

receive the eucharist is given to the sick and aged, even though not gravely sick or in imminent danger of death, frequently and, if possible, daily, especially during the Easter season” (14).

Is there a just cause for Joe to receive Holy Communion daily at home? Joe’s desire to participate in Mass daily with Susan is laudatory. Given the Church’s praxis, the reception of the Holy Eucharist at home or in some other place outside a church, chapel or oratory has been possible only for those who are unable to leave that place.

Joe’s pastor should explain to him that if he is unable to attend daily Mass and wishes to receive Holy Communion, then a solution would be for Joe to make arrangements with the pastor to come to the parish church during the day to receive the Holy Eucharist.

Rev. Msgr. Charles Mangan, JCL

CANON 1336

WHAT PROCESSES MUST THE DIOCESAN BISHOP FOLLOW TO REMOVE THE FACULTIES OF A PRIEST?

OPINION

A faculty is an authorisation by an ecclesiastical authority, usually a bishop, enabling a priest to participate in the ecclesiastical power of teaching, sanctifying or governing for the good of the faithful. Consequently, the priest has “the ability to act in a licit or juridically efficacious manner”.¹ Without the grant of faculties, the priest’s acts would be illicit and/or invalid. Some faculties are granted by law and/or are attached to certain offices such as the office of parish priest or chaplain.

Distinction between diocesan and religious priests receiving or losing faculties

Distinctions must be made among: (1) a diocesan priest incardinated in a diocese; (2) a diocesan priest from another diocese working in the diocese; (3) a religious priest working in the diocese.

When someone is ordained the law states that he is required to be suitable and useful for ministry.² If there is any doubt about his suitability or usefulness, then the person should not have been ordained.³

Diocesan priests incardinated in a diocese should be granted faculties by their diocesan bishop because, although they do not have a specific right to ministry, there is an expectation in the law that they will be authorized to exercise their orders.⁴ A diocesan bishop is not obliged to grant faculties to a priest from another diocese or a religious institute who has moved to the diocese.

Reasons for withdrawing faculties of priests

1 Antonio Viana, “Power of Governance” in Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña (eds.), Ernest Caparros (Eng. ed.), *Exegetical Commentary on the Code of Canon Law* 5 Vols. (Montreal: Wilson & Lafleur, 2004) 1, 835. [Hereafter *Exegetical Commentary*].

2 Canon 1025 §2.

3 Canon 1052 §3.

4 Francis G. Morrissey OMI, “Suitability for Ministry,” *The Canonist*, Vol. 3 No. 2 (2012) 224; cc. 281, 274, 1025; CCEO 371.

When a religious priest or a priest from another diocese has faculties in the diocese, an agreement should have been made by him and his religious institute/diocese with the new diocesan bishop for him to work there. While observing the terms of the agreement, the bishop has the right, for a just reason, to withdraw his faculties. The decree must give the reason(s) at least in summary form.⁵ Depending on the wording of the agreement, a just reason could be that his services are no longer required in the diocese. If there is no agreement, any reasonable motive would qualify as a just reason.

Removal of the faculties of an incardinated priest within his own diocese would require a grave reason⁶ -- for example, a credible complaint that the priest was too inquisitive asking questions during a confession. Prior to any removal of faculties there must have been a preliminary investigation establishing the facts.⁷ Merely saying the priest's services are no longer required is insufficient. An example of a lawful administrative decision to withdraw faculties would be a situation in which a priest had begun to develop dementia. Without fault on the part of the priest, there would still be a grave cause for removing his faculties. Such removal of faculties is not a penalty; it is a non-penal disciplinary act.⁸

Process for Removal of Faculties

In some cases, removal of faculties is an expiatory penalty according to canon 1336 §1:

In addition to other penalties which the law may have established, the following are expiatory penalties which can affect an offender

⁵ Canon 51. A decree is to be issued in writing, with the reasons at least summarily expressed if it is a decision.

⁶ Canon 974 §1: "The local ordinary and the competent superior are not to revoke the faculty to hear confessions habitually except for a grave cause."

⁷ Congregation for the Clergy, Prot. No. 37937/05 CA, June 23, 2007, quoted in Francis G. Morrissey OMI, "Violations of Canon 277 (with an Adult) Appropriate and Just Responses," *The Canonist* 1:2 (2010) 62.

