



## “CUM MANSUETUDINE RIGOR, CUM MISERICORDIA IUDICIUM, CUM LENITATE SEVERITAS”: THE SANCTION IN THE PENAL CANON SYSTEM

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Para citar este artículo puede utilizarse el siguiente formato:

**Enrica Martinelli** (2014): “«Cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas»: the Sanction in the Penal Canon System”, en *Revista crítica de Derecho Canónico Pluriconfesional*, n.º 1 (abril 2014), pp. 169-192. En línea en: <http://www.eumed.net/rev/rcdcp/01/em.pdf>

RESUMEN: La comisión del delito, la celebración del proceso, y la consiguiente aplicación o declaración de la pena, son los síntomas de la fractura producida dentro de la comunidad eclesial y del trabajo del homo viator para cumplir su destino de redención; el signo de la dificultad de la Iglesia para realizar la plenitud de su vocación divina, ya que de esta manera se ha retardado su camino hacia la salvación. Sin embargo, la pena y el relativo procedimiento para su aplicación se pueden considerar como el intento, extremo y radical, para la reconciliación del autor del comportamiento antijurídico con Dios y con los demás, para recuperar conciencia de su dimensión comunitaria y de su destino de salvación. Si, por un lado, no se puede dudar que el sistema regulador de la Iglesia se presente como un verdadero sistema jurídico primordial, que posee el *nativum et proprium ius* para recurrir a la coerción penal, por otra parte, el dato teológico que es implícito en el orden legal de la Revelación, impide considerar todos los aspectos –y especialmente los aspectos penales– como el resultado de una realidad puramente humana, a la que se aplican las típicas categorías de los derechos laicos. La comprensión de las características que el sistema penal canónico presenta y de la función original que éste desarrolla solo puede partir de la cifra absoluta que caracteriza a este orden normativo.

PALABRAS CLAVE: Derecho penal canónico, Proceso penal, Sanción penal, Acción penal, Coerción, Delincuente, Solicitud pastoral, Ordinario, Poder discrecional.

ABSTRACT: The commission of the crime, the trial hearing and the consequent infliction or declaration of the penalty are symptoms of the fracture that has occurred within the ecclesiastical community and of the trouble that the homo viator has in fulfilling his destiny of redemption; a sign that the Church has difficulty in fulfilling its divine vocation completely, since in this way it sees its path towards salvation slowed down. However, the sanction and relative trial for its application can only be considered as an extreme and radical attempt for the reconciliation of the perpetrator of the unlawful behaviour with God and with his brothers, for the conscious recovery of his dimension of communion and his destiny of salvation. If, on one hand, it absolutely cannot be doubted that the legislative system of the Church is presented as an actual primary legal order, worthy of a *nativum et proprium ius* to resort to penal coercion, on

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the other hand, the theological element which is implied by the legal order of the Revelation, prevents every aspect of it – and particularly – from being considered as the fruit of a purely human reality to which the actual categories of secular rights can be applied. The understanding of the peculiarities that the canon penal system presents and the individual function that it performs must start from the absolute element that characterises this legislative order.

KEYWORDS: Penal canon law, Criminal trial, Penal sanction, Prosecution, Coercition, Penalty infliction, Delinquent, Pastoral solicitude, Discretionary power, Ordinary.

## 1. Introduction

In a recent convention dedicated to the penal law of the Church it was said that the latter «non gode di buona salute... anzi è malato; e pertanto è circondato da tanti medici che cercano di esaminare le cause della malattia e provvedere alla debita terapia... La medicina potrà produrre buoni frutti se si è individuata la vera malattia, e quindi la medicina adatta per curarla. In caso contrario non solo non produrrà frutti buoni, ma corre il rischio, come medicina non adeguata di produrre ulteriori danni»<sup>1</sup>.

The state of illness mentioned can be described in a nutshell as being a double thorn in the flesh: in the first place the diffidence and continuous perplexity that the actual existence of a disciplinary system in the ecclesiastical order has always generated<sup>2</sup> and continues to generate<sup>3</sup> which, due to the lack of use that is made of it in practice, penal substantive and procedural law is justifiably considered «il ramo più secco dell'ordinamento della Chiesa e la

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<sup>1</sup> V. De Paolis, *Attualità del diritto penale della Chiesa*, in AA.VV., *Questioni attuali di diritto penale canonico*, Documents of the 43<sup>rd</sup> National Congress of the Italian Canon Association, Verona 5-8 September 2011, Roma, 2012, p. 11.

<sup>2</sup> Although relative to the Pio-Benedictine Code of 1917, previously in force, the observation may equally be extended to the 1983 Code of John Paul II, that «...tra i vari settori del diritto ecclesiale, quello che appare maggiormente incompreso e quindi anche maggiormente contestato o, peggio, semplicemente disatteso è il penale. Tale atteggiamento negativo... non sembra limitarsi agli studiosi, compresi i giuristi, ma pare abbia contagiato la stessa autorità, la quale ricorre... soltanto raramente al meccanismo delle pene» to the extent that the impression is given of «tenere in piedi un enorme edificio, in gran parte disabitato». See F. Coccopalmerio, *Per una critica riscoperta del diritto penale della Chiesa*, in *La legge per l'uomo*, edited by E. Cappellini, Roma, 1979, p. 307.

<sup>3</sup> In fact, in the ecclesiastical structure, there is widespread “resistance” to the perception of the intimate connection between the fundamental precept of charity towards one’s brother and justice, such as to cast doubt on whether the salvation project can be fully achieved regardless of the rigorous application of *caritas*. As has been authoritatively observed, no part of the doctrine has actually attributed to the post-council codes, and in particular to the Latin code, the responsibility of having generated, both in whoever imposes the penalties, and in the addressees thereof, of an erroneous conviction. Therefore, it is a question of having «favorito l’insinuarsi dell’idea che il fine della *salus animarum*... fosse da intendere... in un senso intimistico ed individualistico... e non secondo un significato inclusivo della cura del bene comune e dell’interesse per esso condiviso...». See S. Berlingo, *Spazio pubblico e coscienza individuale: l’espansione del penalmente rilevante nel diritto canonico e nel diritto ecclesiastico*. This is taken from the evocative report presented by the Author at the National ADEC Convention “*Per una disciplina che cambia. Il diritto canonico e il diritto ecclesiastico nel tempo presente*”, held in Bologna from 7 to 9 November 2013.

parte meno applicata di esso»<sup>4</sup>. In the second place, the ineluctability that characterises it and that is marked by man's incessant need for redemption and his inability to redeem himself alone<sup>5</sup>. The solicitude of the Church to operate for the fulfilment, in the unfolding of history, of the promise of grace, cannot exist without the use of appropriate means for that purpose. From this perspective transpires the topicality of a penal law<sup>6</sup> for God's people, instrumental to the dignity of man in the quest for a justice that pursues the Common Good.

And yet, as has been mentioned, the same ecclesiastical legal order has shown itself to be very cautious in taking the route of the infliction of penalty through the court<sup>7</sup>, since a trial hearing always assumes a pathological situation which, destined to become public, may not be the most suitable for the recovery

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<sup>4</sup> L. Musselli, *1917-1983: per un raffronto tra le due codificazioni del diritto penale canonico*, in *Monitor ecclesiasticus*, 114 (1989), p. 29. The very poor application of penal legislation was also reported while the Pio-Benedictine Code was in force, by R. Metz, *Il diritto penale nel Codice di diritto canonico del 1917*, in *Concilium*, 5 (1975), pp. 49 ss.

<sup>5</sup> In fact, the history of man reveals his weakness, fragility and need to be recovered to a path of redemption that makes him worthy of God's promises. «L'alleanza della creazione con Adamo nel giardino dell'Eden era fondata sulla legge, scritta da Dio nel cuore dell'uomo. Essa non ha retto alla prova del serpente. L'uomo ha preteso di fare concorrenza a Dio e mettersi al suo posto... La seconda alleanza sigillata da Dio con il suo popolo ai piedi del monte Sinai si colloca sulla riproposizione della legge e della comunione e della fedeltà ad essa... Ma anch'essa è stata fallimentare. L'esperienza del popolo ebraico letta dai profeti e da essi interpretata è quanto mai importante. Se la salvezza sta nella fedeltà a Dio; se le sue promesse sono legate alla fedeltà dell'uomo a Dio, essa diventa praticamente impossibile perché il cuore dell'uomo è ferito, fragile, debole e inclinato al male. L'uomo ha bisogno di essere guarito dal di dentro... La nuova alleanza viene realizzata nella missione del servo sofferente, riconosciuto in Gesù di Nazareth, figlio di Dio fatto uomo. In lui si realizza la nuova creazione, viene dato il cuore nuovo e viene immesso il principio nuovo». De Paolis, *Attualità del diritto penale...*, cit., p. 20.

<sup>6</sup> Today's proliferation, with methods that are not always coherent, of integrative norms to the code of penal law, can be considered a tangible sign of the topicality of the issue in question, by way of example the *Motu Proprio "Sacramentorum sanctitatis tutela"* on "*delicta graviora*" promulgated, after a series of adaptations, on 15 July 2010 entitled "*Normae de gravioribus delictis*" or, even more recently, Vatican Law no. XVIII of 8 October 2013, concerning *norms on financial transparency, supervision and information*. These norms (which are part of the process of adaptation of the Vatican order to the international parameters of the *Financial Action Task Force – Groupe d'action financière* and the recommendations of the Moneyval Division of the Council of Europe, generally considered the best legislative tools in order to provide an effective network of protection against money laundering transactions and the financing of terrorism) were actually already in force having been adopted urgently with Decree no. XI on 8 August 2013 and represent the 'precipitate' of Vatican Laws no. CXXVII of 30 December 2010 and no. CLXVI of 24 April 2012 and of the *Motu Proprio* issued by the Pontiff on 24 June, 11 July and 8 August 2013 concerning the prevention and countering of money laundering, the financing of terrorism and the proliferation of weapons of mass destruction and the Jurisdiction of Judicial Authorities of Vatican City State in Criminal Matters. Worthy of note, herein, is also the circumstance according to which, by the express provision of the *Motu Proprio* mentioned above, the penal jurisdiction of the Judicial Authorities of Vatican City State is also exercised against 'public officials' who, due to a functional relationship, are connected to the Holy See, the Roman Curia and the Institutions connected to it. On this point it has also been observed that it can be «fondatamente ritenersi che si versi in un'ipotesi di canonizzazione in senso tecnico» even if it is «una canonizzazione senza dubbio singolare... dato che lo Stato (vaticano), le cui leggi vengono... canonizzate, all'art.1 della propria "*Legge sulle fonti del diritto*" dell'1 ottobre 2008, a sua volta riconosce nell'ordinamento canonico la prima fonte normativa e il primo criterio di riferimento interpretativo». S. Berlingò, *Spazio pubblico e coscienza individuale...*, cit.

