Exegetical Commentary on the Code of Canon Law

Prepared under the responsibility of the Martín de Azpilcueta Institute
Faculty of Canon Law
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Volume IV / 1

Reprint
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INTRODUCTION

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1. Certain specific aspects of penal law and penal precept are regulated in the canons under title II. They concern the laws and precepts that establish or threaten a penalty against those who violate the juridical or imperative behavioral obligation (mandate or prohibition) described therein. Law and precept are the juridical instruments by which to determine the different unjust types of behavior that may be punished and the penalties to impose upon those who commit offenses. Thus, penal law and penal precept (and only these two, therefore excluding custom) are the formal constituent sources of offenses, insofar as they indicate which behaviors are considered delinquent and will thus incur the penal sanction established therein. Therefore the specific element that characterizes penal norms is the sanction that they mandate. Along with the penalty, the norm must also precisely describe the behavior to be punished and that which constitutes the offense. This task is called typificatio (see commentaries to cc. 1321 and 1399 on the meaning and function of penal norms in determining the canonical concept of offense).

2. These penal norms are only ecclesiastical norms (cf. c. 11) in the sense that although “the Church has its own inherent right to constrain with penal sanctions Christ’s faithful who commit offenses” (c. 1311), and offensive behavior is frequently unjust because it is a violation of divine law (natural or positive). Still, the decision to impose a penalty for certain behavior is, in the final analysis, always made by an ecclesiastical official.

3. The nature of penal law causes no special difficulties. It is the means by which the legislator promulgates perpetual, permanent or stable common prescriptions that have as their passive subject a community with the ability to receive a law and that is therefore a general and

abstract addressee. In its more general aspects, the juridical system of penal law is common to every other type of law. It is principally regulated by cc. 7–22. In these canons, certain particular dispositions are established that are traditional in the canonical system law and specific to penal laws. Those particularities that evidence great respect for human dignity and for the Christian faithful are typical of Church law. They tend to guarantee the most basic fundamental rights, which might be affected by the discipline of sanctions and seriously violated if sanctions are not applied with a lively sense of justice and in strict obedience to the law. Among these norms are ones that establish a strict interpretation of penal laws (c. 18); prohibit the use of analogy if there is no express prescription in the law on a given penal matter (c. 19); and expressly exempt the case where the person breaking the law or precept was guiltless in his ignorance (inadverence and error are equivalent to ignorance) that he was breaking a law or disobeying a precept, or extenuate only if he did not know that the law included a penalty (cc. 1323, 2° and 1324 § 1, 9°, respectively). Ignorance is never presumed by the law or by the penalty (c. 15 § 2).

Furthermore, in c. 87 § 1, penal laws issued by the supreme authority of the Church are excluded from the powers of dispensation enjoyed by a diocesan bishop.

4. With regard to determining the nature of the penal precept, doctrine is not unanimous. According to the norms in the Code, c. 49, which is included in the title on singular decrees and precepts, considers a precept to be a type of decree, an administrative act, that may be issued by anyone with simple executive power (cf. c. 48) and “by which an obligation is directly and lawfully imposed on a specific person or persons to do or to omit something, especially in order to urge the observance of a law.”

The discussion on the nature of a penal precept is part of the greater issue of the nature of precepts in general. The question is whether a precept simply requires the law to be obeyed (if so, a precept would be an administrative act) or whether the precept can also fulfill an innovative function in the legal system by threatening obligations that are not present in the law. In the latter case, a precept is, or could be, a singular norm proper to legislative power.

Some authors see the threatening of penalties as an innovating act in the law. They think that it creates objective law and therefore is a typical activity of the legislative power, which by its very nature can only be wielded by those with such powers. Therefore, a precept that threatens a penalty, a penal precept, cannot be considered a simple precept or an administrative act, but a singular norm that can only be issued by a legislator.

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However according to the most common opinion, a penal precept is only a type of the precept established in c. 49. Its essential aspects are regulated by cc. 35–38, which refer to special administrative acts, specifically to decrees and special precepts. In other words, these authors understand that, by use of the precept, the executive power may not only threaten and determine the content of the law, but may also create, modify and extinguish subjective juridical situations for a specific case, provided that it has been given the power to do so by law and that it is subject to the law.

Therefore, every precept, including a penal precept, is an act that is administrative in nature because it is to the executive authority that the law attributes the power to threaten penalties for specific cases by means of precepts. In fact, c. 36 § 1 explicitly permits administrative acts that threaten penalties, and c. 1319 establishes the principle that anyone who can impose precepts in the external forum may also give penal precepts. It implicitly remits to general norms in matters of the juridical system of the precepts. The content of a penal precept consists of a positive (mandate) or negative (prohibition) order, whether or not previously established by law, with the threat of a penalty.

This is also a singular act or precept, “imposed on a specific person or persons.” Therefore, the intended person can be an individual or several persons, but specific, clearly distinguished, and considered as individuals.

5. A penal precept may both determine and constitute an offense. The principal function of a penal precept is to determine more specifically the author of the offense or the penalty provided by penal law. In other words, a penal precept does not normally constitute a new offense but simply more clearly defines some of its aspects. The reason is that, because the situations and persons are specific and predetermined, the various factors and specific circumstances of the case may more easily be taken into account. However, it is possible that a penal precept may create or constitute a new offense that was not previously described or classified by a law, but only with respect to the specific person or persons for whom it was issued.

6. A penal precept is mainly personal in nature (cf. c. 52) and tends to be transitory or temporal. In other words, it is justified by unexpected or emergency situations (such as the one included in c. 1399) that demand swift and precise action. After those circumstances have disappeared, it is advisable to revoke the penal precept, or, if it is appropriate, to replace it with a law.

7. The Code apparently explicitly provides only for singular precepts. However, some authors consider that there are no doctrinal or legal

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reasons to preclude general precepts, and therefore also general penal precepts, that threaten to fail to fulfill a juridical obligation. The issue has been studied very little, but a number of authors consider that a penal precept may only be particular, since general precepts are identified with the law\textsuperscript{4} and would not be justified in a penal system. However, considering that there is no clear distinction in current norms, as would be desirable, between disciplinary and penal areas and thus between disciplinary and penal sanctions, it seems undeniable that the general norms of ecclesiastical administration (executory decrees, executive decrees and instructions, regulated in cc. 31–34) may establish disciplinary sanctions, as in fact actually occurs.\textsuperscript{5}

Therefore, in the current canon penal law, there is in fact no "reserve of law." Perhaps it would have been better to reserve the constitution of penalties to the legislator and leave for the executive authority a more specific determination, by means of precept, of the offense and/or the penalty established by law.