⁸ In a decision of the Apostolic Signatura [Card. Erdo 18 March 2006, Prot. No. 32108/01 CA] it was affirmed that the Congregation for the Clergy had violated "the law both in procedure and discernment in the decision of the Congregation for Clergy of 21 December 2000 and confirmed on 19 May 2001." The Signatura stated "the decision by which, e.g., the conferring of an ecclesiastical office by a competent authority is impugned because of the lack of suitability of the candidate or the faculty either to preach or to hear confession is revoked, respectively in accordance with canons 764 and 794 §1, is in no way the inflicting of a penalty, for which is required moral certainty concerning a gravely imputable crime committed, but a non-penal disciplinary action, which may be imposed because of a positive and probable doubt concerning the suitability of the cleric in the matter concerned."

<http://childabuseroyalcommission.gov.au/search?searchtext=signatura&searchmode=anyword>

either perpetually, for a prescribed time, or for an indeterminate time: ...

2° privation of a power, office, function, right, privilege, faculty, favour, title, or insignia, even merely honorary.⁹

While all penalties have the general aim of reforming offenders and saving their souls,¹⁰ expiatory penalties¹¹ specifically aim to re-establish Church order, repair scandal, remedy the damage done to the Church by the offender, as well as deter other offenders. Velasio De Paolis points out that "penalties in the Church are rooted in the possibility of expiating and therefore redeeming – with the help of grace – one's criminal past. It is a time of grace and an offer of salvation, through the Church's pastoral service."¹²

A prior warning is not required before expiatory penalties are imposed, and the penalty may be applied temporarily or permanently as in the case of dismissal from the clerical state.¹³ Nonetheless, any procedures used by a bishop must be in accord with canon law.¹⁴ Giuseppe Di Mattia notes that "the procedural provisions established to inflict penalties juridically and administratively must be observed in applying the penalties that deprive of the good indicated."¹⁵

Permanent withdrawal of faculties or placing a priest on administrative leave¹⁶ require a process.¹⁷ At the outset, before any canonical penalties are imposed, there must be a Preliminary Investigation to establish "the facts, circumstances, and imputability" of the allegations "unless such an inquiry seems entirely superfluous (c. 1717 §1). The Congregation for the Clergy pointed out in a recent Canadian case that a bishop should carry out a preliminary investigation and follow the procedures in canons 1717-1720 before withdrawing faculties or

⁹ Canon 1336 §1.

¹⁰ Canon 1752: "In cases of transfer the prescripts of canon 1747 are to be applied, canonical equity is to be observed, and the salvation of souls, which must always be the supreme law in the Church, is to be kept before one's eyes."

¹¹ Canon 1336 §1, 5°: "dismissal from the clerical state."

§2. Only those expiatory penalties listed in §1, n. 3 are imposed *latae sententiae*.

¹² Velasio De Paolis, "Penal Sanctions, Penal Remedies and Penances in Canon Law," Patricia Dugan, ed., *The Penal Process and the Protection of Rights in Canon Law* (Montreal: Wilson & Lafleur, 2005) 158.

¹³ Canons 291-293 specify the consequences, including loss of all rights as a cleric.

¹⁴ Canon 221.

¹⁵ Giuseppe Di Mattia OFM, "Expiatory Penalties," *Exegetical Commentary*, 4/1, Commentary on canon 1336, 345.

¹⁶ Peter Akpoghiran, *The Catholic Formulary, vol. 5: Penal Acts*, (New Orleans: Guadalupe Book Publishers, 2014) 63.

¹⁷ *Ibid.*, 47.

imposing any penalty.¹⁸ Then the facts of the case and the imputability of the cleric will have been properly documented.¹⁹ This documentation is important whether there is a judicial trial or an administrative process.

Following the Preliminary Investigation, the diocesan bishop must “ascertain that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.”²⁰ If the diocesan bishop decides that these means cannot achieve all these ends, then there are two penal procedures that can be used: administrative or judicial (canons 1720-1731). Theoretically both processes are equally valid.

In the first case the bishop or superior acts hierarchically and issues a decree as provided for by canon 1720. This might be when a priest is arrested by the police and charged with paedophilia in a secular court. In the judicial process, the judge(s) in a church court decrees the sentence after the Ordinary hands the case over to the tribunal to conduct a judicial trial.²¹ In every case, if truth is in doubt, then in the interests of justice there should be a canonical trial.

The diocesan bishop or Ordinary can remove the faculties of the accused priest “to prevent scandals, to protect the freedom of witnesses, and to guard the course of justice.”²² The criteria for whether a bishop proceeds administratively or judicially are contained in canon 1342:

§1. Whenever just causes preclude a judicial process, a penalty can be imposed or declared by extrajudicial decree; penal remedies and penances, however, can be applied by decree in any case whatsoever.