<sup>7</sup> See the combined provisions of canons 1341 and 1718 § 1 and 2 of the C.J.C. of 1983, which will be mentioned in more detail below.

of the offender, may be counterproductive for the purpose and may constitute a serious nuisance for the ecclesiastical community.

However, when it is essential to make use of this tool, even in this specific sector, the principles and spirit that animate the whole legislative system of the Church are fully implemented and have full force.

The commission of the crime, the trial hearing and the consequent infliction or declaration of the penalty are symptoms of the fracture that has occurred within the ecclesiastical community and of the trouble that the *homo viator* has in fulfilling his destiny of redemption; a sign that the Church has difficulty in fulfilling its divine vocation completely, since in this way it sees its path towards salvation slowed down.

However, the sanction and relative trial for its application can only be considered as an extreme and radical attempt for the reconciliation of the perpetrator of the unlawful behaviour with God and with his brothers, for the conscious recovery of his dimension of communion and his destiny of salvation.

From this perspective, even the formal rigour, which is particularly marked in the legislation of the judicial trial<sup>8</sup>, cannot peter out into pure formalism<sup>9</sup>: on the contrary, it must become the most suitable guarantee for the fulfilment of justice and the good of the community<sup>10</sup>, respect for the personality and dignity of a believer who, whilst having made a mistake, must still be seen as a living

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<sup>8</sup> Since the form is not a goal in itself but a «strumento al servizio della giustizia, essa va temperata là dove la giustizia non solo è in gioco, ma addirittura ne riceverebbe danno, se non si introducessero degli adattamenti, in base anche alle esigenze tipiche dell'ordinamento canonico, particolarmente nella parte penale». See V. De Paolis, *Il processo penale nel nuovo Codice*, in *Dilexit iustitiam (Studia in honorem Aurelii Card. Sabattani)*, Città del Vaticano, 1984, p. 447. Alongside the judicial trial for whose hearing a more solemn and rigorous form is required, in order to offer a higher guarantee of justice and the person's dignity, there are administrative procedures within the Church, for the purpose of the infliction or declaration of the penalty, with a less solemn and quicker articulation, although offering fewer guarantees. It has been authoritatively underlined how the practice currently established, which is fully in favour of resorting to the administrative procedure (to the extent that a code reform for allowing the infliction through an administrative procedure of even very severe punishments, such as dismissal from the clerical status, is hoped for by a number of parties), corresponds to the unease caused by the shortage of people able to suitably conduct the criminal trial. This poses a problem not to be underestimated, since the administrative procedure will lead to an unjust or probably unjust measure, whenever it does not follow on from a certain moral, which is difficult to reach outside the judicial trial, always necessary for the full protection of the person's fundamental rights. These fears were expressed by Z. Grochowski, *Presentazione*, in *Il processo penale canonico*, by Z. Suchecki, Roma, 2003, pp. 7-8. F. Pérez-Madrid is also of the same opinion (*Derecho administrativo sancionador en el ordenamiento canónico. Una propuesta para su construcción*, Pamplona, 1994, p. 238), however sees it favourable to resort to the administrative procedure «1. Cuando no conste con seguridad que el acusado haya cometido el delito que se le imputa y que sea responsable. 2. Que no haya sido divulgada la noticia, cuando el conocerla conlleve un daño mayor, y tal conocimiento sea la consecuencia inevitable de la apertura del proceso correspondiente. 3. El peligro de la demora en la resolución de la causa. Frente a estos inconvenientes la solución sería la posibilidad de contar con un proceso rápido y reservado, oral. En el que se asegurara la imparcialidad, la independencia, y la verdad».

<sup>9</sup> «Di fatti, pur appartenendo al settore più "formale" dell'ordinamento canonico e consistendo di aspetti prevalentemente tecnici, non v'è dubbio che anche nel processo il formalismo giudiziale risulti insopportabile». This was observed by R. Bertolino, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico*, Torino, 1983, p. 13 ss.

<sup>10</sup> The public nature of the criminal trial cannot be doubted, underlined by canons 1728 § 1, 1430 and 1452 § 1, of the CJC of 1983.



member of the ecclesiastical body<sup>11</sup>.

The very close connection between substantive and procedural penal law means that, in order to fully understand the value, meaning and function that the penalty infliction system has in Church law, it is necessary – first of all – to focus on the nature and role that the latter has in the legal order of salvation<sup>12</sup>.

## 2. Structural and functional elements in sanction theory

The sanction, meaning the attitude of whoever draws up the rule against the person violating it, «è un carattere essenziale di qualsiasi norma che sia imposta all'osservanza di una libera volontà e quindi anche della norma giuridica»<sup>13</sup>. When examined from a structural point of view, it can be considered as the reactive aspect of the same norm<sup>14</sup>. In particular, the penal

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<sup>11</sup> The close link in the canon order between substantive and procedural legislation is clear, such that it has been stated that the canon order sees [procedural] legislation as being at the service of substantive law. See De Paolis, *Il processo penale amministrativo*, in *Il processo penale...*, cit., p. 216. Likewise, it has been underlined in the doctrine how the 1983 codification confirmed, through the introduction of new provisions relative to the judicial criminal trial, the guarantees and fundamental rights of *christifideles delinquentes*, in harmony with the directives expressed by the first Synod of Bishops of 1967 in the *Principia quae Codicis Iuris Canonici recognitionem dirigant*, «a sort of Decalogue» drawn up by the Legislator himself: this was the definition given by John Paul II in his Address to the Roman Rota on 18 January 1990 [in *Acta Apostolicae Sedis*, 82 (1990), pp. 872-877]. The almost unanimous approval of the *Principia* by the Synod put a final end to the aspirations of anyone who would have been in favour of suppressing – substantive and procedural – penal canon law – in favour of a penitential system or one of a more marked disciplinary nature. See, L. Gerosa, *Diritto penale e realtà ecclesiale. L'applicabilità delle sanzioni penali sancite dal nuovo Codice della Chiesa*, in *Concilium*, 22 (1986), pp. 398 ss. See also the considerations of Z. Suchecki, *Il processo penale giudiziario*, in *Il processo penale...*, cit. p. 236 and of A. Jozwicz, *L'imputabilità penale nella legislazione canonica*, Città del Vaticano, 2005, pp. 72 ss.

<sup>12</sup> The same *Coetus* of the Consultants appointed to review the penal issue points out the need to simultaneously draw up the substantive and procedural legislation: «*Dum ea de iure poenali substantiali parantur, interim de processo quoque poenali visura est ab eodem Consultorum Coetu esse canones proponendos. Quapropter d. 7 ian. 1970 idem Relator praeiit Praevium Canonum schema de iudicio criminali, ex 14 canonibus constans, quod Consultores in sessione generali 27-30 aprilis 1970 examinarunt et emendarunt*». *Communicationes*, 2 (1970), p. 100.

<sup>13</sup> A. Vitale, *Contributo ad una teoria delle sanzioni nell'ordinamento canonico*, in *Ephemerides Iuris Canonici*, 18 (1962), p. 235.

<sup>14</sup> The attempt to draw up a general and univocal notion of the sanction concept meets with more than one level of difficulty comprising, in the first place, the spread of the atechanical use of the term itself, which covers a great variety of meanings, not only in legal disciplines, but also in philosophy, sociology or even in everyday language. Furthermore, even from a purely legal point of view, the sanction concept is not univocal since it is ultimately influenced by the different concepts of law that one wishes to imply. There are however assumptions that are universally shared, particularly the one according to which the sanction (regardless of the different characterisations of the concept that are proposed) is always conceived as a consequence (*posterius*) – or effect – with respect to a cause (*prius*). In the different doctrines on the sanction concept, the consideration of its reactive aspect is also met with approval, i.e. the fact that it is a reaction to behaviour that breaks a norm established to maintain the balance of the system. For an in-depth view of the relationship between norm and sanction and of the sanction as a social control technique, see, amongst others, F. D'Agostino, *La sanzione nell'esperienza giuridica*, Torino, 1989; G. Lumia, *Controllo sociale, giurisdizione e libertà*, Milano, 1971; N. Bobbio, *Sanzione*, in *Novissimo digesto italiano*, XVI, Torino, 1969, pp. 530-540; P. Corso, *Preliminari ad uno studio sulla sanzione*, Milano, 1969. As is well known, the issue as to whether coercion is the characterising element of the judicial norm reached its acme in the 1960s and 1970s when H.L.A. Hart decisively criticised Kelsen's neo-positivist theory

sanction – unlike civil or administrative sanctions<sup>15</sup> – is characterised by the disapproval of the unlawful conduct performed through the techniques of affliction and correction.

This reflection, which is drawn up in general terms by philosophy and the general theory of law also fits the canon order, without the need for any special adaptations, since – despite its peculiarities – it is an actual legal order<sup>16</sup>.

However, when, from the analysis of the structural aspect of penal sanction theory, we focus on the functional aspect – or instead of pre-setting ourselves the goal of defining the penalty we ask ourselves what purpose it serves – it is not possible to avoid being contextualised within an internal perspective to each individual and specific legislative system.

In fact, if in the broad sense a sanction may be considered a tool through which the order guarantees respect for its own precepts, the conservation of the institutions and – ultimately – the reaching of the goals that it recognises as its own, in actual practice in relation to the individual positive norms, it becomes the reflection and most tangible expression of the fundamental principles and

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which saw in the sanction the fragment of primary norm that determines whether a norm is legal or not. Hart (in his work *Il concetto di diritto*, new edition, Torino, 2002 and in numerous essays including *Legal duty and moral obligations*, in *Id. Essays on Bentham: studies in jurisprudence and political theory*, Oxford, 1982) demonstrated that the judicial norm can be such even without coercion aimed at an addressee (citizens or officials). This is the conventionalist turning point in 20<sup>th</sup> century legal positivism. The problem of the sanction has currently been raised (in the work recently translated into Italian: *Perché punire è necessario*, Bologna, 2012) by W. Hassemer, Vice President of the German Constitutional Court and Professor of theory of law and criminal law, the unrivalled leader of the hermeneutic approach to the criminal law coercion theory. This work appears to be fundamental for a simultaneous reflection on the theory of coercion, since it poses the problem of the sanction in relation to social control (particularly in Chapter 3) and in relation to criminal law (in the second part of the book). The very oft-quoted Author, is particularly followed by Fiandaca and his school, in Italy. The work by L. Ferrajoli, *Diritto e ragione. Teoria del garantismo penale*, Bari, 2011 (10<sup>th</sup> edition) is also of undoubted significance, (especially Chapter 5 part 2 and part 3).