§ 1. Si post delictum commissum lex mutetur, applicanda est lex reo favorabilior.

§ 2. Quod si lex posterior tollat legem vel saltem poenam, haec statim cessat.

§ 1. If a law is changed after an offence has been committed, the law more favourable to the offender is to be applied.

§ 2. If a later law removes a law, or at least a penalty, the penalty immediately lapses.

SOURCES: § 1: cc. 19, 2219 § 1; 2226 § 2
§ 2: c. 2226 § 3

CROSS REFERENCES: cc. 6 § 1, 3°, 9 et 20

COMMENTARY

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1. With respect to the efficacy of law in time, c. 9 establishes the general principle that “laws concern matters of the future, not those of the past, unless provision is made in them for the latter by name.” This means that laws are theoretically not retroactive. In the specific case of penal laws, it means, among other things, that a penalty shall be applicable to acts committed after the law comes into effect, not to acts committed before that time.

However this canon establishes some exceptions to this general principle regarding penal laws. In particular, it includes cases in which penal law should be applied retroactively to actions committed prior to the effective date of the law.

2. Paragraph 1 refers to the law that is to be applied when the law has changed since the offense has been committed. In those circumstances, the law most favorable to the offender will be applied.

These are the requirements for such a case:

a) that the action be considered an offense under the penal law in effect at the time of commission. Otherwise, if at the time of the action there was no law threatening a penalty against such behavior, a law that later considers it to be delinquent and establishes a penalty for it cannot be applied retroactively. In this case, it is not the principle of the most favorable law that is applied, but strictly the principle of the non-retroactivity of penal law;
b) that there be a change in the law after the commission of the offense. Modification or change in the law refers to the delimiting aspects of the delinquent act, the requirements or conditions for punishability, or the nature or scope of the penalty. However, it must be a simple change and not an abrogation of the law because, in this last case, the provisions of the second paragraph of the canon would apply;

c) that the penalty for the offense committed shall not yet have been applied. If the penalty has been applied (whether because it was a latae sententiae penalty which the delinquent automatically incurred at the moment of committing the offense, or because it was a ferendae sententiae penalty and the execution of the sentence or decree inflicting the penalty was mandated), it is impossible to apply a different law, because the law in effect at the time of deciding the case has already been applied. However, revocation of the executory decree of sentence or the decree imposing the penalty may be requested, citing the change in penal law.

3. In cases where all of these requirements are met, the juridical principle is applied that guarantees the offender the most favorable treatment among those provided by the various laws from the time of committing the offense. It is possible that the offense may carry the retroactive effect of the later penal law because it is the most favorable.

The text of the canon refers to the lex reo favorabilior (i.e., the law that, taking into account the various requirements established therein, is the most favorable to the offender). Thus it is not merely the law that imposes a lesser penalty. A greater penalty could be more favorable, insofar as it implies that the case is not punishable due to stricter requirements. It could also be considered more favorable, for example, if a later law provides that the offense be punished with a penalty applied ferendae sententiae instead of latae sententiae.

4. On the other hand, § 2 refers to one of the effects of an abrogation of penal law. Abrogation of a penal law may take place with the elimination of an imperative juridical obligation of behavior, with a violation thereof of a delinquent action is committed. Abrogation of penal law may also occur with simple elimination of the penalty, since the defining characteristic of penal law is the penalty it establishes (the text reads “tollat legem vel saltem poenam”). The norms that regulate the abrogation of laws are found in c. 20, which specifies when a later law abrogates or derogates from an earlier law.

These are all cases that assume depenalization, meaning that, for various reasons, the competent authority no longer considers it appropriate to punish the conduct and that henceforth it will not be an offense. Depenalization does not necessarily imply that such behavior ceases to be illegal or antijuridical and obviously does not prejudge whether it is moral. It simply means that, given the specific circumstances of time and place, it is understood that the purposes of the penalty and the guardianship of the
juridical goods involved may be obtained by non-penal means. It is no longer necessary or fitting to go to the extreme of a penalty. One must not confuse a description of behavior as juridical-penal with a moral judgment, or confuse an offense with a sin. Furthermore, classifying offenses does not consist of making a list of sins with all possible antijuridical actions. Just as it is possible to constitute or “create” an offense, it is also possible to depenalize it. In fact, when the Code took effect, all universal or particular penal laws promulgated by the Holy See were abrogated, with the exception of those included in the Code itself (c. 6 § 1,3°).

According to the letter of this canon, the principal effect of abrogation of a penal law is the immediate cessation of the penalty imposed under it. However, whereas in some cases this causes no particular difficulties, either theoretically or practically, in other cases it does not appear that this effect may be applied as readily. This is especially true if the penalties are perpetual expiatory penalties, such as expulsion from the clerical state or deprivation of or removal from office. In any case, the spirit of the norm appears to be clearly expressed in the canon.
Poena plerumque est ferendae sententiae, ita ut reum non teneat, nisi postquam irrogata sit; est autem latae sententiae, ita ut in eam incurrarit ipso facto commissi delicti, si lex vel praeceptum id expresse statuat.

A penalty is for the most part *ferendae sententiae*, that is, not binding upon the offender until it has been imposed. It is, however, *latae sententiae*, so that it is incurred automatically upon the commission of an offence, if the law or precept expressly lays this down.

**SOURCES:** c. 2217 § 1, 2° et § 2; Pius PP. XII, Alloc., 5 dec. 1954 (AAS 47 [1955] 64); Princ. 9

**CROSS REFERENCES:** cc. 1335, 1336 § 2, 1338 § 3, 1341, 1342, 1352, 1357, 1717–1728

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**COMMENTARY**

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1. This canon gives the distinction between *ferendae sententiae* and *latae sententiae* penalties, based on how they are imposed. Canonical penalties are generally *ferendae sententiae*. This means that the normal method of applying them is by a sentence from a judge or a decree from a superior, following a penal procedure (judicial or administrative, depending on the case) to obtain juridical certainty that there was an offense and to ascertain the author's guilt. Juridical certainty is needed to impose the penalty justly (cf. cc. 1341–1342 and 1717–1728). It only then that the penalty obligates the offender. Exceptionally, where law or precept so expressly provides, some penalties (because of their nature, expiatory penalties referred to in c. 1336 § 2 are excluded) are applied *latae sententiae*. This means they are incurred *ipso facto* by the very fact of the offence having been committed.

