Subsidiuum* from the Dicastery for Legislative Texts regarding Book VI explicitly includes non-penal sanctions as a possible measure by ecclesiastical authorities: "However, the obligatory prescription of some of the measures listed by can. 1336 can be adopted by the Authority for other purposes: sometimes, in fact, even without the presence of a specific delict, the ecclesiastical Authority deems it necessary to impose some of these measures of a disciplinary, non-penal nature, in order to correct certain conduct (Cf. 191). As is natural, any disciplinary provision by the Ordinary must be carried out in conformity with the indications of the law, and that is, by means of an administrative decree carried out according to cans. 48 ff. *CIC*; moreover, as an administrative act, the provision is susceptible of normal administrative recourse to the higher Authority according to cans. 1732 ff," Dicastery for Legislative Texts, *Penal Sanctions in the Church: User Guide for Book VI of the Code of Canon Law*, Vatican City 2023, p. 64, n. 49.

to punish a past act whereas the non-penal process takes a management approach, relying on a prudential judgment about future harm to the Church. Essentially, the latter is an act of *administration* (*personnel management*) even though it is based on findings of fact."[5]

A penalty has grave effects on the relationship between the offender and the rest of society precisely because the juridical order of that society has typified the criminal conduct in question as gravely serious. Accordingly, the imposition of a penalty is always the *ultima ratio*, the most extreme measure within a system.[6] The typification of all antisocial behavior as penal, without considering its relative effect upon society, makes punishing less damaging behavior more severe than it may merit. This leveling of criminal punishments for all types of antisocial behavior obscures the severe effects of more serious crimes that merit society's condemnation. Appropriately, secular states typically have a range of criminal punishments available to the legal system to select an appropriate penalty corresponding to the crime's gravity.

Although canon law includes the concept of penalties that correspond to delicts established in law, not every possible offense is sanctioned with a penalty. As M. F. Rosinski observes, "The law cannot anticipate every eventuality, and many aspects of life happily require little or no legal oversight."[7] The recent promulgation of the revised Book VI has given new emphasis to penal law within the Code of Canon Law, but not every possibility is considered. D. Cito observes, "It is true that there is canon 1399, which allows, under certain peremptory conditions, for the violation of a non-penal canonical norm to be made criminally relevant, yet sometimes there are behaviors that, while not formally contrary to a legal requirement, are detrimental to the public good and require a response from authority in defense of Church discipline."[8]

Nevertheless, beyond the possibilities offered by a range of criminal penalties that correspond more precisely to the seriousness of the offense, what is to be done about antisocial behavior that is not so serious as to merit the most severe of responses? In other words, what can and should be done about the gray area beyond behaviors not covered by penal laws? One extreme is to do nothing and to leave such behavior unregulated. However, there are behav-

[5] J. A. Alesandro, *Removal from the Clerical State for the Sexual Abuse of Minors*, «Studia Canonica»/2 (2013), p. 297.

[6] F. Pérez-Madrid, *Derecho administrativo sancionador en el ordenamiento canónico: una propuesta para su construcción*, Ediciones Universidad de Navarra, Pamplona 1994, p. 89; Cf. J. A. Alesandro, *Removal from the Clerical State for the Sexual Abuse of Minors*, cit., p. 303.

[7] M. F. Rosinski, *Mercy and Due Process in Religious Institutes*, «Studia Canonica», 51/2 (2017), p. 583.

[8] D. Cito, *Note sui provvedimenti urgenti in ambito penale*, «Ius Ecclesiae», 15 (2003), p. 303. Italian original: "È vero che esiste il can. 1399, che consente a certe tassative condizioni, di rendere penalmente rilevante la violazione di una norma canonica non penale, tuttavia a volte esistono comportamenti che, pur non formalmente contrari ad una prescrizione di legge, sono pregiudizievoli per il bene pubblico e necessitano di una risposta da parte dell'autorità a difesa della disciplina ecclesiale."

iors within the ecclesial community that, while not considered delicts, are immoral and sometimes illegal within the civil jurisdiction. By way of example, Rosinski offers a non-exhaustive list of examples of these kinds of behaviors in consecrated life: "Religious who attempt to conceal major traffic offenses, such as driving under the influence; are accused of frequenting casinos or disreputable places; appear to be friends with people publicly opposed to the Catholic faith or persons associated with organized crime; are regularly absent from the community without permission; who possess luxury items the community did not buy or fund; who use threatening or inappropriate language towards fellow members of the community or employees."[9]

Furthermore, given the enormous number of Catholic faithful on every continent and the hundreds of different languages and cultures, one culture's particular sensitivities and needs will not always be the same. Consequently, the more detailed regulation of proper behavior and the standard to be followed is appropriately carried out at the level of the particular Church and other local ecclesiastical entities.[10]