§2. Perpetual penalties cannot be imposed or declared by decree, nor can penalties be so applied when the law or precept establishing them prohibits their application by decree.

§3. What a law or precept states about the imposition or declaration

18 Congregation for the Clergy, Prot. No. 37937/05 CA, June 23, 2007, quoted in Morrissey, *Violations of Canon 277*, 62.

19 Pat Laggés, “The Penal Process: The Preliminary Investigation in Light of the Essential Norms of the United States,” P. Cogan, ed., *Sacerdotes iuris* (Ottawa: Saint Paul University, 2005) 255-296.

20 Canon 1341.

21 Canon 1721 §1: “If the ordinary has decreed that a judicial penal process must be initiated, he is to hand over the acts of the investigation to the promoter of justice who is to present a libellus of accusation to the judge according to the norm of canons 1502 and 1504.” Innocent III in the *Decretals of Gregory IX* (X 5.39.35) said “Rei Publicae interest, ne crimina remaneant impunita” - “It is in the public interest that crimes not remain unpunished.”

22 Canon 1722.

of a penalty by a judge in a trial must be applied to a superior who imposes or declares a penalty by extrajudicial decree unless it is otherwise evident or unless it concerns precepts which pertain only to procedural matters.

Canon 1342 has a bias towards a judicial process. This is related to the right of the Christian faithful to “legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law” (c. 221). Nonetheless, the judicial process is only obligatory for the imposition of perpetual expiatory penalties or in cases in which the law or precept requires the judicial process.²³

It is very important that bishops understand that perpetual penalties cannot be incurred automatically or normally be imposed by an administrative decree.²⁴ The judicial process is almost always the preferred method for imposing penalties on an offender.²⁵ Bishops are given wide powers of discretion concerning the remission of penalties.²⁶ Penalties may prohibit the exercise of an order or some of its acts, but they cannot deprive a priest of the power of the sacrament of Holy Orders.²⁷

Analysis of a Canadian Case of Removal of Faculties by the Signatura

A bishop revoked a priest’s faculties on 19 August 2003 in a letter that reads as follows:

As of today your faculties are herewith revoked. You can no longer celebrate mass publicly nor hear confessions nor preach... You are not to invite people to attend your privately celebrated Masses and not to concelebrate Mass publicly.

23 Canon 1342 §2.

24 Canon 1342 §2. See, however, SST 22 on administrative dismissal.

25 Some people wanted to eliminate this preference during the Code revision process. Cf. *Communicationes IX* (1977) 161. See also V. De Paolis, “Il Processo penale del nuovo codice,” Z. Grochowski - V. Carcel Orti (eds.) *Dilexit iustitiam* (Vatican City: Libreria Editrice Vaticana, 1984) 473-494.

26 Canon 1354 §1: “In addition to the persons listed in cann. 1355-1356, all who can dispense from a law which includes a penalty or who can exempt from a precept which threatens a penalty can also remit that penalty.

§2. Moreover, a law or precept which establishes a penalty can also give the power of remission to others.

§3. If the Apostolic See has reserved the remission of a penalty to itself or to others, the reservation must be interpreted strictly.”

27 Canon 1338 §2: “Privation of the power of orders is not possible but only a prohibition against exercising it or some of its acts; likewise, privation of academic degrees is not possible.”

On 8 October 2004, the bishop wrote permitting the priest to administer the sacrament of the anointing of the sick on an individual basis to family members, but only with the permission of the Chancellor or the bishop himself.²⁸

Afterwards, the bishop claimed that he revoked the priest's faculties by an administrative act rather than by using a judicial process. The bishop maintained that the removal of faculties was not a penalty and that he did not need to use the preliminary process of canon 1717 ff. The bishop argued that no canon in the Latin Code gives a priest a right to ministry. The bishop claimed that prescription²⁹ applies in judicial cases, but not in administrative matters.

The bishop made the following statements:

- 1) I did not impose a penalty...
- 2) I used my administrative authority for the good of the diocese
- 3) I did not want another court case implicating the Catholic Church
- 4) Father Christopher was not suspended and is allowed to celebrate mass privately
- 5) Father Christopher receives the same financial benefits as ... a priest in active ministry."³⁰

The priest appealed his case to the Congregation for the Clergy, which decided on 28 October 2005 that the bishop had imposed an expiatory penalty depriving the priest of a faculty (cf. canon 1336 §1 2°), without the required judicial process (cf. canon 1341) since a permanent penalty had been imposed (canon 1342 §2).