<sup>15</sup> In fact, although the civil sanction may have an afflictive content – for example compensation for financial damage – it has the main aim of restoring an altered economic balance. A known characteristic of administrative sanctions with a penal content, on the other hand, is that their primary aim is the self-protection of the Public Administration or, in other words, the aim of discharging a debt owed to the Public Administration. Administrative sanctions are, usually, applied by the administrative authority itself by means of its own measures guided by the principle of discretionary power. In the current historical moment, the typical tendency of enlightenment-inspired and liberal doctrines – which aimed to take penalties away from administrative law and consequently extend the area of penal law – seems to have been surpassed, moving in the opposite direction, since the requirements of speed and prompt judgements push for ‘decriminalisation’ so that smaller sanctions, such as fines, are applied through administrative systems, with simplified procedures.

<sup>16</sup> A solution is pursued, herein, to all problems relating to the challenged lawfulness of the canon order and consequently the legitimacy of the law in the ecclesiastical experience. Whatever structure, qualification or function we wish to give to the legislative element (in the sense of ‘*regula-canon*’) it does not appear to be seriously possible to doubt the possibility of affirming a legal dimension in the life of the Church. On the other hand, even the teaching of the council has not rejected this aspect of the ecclesiastical reality; rather, it has contributed to its enrichment with ‘*Populus Dei*’, ‘*Sacramentum Mundi*’ images able to grasp and convey the theological foundation of canon legislation. For this aspect, see in particular F.E. Adami, *Continuità e variazioni di tematiche penalistiche nel nuovo Codex Iuris Canonici*, in *Ephemerides Iuris Canonici*, 40 (1984), pp. 63 ss. See also the interesting reflections of A. M. Rouco Varela and E. Corecco, *Sacramento e diritto: antinomia nella Chiesa? Riflessioni per una teologia del diritto canonico*, Milano, 1971, in particular pp. 52 ss.

theological element that characterise every legal order.

It is precisely these elements (which, if considered in their profound essence are resolved in the confirmation of the existence of an '*a priori*' metaphysics on which every legal theory is based) that must lead to the steps to be taken for putting the problem of the function of the penalty in the canon legal experience in the right light<sup>17</sup>.

In more general terms, it has been observed that any penalty theory that we may wish to take into consideration, when stripped of all its theological (absolute) dimensions, and built up with '*stricto sensu*' empirical elements (such as prevention, social defence, the re-education of the offender<sup>18</sup>) ultimately proves to be absolutely fragile. This, on one hand, is «perché arriva rapidamente a negare se stessa come teoria giuridica» replacing what should be the main duty of the jurist with that of human science enthusiasts and, on the other hand, because, having been verified in practice before the Court of facts, it reveals its absolute, if sometimes generous, inconsistency<sup>19</sup>.

All this means that it is not possible – and neither can it be considered methodologically correct – to separate the problem of the penal sanction – and particularly the function that it has in a certain legal order – from the ideological *prius* that informs it; this is even more true when referring to the theological system on which the canon order is based<sup>20</sup>. These reflections not only find a

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<sup>17</sup> F. D'Agostino, *Fondamenti filosofici e teologici della pena*, in *Monitor ecclesiasticus*, 114 (1989), pp. 2 ss. The Author shows how «solo i più ingenui possono continuare oggi a credere che il mirabile sistema delle scienze umane, costruito a partire da un esplicito rifiuto di qualsivoglia fondamento metafisico, sia in grado di condurre da solo un'adeguata partita epistemologica; nessuna dimensione del sapere contemporaneo può fare a meno di un occulto, ma perciò non meno reale, fondamento assoluto».

<sup>18</sup> The listing does certainly not claim to include all the possible aims of the penalty, but responds to the more traditional classification according to which sanctions must have a repressive or repair or promotional function. However, it must be observed that the same sanction can simultaneously have more than one function and, in particular, it can set out to fulfil one or more secondary aims alongside its primary aim, which, according to the circumstances, can even turn out to be more significant than the primary function. A doctrine identifies, even without claiming to be complete, at least five different answers to the question: What is a sanction for? 1. Sanctions aim to *castigate* and, if positive sanctions are accepted, also to *reward*; 2. Sanctions aim to *prevent*; 3. Sanctions aim to *repair*; 4. Sanctions aim to *frustrate* (the expression comes from Bobbio); 5. Sanctions aim to *encourage* (or to *promote*). It is clear that the five responses listed above propose to outline a broader and more articulated view of the one provided by the classification which, traditionally, seeks to express the functions of a sanction, without actually concealing the relations that already exist between the first and the second ones. See G. Gavazzi, *Sanzione. Teoria generale*, in *Enciclopedia giuridica Treccani*, vol. XXXII, 1994, p. 5. For an interesting and detailed examination of the most significant schools of thought relative to sanction theory in a historical path that accompanies the formation of the codes that have characterised the 19th century until the present day, see L. Mazza, *Lezioni di diritto penale. I. Il dibattito sulle scuole*, 3<sup>rd</sup> ed., Roma, 2009 in particular pp. 272 ss. See also: M. Pelissero, *Funzioni della pena*, in C.F. Grosso, M. Pelissero, D. Petrini, P. Pisa, *Manuale di Diritto penale*, Milano, 2013, pp. 585 ss.; F. Palazzo, *Corso di diritto penale. Parte generale*, Torino, 2011, p. 13 ss.; F. Mantovani, *Diritto penale. Parte generale*, Padova, 2011, pp. 705 ss. For a view that looks beyond national borders, see: S. Moccia, *Funzioni della pena e implicazioni sistematiche: tra fonti europee e Costituzione italiana*, in *Dir. Pen. Proc.*, 2012, pp. 921 ss.

<sup>19</sup> D'Agostino, *op. and loc. cit.*

<sup>20</sup> «Se... non è facile in generale abolire il riferimento teologico dal problema penale, non lo è particolarmente per chi faccia riferimento a un sistema teologico particolare, come quello cristiano. Tra cristianesimo e pena sembra, infatti, che ci sia un nesso estremamente complesso sì, ma anche assolutamente inequivocabile e non occasionale: per i cristiani la pena

convincing demonstration in the – essentially indisputable – circumstance that Church law is presented as a legal expression of a society whose primary reality precedes it and transcends it and whose ultimate aim is meta-historical, but also in the consideration that the canon legislative structure itself does not originate from the normal dynamic of human cohabitation, but from the legal projection of the specific and very peculiar restriction of the ‘*communio*’, which ultimately arises from grace and can only be known through faith<sup>21</sup>.

If, on one hand, it absolutely cannot be doubted that the legislative system of the Church is presented as an actual primary legal order, worthy of a *nativum et proprium ius* to resort to penal coercion<sup>22</sup>, on the other hand, the theological

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è insieme una minaccia da prendere indubbiamente sul serio (l’inferno) e il simbolo della loro religione, cioè della – immeritata – possibilità di salvezza offerta a tutti da Cristo (la croce)» (*Ibidem*).

<sup>21</sup> See L. Gerosa, *La scomunica, è una pena? Saggio per una fondazione teologica del diritto penale canonico*, Friburgo, 1984, pp. 104 ss. The reflections of P.A. Bonnet, (*Giudizio ecclesiale e pluralismo dell’uomo. Studi sul processo canonico*, Torino 1998, p. 502) on this subject are particularly interesting, stating that the communion dimension in the ecclesiastical experience is the measurement «attraverso la quale ciascuno si rapporta ad ogni altro ed alla Chiesa nel Popolo di Dio. Si tratta di una misura per effetto della quale ciascuno canonicamente vive con gli altri in unità radicale e profonda animata da una giustizia corroborata dalla carità, che tutti inonda e arricchisce dei doni che ognuno nell’ottica dell’amore non può possedere che per il bene degli altri».

<sup>22</sup> This is the dictate – while not free from apologetic tones – of canon 1311 of the CJC of 1983, which essentially restates, but more concisely, the legislative outcome of can. 2214 § 1 CJC of 1917. The direct sources of these code formulations include the encyclical *Immortale Dei* of Leone XIII (1 November 1885), as an example of the positive expression of the penal power of the Church. See A. Borrás, *Les sanctions dans l’église*, Paris, 1990, p. 202. In both provisions, the expression *ius nativum* was chosen, underlining how the *potestas coactiva* is one of the constituent elements of the same ecclesiastical social power. See Adami, *Continuità...*, cit., p. 61. From a different perspective, on the other hand, a claim of completeness of the Church order has been underlined, «e cioè, la volontà di non ricorrere altrove per poter applicare il proprio ordinamento». It should be the same objective base comprising the nature of the things and materials to which the trial refers that founds the claim of the own and exclusive competence of the canon order, for the purpose of the trial hearing and the infliction of the penal sanction. M.J. Arroba Conde, *Introduzione al processo canonico*, in *Il processo penale...*, cit., pp. 22-23. See also J. Acebal, *Comentario al c. 1400*, in *Código de derecho canónico* (edited by L. Echevarría), Madrid 1983, p. 686; G. Lumia, *Lineamenti di teoria e ideologia del diritto*, Milano, 1973, p. 56. R. Coppola reconnects the own and native right of the Church to impose sanctions, apart from to the traditional principles of the governing function of the Supreme Pontiff and the Bishops, as reaffirmed by the ecclesiology of the Second Vatican Council, also to the self-defence and coercion system dating back to the original Christian communities (in *Diritto penale e processo: caratteri distintivi nel quadro delle peculiarità dell’ordinamento canonico*, in *Il processo penale...*, cit., p. 41). P. Ciprotti (*Il diritto penale della Chiesa dopo il Concilio*, in *La Chiesa dopo il Concilio. Atti del congresso internazionale di diritto canonico [Roma 14-15 gennaio 1970]*, Milano, 1972, p. 521), was also of this opinion, actually stating that: «... l’abolizione del diritto penale canonico può essere sostenuta solo da chi non abbia idee chiare sull’essenza del diritto canonico, e sulla posizione in cui esso si trova nella Chiesa (e in particolare sul rapporto in cui esso sta con il fine soprannaturale della Chiesa) ovvero da chi non abbia idee chiare sulla funzione del diritto penale nella Chiesa e sulle sue caratteristiche». It is appropriate to note how, on the contrary, the code of canon law for the Eastern churches does not appear at all concerned about having to state the originality of the punitive power of the Church, which, in harmony with the marked pastoral tendency of Eastern penal tradition, takes all its inspiration for the criminal coding system from the «sentito afflato pastorale del can. 1401, espressivo del desiderio di offrire ad ogni fedele incorso nel delitto un’efficace opportunità di salvezza, affinché nessun baratro di disperazione..., o inemendabile dissoluzione..., lo travolga in modo definitivo». See R. Mazzola, *La pena latae sententiae sententiae. Profili comparati di teoria generale*, Padova, 2002, p. 67. In fact, the Eastern



element which is implied by the legal order of the Revelation, prevents every aspect of it – and particularly the penal aspect – from being considered as the fruit of a purely human reality to which the actual categories of secular rights can be applied.