1.1. The Principle of Minimal Penal Intervention

In secular state systems, juridical science has articulated a principle of minimal penal intervention, following the adage *graviore culpa, graviore poena,* to regulate which kinds of antisocial behaviors are typified as crimes and which are left unregulated or typified as non-penal administrative sanctions. In the civil system, these non-penal administrative sanctions are considered to have a functional or even medicinal purpose in that they regulate behaviors in which criminal imputability is not possible.[11] F. Pérez-Madrid describes the principle of minimal penal intervention as the combination of the *ultima ratio* nature of penal law and the fragmentary nature (*fragmentariedad*) of penal law, which means that the legislator uses penal law for only the gravest kinds of misconduct.[12] As a response, most societies limit crimes to those listed in the penal code and, consequently, resist the tendency to continually add to that penal code by over-criminalizing matters that are not so severe.[13]

The principle of minimal penal intervention guided the initial reform of the CIC 1917 in what came to be Book VI of the CIC 1983. Although there were those who, during the creation of the 1917 Code, asked for a universal disciplinary law distinct from penal law, this did not come to be.[14] Consequently,

[9] M. F. Rosinski, *Mercy and Due Process in Religious Institutes*, cit., p. 583.

[10] Cf. B. Daly, *Put It in Writing*, «The Canonist», 11/2 (2021), p. 57.

[11] E. Baura, *Atto amministrativo e limitazione dei diritti*, in J. I. Arrieta (ed.), *Discrezionalità e discernimento nel governo della Chiesa* (*Studi / Istituto di diritto canonico San Pio X*), Marcianum Press, Venezia 2008, p. 208.

[12] F. Pérez-Madrid, *Derecho administrativo sancionador en el ordenamiento canónico*, cit., p. 162.

[13] J. A. Alesandro, *Removal from the Clerical State for the Sexual Abuse of Minors*, cit., p. 303.

[14] G. P. Montini, *Il diritto disciplinare canonico*, «Quaderni di diritto ecclesiale», 31/3 (2018), p. 266.

as canonical science advanced and the advantages and disadvantages of the CIC 1917 were appreciated over time, the reduction of the number of penalties was understood to be a desirable goal in the development of the CIC 1983: "Placet reductio normarum generalium ad principia tantum generalia quaedam et constitutio quarundam solummodo poenarum in singular delicta. Quod quidem aperiet legislatoribus particularibus viam, qua ea praescripta poenalia ferantur, quae locorum necessitatibus melius respondere possint."[15]

The results of this observation eventually became part of the CIC 1983 and the CCEO.[16] The reduction of penalties did not mean the Church's Codes abandoned the notion altogether. Indeed, can. 1311, §1 affirms the *ius nativum et proprium* of the Church to impose penal sanctions upon the Christian faithful, continuing in paragraph two to recall that penalties are not the only means or even the most preferable means to deal with offenses against justice. These other means ("pastoral charity, example of life, advice and exhortation") are not exhaustive but indicative of other possible options. Among those means possible are non-penal disciplinary measures, which, if not mentioned explicitly in Book VI of the Code of Canon Law, are available to those charged with pastoral governance.[17]

Consequently, the principle of minimal penal intervention also applies to non-penal sanctions. These are alternatives to inflicting penalties that reflect the lesser gravity of the offenses and provide a means of protecting the juridical values of the ecclesiastical community without resorting to penalties.

1.2. The Concept of Right (Ius) and Non-Penal Sanctions

Since the topic of our investigation regards the non-penal restrictions of rights, it is first necessary to clarify our understanding of right (*ius*) and, above all, its polyvalent meaning in English. As has been well-noted, the English language generally does not distinguish between the Latin terms *ius* and *lex*, typically (but not always) translating them as "law." The term "right" in English often means (but again, not always) "subjective right,"

[15] Coetus studiorum «De Iure Poenali», *Brevis relatio de animadversionibus generalibus quae factae sunt ad Schema canonum ab Episcoporum Conferentiis, a S. Sedis Dicasteriis, ab Unione Superiorum Maiorum et ab Universitatibus studiorum ecclesiasticorum*, «Communicationes», 7 (1975), p. 93.

[16] CIC can. 1317: "Poenae eatenus constituantur, quatenus vere necessariae sint ad aptius providendum ecclesiasticae disciplinae. A legislatore autem inferiore dimissio e statu clericali constitui nequit." There is a change from the previous Book VI can. 1317, which specified, "Dimissio autem e statu clericali lege particulari constitui nequit." In any case, the practical effect is the same.
CCEO can. 1405, §1: "Qui habet potestatem legislativam, potest, quatenus vere necessarium est ad aptius providendum disciplinae ecclesiasticae, etiam leges poenales ferre necnon suis legibus etiam legem divinam aut ecclesiasticam ab auctoritate superiore latam congrua poena munire servatis suae competentiae limitibus ratione territorii vel personarum."

[17] Cf. B. F. Pighin, *Il nuovo sistema penale della Chiesa*, Marcianum Press, Venezia 2021, p. 101.

that is, the faculty or power to exercise one's right, understood in the classical sense of *ius*. As a result, in discussions in English, law and right can frequently become confused and, in turn, generate confusion regarding rights, faculties, and powers as well as the source of those same.