The bishop appealed the decision to the Signatura, which issued a sentence in which it noted that a priest enjoys the faculty to preach everywhere unless this faculty has been restricted or removed or express permission is required by particular law. It acknowledged that the faculty to preach can be removed for any just reason.³¹ Also, a bishop can revoke the faculty to hear confessions for a grave cause.³² Both these faculties can be removed administratively and not for a penal reason. Similarly, the law concerning the minister of the anointing of the

28 "The Revocation of Ministerial Faculties," William Daniel (trans), *Ministerium Iustitiae: Jurisprudence of the Supreme Tribunal of the Apostolic Signatura* (Montreal: Wilson & Lafleur, 2011) 417.

29 Canon 1362 §1: "Prescription extinguishes a criminal action after three years unless it concerns: 1° delicts reserved to the Congregation for the Doctrine of the Faith; 2° an action arising from the delicts mentioned in cann. 1394, 1395, 1397, and 1398, which have a prescription of five years."

30 Daniel, *op. cit.*, 214.

31 Canon 764.

32 Canon 974 §1.

sick³³ mentions the presumed consent of the pastor entrusted to care for the sick member of the faithful, so it is not a penalty for a bishop to restrict the priest's anointing the sick.³⁴ In addition, since an inactive priest requires delegation to assist at marriage (cf. canons 1108 §1, 1111), the bishop can decide that the conditions for granting the delegation do not exist.

The Signatura also agreed that the priest can always celebrate the Eucharist daily as recommended by canon 904 unless he is impeded by canon law (c. 900 §2). Yet, the removal of such a faculty may be an administrative decision rather than an expiatory penalty. The Signatura in a sentence of 18 March 2006 agreed that a diocesan bishop could use an administrative decree to restrict a priest from publicly celebrating the Eucharist because of his imprudence with young people.³⁵

On the other hand, the Signatura pointed out in this case that the bishop had removed the faculties of a priest primarily to avoid a civil lawsuit, rather than for canonical reasons "to prevent scandals, to protect the freedom of witnesses, and to guard the course of justice" (c. 1722). Bishops cannot remove the faculties of a priest for extraneous reasons such as avoiding civil law suits. Furthermore, there was no Preliminary Investigation. The bishop "entirely neglected an examination about Fr. Christopher's imputability, the suitability of conducting a judicial process and observing prescription. He did not initiate a previous investigation or observe the penal procedure mentioned in canon 1720."³⁶

The Signatura accepted the fact that the bishop had not made a perpetual decision in this case, but a decision for an indeterminate time while the cause endures. The Signatura quoted *coram* Fagiolo, 11 June 1993, which stated: "A prohibition to exercise power... can affect an offender as an expiatory penalty (cf. canon 1336 §1 3°); however, apart from a delict, it can be imposed as a mere disciplinary precept for a just and proportionate cause, while the cause endures. A perpetual prohibition to exercise power, however ... cannot easily be considered a mere disciplinary precept."³⁷

Analysis of Australian Cases

An Australian archbishop removed the faculties of three priests using the same process and similar reasons in each case. In one case, the archbishop decreed on

33 Canon 1003.

34 Daniel, *op. cit.*, 217.

35 *Ibid.*, 219.

36 *Ibid.*, 221.

37 *Ibid.*, 222: Case from Pamplona, Pro. No. 22785/91 CA, no. 8 p.6.

17 July 1998 that his pastoral office required of him to protect the unity of the people of God and to build up the Body of Christ. Therefore, he wrote,

“Remedial considerations arising from that responsibility lead me to derogate from the normal diocesan custom and withdraw as from this date [17 July 1998] your faculty to celebrate the Eucharist publicly, to hear confessions and to preach ... These remedies will remain in force for such time as is necessary for the public good of the Church.”³⁸

The priest requested that the archbishop revoke his decree because “no motives were expressed in his decree and that a basis for the removal of my faculties had not been canonically proven.”³⁹ The archbishop did not revoke the decree. The priest proposed recourse against the decree to the Congregation for the Clergy seeking the restoration of full faculties of the Archdiocese. The Congregation found that the archbishop had employed a commissioner, using a mixture of canonical and civil procedures and giving canons 1717 and 1722 as the basis for an investigation and decision. The Congregation found the archbishop violated canons 221, 51, 39, 1717 and 483 §2.