2. The *latae sententiae* method of applying penalties is exceptional because of its particular characteristics, mainly how difficult it is, in observing the effects of the penalty, to coordinate the internal and external fora, especially if one considers that a canonical penalty, *natura sua*, is a juridical institution proper to the external forum. Thus, in no. 9 of the “Directive Principles for the Reform of the Code of Canon Law” reads: “The

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238

Exegetical Commentary on the Code of Canon Law  btcalw  p. 8/32
general tendency has been to employ *ferendae sententiae* penalties, imposed and remitted in the external forum. As far as *latae sententiae* penalties are concerned, despite the fact that many have proposed their abolition, the tendency has been to limit them to small number of cases, and what is more, to a select few of the gravest offenses."

3. For the reasons indicated, in the Code, penalties applied *latae sententiae* are subjected to a particular juridical system that inevitably tends to confuse offenses with sins, penalties with penitence and, all things considered, juridical-penal order with moral order. This because, in such cases, the effects of the penalty, and its possible remission, take place in the internal forum (personal conscience), since in most cases the offense, and especially the penalty, remain hidden, or there is no record in the external forum that it was effectively imposed.

4. It is only in appearance that a penalty is automatically incurred for committing an offense when a *latae sententiae* penalty is mandated. In such cases, the conditions of punishability are logically much stricter than in normal circumstances, where the penalty is applied by sentence or decree, since the person who has committed the offense should judge himself. Any of the attenuating causes listed in c. 1324 § 1 (e.g., non-culpable ignorance of the penalty, described at no. 9) is a reason that the person who committed the offense will not incur the penalty (cf. c. 1324 § 3). If the penalty is incurred, its effects, however, are explicitly limited (cf. cc. 1331, 1332, 1333 § 3, 1334 § 2), mainly to contain them within the internal forum. In addition, codical legislation provides for various circumstances in which the obligation to observe the effects of *latae sententiae* penalties is suspended (cf. cc. 1335, 1338 § 3, 1352). The general principle governing here is that there is an obligation to fulfill a *latae sententiae* penalty but, if it has not been declared or is not notorious in the place where the offender is located, then it is partially or totally suspended, insofar as it cannot be fulfilled without danger of serious scandal or disgrace (c. 1352 § 1). It has also been necessary to provide for exceptional cases of remission of the penalty in the internal forum, normally sacramental (cf. cc. 508, 1357).

5. After commission of an offense, if the mandated penalty is *latae sententiae*, it may also be handled *ferendae sententiae*, that is, declared by sentence or decree. In such a case, the penalty will become fully effective from that moment. However, the sentence or decree can be declared only in cases where the penalty has been incurred *ipso facto*, and this does not always happen, even though the offense has been committed. In other cases, the declarative sentence or decree will be constituent of the penalty.

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6. The fact that *latae sententiae* penalties remain in the Code is due to their principally pedagogical and dissuasive function. By appealing to the conscience of the faithful, they warn them of the gravity of the offense and of its consequences. In this sense, such penalties fulfill a relevant function, especially now that the Church’s penal law is almost exclusively limited to the automatic application of penalties, with very few cases of penal process.
§ 1. Qui legislativam habet potestatem, potest etiam poenales leges ferre; potest autem suis legibus etiam legem divinam vel legem ecclesiasticam, a superiore auctoritate latam, congrua poena munire, servatis suae competentiae limitibus ratione territorii vel personarum.

§ 2. Lex ipsa potest poenam determinare vel prudenti iudicis aestimatione determinandam relinquere.

§ 3. Lex particularis potest etiam poenis universali lege constitutis in aliquod delictum alias addere; id autem ne faciat, nisi ex gravissima necessitate. Quod si lex universalis indeterminatam vel facultativam poenam comminetur, lex particularis potest etiam in illius locum poenam determinatam vel obligatoriam constitutere.

§ 1. Whoever has legislative power can also make penal laws. A legislator can, however, by laws of his own, reinforce with a fitting penalty a divine law or an ecclesiastical law of a higher authority, observing the limits of his competence in respect of territory or persons.

§ 2. A law can either itself determine the penalty or leave its determination to the prudent decision of a judge.

§ 3. A particular law can also add other penalties to those laid down for a certain offence in a universal law; this is not to be done, however, except for the gravest necessity. If a universal law threatens an undetermined penalty or a discretionary penalty, a particular law can establish in its place a determined or an obligatory penalty.

SOURCES: § 1: cc. 2220 § 1, 2221  
§ 2: c. 2217 § 1, 1°  
§ 3: c. 2221  
CROSS REFERENCES: cc. 135, 1343–1346, 1349  

——— COMMENTARY ———

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1. This canon begins by establishing in § 1 the general principle by which anyone with legislative power (proper or delegated, cf. c. 30) may also, as is logical, make penal laws. Therefore, no unipersonal organ (the Roman Pontiff, diocesan bishop and equivalents, etc.) or member of a college (College of Bishops, particular Council, bishops’ conference) enjoying legislative power in the Church is excluded from making laws that
establish canonical penalties. This is to say that those persons may create or constitute new offenses, naturally while respecting the limits of their competence, be it material, territorial or over persons.

During the work of drawing up the Code, to avoid any rigorous interpretation or excessive diversity in penal legislation, it was proposed to limit this power and confer it solely upon the bishops' conferences. But, the answer to this suggestion was that, in that case, the power of the bishops would be too restricted.

2. The juridical obligation being mandated or the juridical good that the new penal law proposes to safeguard may be contained in the provisions of various types of law: divine law, natural law (in the Code, for example, offenses against the life and liberty of human beings are described in cc. 1397–1398), positive law (cf., for example, offenses in the administration of the sacraments in cc. 1378–1380) and human law (cf., for example, c. 1392, which classifies engaging in commerce by the clergy or the religious as an offense). A human law may be ecclesiastical, promulgated by the ecclesiastical legislator or by other, normally superior, legislators, or it may be a law issued by civil authorities.