The understanding of the peculiarities that the penal canon system presents and the individual function that it performs must start from the absolute element that characterises this legislative order. In fact, if on one hand it may appear difficult to reconcile the pastoral and redeeming dimension of the Church of Christ with the use of coercive power<sup>23</sup>, on the other hand, it is necessary to reflect on the circumstance that, in the dynamic of salvation by means of the faith, the private 'ego' is destined to be projected – not cancelling itself out but becoming filled and enhanced – with an ecclesiastical 'ego' that can be fulfilled in the community of creed and in the announcement of the death and rebirth of Christ<sup>24</sup>; only this dimension integrates the sacramental structure of the society founded by the Saviour<sup>25</sup>.

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legislation, which is free from the institutional inadequacy qualms of the Latin coding, has sought to avoid – not reproducing the formula contained in can. 1311 of the 1983 code – all references to coercive power, demonstrating greater ecclesiastical maturity and adherence to council principles, in light of which, as has been correctly observed «non si vede la ragione di siffatta enunciazione; essa è superflua sotto il profilo tecnico-sistematico nel contesto di un intero codice già espressione di una volontà sovrana ed è priva di valore giuridico sotto il profilo socio-politico attuale». See G. Di Mattia, *Pena e azione pastorale nel diritto penale della Chiesa*, in *Monitor ecclesiasticus*, 114 (1989), p. 40. For a comparative approach to Latin rite and Eastern penal law see M. Ventura, *Spunti di comparazione in diritto penale canonico dopo la promulgazione del codice delle Chiesa orientali*, in *Il diritto ecclesiastico*, 107 (1996), p. 632 ss. Finally, B.F. Pighin, *Diritto penale canonico*, Venezia, 2008, p. 64.

<sup>23</sup> In actual fact, it is only an apparent contradiction since reasoning in terms of contrast between pastoral and legal elements is misleading. It cannot be stated that to be more pastoral law must be made less legal; on the contrary, it is necessary to consider applying «le tante manifestazioni di quella flessibilità che, proprio per ragioni pastorali, hanno sempre contraddistinto il diritto canonico. Ma vanno altresì rispettate le esigenze della giustizia, che da quella flessibilità possono venire superate, ma mai negate. La vera giustizia nella Chiesa, animata dalla carità e temperata dall'equità, merita sempre l'attributo qualificativo di pastorale». John Paul II, *Address to the prelate Auditors...*, cit., p. 872. In truth, if all Canon law is pastoral by its very nature, this definition is even more suited to the penal law of the Church, relative to which it has been sustained that: «La pastorale est une 'note' spécifique, la 'mansuétude', qu'apporte l'Église a un droit pénal rigoureux dans sa technique... Le caractère proprement pastoral de la peine réside...dans l'approche du coupable dont il s'agit de changer la *ratio peccati* et d'assurer la *salus animae* posée comme la loi suprême de l'Église». J.L. Hiebel, *Pastorale et droit canonique pénal*, in *Revue de droit canonique*, 56 (2009), p. 169 e 175. On this point, see also Di Mattia, *Pena e azione pastorale...*, cit., pp. 35-67.

<sup>24</sup> J. Ratzinger, *Was ist für den christlichen Glauben heute konstitutiv?*, in H. Rossmann-J. Ratzinger, *Mysterium der Gnade. Festschrift für J. Auer*, Regensburg, 1975, pp. 11-19. See also Gerosa, *La scomunica...*, cit., p. 107 e A. Anton, *Ecclesiologia post conciliare: speranze, risultati e prospettive*, in *Vaticano II, bilancio e prospettive venticinque anni dopo 1962/1987* (edited by R. Latourelle), Assisi, 1988, 2<sup>nd</sup> ed., pp. 370 ss. The latter author underlines how, starting from Vatican II, the idea of communion is at the heart of the ecclesiastical discussion. It is intimately connected with another fundamental key idea, that of the People of God. The teaching of Vatican II, «partendo dal concetto chiave di Chiesa-comunione di tutta l'umanità in Cristo, la vede realizzata nel popolo della Nuova Alleanza che ha per capo Cristo, secondo il piano di salvezza universale del Padre che si manifesta in modo pienamente chiaro ed irrevocabile nella missione di suo Figlio e, con la missione dello Spirito, conserva perennemente la sua validità nel tempo e nello spazio fino al compimento escatologico, quando Dio sarà in tutte le cose». See also S. Dianich, *La Chiesa mistero di comunione*, Torino, 1975, p. 12.

<sup>25</sup> In the ecclesiastical reality, already long before the conciliar period, Canon procedural and penal law codified by the Pio-Benedictine code had largely been forgotten. On the contrary, in

According to this ecclesiological and legal perspective, a punishment cannot therefore have another function apart from that of reconstructing the fraternal constraint shattered between the anti-ecclesiastical behaviour of the believer, re-affirming its value and bringing the offender back into the sole dimension that enables him to reach salvation<sup>26</sup>.

### 3. Claimed antinomy between a system of penal sanctions and the sacramental nature of the Church

The first consequence of the pastoral nature of penal canon law is reflected in the circumstance that, in the ecclesiastical society, the reaction to the violation of a legal precept of the order, does not necessarily correspond, automatically, to the application of a penal sanction.

The practical observance of the penal norm, in fact, remains entrusted to prevention tools, which can exert moral pressure or a convincing force, rather than coercive means, except in cases where the latter are absolutely necessary<sup>27</sup>. This perspective remains confirmed in the code in force by the provisions of canon 1341 which, if it has not introduced a revolutionary principle to the order of the Church, has translated into a more markedly legal formula a pastoral concern already underlined by the Council of Trent and reproduced by can. 2214 § 2 of the CJC of 1917<sup>28</sup>.

On the other hand, the metal-legal goal of the Canon Order – the *salus aeterna animarum* – can only illuminate the aims specifically pursued both by

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terms of doctrine, the debate on the function and nature of ecclesiastical punishments and their application has always been very fervent, and still today cannot be said to be definitively concluded. It lies outside the limits of this investigation to retrace the phases that occurred; but, for these profiles, see the thorough examination made by Adami, *Continuità...*, cit., pp. 56 ss.; and, also Gerosa, *La scomunica...*, cit., pp. 171 ss.

<sup>26</sup> The ultimate aim of penal coercion is, in fact, making the redeeming word of God more operative. See Z. Grochowski, *Aspetti teologici dell'attività giudiziaria della Chiesa*, in *Teologia e diritto canonico*, Città del Vaticano, 1987, p. 199. In fact, we must be aware of the fact that affirming the missionary and communion-related nature of the Church of Christ means accepting that its institutional foundation descends from the vivifying Spirit and, in the same way, also the means for overcoming tensions and conflicts. See De Paolis, *Il libro VI del codice di diritto canonico: diritto penale, disciplina penitenziale o cammino penitenziale?*, in *Periodica de re morali canonica liturgica*, 89 (2000), p. 650.

<sup>27</sup> The distinction between the compulsoriness and applicability of the legal norms had already been discussed by the general theory of law and seems to find a perfect collocation in Church law, where 'economic' institutions such as dispensation, privilege, '*ignorantia*' and '*aequitas*' (just to mention a few) have value which, although implying the disapplication of the norm in the practical case and due to a just cause, do not tarnish the compulsoriness of canon law in the slightest. For these aspects see R. Coppola, *La non esigibilità nel diritto penale canonico. Dottrine generali e tecniche interpretative*, Bari, 1992, pp. 204 ss. In particular, in relation to the fair application of the norm, the Author underlines how it is to be considered «come esigenza dello stesso diritto (non solo come *exigentia aequalitatis*) è, nell'ordinamento canonico, anche armonia di tutte le sue componenti, dato che in essa concorrono... vuoi il concetto di *jus divinum* ed inoltre di *peccatum*, *periculum animae*, *miser cordia*, *benignitas*, di speciale derivazione cristiana, vuoi l'urgenza del *rigor iuris* e quella della *caritas*, se è vero che la legge umana è proiezione del diritto divino, dunque estrinsecazione della *caritas*, senza la quale una norma non potrebbe definirsi canonica». Coppola, *op. ult. cit.*, p. 211.

<sup>28</sup> The admonition of the Council of Trent, inspired by St. Paul (2 Tm. 4, 2), invited bishops in the penal area to exert «*cum mansuetudine rigor, cum misericordia iudicium, cum lenitate severitas*». See Concilium Tridentinum, Sessio XIII, in *Conciliorum Oecumenicorum Decreta* (3<sup>rd</sup> ed.), edited by G. Alberigo et al, 3<sup>rd</sup> ed. Bologna, 1973, p. 669.

the laws and by the criminal precepts. Consequently, the penalty must be declared or applied «solo quando si constati o si preveda che gli altri mezzi più propriamente pastorali, o anche giuridici, non siano sufficienti ad assicurare la riparazione dello scandalo, la emenda del reo, e, se si vuole, anche la restaurazione della giustizia violata»<sup>29</sup>. It goes without saying that such an objective cannot be fulfilled if the ecclesiastical authority is not the depositary of a discretionary power relating to the assessment of the opportunity to begin and potentially continue the criminal action<sup>30</sup>.

In fact, it appears fully compliant with the spirit of the ecclesiastical legal order and its soteriological aim to entrust – in the case in question – to the ordinary assessment approach the opportunity of resorting to penal action and – once the relative trial has begun – that on its prosecution. This is not only based on the considerations relative to the validity of the probability of the accused being guilty, but also, even faced with a clearly established responsibility, in light of the consideration that the criminal trial hearing and consequent infliction of the punishment could represent an obstacle to the salvation process of the *christifidelis delinquens*. Without even mentioning the damage that could derive from the *strepitus fori* connected with the trial or the application of the penalty and that could represent an *occasio ruinae spiritualis* for many brothers, reverberating on the entire ecclesiastical community.

A further consequence of the salvation-sacramental structure of the ecclesiastical situation reflects on the accentuation of the emendatory aim of the sanction; an aim which – if not the only one – is to be considered absolutely pre-eminent with respect to others<sup>31</sup>. In fact, while it cannot be doubted that in special cases, the requirements of the ecclesiastical body – relative to the protection of its integrity and its salvation mission – could require the sanction inflicted on the offender to remain in force even after the latter has corrected himself, however, the recovery of the offender and his reconciliation with God and his brothers must represent the first objective to be reached through the infliction of the penalty.