The classical sense of *ius*, going back to the Romans, carries a broad meaning, encompassing the entirety of the law, regardless of its source, hence the distinction that the Romans made between *ius* and *lex*, a statute that is a source of *ius*. When *ius* is used with a modifier, it refers to a specific field or topic of the law, such as *ius publicum* or *ius privatum*. *Ius,* in addition to its general meaning of the entirety of the law, can mean both the *ius obiectivum* and *ius subiectivum*:

> Besides the use of the term in the objective sense as 'the law,' *ius* is applied to indicate the subjective right or rights (*iura*) of an individual, as the right to do something in a certain legal situation, to acquire a thing or to dispose of it, to claim something from another […]. Almost synonymous with *ius* in this meaning are the expressions *facultas* and *potestas* although the legal element is not explicit in them.[18]

The concept of justice, as defined by Ulpian, involves the will to give everyone his or her due: "Justice is the constant and perpetual will to give to each what is his due (*ius suum*)."[19] Building upon this definition, J. Hervada explains that the objective sense of *ius* refers to what is owed to someone and is not a norm or subjective right.[20] In the objective sense, *ius* is "the just thing owed to someone" and is neither a norm nor a subjective right. In its primary sense, it is simply "that which is owed" and can be a tangible or intangible good.[21]

An objective right, being what is owed, remains static and is defined by law. It exists without being exercised or restricted; it merely "is." In contrast, as Hervada notes, a subjective right is "a faculty to do, to omit, or to demand," particularly emphasizing the faculty to demand. However, even should the faculty to demand never be exercised, the just thing itself, the object of justice, remains: "Justice does not wait for a demand; it gives things when it must give them without waiting for the titular of the right to exercise his faculty to demand them."[22] The distinction between the right itself, the *ius suum,* and the faculty to demand, the *ius subiectivum,* is essential, because "a subjective right is the faculty to act, and as such it has a dynamic rather than a static quality. Because it can be exercised, that exercise can also be restricted. When restric-

[18] A. Berger, *Encyclopedic Dictionary of Roman Law*, in *American Philosophical Society* (*Transactions of the American Philosophical Society held at Philadelphia for Promoting Useful Knowledge*), vol. 42/2, American Philosophical Society, Philadelphia 1953, p. 525.

[19] "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi." D.1.1.10.

[20] J. Hervada, *What is Law? The Modern Response of Juridical Realism: An Introduction to Law*, W. L. Daniel (trad.), Wilson & Lafleur, Montréal 2007, p. 44.

[21] *Ibid*., p. 48.

[22] *Ibid*., pp. 50–51.

tions on the exercise of rights are put in place, *it is always the exercise of the subjective right which is being restricted*."[23]

An objective right *is*, while a subjective right involves the potential for action and can be restricted. Distinguishing between objective and subjective rights helps to avoid the modern tendency to equate a right with its exercise and to divorce the exercise of the right from its objective foundation.[24] Though not common in modern discussions, the distinction between objective and subjective rights occasionally surfaces. For instance, objective rights can be expressed as statements like "Freedom of speech is a fundamental right," emphasizing an objective reality existing independently of the acting subject. On the other hand, subjective rights are expressed in terms like "He has the right to speak freely," focusing on the dynamic quality and the individual's faculty to act.

Placing too much attention on the acting subject, thereby minimizing objective right, may divorce the exercise of the right from its objective foundation, the *ius suum*. Understanding the objective right becomes crucial for properly exercising the subjective right since, as Hervada notes, the subjective right is the faculty to claim what is owed — neither more nor less.[25] Furthermore, within the Church, the pastoral and the legal are sometimes imagined to be opposed to one another, which may be a response to a conception of law without reference to justice, that is, only a rigid application of the normative text.[26]

A realistic conception of right is rooted in the shared human experience of being able to say, "This is mine, and that is yours." Hervada describes this as "allotment" or "apportionment."[27] This is based on human freedom, "an essential dimension of the human […] and, consequently, his responsibility, given that a man can truly say that his actions are his own insofar as he has freely performed them."[28] Consequently, the things that belong to a human person become extensions of her person since they are under her domination.

[23] E. Lohse, *Restricting the Right of the Faithful to Enter a Church for Divine Worship: Law and Jurisprudence*, Editrice Pontificia Università Gregoriana, Roma 2016, p. 16 [Emphasis in original]. Lohse continues in a footnote on the same page: "It is for this reason that the seventh principle for the revision of the Code called for the development of procedures specifically to protect subjective rights." Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Principia quae Codicis iuris canonici recognitionem dirigant*, «Communicationes», 1 (1969), p. 83.

[24] E. Lohse, *Restricting the right of the faithful to enter a church for divine worship*, cit., p. 17.

[25] J. Hervada, *What is law?*, cit., p. 39.

[26] E. Baura – T. Sol, *The Church, Persons, and Juridical Goods: An Introduction to Canon Law*, Librairie Wilson & Lafleur inc., Montréal 2023, p. 27.

[27] "Las cosas están repartidas." J. Hervada, *Introducción crítica al derecho natural*, Universidad de Navarra, Pamplona 1982[2a], pp. 23–24; For the translation "alloted", see J. Hervada, *What is law?*, cit., p. 16; For the translation "apportioned, see J. Hervada, *Critical Introduction to Natural Right*, M. Emmons (trad.), Wilson & Lafleur, 2020[2nd], p. 7.