3. Penal law and penal precept may make imposition of the threatened penalty obligatory (preceptive or obligatory penalty). They may also give the judge (or superior) the power to apply or not apply the penalty (facultative penalty), in which case the person applying the penalty must follow the provisions of cc. 1343–1346.

4. As provided in § 2 of this canon, the law that establishes the penalty may precisely determine the penalty (determined penalty) or leave it to the prudent judgment of the judge to determine, with a greater or lesser margin of discretion (undetermined penalty). The judge should particularly keep in mind the norm in c. 1349. By their very nature, latae sententiae penalties are always determined.

The number of undetermined penalties in the Code is excessive. Although they allow the judge to apply the most appropriate penalty to the circumstances of the person and the offense, they also weaken the preventive effect of the penalty and may cause unequal and unjust treatment of the faithful and lead to arbitrary action by the judge or the superior who must apply them. In canon law, however, undetermined penalties are more easily justified, because they are universal norms and cannot take sufficient account of the varied circumstances and particularities of each of the places where they must be applied.

5. Particular legislative activity in penal matters does not refer only to the possibility of creating an offense ex novo with a penal law. One of the tasks of particular legislation is to accommodate universal legislation

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to the specific circumstances of a place. In penal matters, one way to accomplish that is explicitly provided in § 3 of this canon: “If a universal law threatens an undetermined penalty or a discretionary penalty, a particular law can establish in its place a determined or an obligatory penalty.” In addition, the particular legislator may also add other penalties to those established for an offense by the law of a superior legislator. Given the characteristics and function proper to penalties, this canon warns that “this is not to be done except for the gravest necessity.”
Diocesan bishops are to take care that as far as possible any penalties which are to be imposed by law are uniform within the same city or region.

SOURCES: LG 27; CD 36, 37
CROSS REFERENCES: c. 1315

--- COMMENTARY ---

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By including ample recognition for the legislative power in the area of penalties in the preceding canon, the Code attempts to set down the basis for suitably adapting penal legislation to the most varied circumstances of time and place. Although this should theoretically be considered a positive factor and is the fruit of attentive and responsible pastoral exercise of power, such variety may cause problems.

While preparing the schema of penal law, some consultative bodies indicated that it was appropriate to avoid excessive variety and fragmentation of territorial penal norms. To that end, it was suggested that competence to make penal laws be granted exclusively to the bishops' conferences. Since this suggestion was not accepted (see commentary on c. 1315), the drafting group thought it opportune to include the contents of this canon.1

Indeed, while the convenience and usefulness of particular penal norms is acknowledged, the diocesan bishop and all those with power to issue penal laws are exhorted to observe a degree of uniformity in the matter, at least within certain territorial limits (the same city or region).

Uniformity is especially advisable to avoid perplexing the faithful and to prevent possible abuse by the authorities. In other words, in a matter as serious and delicate as this, it is particularly appropriate for the authority to act with uniform criteria to avoid possible abuses and to ensure equal treatment. In this way, the faithful will not be surprised to see that, in some places, certain acts are punished as delinquent, while in others

nearby, perhaps neighboring, they are not, or that in some places, heavy penalties are applied, and in others, for the same behavior, much lighter penalties are imposed.

Since a bishops' conference cannot offer a complete and uniform set of norms on penal matters because its competence is materially limited, this may be achieved in other ways, decisions of such as particular councils and agreements between neighboring diocesan bishops. In any case, the path to making agreements is open at sessions of a bishops' conference, as provided in c. 455 § 4.²

However, diversity per se cannot be rejected.³ In light of diversity of circumstance, social sensitivity and other factors, the competent ecclesiastical authorities should carefully and prudently ponder the matter with pastoral responsibility, and decide what would be best.

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1. This canon states the general criteria for establishing canonical penalties.

To achieve its purpose, the Church also has penal sanctions as legitimate and necessary juridical-pastoral instruments. However, for pastors, when exercising their power of governance, recourse to the use of penalties should be the exception. As the Council of Trent (Session XIII, de ref., ch. 1) states and c. 2214 § 2 of CIC/1917 briefly mentioned, example, exhortation, and persuasion, should be the ordinary means to prevent offenses and, above all, to lead the faithful by the correct and ordered exercise of the freedom they enjoy in the Church to attain salvation and edification from the Body of Christ. Canonical penalties are certainly not the most important instrument in pastoral governance, not even to encourage observance of the more serious obligations of justice for the faithful. But, this does not mean that canonical penalties are not appropriate, and necessary, in the face of certain behavior. However, it must be remembered that the effectiveness and proper function of canonical penalties has a double dimension: personal and social. This means that it looks to the personal good of the faithful and to the general and common good of the people of God. In this sense, the purpose of canonical penalties, in which the Church’s entire penal system plays a part, is the guardianship of communion. Thus it is a defense of the bonds and goods upon which communion is founded: faith, the sacraments and the ecclesiastical regimen.

2. As the fundamental pastoral criterion in this matter, the canon provides that penalties should be established, meaning laws and penal precepts should be made, only when they are truly necessary to better
provide for ecclesiastical discipline. In order to judge the appropriateness or necessity of mandating a penalty for certain behavior, an authority may make use of the opinion of consultative bodies formed at various levels of the ecclesiastical organization.

Canon 392 explicitly alludes to ecclesiastical discipline when it notes that a diocesan bishop is obligated to defend the unity of the Church and therefore, to promote the discipline common to the entire Church, as established in laws and other ecclesiastical norms. Therefore, he should be vigilant to prevent the introduction of abuses, particularly in matters of special importance, such as the ministry of the word, the celebration of the sacraments and divine worship, and the administration of goods. Indeed, all canonical penalties tend to defend these fundamental goods and interests of the Church.

3. The last part of the canon prohibits mandating the expiatory penalty of expulsion from the clerical state by particular law. Literally, the canon reads, “Dismissal from the clerical state, however, cannot be laid down by particular law.” But, the expression “particular law” is understood in the sense of a law made by a legislator under the supreme authority (Roman Pontiff and College of Bishops). This is because, in addition to universal norms, the supreme authority also may make particular norms for a given territory or a specific ecclesial community. It does not appear that with this canon the supreme authority wanted to impose limitations on its own power by prohibiting itself from making particular laws that mandate expulsion from the clerical state. In addition, the canon refers explicitly only to “law.” As for “precept,” c. 1319 § 1 provides that perpetual expiatory penalties such as expulsion from the clerical state cannot be mandated by precept. It must also be made clear that, in this case, there is nothing to prevent the supreme authority from imposing a precept under penalty of expulsion from the clerical state. Finally, this provision is nothing other than a concrete application of the juridical institution of reserve. Because of the gravity of the penalty of expulsion from the clerical state, the supreme authority wanted to reserve for itself the possibility of establishing it against some offense.
A legislator is not to threaten *latae sententiae* penalties, except perhaps for some outstanding and malicious offences which may be either more grave by reason of scandal or such that they cannot be effectively punished by *ferendae sententiae* penalties. He is not, however, to constitute censures, especially excommunication, except with the greatest moderation, and only for the more grave offences.