In the same way – as has been observed<sup>32</sup> – it is just as essential that the emendatory aim of the penalty have a direct influence on the structure and function of the proceedings for the purpose of inflicting the penal sanction, either legal or administrative; this would contribute substantially to attenuating what was considered the main afflictive function of criminal prosecution while the Pio-Benedictine Code was in force<sup>33</sup>.

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<sup>29</sup> See Ciprotti, *Il diritto penale...*, cit., p. 524.

<sup>30</sup> Ciprotti, *Il diritto penale...*, loc. cit.

<sup>31</sup> This reflection meets with much agreement in most of the canon doctrine. See, amongst others, Ciprotti, *Il diritto penale...*, cit., pp. 525 ss.; Id., *La riforma...*, cit., p. 77 ss.; G. Baldanza, *De iure canonico poenali secundum hodiernam ecclesiologiam reconoscendo*, in *Ephemerides iuris canonici*, 20 (1964), p. 104; J. Arias, *Principios básicos para la reforma del derecho penal canónico*, in *La Chiesa dopo il Concilio...*, cit., vol. II, p. 23; V. Ramallo, *Derecho penal canónico y libertad religiosa*, in *Revista española de derecho canónico*, 28 (1972), p. 21; and more recently Adami, *Continuità...*, cit., pp. 73 ss.; Gerosa, *La scomunica...*, cit., pp. 220 ss.; Di Mattia, *Pena e azione pastorale...*, cit., pp. 54 ss.; R. Coppola, *Il nuovo codex iuris canonici e il diritto penale*, in *Raccolta di scritti in onore di Pio Fedele*, Perugia, 1984, pp. 104 ss.

<sup>32</sup> Ciprotti, *Il diritto penale...*, cit., p. 525.

<sup>33</sup> See Vitale, *Contributo...*, cit., pp. 274 ss. Based on some interesting considerations relative to the different ways in which, in the canon law previously in force, the penalty could reach the 'delinquens' (but these are observations that could largely be extended to current legislation), the Author highlighted how the criminal trial was marked by the specific note of the afflictive

#### 4. Peculiar nature of Church penal law

It emerges from these reflections how the meaning, the value and particularly the function that the punishment is called upon to absolve in Church law are indissolubly linked, on one hand, to the spirit that animates the entire legislative system and, on the other, to the peculiarities that characterise it and differentiate it, sometimes substantially, from most modern orders of a liberal-democratic nature.

From this point of view, the meta-legal concept of the 'aim' of canon law is not as significant as the consideration that instruments of a strictly legal nature used by the Church order aim to implement practical response of the individual rules to the 'ultra-mundane' result that they, directly or indirectly, set themselves and to whose fulfilment they are assigned. In other words, canon legislation which from a legal point of view governs the dynamics of the ecclesiastical reality, aims to ensure that *christifideles*, by avoiding sin and through the intrinsic uprightness of their operations, attain supernatural vivification.

It is absolutely indubitable that the Church is equipped with many tools in order to achieve its salvation mission, some of which transcend the world of law and often in practice turn out to be more appropriate than the latter. And yet it has been appropriately observed that «se mai fosse possibile immaginare una comunità di uomini organizzata in forme diverse da quelle giuridiche, non sarebbe in ogni caso possibile pensare la Chiesa senza l'uomo con tutto ciò che trascendentalmente lo connota, fra cui il suo essenziale bisogno di giustizia, a soddisfare il quale appunto il diritto»<sup>34</sup>.

Precisely that innate and insuppressible aspiration towards the transcending idea of justice ensures that the legal organisation of God's people can show itself to be appropriate and suitable – in the specific areas of competence – for the purpose of the afterlife. It cannot be forgotten that the regulatory order of salvation is based on and can ultimately be justified by the intrinsic obligatory nature of the revealed Word, from which it exclusively takes its *vis*. In other words, the entire legal outlook of the Church rests in God, since God «... è il

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nature of the punishment to be inflicted on the offender, and not by that of ascertaining the commission of the crime and the relative responsibilities intrinsic in the state penal trial. In the canon order this certainty was (and still is) attained by the ecclesiastical authority, with different, not strictly judicial, means, such as investigations, inquiries and information: the trial hearing – observed Vitale – can only serve to exacerbate the castigation of the offender. The prevalent afflictive function of the criminal prosecution, in relation to offences that have generated turmoil in the ecclesiastical conscience, ensures that through the trial there is «una specie di legge del contrappasso, proprio sulla base di quello scandalo che il reo ha prodotto, e che ora si ritorce contro di lui sotto forma di disapprovazione e disistima da parte dei fedeli: il processo servirà quasi per esporre all'unanime disprezzo il reo, procurandogli la sofferenza di vedersi tagliato fuori da quei rapporti con i suoi simili, di cui pure avrebbe bisogno...». However, sharing the mentioned observations is not an attempt to deny that the Code previously in force also considered the emendatory aim of the criminal trial when, for example, it tried to replace the further implementation of the trial with a *correctio* (can. 1947), or when it allowed the judge not to apply a penalty, even a compulsory one, or to defer a sentence «*si ex praepropera rei punitione maiora mala eventura praevideantur*» (can. 2223 § 3). See Ciprotti, *Il diritto penale...*, cit., p. 525. A further opportunity for reflection on the emendatory aims of the penalty and the trial is inspired by the recent extension *ratione materiae e ratione muneris* of Vatican penal jurisdiction (see above *supra* nt. 5).

<sup>34</sup> See G. Lo Castro, *Il mistero del diritto. II. Persona e diritto nella Chiesa*, Torino, 2011, p. 11.



sommo giusto, *ipsum iustum*, è la stessa giustizia, e non semplicemente perché Dio ha un potere supremo, non discutibile né prevaricabile, che può esercitare castigando quanti da Lui si allontanano»<sup>35</sup>. In a legal order that recognises the beginning and the end in the incarnation of the Word, the administration of justice has the main aim of reconciling the insuppressible meta-historical vocation with the historic concreteness thereof and, like the 'lamp under the bushel', marking the way that the Church incarnate must travel along in order to be united with the Church of the Saints or of the 'not yet', in the fulfilment of the salvation project.

It follows that, from this point of view, also penal canon law (and, likewise, the penalty) is one of the means that the Church uses in its visible structure, in its social context, for the accomplishment of the salvation mission entrusted thereto by the Founder<sup>36</sup>.

Since the special nature and pastoral function of canon law have already been noted and – in particular – of its penal branch<sup>37</sup>, reflection is also made on the characteristics of the sanction which, due to its essence and structure, cannot fail to contradict a legislative system aimed at supreme ends, for the believer largely superior to any other asset<sup>38</sup>. The canon order, unlike the secular legislative order, also bases its legal relations on an absolutely original element: 'charisma', which in the community of the *christifideles* plays an ecclesiastical bridging role<sup>39</sup> between the individual and the institution, guaranteeing exceptional dynamism of the system of precepts, able to translate «ogni esperienza giuridica in un momento di superamento e di incremento»<sup>40</sup>.

The individual adaptational ability of the Church legal system translates into the unavoidable requirement that in the application of the norm and the potential infliction of the penalty, no means are neglected which could potentially be fruitful for the salvation of the soul of the individual *fidelis* who has made a mistake. Hence the requirement for norms that take into consideration the particular circumstances and individual spiritual requirements of the *delinquens*.

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<sup>35</sup> Lo Castro, *Il mistero del diritto...*, cit., p.12. See also John Paul II, Litt. enc. *Fides et ratio*, 14 September 1998, cap. III, nn. 24-35.

<sup>36</sup> See V. De Paolis, *La potestà coattiva nella Chiesa*, in *Quaderni di diritto ecclesiale*, 12 (1999), p. 135: «...nel diritto ecclesiastico occorre che la coercibilità sia necessariamente retta e tradotta nella prassi secondo la natura e l'indole della Chiesa stessa, che è società di ordine soprannaturale che cerca pienamente il bene di tutti i suoi figli, non solo comunicando loro in abbondanza i suoi beni, ma anche conservandoli nella via della salvezza, utilizzando i rimedi opportuni perché non la abbandonino e siano, in modo salutare restituiti al buon ordine, quando la abbandonano». Z. Suchecki, *Le sanzioni penali nella Chiesa. Parte I. I delitti e le sanzioni penali in genere*, Città del Vaticano, 1999, pp. 47 ss also develops further the reflections on the legal effect of the pastoral structure of penal law in the Church. The Author highlights that «riconoscere il carattere pastorale della pena non significa diminuirne il valore giuridico, bensì conferire alla pena quel carattere che tende alla *salus delinquentis* e alla conservazione della comunità ecclesiale» (*Ibidem*). On the same subject, see also Hiebel, *Pastorale et droit canonique pénal...*, cit., pp. 163 ss.

<sup>37</sup> This has been sustained unanimously by all post-Council penal doctrine. See, by way of example, Ciprotti, *Il diritto penale...*, cit. p. 524; Id., *La riforma...*, cit., p. 76; Adami, *Continuità...*, cit., pp. 69 ss.; Di Mattia, *Pena e azione pastorale...*, cit., pp. 49 ss.; Coppola, *Il nuovo Codex...*, cit., pp. 106 ss., and also the bibliography mentioned in the previous note.

<sup>38</sup> P. Fedele, *Lo spirito del diritto canonico*, Padova, 1962, p. 791.

<sup>39</sup> L. Gerosa, *Diritto e pastorale*, Torino, 1991, p. 125.

<sup>40</sup> E. Corecco, *Valore dell'atto contra legem*, in *La norma en el derecho canónico*, Pamplona, 1979, p. 443.

Thus, the fundamental ‘elasticity-ductility’ nature that constitutes one of the qualifying characteristics of canon law overall is highlighted, in the first place, but which is felt more pronouncedly in the penal areas. In fact, in the repression of the crime the Church is in need of an extremely agile tool, which can be perfectly adapted to the ethical/theological requirements that constitute the substrate in which penal norms must operate<sup>41</sup>.

This necessarily postulates – through the use of instruments that have full citizenship in the world of law – an adaptation of the legal ‘moment’ with respect to the theological one, which constitutes the transcending element and the ontological essence of the ecclesiastical reality.

From this particular visual angle it can also be understood why the canon order which, on one hand, knows the individual institution of the *poena latae sententiae*, for which the perpetrator of the deviant behaviour incurs the penal sanction “*ipso facto commissi delicti*”<sup>42</sup> – without, that is, the need for (judicial or administrative) proceedings with the aim of inflicting the punishment – on the other and in the diametrically opposite direction, attributes ample relevant discretionary power to pastors regarding the decision as to whether it is

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<sup>41</sup> For this aspect see Adami, *Continuità...*, cit., pp. 96 ss. For a recent contribution to the theory of the penal sanction in canon law, see C.J. Errazuriz M., *Il diritto e la giustizia nella Chiesa. Per una teoria fondamentale del diritto canonico*, Milano, 2000, pp. 230 ss. and also Suchecki, *Le sanzioni penali...*, cit., pp. 95 ss.