[28] E. Baura – T. Sol, *The church, persons, and juridical goods*, cit., p. 5.

The corresponding side of the capacity for appropriation is the fact that things are apportioned and attributed to persons.[29]

Regarding the *suum*, the element of possession, Hervada emphasizes that a right exists when one has a title, "that is, that in which—the source—the dominion of the subject over a thing originates."[30] The title to rights may come from various sources but is not the same as the foundation of the right: "The foundation is that by virtue of which a subject *may* be the subject of a right or of certain rights. The foundation qualifies one to hold a right but does not grant it; on the other hand, the title grants the right."[31]

The classical tradition, adopted by canonists, divides the source of that which is just into divine law (positive and natural) and human law (positive). Positive divine law is all that God has revealed for humanity's salvation through sacred revelation. In contrast, natural law is founded in the order of creation, primarily human nature, but also other creatures who have various relationships with humanity because they exist in the same order of creation.[32] Divine law is the "fundamental orderedness of man towards his natural [and supernatural] ends."[33] This means that within the divine precepts, both positive and natural, the human person finds his ends and determines what is to be done based on what is his and what belongs to others. But because these determinations of his ends are often only general, positive human law establishes how those ends may be achieved, such that "the content of positive law is a determination or a conclusion of the precepts of natural law, and positive law always represents a political decision, a choice by the legislature."[34]

Positive human laws cannot annul the commands and prohibitions of divine law (positive and natural) since the divine law comes from God Himself, who establishes the order. Since the duty to observe the law derives from the justice of the thing itself, that is, it is a thing that is owed, a positive human law which presumes to undo the obligatoriness of the divine law must undo the order established, that is, take away the *ipsa res iusta*. This is impossible, in as much as no positive human law can destroy divine Revelation or human nature.[35] Errázuriz points out that a realistic understanding of right in the Church is orientated toward that which is just, whether the title to the *ipsa res iusta* is established by God's will or human will. He writes, "Establishing what is just or unjust is proper to an agent endowed with intelligence, capable of constituting a reality that has that order of interpersonal justice appropriate

[29] J. Hervada, *Critical Introduction to Natural Right*, cit., pp. 39–40.

[30] *Ibid*., p. 26.

[31] *Ibid*., p. 27.

[32] C. J. Errázuriz Mackenna, *Il diritto e la giustizia nella Chiesa: per una teoria fondamentale del diritto canonico*, Giuffrè Francis Lefebvre, Milano 2020[2.] ed. aggiornata, pp. 223–224.

[33] J. Hervada, *Critical Introduction to Natural Right*, cit., p. 113.

[34] *Ibid*., p. 114.

[35] *Ibid*., p. 119.

to the person's being and good."[36] Since God and human persons are different orders of being, the realities that human persons are capable of constituting are far different what God establishes. However, the "behaviors or acts allowed by natural juridical law may be subject to regulation by positive law defining them and indicating their requirements."[37] This means that, for a just cause, the right contained in divine law can be regulated through positive human law. Finally, the capacities contained in divine law may be modified, but never to the point that the capacity itself is transformed into absolute incapacity since "this would go against natural law and violate the natural content of personality."[38]

Regarding this last point, Hervada summarizes the limitations of positive law versus divine law by pointing out that while positive law may prohibit what is permissible by divine law, the reverse is not true, such that what is impermissible by divine law cannot be made acceptable by positive law. Similarly, an act null or invalid because of divine law cannot be valid by positive law, but positive laws may grant efficacy to the act in those areas in which it has authority. However, if the legislator lacks authority over that area, the positive law issued by it cannot make a naturally invalid act valid. Finally, Hervada shows that positive law can impose requirements for the validity of an act that would be valid by divine law; however, this does not mean that there would be a twofold validity, one from the divine law perspective and the other from positive law. Instead, it is one juridical act that is either valid or invalid, according to the requirements for validity established by positive law.[39]

With the present topic, non-penal sanctions, since these sanctions frequently (but not always) only restrict the use of a right, it is necessary to be clear that the *ipsa res iusta* remains. The underlying juridical reality of the title to the various rights in question will help to distinguish the degree to which the subjective use of the right may be restricted or even removed, as the case may be.

1.3. Definition of Non-Penal Sanctions

Thus far, we have used the term non-penal sanction without defining the concept. To do this, it is first necessary to define a sanction briefly. The ancient *lex talionis*, with its retributive function, provided a proportional limitation on unmitigated revenge for offenses.[40] Generally, a sanction is "a repressive means that is exercised when an obligation has not been fulfilled."[41] Although

[36] C. J. Errázuriz Mackenna, *Il diritto e la giustizia nella Chiesa*, cit., p. 224.

[37] J. Hervada, *Critical Introduction to Natural Right*, cit., p. 120.

[38] *Ibid*..

[39] *Ibid*., pp. 120–121.

[40] B. F. Pighin, *Il nuovo sistema penale della Chiesa*, cit., p. 120.

[41] F. Pérez-Madrid, *Derecho administrativo sancionador en el ordenamiento canónico*, cit., p. 52. Spanish original: "es un medio represivo que se ejerce cuando una obligación no se ha cumplido".