**SOURCES:** c. 2241 § 1; Princ. 9

**CROSS REFERENCES:** cc. 1312, 1314, 1321, 1331

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**COMMENTARY**

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1. In this canon, the supreme legislator gives those who may make penal laws or impose penal precepts some criteria for the establishment of *latae sententiae* penalties and the constitution of censures or medicinal penalties.

   Taken by themselves, these are simply directives that have limited practical relevance. If they are not taken into account by lower ecclesiastical authorities when issuing these norms, the norms would not be null or without effect. However, in the case of a precept, failure to observe these criteria could be a sufficient reason for legitimate impugnment. In any case, some provisions of this canon have a precise and direct juridical effect.

2. With regard to *latae sententiae* penalties, the general principle is not to establish them (*ne comminetur*), because this method of applying canonical penalties should be considered exceptional. Therefore, it should be limited to very few, very concrete, specifically determined offenses (*singularia quaedam delicta*). Thus in the overall canonical penal system, they are not the normal way to apply penalties. Threatening a *latae sententiae* penalty is justified only if it simultaneously meets the conditions of the assumption and at least one of the two circumstances stated in the canon. The assumption is that it must necessarily be an
outstanding and malicious offense, meaning a deliberate violation of a penal norm (cf. c. 1321 § 2). This assumption must be understood to mean that latae sententiae penalties cannot be threatened (constitutive moment) against culpable offenses, just as latae sententiae penalties are not incurred (applicative moment) when the offense was committed by omission of due diligence, that is to say, with culpability.

3. Since a necessary assumption is that the offense be malicious, a latae sententiae penalty may be threatened after verifying either of the following circumstances: the offense may cause a greater scandal or it cannot be effectively punished with ferendae sententiae penalties.

It is not easy to precisely determine the significance and scope of these two circumstances. They must be considered at the time of threatening the penalty, that is, at the time of making the penal norm and therefore, before the offense is actually committed.

The first of these circumstances implies that the ecclesiastical authority, with timely and prudent care for the good of souls, should foresee the offenses that may cause greater scandal among the faithful. These are the offenses that, because of their objective gravity and the circumstances and social sensitivity of the environment in which they occur, may cause discredit to the Church or its teachings and means of salvation (the sacraments) or create among the faithful an attitude that might induce offensive behavior.

The second circumstance that may justify threatening a latae sententiae penalty is that the offense cannot be effectively punished with a ferendae sententiae penalty. The only offenses that cannot be punished with ferendae sententiae penalties are those that theoretically cannot be proved in the external forum except by confession of the author; then, it is not possible to initiate a penal procedure. Nevertheless, it seems that the determining element in choosing between the modes of applying the penalty is the hypothetical ineffectiveness of the ferendae sententiae penalty, not the real possibility of applying it by sentence or decree. But, it is uncertain whether a latae sententiae penalty is more effective than a ferendae sententiae penalty unless, for some offenses, the latae sententiae penalty is more effective in practice, from the point of view of prevention, because if it were ferendae sententiae, it would, in fact, not be applied. In sum, this is an attempt to find the most appropriate and effective means to combat certain delinquent actions.

4. With regard to censures or medicinal penalties, the general criterion on constituting them is very restrictive. The canon states that the ecclesiastical authority theoretically shall not establish (ne constituat) them except with the greatest moderation—a criterion of maximum restriction for the gravest of censures, excommunication. Censures, in the final analysis, should be reserved only for the most grave offenses.
1319 § 1. Quatenus quis potest vi potestatis regiminis in foro externo praecepta imponere, eatenus potest etiam poenas determinatas, exceptis expiatoriis perpetuis, per praeceptum comminari.

§ 2. Praeceptum poenale ne feratur, nisi re mature perpensa, et iis servatis, quae in cann. 1317 et 1318 de legibus particularibus statuuntur.

§ 1. To the extent to which one can impose precepts by virtue of the power of governance in the external forum, to that extent can one also by precept threaten determined penalties, with the exception of perpetual expiatory penalties.

§ 2. A precept to which a penalty is attached is not to be issued unless the matter has been very carefully considered, and unless the provisions of cann. 1317 and 1318 concerning particular laws have been observed.

SOURCES:  c. 2220 § 1
CROSS REFERENCES:  cc. 35, 36 § 1, 49

COMMENTARY

Josemaría Sanchis

1. In order to establish who may impose penal precepts, § 1 of this canon, similarly to the way c. 1315 referred to the power to make penal laws, refers to the general provisions regulating the powers of governance in the Church and, more specifically, to the powers related to making precepts.

During the preparation of the Code, with the statement of this general principle in penal law, a timely attempt was made to make the provisions on the juridical institute of precept found in different parts of the Code uniform. The legislators were trying to avoid introducing possible contradictions, especially on such a debated question as the nature of precepts; moreover, a different study group had the task of elucidating the question.¹

Therefore, the following are required in order to impose penal precepts: a) to have the power of governance or jurisdiction, and b) that power must allow precepts to be imposed in the external forum. This


Exegetical Commentary on the Code of Canon Law  btcalw  p. 20/32
means that it is necessary to have executive power in the external forum (cf. c. 35). In addition to those who also have legislative power, ordinaries (cf. c. 134 § 1) and their delegates (cf. c. 137), the latter within the limits of their mandate, enjoy that power and may therefore make penal precepts. The dicasteries of the Roman Curia, who have vicarious executive power (cf. c. 1356 § 1 in relation to c. 361), may also make penal precepts within their respective material competences, as may bishops' conferences.

However, those who may only impose non-jurisdictional precepts are excluded, as are those who may exercise their power only in the internal forum (cf. c. 596). On the other hand, it does not appear that judicial vicars and judges enjoy such power, except in regard to internal discipline of the tribunals (cf. c. 1470 § 2).