The Congregation considered that the archbishop had applied a perpetual penalty using canon 1722 without a clear canonical administrative or judicial process. There was no indication that the promoter of justice was involved in the process as canon 1722 requires. The Congregation considered the procedures used were confused and not in accord with canon law and in particular canon 221. Furthermore, the accusations kept changing and were already extinguished by prescription. The priest’s good reputation was tarnished by the Archdiocese circulating information contrary to the prescripts of canons 1717 §2 and 220. The Congregation declared on 23 August 2001 that the decree of the archbishop removing the faculties of the priest on 17 July 1998 was “null and void and without juridical effect” because of serious flaws in procedure.

In a second case the Congregation was critical of the procedural irregularities in the local process, which ignored prescription. The Congregation concluded that the decree of the Ordinary dated 3 September 1998 lacked a basis both in law and in fact. The Congregation pointed out that, according to canon 51, a decree

³⁸ Congregatio pro Clericis, 23 August 2001, Prot. No. 2001/1099, quoted in Augustine Mendonça, *The Bishop as the Mirror of Justice and Equity in the Particular Church: Some Practical Reflections on Episcopal Ministry*, unpublished paper.

³⁹ Ibid.

is to be “issued in writing, with the reasons at least summarily expressed, if it is a decision.”⁴⁰

In a third Australian case the archbishop had stated in his decree that the criteria of proof to be applied were the ‘balance of probabilities’ and ‘unacceptable risk.’ The Congregation found that these criteria were foreign to canon law and its processes, from which no dispensation is possible.⁴¹

Conclusion

Although priests do not have a right to an office in the Latin Code, the law presumes that, from the fact that the priests were ordained, they should be able to minister and have faculties to function publicly.

- The faculties of a priest cannot be removed in an arbitrary manner: the bishop must follow correct canonical procedures.
- He must involve the promoter of justice and carry out a proper preliminary investigation out of respect for the rights of the priest to due process and a good reputation.
- A bishop should “never try to short-circuit the law,”⁴² or remove faculties simply for non-canonical reasons such as to avoid law-suits.
- A proper preliminary investigation should establish the facts and then correct procedures must be followed using an administrative or judicial process in which the standard of proof is that of moral certainty.
- The bishop in his decree removing the faculties of a priest must give valid canonical reasons such as “to prevent scandal, to protect the freedom of witnesses, and to guard the course of justice” (c. 1722).

He cannot be like Caiaphas (John 11:50) and simply claim that he is acting for the good of the Church.

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⁴⁰ Congregatio pro Clericis, 23 August 2001, Prot. No. 2001/0081. See <http://webmail.aol.com/msgview.adp?folder=UkVBRA==&uid=3084672>, quoted in Mendonça (Ibid.).

⁴¹ Congregatio pro Clericis, 21 December 2000, Prot. No. 2000/1201. See <http://webmail.aol.com/msgview.adp?folder=UkVBRA==&uid=3084679>, quoted in Mendonça (Ibid.).

⁴² Morrissey, *Suitability for Ministry*, op. cit., 232.

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OPINIONS

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FOREWORD

The Canon Law Society of America (CLSA) publishes annually *Roman Replies and CLSA Advisory Opinions* for canonists and those seeking a clearer understanding of the *praxis legis* of the Catholic Church. The combination of these two services, begun in 1984, continues to serve as useful resources for those involved in the application of canonical discipline.

The compilation of materials for *Roman Replies 2017* was guided by Sister Sharon A. Euart, RSM, Chair of the CLSA Publications Advisory Board. The collection of entries in this issue, when viewed in conjunction with previous volumes, assists the reader both in understanding recent developments in the law and in identifying current trends in the praxis of the Roman Curia.

The selection and assembly of opinions for *CLSA Advisory Opinions 2017* was provided by Monsignor John A. Alesandro and Monsignor Thomas J. Green, editors and members of the CLSA Publications Advisory Board. The topics addressed in the opinions reflect a variety of canonical issues and demonstrate the scope of canonical expertise and reflection by members of the Society. Editorial assistance was provided by the CLSA Administrative Office.

Roman Replies and CLSA Advisory Opinions that are out-of-print are available electronically on the CLSA website (www.clsa.org). As an additional resource, the CLSA Advisory Opinion Online Index includes all published opinions, grouped by canon number on the CLSA website.

The CLSA provides this series as a professional resource. Care should be taken in considering the relative weight of the materials found in this publication. The principles for canonical interpretation (*CIC* cc. 16-19 and *CCEO* cc. 1498-1501) serve as guides in considering the contents of this volume.

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