Gherri points out that "sanction" can mean any "socio-institutional reaction to a conduct,"[42] and while it is undoubtedly true that sanctioned conduct can be positive, negative, or neutral, and consequently, the response,[43] For this thesis, sanctions generally will be understood as an institutional response to *illicit* behavior.

Given this distinction, we concur with the definition of a sanction offered by E. Baura, applicable to both penal and non-penal sanctions: "a deprivation of a juridic good, coercively imposed on a person to redress a social harm."[44] In a secular context, non-penal sanctions are "Any [negative] action inflicted by the Administration on a person under administration as a consequence of illegal conduct as a result of an administrative procedure and with a purely repressive purpose."[45] For example, in many Western societies, ordinary traffic violations such as speeding or failing to yield at an intersection are punished not as criminal violations but as administrative ones. The violator is issued a citation, which he or she may contest through an administrative procedure or accept the corresponding fine issued as punishment. The fine is imposed to discourage violations and punish those violating traffic norms to help safeguard public goods such as road safety and public order.

In secular States, the distinction between administrative sanctions and penalties is normally apparent because they are each subject to different legal regimes. Criminal violations are subject to criminal law and a judicial process. As their name implies, the administrative authority inflicts administrative sanctions, and an appropriate administrative procedure is employed. That procedure aims to discipline the illicit behavior proscribed by an administrative norm. In contrast to penal violations, administrative violations do not

[42] P. Gherri, *Struttura ed elementi dell'intervento sanzionatorio canonico. Ipotesi per una sistematica*, «Ius Ecclesiae», 34/2 (2022), p. 575. Italian original: "reazione socio-istituzionale ad una condotta"

[43] Gherri gives the example of the conferral of an order of merit as a positive sanction of conduct. This ambiguous use of "sanction" also occurs in the English language since, in the example above, it is more common to use the word "citation" to describe the (positive) assessment of behavior that is given through the award of a medal or other commendation. The opposite sense is used, for example, in a traffic citation, which is a reaction to some (negative) behavior by the authorities toward a driver.

[44] E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, in P. A. Bonnet – C. Gullo (eds.), *La lex propria del S.T. della Segnatura Apostolica*, Libreria editrice vaticana, Città del Vaticano 2010, p. 340. Italian original: "Una privazione di un bene giuridico, imposta coattivamente ad un soggetto allo scopo di rimediare un danno sociale."

[45] "Cualquier mal infligido por la Administración a un administrado como consecuencia de una conducta ilegal a resultas de un procedimiento administrativo y con una finalidad puramente represora." F. Pérez-Madrid, *Derecho administrativo sancionador en el ordenamiento canónico*, cit., p. 53; original in E. García de Enterría, *El problema jurídico de las sanciones administrativas*, «REDA. Revista Española de Derecho Administrativo», 10 (1976), p. 399; Id., *Curso de Derecho administrativo*, Madrid 1982, p. 147.

require the intention to act maliciously (*dolus*) or to possess guilt (*culpa*).[46] They can be punished with objective guilt, and even mere negligence can be punished. Consequently, they are not subject to the same exact requirements for determining imputability as a crime. The social implications of non-penal sanctions are less grave than criminal penalties, meaning they are more appropriate for less grave misconduct. For example, the "softer" approach of administrative removal may be more palatable than penal deprivation of office, even though both may be possible in given circumstances.[47] Finally, the sanctions have juridical consequences that differ from penalties.

On the other hand, penalties are imposed by the judiciary through a judicial process, with the guarantees of rights that are typical of a judicial process. The object of the process is to punish behavior previously declared criminal by the relevant legislation. Judicial processes require a determination of subjective imputability of the crime to the accused, while the determination of imputability is not always present in non-penal administrative sanctions.[48] Furthermore, within the moral tradition of the Church, grave sin is the fruit of a free human act, and, as such, the canonical system only punishes with coercive penalties those freely committed sins that are also classified as delicts.[49] Since imputability is a requirement to impose a penalty (cf. can. 1321, §2), this is an essential distinction between what is penal and what is non-penal in the sanctioning activity of the Church. This distinction involving moral certainty regarding imputability has been affirmed in an affirmative definitive sentence of the Apostolic Signatura *coram* Cacciavillan in which the Judges of the Supreme Tribunal found that the Congregation for the Clergy erred both *in procedendo* and *in decernendo* in finding that the Ordinary's decrees were penal rather than non-penal, stating, "However, the decision by which, for example, the conferral of an ecclesiastical office is refused by the competent authority due to the defect of suitability of a candidate, or the faculty to preach or to hear confessions is revoked according to the norm of cann. 764 and 974, §1, respectively, is in no way the imposition of a penalty, for which moral certitude about a gravely imputable perpetrated delict is required, but a non-penal disciplinary decision, which can be issued due to a positive and probably doubt about the suitability of a cleric in the matter."[50]

Among those authors who write about non-penal sanctions, the distinctions between penal and non-penal sanctions are generally characterized as

[46] *Ibid*., p. 51; cf. P. Buselli Mondin, *Il diritto di difesa in ambito disciplinare*, «Ius Ecclesiae», 23/3 (2011), p. 673.