<sup>42</sup> Can. 1314 CJC of 1983. It cannot be denied how the actual conservation of the institution of the *latae sententiae* penalty seems to have largely contradicted the governing principles of code reform. As has been seen, a non-secondary part of the doctrine established during the period in which the repealed code was in force, like the votes expressed by the advisory bodies during the preparation of the Second Vatican Ecumenical Council, highlighted the insuppressible need for the reform of Church penal law to stem from the abolition of the *poenae latae sententiae*, or from their contraction since they were to be limited «*ad paucissima eaque gravissima delicta*» (*Communicationes*, 2, 1969, p. 85). Their method of infliction (offering insufficient guarantees since it lay outside any procedure) was particularly criticised, along with their limited effectiveness (often deriving from the ignorance of the application of the penalty by the perpetrator of the deviant behaviour, having not been declared in an external jurisdiction). The opinions expressed by the Faculty of Canon Law of the Papal Universities, consulted during the preparatory phase, were significant in terms of this aspect. See, in particular, in *Acta et Documenta Concilio Oecumenico Vaticano II apparando, Series I, (antepreparatoria)*, vol. IV, pars I: p. 47 (vote of the Pontifical Gregorian University), p. 215 (vote of the Salesian Pontifical University), p. 283 (vote of the Theology Faculty of the Pontifical University of St. Bonaventure), p. 390-391 (vote of the Pontifical Lateran University) and in *Acta et Documenta...*, cit., *Appendix* vol. II, pars I: p. 237 (vote of the Catholic University of Leuven), p. 512 (vote of the Catholic University of Paris), p. 630 (vote of the Catholic University of American in Washington), p. 754 (vote of the Theology Faculty of Trier). For that purpose, in doctrine see particularly Ventura, *La pena e penitenza...*, cit. pp. 16 ss.; Mazzola, *La pena latae sententiae...*, cit., pp. 18 ss. The penal legislation of the Code of Canons of the Eastern Churches (CCEO) appears to be much more innovative and appropriate in terms of this aspect, which, not only places more importance on the pneumatological and pastoral dimension of the coercive power of the Church, limiting the infliction of the punishment to sole cases in which it is not possible to resort to other active pastoral means, but also particularly establishes the exclusion of *latae sententiae* penalties (can. 1408) and the principle of the possibility to impose sanctions only through judicial means (can.1402). See De Paolis, *La potestà coattiva...*, cit., p. 151 ss. In particular, regarding this abandonment of *latae sententiae* penalties, it has been observed how Eastern codification has reached a higher degree of precision than Western codification, with the elimination of all ambiguity with the extra-penal dimension, achieving the valuable result of a net separation of the sin from the crime and the consequent «...ottimo grado di coordinamento raggiunto fra il foro interno e esterno...». See Mazzola, *op. ult. cit.*, p. 71; but also pp. 67 ss.

necessary to apply or declare the penalty envisaged by the violated rule following the unlawful behaviour of the believer.

The attribution of ample discretionary power is, for the penal system of the Catholic Church, a direct consequence of the finalistic element of the order and the founding legislative will, illustrated up to now. The discretionary assessment approach is, in fact, the most appropriate technical tool for enabling the spiritual salvation of the individual and the entire community to be reached, through the fair nature of the abstract and general restrictiveness of the rule.

In fact, the *aequitas canonica*, the real *norma normans*<sup>43</sup> of the Church order, has the main aim of practically implementing the evangelical ‘precept’ of concern for one’s neighbour, instilling the legislative vigour of original Christian inspiration into the rule dictated for the individual case<sup>44</sup>.

A second point worthy of note for its remarkable reflections in the penal area relates to the requirement, felt by the Church order, for the intimate and earnest adhesion of the *fidelis* to their own precepts.

The theological nature and particularly the theological element inherent in the ecclesiastical legal order are, in fact, such as not to be able to be contented with a state of purely exterior and formal subjection to the law by the ecclesiastical community<sup>45</sup>. Other legislators and other orders, having reached this objective, can consider themselves to have fulfilled their role and satisfied their social conscience. They could not do any more than this, since they are not allowed (and it would not be relevant for their purposes) to ascertain whether a citizen obeys the legislative command, due to interior conviction, the incisiveness of the prevention or due to fear of the sanction which would inevitably follow the violation thereof<sup>46</sup>. This is not so for the canon order, in which the founding and supporting force behind the primigenial ‘precept’ – concern for one’s neighbour, the source of which can be found in the love of God, which operates incessantly, being perpetuated, so to speak, into the transmission of a genetic ‘memory’ – necessarily postulates respect, also interior, for the addressee of the legislative command<sup>47</sup>.

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<sup>43</sup> See S. Berlingò, *Giustizia, e carità nell'economia della Chiesa. Contributi per una teoria generale del diritto canonico*, Torino, 1991, p. 5.

<sup>44</sup> From this point of view, *aequitas*, also in the penal area, does not set itself in contrast with the requirement of legal certainty, but actually stimulates the fulfilment of more reliable and more authentic certainties, since it is perfectly coherent with the original core of the entire legislative system.

<sup>45</sup> See G. Olivero, *Dissimulatio e tolerantia nell'ordinamento canonico*, Milano, 1953, p. 32.

<sup>46</sup> On this point, it has been shown how the prescription of interior actions is not an exclusive characteristic of the canon order: in any order, where it is necessary or desirable to give prominence to spiritual elements, the need arises to prescribe interior actions. See S. Berlingò, *Giustizia e carità...*, cit., p. 152. And, actually, according to Graziani *Postilla al «Discorso generale sull'ordinamento Canonico» di Pio Fedele*, in *Il diritto ecclesiastico*, 3 (1941), p. 148, in any legal system, including the canon one, it is not possible to talk about merely interior and exterior actions, but only mixed.

<sup>47</sup> This necessarily implies that the order of canon justice cannot be fulfilled without starting from a subjective basis which, hence, recognises the human subject as the protagonist. On this point it has been correctly observed that «il prevalente soggettivismo del diritto canonico rende... più intensa e a suo modo drammatica la esperienza giuridico-comunionale del fedele; il suo travaglio interiore, i conflitti e le lacerazioni della coscienza, diventano parte integrante dell'esperienza giuridica ecclesiale, importando un dramma intimo attraverso cui è dato entrare nella luce del Cristianesimo...». See R. Mazzola, *Il 'grave incommodo' e le cause scriminanti nella teoria generale del diritto penale*, in *Diritto Canonico e Comparazione. Giornate*

On the other hand, the consideration that the foundation of the actual Church-institution cannot be traced back exclusively «ad un esplicito atto di volontà di Cristo»<sup>48</sup>, but is, rather the consequence of the meeting, in history, of God's initiative and man's response – undoubtedly highlighting the common participation and communication of the believers in the conduction of Trinitarian missions<sup>49</sup> – justifies the accentuated tendency, of the legal order of the Church, to demand not only the extrinsic observance of (pre-)determined contents of charity or justice but, as far as possible, «un impegno totale della persona per lo sviluppo di tutte le implicazioni e per il reale compimento della norma, al di là della sua stessa formulazione letterale, condizionata dalla contingenza»<sup>50</sup>.

In fact, ecclesiastical legal phenomenology is more complex than the secular legislative experience, which is established in the exterior environment of the addressee of the precept, to later be directed to the latter in the form of a command. In the former case, on the contrary, the further phase of the interiorisation of the law runs alongside the nomogenetic phase and the impositional one, so that the judicial norm interfaces with the «interiorità umana e fa sì che l'uomo non possa svolgere la sua vita interiore al di fuori del diritto»<sup>51</sup>, underlining the anthropocentrism of the canon norm.

Hence the Church, not only for the fulfilment of the supreme assets that the *homo viator* is obliged to pursue, but also for the achievement of the salvation mission for which he is called, penetrates into the intimate positions of the conscience, giving equal value to thought and action<sup>52</sup>; hence, «l'uomo legato a un sistema spirituale, materiato di precetti etici, come di precetti giuridici» governs<sup>53</sup>.

The marked tendency of canon legal experience to solicit interior attitudes (or, better, the correspondence of the exterior ones to the real interior frame of mind) and to avoid, as far as possible, the contrast between the legal dimension and that of the conscience, postulates the need to save the perpetrator too, along with the action and beyond the action<sup>54</sup>, attributing greater significance to

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*canonistiche di studio. Venezia 22-23 maggio 1991* (edited by R. Bertolino-S. Gherro-L. Musselli), Torino, 1992, p. 312.

<sup>48</sup> See Ruffini-Lodi, «*Mysterion*» e «*Sacramentum*» (*La sacramentalità negli scritti dei Padri e nei testi liturgici primitivi*), Bologna, 1987, p. 53. On this point, see also, S. Berlingò, *La tipicità dell'ordinamento canonico nel raffronto con altri ordinamenti e nell'«economia» del diritto divino rivelato*, in *Ius ecclesiae*, 1 (1989), p. 9 ss.

<sup>49</sup> «Nel cuore dei figli di Dio dimora lo Spirito Santo come nel suo Tempio ed essi costituiscono un popolo messianico che ha per capo Cristo» «Questo popolo ha per legge il nuovo precetto di amare come lo stesso Cristo ci ha amati» (L.G. 8).

<sup>50</sup> Berlingò, *Giustizia e carità...*, cit., p. 152.

<sup>51</sup> See F. D'Agostino, *Antropocentrismo e filosofia del diritto*, in AA.VV., *Studia odiernae antropologiae*, Milano, 1971, p. 212.

<sup>52</sup> A.C. Jemolo, *Il nostro tempo ed il diritto*, in *Pagine sparse di diritto e storiografia*, Milano, 1957, p. 65.

<sup>53</sup> G. Saraceni, *Riflessioni sul foro interno nel quadro generale della giurisdizione della Chiesa*, Padova, 1961, p. 18. The Author also highlights how law, in the Church legal order, more than in any other order, is not only that which has received objectification and social sanction, but what is Thomistically indicated as «*participatio legis aeternae in rationali creatura*» (*Summa Theologiae*, I<sup>a</sup> 2<sup>ae</sup>, q. 91, a 2) and is promulgated «*...ex hoc ipso, quod Deus eam* (the eternal law) *mentibus hominum inseruit naturaliter cognoscendam*» (*Summa Theologiae*, I<sup>a</sup> 2<sup>ae</sup>, q. 90, a 4, ad 1).