2. Both medicinal and expiatory penalties may be mandated using penal precepts. However, a requirement consistent with the proper nature and operability of penal precepts, since reference is made to specific situations and persons, is that penalties threatened by means of penal precept must always be determined penalties. Furthermore, because of their gravity, from among expiatory penalties, those that are perpetual by nature (for example, dismissal from the clerical state or deprivation of office) or by the will of the superior are excluded from the scope of penal precepts. In any case, § 2 explicitly refers to c. 1318, so as to take into account the restrictive juridical-pastoral criteria stated in it on threatening censures and latae sententiae penalties.

Similar to the way c. 1317 provides for penal law, this canon, also in § 2, did not wish to omit recalling that “a precept to which a penalty is attached is not to be issued unless the matter has been very carefully considered.”

The legitimacy of a precept is determined by its essential elements, which are competence, written form and notification or summons. Functional competence is executive power in the external forum, territorially, personally or materially determined. The external form of a precept must obligatorily be written, with at least a summary indication of the reasons (cf. c. 51). Notification or summons of the precept may be made ordinarily (document with the written text of the precept), extraordinarily (cf. c. 55) or by the equivalent (c. 56).

A precept takes effect only after the notification of the addressee (c. 54 § 1) and ceases to be effective by legal revocation and upon cessation of the law under which it was executed (c. 58). The norms on the temporary effect of penal laws in c. 1313 are not applicable to precepts because, precepts always refer to specific persons and situations.2

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As is true for penal laws, in case of doubt, penal precepts must be strictly interpreted (c. 36 § 1), and they cannot be extended to other cases that are not explicit in the precept (c. 36 § 2).

Like any administrative act, a penal precept may be impugned. For the reasons established by law, annulment, revocation or modification may be requested from the administrative authority superior to the one that made the precept (hierarchical recourse in cc. 1732–1739) or in an contentious-administrative process (c. 1445 § 2; PB 123).
In omnibus in quibus religiosi subsunt Ordinario loci, possunt ab eodem poenis coerceri.

In all matters in which they come under the authority of the local Ordinary, religious can be constrained by him with penalties.

SOURCES: cc. 619, 631; Pius PP. XII, Alloc., 8 dec. 1950, I (AAS 43 [1951] 28); CD 35; ES I, 25; MR 44

CROSS REFERENCES: cc. 134 § 1, 591, 593, 594, 596 § 3, 631, 678 § 1

COMMENTARY

Josemaría Sanchis

1. In clerical religious institutes of pontifical right, the chapters (cf. c. 631 § 1) and the major superiors (cf. c. 620) have "ecclesiastical power of governance, for both the external and the internal forum" (c. 596 § 2) over their members. Major superiors of clerical religious institutes and societies of apostolic life of pontifical right are also ordinaries and, with respect to their members, have ordinary executive power (cf. c. 134 § 1). Consequently, insofar as the chapters and the superiors can issue norms, they may also establish penalties to encourage fulfillment of the norms. Therefore, there is no doubt that superiors of those institutes may, within the limits of their competence, impose penal precepts upon their members.

Institutes of consecrated life (religious or secular) of diocesan right are "under the special care of the diocesan bishop" (c. 594). But, those of pontifical right, with regard to exemption from the regimen of local ordinaries (cf. c. 591), "in their internal governance and discipline, (...) are subject directly and exclusively to the authority of the Apostolic See" (c. 593). These norms are also applicable to societies of apostolic life (cf. c. 732).

However, "in matters concerning the care of souls, the public exercise of divine worship, and other works of the apostolate, religious are subject to the authority of the bishops" (c. 678 § 1).

2. With these assumptions we may ask some questions regarding the meaning and scope of this canon.

Although by its systematic placement under the title devoted to the constituent sources of penalties (penal law and penal precept), one would assume that the reference is to the constitutive moment of penal norms, in reality, the content may equally well be applied to the moment of imposition. The verb used (coercere) is the same one used by c. 1311 in the
general statement on the original right of the Church to punish members of the faithful who commit offenses.

In both cases, the canon would merely be making a general principle explicit with respect to the members of a religious institute; the principle is the subjection of the faithful to canonical norms (cf. cc. 12 and 13), including penal norms, that affect them because of territory, personal conditions or subject matter.

Therefore, with regard to the constitutive aspect of penalties and the internal regimen and discipline of the institute, religious are subject to the norms, including the penal norms, of their superiors. With regard to the discipline common to the entire Church, the care of souls, the exercise of divine worship and works of the external apostolate, they are also subject to the laws, including penal laws, of the bishop.

Nevertheless, instead of referring to the diocesan bishop or his equivalent, the text of the canon refers to the local ordinary (cf. c. 134 § 2), which also includes the offices of vicar general and episcopal vicar, offices that possess neither legislative nor judicial power, but executive power alone.

Thus, it appears that when the canon states that the local ordinary may punish religious with penalties, it is trying to emphasize that the local ordinary, when necessary, may make particular penal norms and precepts that also affect religious, including the exempted, in all matters in which the religious are subject to them. Something similar may be said with respect to imposing penalties; that is, the local ordinary, in accordance with the norms that establish competence, may initiate a penal procedure and, if applicable, by extrajudicial decree, may impose the appropriate penalties, when the author of the offense is a member of a religious institute.
CAPUT III
De remediis poenalibus et paenitentiis

CHAPTER III
Penal Remedies and Penances

1339 § 1. Eum, qui versatur in proxima delinquendi occasione, vel in quem, ex investigatione peracta, gravis cadit suspicio delicti commissi, Ordinarius per se vel per alium monere potest.

§ 2. Eum vero, ex cuius conversatione scandalum vel gravis ordinis perturbatio oriatur, etiam corripere potest, modo peculiaribus personae et facti conditionibus accommodato.

§ 3. De monitione et correptione constare semper debet saltem ex aliquo documento, quod in secreto curiae archivo servetur.