[47] E. Baura, *Atto amministrativo e limitazione dei diritti*, cit., p. 210.

[48] E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., p. 340

[49] N. Schöch, *L'applicazione di misure disciplinari a membri di un instituto di vita consecrata o di una società di vita apostolica accusati di un delitto contro il sesto comandamento nella recente giurisprudenza della Segnatura Apostolica*, cit., p. 641.

[50] Supremum Signaturae Apostolicae Tribunal coram Cacciavillan (18 martii 2006), *Prot. N. 32108/01 CA Exercitii ministerii sacerdotalis*, in W. L. Daniel (ed.), *Ministerium Iustitiae*, vol. 2,

qualitative, quantitative, functional, or formal, depending on the author.[51] Concerning the quantitative and qualitative distinction between penal and non-penal sanctions, a representative canonist, Pérez-Madrid, establishes the criterion of the gravity of the conduct, which guides the legislator when creating the law.[52] The legislator, guided by the principle of minimal penal intervention, will typify only the gravest of anti-juridical conduct as a crime. Lesser anti-juridical conduct is established as administrative infractions with corresponding sanctions. As she points out,[53] the quantitative distinction depends considerably on the legislator's decision, and there has been a movement in most Western States to decriminalize many actions and reclassify them as administrative infractions. The consideration of what stance is to be taken towards offenders is consonant with the preference within the penal field itself to use the term "penal law" rather than "criminal law" since it places the focus on the *response* of the community towards the criminal act, rather than on the act itself.[54]

The functional distinction regards a distinction in the authority of the one imposing the sanction.[55] In secular states, in which there is a separation of powers and the application of the principle of penal legality, the possibility of the public administration imposing sanctions is limited to non-penal sanctions. Consequently, the legislator determines its nature, either penal or not, with the effects of the two different legal orders. A functional understanding of sanctions sees non-penal sanctions as those that do not require the most characteristic elements of criminal law, above all, the judicial process and imputability, and consequently allow the public administration to punish objective violations of norms through the principles of administrative law.

Given that there is not a separation of powers in the Church but a distinction of functions, a functional distinction between penal and non-penal sanctions is imperfect. The qualitative (and related quantitative) and functional distinctions, while helpful and indeed reflections of the juridical principle of minimal penal intervention as well as general principles of penal law, are ultimately *formal* distinctions in that the difference between a penal sanction

Librairie Wilson & Lafleur, Chambly Qc 2021, pp. 67–68, n. 8. Cf. P. Buselli Mondin, *Il diritto di difesa in ambito disciplinare*, cit., pp. 682–683; B. Daly, *Canon 1336: What Process Must the Diocesan Bishop Follow to Remove the Faculties of a Priest?*, in *Roman Replies and CLSA Advisory Opinions 2017*, 2017, p. 88.

[51] E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., pp. 340–341.

[52] F. Pérez-Madrid, *Derecho administrativo sancionador en el ordenamiento canónico*, cit., pp. 41–48.

[53] *Ibid*., pp. 44–45.

[54] B. F. Pighin, *Il nuovo sistema penale della Chiesa*, cit., p. 119.

[55] E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., pp. 340–341 .

and a non-penal sanction depends upon the choice of the ecclesiastical legislator at the time of legislation.[56]

However, the deconcentration of power, the separation of functions, and vicarious participation of power in the Church permits a qualified functional distinction between penal and non-penal sanctions: 1) The application of a penalty requires that there be malice or culpability (*dolo vel culpa* cf. can. 1321, §2), while violations of disciplinary norms do not need proof of malice or culpability, or are presumed *de iure et de facto*;[57] 2) Unlike penal sentences or decrees, in which the execution of the penalty is suspended upon appeal, or hierarchical recourse (cf. can. 1353),[58] disciplinary decisions enter into effect upon notification. Any hierarchical recourse against the decree is *in devolutivo tantum*, that is, the appeal is made to an authority different than the one who made the original decision, and at the same time, the competence to treat the object of the controversy is granted (*obiectum litis*) to that authority;[59] however, the effects of the decision are not suspended;[60] 3) While the application of a penalty is restricted to the violation of penal law, "disciplinary law reacts to violations of any norm."[61]

Another possible distinction between penalties and non-penal sanctions is whether the act imposing the sanction is directed towards a permanent or temporal restrictions.[62] Gherri classifies singular normative acts into *diritto speciale* (special law), *atti normativi singolari permanenti* (permanent singular normative acts), and *atti normativi singolari temporanei* (temporary singular normative acts). While the first concerns particular acts of the legislative or executive function and are directed towards special subjects like the Supreme Tribunal of the Apostolic Signatura, the Roman Rota, or the various organs of the Roman Curia,

[56] *Ibid*., p. 340. F. Daneels observes, "Si tratta chiaramente di un provvedimento penale qualora esso invochi come motive principale la violazione di una norma o di un precetto penale, tanto più qualora anche per la procedura faccia menzione di norme che appartengono al processo penale. Il provvedimento risulta invece senza dubbo non penale, quando esso invoca sia *in procedendo* che *in decernendo* una normative non penale", F. Daneels, *Alcune osservazioni sul processo penale canonico e la sua efficacia*, «Folia canonica», 7 (2004), p. 199, note 4.