<sup>54</sup> Berlingò, *Giustizia e carità...*, cit., p. 8, where it is stated that «il diritto in sé preso, avrebbe il compito di assicurare la realizzazione dell'azione *giusta* e del giusto *oggettivo*, cui però non si accompagna di necessità un'adesione personale da parte del soggetto, così da corrispondere



the promotional aspects, rather than to the preventive and repressive aspects of the law<sup>55</sup>. It follows that when a norm, in its practical execution, turns out to be inadequate for satisfying believers' requirements for participation in the dynamic of the order, it «non può considerarsi un disposto secundum *tenorem rationis (sacramenti)*, ma una mera *iuris corruptio* da eliminare e da sostituire con gli strumenti propri del diritto suppletorio, dall'analogia alla comune e costante *sententia doctrinalis*, assumendo a guida e a criterio di discernimento l'*aequitas canonica*»<sup>56</sup>.

This characteristic of canon law is also reflected in the individual approach that it has to the perpetrator of unlawful behaviour.

The perpetrator, precisely because of their mistake, will become the object of particular care which, at first, will be neither a prize nor a punishment, but a special kind of remedy, intended to recover them, rather than changing their will<sup>57</sup>: by causing and obtaining the interior adhesion of the *christifidelis* to the norm, «la conformità del comportamento anche esteriore, terrà dietro, forse del tutto spontaneamente, senza coazione»<sup>58</sup>.

Church law, which aims to reach supernatural assets – which are detached, in terms of their value, from all other assets – does not envisage in a generalised way a rigidly predetermined automatic reaction mechanism, when faced with any anti-ecclesiastical behaviour. The remarkable significance that the institutions of *dissimulatio* and *tolerantia*<sup>59</sup> (also) have in the context of penal canon law (substantive and procedural) – which perfectly merge into the practice of «economy/dispensation» – demonstrates how the ecclesiastical authority, in order to «*vitare mala maiora*» (but what is in play is still a criterion of opportunity, based on public interest and structured in adherence to the meta-legal purpose of the *societas fidelium*) can, in practice, reach the

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ad una realizzazione morale perfettamente virtuosa. Per attingere questo risultato occorrerebbe ... coniugare la giustizia con la *pietas* o, appunto, con la carità religiosamente intesa...».

<sup>55</sup> See also E. Graziani, *Persona e ordinamento nel diritto sacramentale*, in «*Persona e ordinamento nella Chiesa*» (Documents from the 2<sup>nd</sup> International Congress of Canon Law, Milan, 10-16 September, 1972), Milano, 1975, p. 532.

<sup>56</sup> Berlingò, *Giustizia e carità...*, cit., p. 158.

<sup>57</sup> This is the rule of the ecclesiastical government, expressed with unrivalled clarity in the New Testament parables of the Good Shepherd and the Prodigal Son. The canon order must show more diligence towards the deviant subject – rather than to those who are submitted to discipline – bending, adapting and meeting the needs of even an individual, in order to save them and take them back towards their destiny of salvation.

<sup>58</sup> See Olivero, *op. cit.*, p. 32.

<sup>59</sup> These are, as we know, different institutions but that respond «ad una esigenza fondamentalmente unitaria, omogenea, della Chiesa: quella dell'istituzione di ripieghi contro il male, e cioè di mezzi attenuati, indiretti – diversi dalle sanzioni – di lotta contro l'illegalità, l'indisciplina». Olivero, *op. cit.*, p. 158. Notably, with the very individual institution of *dissimulatio*, the ecclesiastical authority, through a fictitious ignorance of the contradictory nature of the behaviour of the individual with respect for the law (neither does it show, from this point of view, whether it is a penal norm or not) can, in practice, reach the disapplication of the sanction which the anti-legal nature of the perpetrated deed, in itself, would imply. But in the world of ecclesiastical discipline there are also occurrences that the authority cannot pretend to ignore, or repress without exposing the ecclesiastical community «a rovine e laceramenti di conseguenze incalcolabili» (Olivero, *op. cit.*, p. 159). Hence, these occurrences, are tolerated, or isolated, surrounded by an area of silence. The *ratio* of the two institutions appears to be the same: no less than what is covered up, what is tolerated is also non-compliant behaviour with canon discipline. Notably, the institution of *tolerantia*, can, ultimately, be interpreted as dispensation from the penal norm (technically it should be *dispensatio post-factum*) and become, in practice, an applicative instrument of discretionary power.

disapplication of the sanction which, as a general rule, should follow the unlawful conduct.

A further consideration should not be concealed, without which a full understanding of the effective role of the canon penalty would be impossible.

In a society marked by an eschatological perspective, where the substantial equality<sup>60</sup> of all the members is in force, it is difficult to conceive a sort of antagonism between the social body, as a whole, and the individual, which, radically eliminates all retributive meaning from the canon punishment, at least in the acceptation traditionally attributed to the term<sup>61</sup>.

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<sup>60</sup> The principle to which reference is made is not that of the formal equality of all the members of the ecclesiastical community – which would translate into giving the same to all and which finds no applicative logic in the canon order – but is the substantial acceptation that is more correctly reflected in the «*suum cuique tribuere*» according to the individual requirements and needs in the salvation perspective.

<sup>61</sup> See Arias, *Principios básicos...*, cit., pp. 199-201; Id., *El sistema penal canónico ante la reforma del C.J.C.*, in *Ius canonicum*, 15 (1975), pp. 227-233. If we consider how the retributive significance of the punishment essentially plays on an idea of symmetry of justice, according to which it is right that the evil of the crime is followed by the evil of the punishment (*malum passionis propter malum actionis*), it is easy to understand how such premises are «assolutamente antitetiche con le ragioni che ispirano l'antropologia posta a fondamento dell'ordinamento della Chiesa» mainly due to the fact that the penalty becomes the application of «una sofferenza a chi ha volontariamente commesso un male morale; il delinquente infatti è ritenuto meritevole di pene prima ancora che si pensi di trarre da queste alcun vantaggio, né per lui, né per gli altri». These are the reflections of G. Lo Castro, *Responsabilità e pena. Premesse antropologiche per un discorso penalistico nel diritto della Chiesa*, in *Ius ecclesiae*, 16 (2004), with respect to p. 404 e p. 398. The following statement also responds to the same order of considerations, based on which: «...la sanzione canonica non può applicare rigorosamente il principio della retribuzione, proprio perché l'ordinamento canonico si vincola alla *caritas* e alla *communio* più che alla *proportio inter delictum et poenam*». See M. Ventura, *Pena e penitenza nel diritto canonico postconciliare*, Napoli, 1996, p. 61. The idea of penalty considered as legal revenge for the commission of the crime is, also, far from modern penal culture, to the full advantage of a multifunctional interpretation of the sanction, which highlights the primary role of its being a rehabilitation and re-education tool for the offender, also underlined by R. Botta, *La norma penale nel diritto della Chiesa*, Bologna, 2001, p. 50. From this viewpoint it is also interesting to note how a more current contextualisation places retribution in relation with the aim of general prevention and special prevention. From this first viewpoint, retribution constitutes the rational limit of the level of severity contained in the non-contradictory requirements with the preventive aim directed towards the protection of legal assets, aiming to prevent the application of the sanction causing greater damage than the common damage that the judicial norm intends to prevent. This, which may be conceived as a relationship of proportion «non si pone, come per la teoria classica della retribuzione, tra il singolo illecito e la singola sanzione, ma piuttosto tra l'insieme dei danni comuni provocati dalle sanzioni previste dalla norma e l'insieme dei danni comuni che la norma stessa vuol prevenire». On the contrary, the relationship of proportion between the retributive principle and the special preventive function enables an easier «accettazione della sanzione penale da parte del soggetto che ne è destinatario» to be obtained, in the sense that, only when the sanction is «proporzionata al fatto commesso, può esservi qualche speranza che essa sia riconosciuta come giusta e porti, quindi, all'emenda morale del reo». In this sense, see A. Pagliaro, *Sanzione. II. Sanzione penale*, in *Enciclopedia giuridica Treccani*, vol. XXXII, Roma, 1994, p. 4. Therefore, having dealt with any retributive claim of the canon penalty, it remains simpler to explain why the Church order knows the individual figure of the occult crime, which actually translates into an external unlawful action, but which – either due to its nature or mere contingent circumstances – is intended, at the most, to be a note only to the offender. On this point it has been observed how the occult violation of the law would not even require the intervention of the ecclesiastical positive norm (even for the application envisaged in the case of a *latae sententiae* penalty), since this would not count for anything more than has already been provided for by the divine law. See P. Huizing, *Problemas de derecho canónico penal*, in *Ius*

Finally, it is necessary to remember that the ministerial function of the hierarchical organisms, which imposes the fulfilment of their mission using the most suitable means so that the ecclesiastical community reaches the superterrestrial aim of *salus animarum* – which cannot prescind from *salus uniuscuiusque animae* – excludes any risk of the exercise of ecclesiastical power<sup>62</sup>.

This has a direct consequence on criminal law: the canonical penalty cannot constitute nor be inflicted by an irrational wish, since that would represent an irretrievable fracture in the harmony of the legal order<sup>63</sup> as well as denying justice<sup>64</sup>.

##### 5. *Penalty and penal trial as extrema ratio*

Following on from the previous considerations, it is now clear which role penal law – and hence the penalty – plays in the life of the Church. The coercive tool, predisposed to prosecute human actions that simultaneously harm the legal order as much as the ethical order (in fact, it can never be forgotten that every crime is also a very serious sin) must be considered a completely exceptional remedy for tackling a nuisance, which is also just as exceptional.

In the ecclesiastical experience – whose dynamics are far from resolvable in a mere judicial activity – the infliction of the penalty can only take place once all the other instruments available to the Church have proven to be or risk proving to be useless.

Definitively, in this open, flexible and dynamic order, the observance of the commands must be pursued, their violation must be repressed, only to the extent to which coercion and repression are coherent with the theological element and with the original inspiration thereof.

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*canonicum*, 8 (1968), p. 210. Consequently, it can also be shown how in the canon order, the unlawfulness of the criminal action cannot always be placed alongside the idea of anti-socialism, if not in the strictly theological sense referred to in the text.

<sup>62</sup> It appears that the impossibility of the degeneration of functional discretionary power in the pathological arbitrary power in Church penal law is referred to by anyone who states that «il Vescovo è originariamente libero nei confronti della legge penale. Quest'ultima non può pretendere di mediare, in modo esclusivo, il rapporto intersoggettivo esistente tra il Vescovo ed il fedele». See E. Corecco, *L'amministrazione della giustizia nel sistema canonico e in quello statale*, in *Amministrazione della giustizia e rapporti umani*, Rimini, 1988, p. 136. Jemolo (*Peculiarità del diritto penale ecclesiastico*, in *Studi in onore di F. Cammeo*, I, Padova, 1933, p. 732) had already effectively noted – in relation to the codification previously in force – that, despite the canon order not recognising any protection «ai soggetti di diritto contro gli organi della Chiesa stessa dotati di potere punitivo», however «il diritto della Chiesa è un diritto il quale persegue dei beni supremi: meglio, quel bene della salvezza delle anime, che per il credente si distacca in modo fondamentale, per il suo valore incommensurabile, da ogni altro bene, non consentendo deroghe di sorta, in alcun caso, per alcuna altra finalità, a tutte le direttive atte a realizzarlo».