SOURCEs: § 1: cc. 2306,1°, 2307, 2309 §§ 1, 2 et 6
§ 2: cc. 2306,2°, 2308, 2309
§ 3: c. 2309 § 5

CROSS REFERENCES: cc. 316 § 1, 697, 1312 § 3, 1328 § 2, 1341, 1342 § 1, 1347 § 1, 1348, 1394 § 1, 1395 § 1, 1396, 1371

Exegetical Commentary on the Code of Canon Law   btcalw p. 25/32
1. Within the general framework of the penal system, **penal remedies** are preventive measures; they are juridical and pastoral instruments whose principal purpose is to prevent offenses (cf. c. 1312 § 3). Primarily, they are used to avoid the commission of an offense. They may, however, also be used to avoid imposing a penalty when the same purpose may be achieved with a penal remedy. Thus ecclesiastical authorities have available not only penalties (to punish offenses actually committed and proved through the penal process), but also penal remedies suitable for handling situations that might be called intermediate, since the offense has not actually been committed (cf. c. 1328 § 2), or the behavior does not in and of itself constitute an offense, or finally, because the presumed delinquent action is not sufficiently certain for the penalty to be applied (cf. c. 1348).

These measures may be used during the period of time between notice of the possible commission of an offense and certainty that it was committed. Thus, penal remedies are not penalties or even punishment, properly speaking, for both necessarily presuppose a certain offense. Rather, they are acts by the ecclesiastical authorities related to behavior that to some degree, or at least apparently, has harmed or may harm the ecclesiastical juridical system. By their nature and function, penal remedies have a well-defined pastoral purpose, as c. 1341 also highlights when it refers to them among the means that may be used to obtain the purpose of a penalty and thus avoid the penal process.

2. There are two types of penal remedies: warning and correction.

   a) **Warning** consists in ordering or inviting someone to amend their behavior. It may be directed specifically to a member of the faithful in any of the following circumstances: a) being in a proximate occasion of committing an offense, or b) being gravely suspected of having committed an offense. The text adds that suspicion must be based on investigation prior to the penal process, that is, after receiving notice that an offense has possibly been committed, and referred to in c. 1717. It cannot be said, however, that prior investigation is a requirement in this case for a legitimate warning.

   In some cases warning is a prerequisite for the valid imposition of a penalty, meaning that it is a condition of punishability. To fulfill their medicinal purpose, censures cannot be validly imposed unless the offender was first admonished to cease in obstinacy (cf. c. 1347 § 1). Similarly, to apply certain graver expiatory penalties, prior warning is established as a requirement (cf. cc. 1394 § 1, 1395 § 1, and 1396). In other cases warning is a constitutive element (cf. c. 1371).
Warning prior to expulsion from an association of the faithful (cf. c. 316 § 2) and expulsion of religious from their institute (cf. c. 697) are juridically similar figures with regard to their disciplinary function.

b) A *correction* is a formal reprimand to someone who has done something wrong. Specifically, someone who by misconduct has caused scandal or a serious disturbance of public order may be corrected. Therefore, the penal remedy of correction is used in situations where the behavior of a member of the faithful, without being an offense because it is not so designated in a penal norm, nevertheless causes harm similar to an offense, although usually less serious. Therefore, in many cases, correction can be an appropriate response to the types of behavior covered in c. 1399.

To be effective, a correction must be just and therefore proportionate to both the circumstances of the event (that determine the degree of seriousness) and the circumstances and condition of the person (age, health, office, etc.).

3. According to the text of the canon, only an ordinary can be *the author* of a penal remedy (cf. c. 134 § 1), although in the case of a correction, it may done personally or through another.

Penal remedies may be applied by decree (cf. c. 1342 § 1). For the various aspects and essential/incidental elements regarding their establishment, notification and execution. The juridical regulations for these administrative acts must be followed. These juridical regulations are mainly found in cc. 35–38.

Penal remedies, because they affect the external forum, should be in writing (cf. c. 37). This differentiates them from other types of verbal warnings, warnings or corrections that are not as formal, such as the fraternal correction mentioned in Mt 18:15 and other possible methods used in pastoral care (cf. cc. 1341 and 1348). In c. 1328 § 2 it seems, however, that it is also acceptable for penal remedies to be applied, at least in some cases, by a judge’s decision or court order. In c. 1342 § 1 this possibility is left open.

There should always be a written record of a penal remedy, or it should at least be documented, since upon occasion it will be necessary to prove that it occurred, when it happened or when notice was given. Because of the nature of the content, it will be kept in the secret archive of the curia (c. 489).
A penance, which can be imposed in the external forum, is the performance of some work of religion or piety or charity.

A public penance is never to be imposed for an occult transgression.

According to his prudent judgment, the Ordinary may add penances to the penal remedy of warning or correction.

Sources: § 1: cc. 2312 § 1, 2313 § 1
§ 2: c. 2312 § 2
§ 3: c. 2313 § 2

Cross References: cc. 1312 § 3, 1324, 1326, 1342 § 1, 1343, 1344, 2°, 1357 § 2, 1358 § 2

Commentary

Josemaría Sanchis

1. Canonical penance consists in having to perform some religious, pious or charitable work. Canon 2313 § 1 of CIC/1917 listed some examples of penances: saying certain prayers, making a pilgrimage, observing a special fast, giving alms for pious purposes, doing spiritual exercises.

A penance is mostly used instead of a penalty or is added to a penalty (cf. c. 1312 § 3).

A canonical penance, like a penalty, is always caused by the prior commission of an offense, or at least an unconsummated offense (cf. c. 1328).

2. A penance may be imposed as a substitute for a penalty a) under any of the attenuating circumstances listed in c. 1324; b) if the penalty mandated for an offense is optional and substitution by a penance is considered appropriate (cf. c. 1343); and c) even if imposition of a penalty is preceptive or obligatory, when at the time of applying it, the offender has already amended his or her life and the scandal has been repaired, or if the
offender has already been sufficiently punished by civil authorities, or if it is foreseen that it will happen (c. 1344, 2). A penance may be added to a penalty incurred *latae sententiae* if among the circumstances of the offense, there are any of the penalty-aggravating causes established in c. 1326 § 1 (cf. c. 1326 § 2). It is also possible to impose a penance when a censure is remitted (c. 1358 § 2).

3. Under § 3, the ordinary may, according to his prudent judgment, add penances to a warning or correction in cases covered by norms, and only in those cases, if a penal remedy is applied to an offense that has certainly been committed.