[57] G. P. Montini, *Il diritto disciplinare canonico*, cit., p. 269; Cf. E. Baura, *Atto amministrativo e limitazione dei diritti*, cit., p. 210.

[58] Cf. Supremum Signaturae Apostolicae Tribunal coram Fagiolo (11 iunii 1993), *Prot. N. 22785/91 CA Amotionis ab officio*, «Ius Ecclesiae», 32/1 (2020), p. 190, n. 8.

[59] I. Zuanazzi, *In devolutivo*, in J. Otaduy Guerín – A. Viana – J. Sedano – Instituto Martín de Azpilcueta (eds.), *Diccionario general de derecho canónico*, vol. 7, Aranzadi, Cizur Menor (Navarra) 2012, p. 466.

[60] G. P. Montini, *Il diritto disciplinare canonico*, cit., p. 269.

[61] *Ibid*., p. 268. Italian original: "il diritto disciplinare reagisce a violazioni di qualsiasi norma". Montini does not note the possibility of imposing a penalty through precept or the application of can. 1399.

[62] P. Gherri, *Introduzione al diritto amministrativo canonico: metodo*, Giuffrè editore, Milano 2018, p. 197.

the latter two are directed towards individuals or specific juridical persons.[63] Gherri gives examples of permanent singular acts as being privileges (cann. 76-84), indults, and perpetual expiatory penalties (can. 1336), saying, "While extremely varied in quality and physiognomy, several regulatory acts addressed to individual recipients can permanently change their so-called legal heritage by ending up operating as true 'extensions' or 'reductions' of individual status, structurally conditioning their future."[64] Conversely, temporary singular normative acts are of limited duration and interest, such as the precept (both simple and penal), the sanction, and contracts.[65] Gherri includes both non-penal sanctions and censures within this category since, regarding the latter, only contumacy (can. 1347) can extend the (possibly indefinite) duration of a censure.[66]

While an attractive theory, not least because it provides a means for classifying the gravity of sanctions based on the "weight" of the sanction and its temporal duration, the classification is not sustainable according to the current Code of Canon Law. The Code includes as penalties some punishments that may be imposed perpetually or temporally, such as the punishments found in can. 1336. The medicinal penalties, or censures, of excommunication, interdict, and suspension are classified as penalties but are never imposed perpetually. Other non-penal sanctions may be perpetual insofar as they remove someone from a determined state in life, for example, dismissal from the religious institute or society of apostolic life (cann. 694-696) or involuntary removal of a pastor (cann. 1740-1741). More generally, a distinction based on a temporal criterion would mean that the only "true" penalties involve a permanent change in status. At the same time, non-penal sanctions would be all those alterations of one's subjective patrimony that are not perpetual.

Baura specifies that penal sanctions affect rights regarding the person's condition, either as a natural person or as a member of Christ's faithful (for example, a restriction on movement or the deprivation of spiritual goods such as the sacraments).[67] Although there are examples of the penal privation of lesser goods, like in the instance of can. 1336, §1, 2° and 3°,[68] he reserves, in

[63] *Ibid*., pp. 197–199.

[64] *Ibid*., p. 199. Italian original: "Pur di qualità e fisionomia estremamente variegata, un certo numero di atti normativi indirizzati a singoli destinatari ne possono mutare in modo permanente il c.d. patrimonio giuridico finendo per operare come vere 'estensioni' o 'riduzioni' dello status individuale, condizionandone in modo strutturale il futuro."

[65] *Ibid*., pp. 201–204.

[66] *Ibid*., p. 203.

[67] E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., p. 340.

[68] Baura refers to the canon as originally promulgated: 1336 §1, 2° and 3°: "2. privation of a power, office, function, right, privilege, faculty, favor, title, or insignia, even merely honorary; 3. a prohibition against exercising those things listed under n. 2, or a prohibition against exercising them in a certain place or outside a certain place; these prohibitions are never under pain of nullity"

theory, only the most severe anti-juridical conduct as penal.[69] However, he points out that there is no *a priori* criterion for determining which behavior is particularly grave enough to be typified as penal, and in any case, the possibility for prescinding from the strict application of the principle of legality through the use of can. 1399 makes it, at present, impossible to establish beforehand which behaviors are never penal delicts.[70]

However, even though we agree with the (merely) *formal* distinction between penalties and non-penal sanctions within the current juridical order of the Church, there is still an element of the end or purpose of the sanction, penal or not, in the choice of the Legislator to classify and respond to illicit behavior as penal or non-penal. The purpose of penalties expressed in can. 1311, §2, is to repair scandal, restore justice, and reform the offender, while non-penal sanctions exist to protect individuals or groups.[71] Non-penal sanctions, on the other hand, have as their finality the protection of the good of the community from an incorrectly or unjustly exercised ecclesiastical office, ministry, or function.[72] A delict causes the corresponding penalty, whereas the omission of the correct behavior is the occasion of a disciplinary sanction. A penalty seeks to punish and correct, whereas a disciplinary sanction wishes to see the fulfillment of the correct behavior or functioning of the office.

In an affirmative sentence *coram* Grocholewski, the Apostolic Signatura commented on the difference between what could be seen as functionally the same act, namely, the penal privation of office (cf. can. 1336, §4, 1°) and the non-penal removal from office (cf. cann. 192-195; 196; 1740-1747). The Judges of the Supreme Tribunal pointed to the differing motivating causes between a penal deprivation and a non-penal removal: "The motivating cause in a case of removal is the harm or inefficacy of the exercise of his ministry (perhaps because of a delict); in a case of privation, it is the direct commission of a de-

[69] E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., p. 341.

[70] *Ibid*.

[71] J. Arias Gómez, *El sistema penal canónico ante la reforma del C.I.C.*, «Ius Canonicum», 15/29 (1975), pp. 197–198; Cf. M. F. Rosinski, *Mercy and Due Process in Religious Institutes*, cit., p. 600.

[72] G. P. Montini, *Il diritto disciplinare canonico*, cit., p. 268; cf. P. Malecha, *Il processo penale amministrativo nella giurisprudenza della Segnatura Apostolica. Alcune considerazioni*, cit., p. 667. Similarly, F. Daneels highlights the element of protection of the good-functioning of offices: "Occorre anche tenere presente la dovuta distinzione tra interventi penali e interventi disciplinari da parte dell'Autorità competente come per es. la rimozione dall'ufficio ... la dimissione o l'esclaustrazione imposta di un religioso ... la revoca di facoltà ... della missio canonica oppure del mandatum docendi ... la dichiarazione dell'impedimento di esercitare gli Ordini sacri ... il precetto di ritornare in diocesi, il divieto di abitare in un certo luogo per ragioni pastorali, l'imposizione di sanzioni disciplinari per mancanze deontologiche," F. Daneels, *L'imposizione amministrativa delle pene e controllo giudiziario sulla loro legittimità*, in D. Cito (ed.), *Processo penale e tutela dei diritti nell'ordinamento canonico* (*Monografie giuridiche / Pontificia Università della Santa Croce*), Giuffrè, Milano 2005, p. 293.

lict."[73] Similarly, the final cause of a penalty and a non-penal removal is different: "The final cause in a case of removal is the protection of the good of the faithful; in a case of privation, it is the punishment of the delict itself."[74] Finally, the procedures differ because penalties must follow a penal procedure, while non-penal sanctions follow an administrative one.[75]

Baura comments on the advantage of this distinction between penalties and non-penal sanctions: "Such a distinction has proved to be very useful, as it allows (through administrative sanctions) to remedy certain damages to the community in an agile manner, and at the same time citizens' rights are guaranteed through the principle of penal legality. The difference between an administrative sanction and a penalty was made possible by the distinction of powers, based on the principle of legality, and more concretely of penal legality."[76]

Sanctions can be penal or non-penal according to this general understanding of sanctions. Penal sanctions, or penalties, properly speaking, are connected to a delict by a previously established penal law or precept, barring the exceptional case of the application of can. 1399. Both Sanchis and Baura point out that the threat of a penal sanction makes a canonical norm *penal*.[77] Non-penal sanctions, understood in a reductive way, will be all those other institutional responses to illicit behavior that are not correctly speaking penalties. Thus, we can conclude that non-penal sanctions are the administrative privation of some juridical good by ecclesiastical authority that have as their

[73] "Causa motiva in casu amotionis est noxia vel inefficacia exercitii eius ministerii (fortasse delicti causa), in casu privationis directe ipsum delictum commissum." Supremum Signaturae Apostolicae Tribunal coram Grocholewski (28 aprilis 2007), *Prot. N. 37937/05 CA*, in W. L. Daniel (ed.), *Ministerium Iustitiae*, vol. 1, Librairie Wilson & Lafleur, Chambly Qc 2011, pp. 427–428, n. 10e.

[74] "Causa finalis in casu amotionis est bonum fidelium tuendum, in casu privationis ipsum delictum puniendum." *Ibid*., p. 428.

[75] *Ibid*., n. 10e.

[76] "Un tale divario si è rivelato assai utile, in quanto permette (mediante le sanzioni amministrative) di rimediare in modo agile a certi danni alla comunità, e contemporaneamente vengono garantiti i diritti dei cittadini mediante il principio di legalità penale. Ovviamente la differenza tra sanzione amministrativa e pena si è resa possibile a partire dalla distinzione di poteri e in base al principio di legalità, e più concretamente di legalità penale." E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., p. 340.

[77] J. Sanchís, *La legge penale e il precetto penale*, cit., p. 88. ""Il secondo elemento della norma penale è costituito dalla pena o sanzione penale in senso stretto. È questo l'elemento che in realtà determina il carattere penale di una norma giuridica. Perciò se manca la comminazione di una pena la norma non può dirsi penale." E. Baura, *Le sanzioni disciplinari, i ricorsi gerarchici, le dichiarazioni di nullità del matrimonio*, cit., p. 351.