4. Differing from sacramental penances, canonical penances, which presuppose an offense, because they are a juridical institution, are normally imposed, although not exclusively, in the external forum by means of a decision or decree. Canon 1342 § 1 merely says that penances may in any case whatsoever be applied by decree. Evidently this does not exclude applying them by decision, as can be deduced from the various norms cited above that speak of canonical penance in relation to the discretional powers of a judge. A penance is applied by a judge or superior's decision or decree respectively, depending upon whether the offense was heard judicially or administratively.

Even though a penance may be imposed in the external forum, § 2 of c. 1340 provides that a penance for a transgression that is and remains hidden cannot be imposed publicly. This provision is a concrete manifestation of the right enjoyed by all persons to retain their reputation, even in the Church (cf. c. 220); it acquires special relevance and application in penal matters.

Canon 1357 considers a special case of remission of the *latae sententiae* censure of excommunication or interdict in the internal sacramental forum. For the cases therein indicated, when a confessor, to whom the law grants the power to remit such penalties in those cases, absolves from a penalty, under c. 1358 § 2 he is obligated to impose an appropriate penance. Consequently this would be a canonical penance imposed in the internal forum without the requirements, characteristics and formalities required in the external forum.
SOURCES: c. 2222 § 1; PIUS PP. XII, Alloc., 5 dec. 1955 (AAS 47 [1955] 64)
CROSS REFERENCES: cc. 1315, 1321, 1342, 1343, 1349

1. This norm was included in the current legislation because it is considered an “instrument” that the pastoral government of the Church, directed towards the salvation of souls, cannot do without. Therefore, it is important to analyze it carefully to determine the conditions in which it is to be applied and how useful it is for safeguarding communion in the church.

The norm is placed in title VII as the last canon in the section devoted to describing offenses and their penalties. Among other things, this implies that the norm designates an autonomous offense. All the common


Exegetical Commentary on the Code of Canon Law
c. 1399

Bk. VI. Pt. II. Penalties for Particular Offences

J. Sanchis, Comments on cc. 1313-1320, 1339-1340 and 1399

Exegetical Commentary on the Code of Canon Law

norms referring to the elements of an offense in the first part of book VI are applicable to this norm (external act, imputability, culpability), as are the norms referring to the requisites for determining punishability and the provisions for applying and remitting a penalty.

2. The acts that should be considered to be included in the provision of this canon and which constitute what is unlawful and punishable, as in any other offense (cf. cc. 1315 § 1 and 1321 § 1), are the external violation or breaking of a divine or ecclesiastical law.

3. From the context, it can be deduced that the term law should not be understood in its juridical-formal sense. Instead, it is a reference to the precepts contained in divine or merely ecclesiastical law. At the same time, it emphasizes that only juridical precepts are concerned, not simply moral precepts. However, it is not always easy to determine whether a given obligation is contained in divine law, or to what extent.

In any event, the violation must be grave. The degree of gravity is determined by both subjective and objective factors. The norm does not explicitly provide for punishing a culpable violation; therefore, only acts that are gravely imputable and committed with malice may be punished under this canon (cf. c. 1321 § 2).

4. The generic offense designated in this canon is causing harm to juridically protected goods or rights by failing to fulfill a positive or negative juridical obligation established in canon law through the various technical instruments or formal sources such as laws, precepts, etc., with the exception of custom. That means the offense consists in the malicious external violation of a divine or ecclesiastical precept. However, certain conditions or requirements are established that limit punishability ("tunc tantum potest puniri"); they also underline the exceptional nature of the norm. Such conditions, which must be met simultaneously ("punitionem postulat, et necessitas urget"), are the special gravity of the violation and the surgent need to prevent or repair scandal. The first condition is the assumption that there is a grave violation of the law, and the law in this specific case requires special gravity. However, what justifies the exceptional provision of this canon is not special gravity, but the urgency to prevent or repair scandal. Therefore, it is insufficient that the behavior might merit punishment; it is necessary that there be urgency to prevent or repair the scandal produced by it.

5. The author of the violation may be facultatively punished with a penalty that is left indeterminate by the norm ("iusta poena"); this expression is paradoxically used by the Code when treating offenses of lesser gravity. Since prior admonishment (c. 1347 § 1) is required for the valid imposition of medicinal penalties or censures, some authors feel that those penalties are inapplicable to the case covered by this canon because, if

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they were, how could the canon be an effective instrument in emergency situations? About expiatory penalties, application of perpetual penalties is excluded (c. 1349).

6. Evaluation of the urgency of applying the punishment is incumbent upon the ordinary who may initiate the penal procedure, not on the judge. The penalty may be applied either by decree by the ordinary when following the administrative path, which is prohibited in the cases established by c. 1342 § 2, or by a sentence from the judge or court in a judicial process. In addition, the attenuating circumstances indicated in c. 1324 § 1,9° must be kept in mind; according to that norm, the penalty should be mitigated or substituted by a penance if the offense was committed by “one who through no personal fault was unaware that a penalty was attached to the law or precept.”

All of the above leads to the conclusion that the actual scope and practical operability of the juridical instrument provided in this canon is very limited, almost nonexistent. Only with difficulty can it be considered a pastorally effective measure against urgent and grave situations that can be more speedily resolved with greater effectiveness and justice by other means, including non-penal ones, as provided by law; for example, by correction (cf. c. 1339 § 2).

7. This canon may have the merit of demonstrating that a simply formalist, not to say positivist, conception of offenses is unacceptable. However, not only is an abstract principle of public law established therein, according to which the authority “may threaten to penalize” grave violations of canonical norms, but it is intended to be a norm that can be directly applied. In other words, it is a norm that allows a penalty to be imposed that has not been previously established and thus introduces an element of distortion into the Church’s penal system that is unjustified because of the disproportion of the norm’s meager virtues. It raises more important problems than it resolves.

It may be that c. 1399 deprives of their meaning the canonical provisions on exercising legislative and preceptive power in penal matters, thus rendering them useless. Those powers are the fruit of a prudent, responsible exercise of the power of governance that can counter behavior that causes grave harm to communion. On the other hand, the norm favors a passive attitude by the authorities, since, in any case, a penalty can be applied if there is particularly grave behavior that causes grave scandal. But, the use of the discreitional faculty that this canon grants runs the risk of being transformed into arbitrariness that endangers communion, the good of the Church and the rights of the faithful.

In addition, the solution adopted by the Code to the problem is not the only possible response. According to many authors, it is also not the best solution for the good of the ecclesial community. In such situations, an effective instrument that respects the requirements of justice is the use of a penal precept (cf. c. 1319).