<sup>63</sup> Arias, *Principios básicos...*, cit., p. 202.

<sup>64</sup> In fact, in the Christian outlook «ciò che rispecchia la *ratio* divina, onde si può affermare, in senso non paradossale, che il diritto tanto più è tale quanto più sa di razionalità, cioè di divinità. Nella Chiesa pertanto non un qualunque atto imperativo, ma soltanto un atto imperativo *rationabilis* ...può essere funzionale alla formazione dell'esperienza giuridica». Lo Castro, *Il mistero del diritto. II. Persona e diritto...*, cit., p. 12.

This is the key to interpreting can. 1341 of the code in force, which is presented as the highest expression of pastoralism in Church penal law<sup>65</sup>.

From the legislative provision, which establishes that the ordinary «*proceduram iudicialem vel administrativam ad poenas irrogandas vel declarandas tunc tantum promovendam curet, cum perspexerit neque fraterna correptione, neque correptione neque aliis pastoralis sollicitudinis viis satis posse scandalum reparari, iustitiam restitueri reum emendari*», it is possible to take a double order of considerations.

In fact, on one hand, the Ordinary must make sure the infliction or declaration of the penalty only takes place after the other ways dictated by pastoral diligence have been noted to have failed. The parameter on which to assess the ineffectiveness of these means is represented by not having sufficiently repaired the scandal, restored justice and reformed the offender<sup>66</sup>.

At the same time, on the other hand, can. 1341 is concerned, if indirectly, with stating the aims of the ecclesiastical penalty. Neither should it be forgotten that the provisions of the quoted norm are referred to and, it could be said, supported – on the subject of the criminal trial – by can. 1718 § 1, no. 2 which resubmits for the discretionary evaluation of the Ordinary, the decision as to whether to activate the proceedings for the infliction (or declaration) of the penalty.

In other words, the justice of opportunity as to whether to activate the judicial or, potentially, administrative proceedings must be based, in the evaluation of

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<sup>65</sup> «*Coetus studiorum de iure poenali*» actually states that this canon is «*maxime perfusus... spiritu novi iuris poenalis*». See *Communicationes*, 9 (1977), p. 160. However, the principle contained in the legislation provided by can. 1341 is not new. The same pastoral concern was expressed by can. 2214 § 2 of the Pio-Benedictine code which recommended tempering rigour with benevolence, using mercy in justice and not distinguishing severity from mildness. This means that, in actual fact, the Church has never resorted to penalty with ease and even when it considered making use thereof – when faced with a delinquency which did not lend itself to being either fictitiously ignored or corrected on a meta-legal level – through the use of instruments of a theological nature (think about the Sacrament of Penance) or a pastoral nature – also in this case it did so in the mildest way, even renouncing completely, when possible. On this point, see Adami, *Continuità...*, cit., p. 139; V. De Paolis, *L'applicazione della pena canonica*, in *Monitor ecclesiasticus*, 114 (1989), p. 74. The reflections on this theme by J. Llobell, *Contemperamento tra gli interessi lesi e i diritti dell'imputato: il diritto all'equo processo*, in *Ius ecclesiae*, 16 (2004), pp. 367 ss.

<sup>66</sup> On this point, it is important to note that the history of the drafting of can. 27 of the «*schema documenti quo disciplina sanctionum seu poenarum in Ecclesia latina denuo ordinatur*», did not present any particular difficulties and the text of can. 1341 CJC 1983 is actually completely identical to the text originally proposed. This, notwithstanding the final parenthesis «*idque praevideat poenis efficacius posse obtineri*», which was deleted. The motivation adopted by the *Coetus* was «*quia exquirunt a superiore praevisionem aliquam quae difficilis est quaeque fons anxietatis pro ipso superiore esse potest. Praeterea si illa verba deleantur, norma huius canonis mitior ac suavior evadit*» (*Communicationes*, 1977, 160-161). In other words, the requirement that has been noted on various occasions to combine the legal motions of the *Ecclesia iuris* with the higher values of the *Ecclesia charitatis*, has, actually, led to a further mitigation of penal law and indirectly a further limit to the criminal trial hearing. In fact, the Ordinary is not obliged to choose the way that allows him to achieve the indicated aims more effectively: he must however prefer pastoral instruments to criminal prosecution, since they allow him to sufficiently reach the typical aims of the canon sanction, that is, to restore justice, repair the scandal and reform the offender. See De Paolis, *Il processo penale...*, cit., p. 486. See also, Mazzola, *La pena latae sententiae...*, cit., pp. 18 ss., and Ventura, *Pena e penitenza...*, cit., pp. 15 ss.; R. Coppola, *Diritto penale e processo: caratteri distintivi nel quadro delle peculiarità dell'ordinamento canonico*, in *Il processo penale canonico...*, cit., p. 55.



the ecclesiastical authority, on the consideration that it is the only way by which to reach the Common Good in its individual and collective projections.

The very close connection between the canon penalty and the system provided by the order for its infliction (or declaration) ensures that, like the sanction, also the trial hearing must be considered an extreme remedy – the most radical – hence a sort of *extrema ratio*, to which to resort only when there is no longer any hope of recovering the offender in another way and reintegrating him fully into the ecclesiastical *communio*<sup>67</sup>.

#### 6. Other means suitable for facing delinquent situations

It is at this stage essential to consider the ways that the Ordinary<sup>68</sup> is obliged to follow before taking that which will lead him to instigate penal action against the *delinquens*.

Canon 1341 CJC of 1983 indicates them in the following order: a) «*fraterna correctio*», b) «*correptio*», c) «*aliae viae sollicitudinis pastoralis*». Hence, the first attempt that must be made is represented by fraternal correction, which does not hold any penal character and must be animated by a purely evangelical spirit and attitude<sup>69</sup>.

Due to the same divine filiation, in fact, the members of the ecclesiastical community are joined together by restrictions of fraternal solicitude and reciprocal responsibility: the first means to be used for a brother who has made a mistake is therefore that of exerting moral pressure on him in order to deter

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<sup>67</sup> This aspect is underlined by Llobell, *op. ult. cit.*, pp. 365 ss.; Z. Suchecki, *Le sanzioni penali nella Chiesa*, p. I, Città del Vaticano, 1999; Botta, *La norma penale...*, cit., pp. 52 ss.; A. Calabrese, *Diritto penale canonico*, Città del Vaticano, 1996, pp. 147 ss. For further considerations on the disapproval with which the Church saw resorting to trial also in codification previously in force, see J. Ochoa, *Il «De processibus» secondo il Nuovo Codice*, in «*La nuova legislazione canonica*»..., cit., pp. 365-392.

<sup>68</sup> On this point, it is appropriate to ask ourselves to which ecclesiastical authority canon legislation refers in the use of the term Ordinary and, consequently, which function the exercise of the power of assessment attributed thereto expresses. To answer this question correctly, reference can be made to the provisions of can. 134 CJC of 1983 which establish that, the name «Ordinary» refers, in addition to the Roman Pontiff, also to diocesan bishops and those who, leading a particular Church, pursuant to can. 368 CJC of 1983 are equivalent, also the vicars general and episcopal vicars who, due to the provisions of can. 134 § 1, enjoy the sole general ordinary executive power and finally the major superiors of the clerical religious institutions of papal law and societies of apostolic life. From this point of view, see Calabrese, *Diritto penale...*, cit., p. 149; Botta, *La norma penale...*, cit., p. 101. It is also right to observe that there is no unanimity of viewpoints on this issue. However, it is clear that the penal proceedings against a religious subject of a clerical institution of papal law – excluding the case envisaged by can. 1320 – should be performed by the competent superior (who enjoys, pursuant to can. 134 § 1, at least ordinary executive power); «per questo nei cann. 1717 ss. si parla di Ordinario e non di Vescovo». See P. Ciprotti, *La riforma del diritto penale della Chiesa*, in *Raccolta di scritti...*, cit., p. 88. The involvement in the concept of Ordinary of vicars general and episcopal vicars is more controversial. On this point, see F. Nigro, *Commento al codice di diritto canonico*, Roma, 1985, pp. 757 and 785. For a wider examination of the notion of Ordinary and their power in the penal area, see, more recently, A.G. Miziński, *Ruolo preminente dell'Ordinario nel processo penale canonico secondo la normativa del CIC del 1983*, in *Il processo penale canonico*, cit., p. 131 ss.

<sup>69</sup> Mt. 18, 15.

him from the anti-ecclesiastical behaviour and put him back on track to his destiny<sup>70</sup>.

If *fraterna correctio* does not achieve the desired result, the Ordinary must proceed with the other instrument dictated by pastoral solicitude, *correptio*. It is self-evident that, despite the ambiguous terminology, the admonition mentioned by can. 1341 must be kept separate from the homonymous *correptio* which by the code in force is indicated – along with *monitio* – as a penal remedy<sup>71</sup>. In fact, *monitio* and *correptio* – moreover, it is not considered that the listing of the code has a compulsory nature, therefore it is not excluded that further remedies could be envisaged by lower legislators – whilst not being penalties in the strict sense<sup>72</sup>, have a penal nature and perform both a preventive function – due to their application also possible regardless of the commission of the crime – and a repressive function<sup>73</sup>. In relation to correction, in fact, behaviour that generates scandal or nuisance to public order to the extent that it puts the good of the ecclesiastical community at risk may be sufficient<sup>74</sup>, whereas in the case of *monitio* can. 1339 § 1 provides for the situation of an offence that is about to be committed or a serious suspicion of a crime already perpetrated<sup>75</sup>.

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<sup>70</sup> «...in una comunità come la Chiesa, il processo non è la situazione ideale dei conflitti ... dal punto di vista ecclesiale, il processo è un male, una situazione patologica che danneggia la comunione». See Arroba Conde, *Introduzione al processo canonico...*, cit., p. 20. The provisions of can. 1718 § 4 should also be considered which envisage, still in order to prevent, as far as possible, resorting to judicial proceedings, an attempt to settle the case outside the court, according to the principles of justice and equity, regarding the issue of compensation for damage deriving from the commission of the crime. On this aspect see the considerations of C. Papale, *Il processo penale canonico. Commento al codice di Diritto Canonico, Libro VII, Parte IV*, Roma, 2007, p. 35.

<sup>71</sup> Can. 1399 CJC of 1983. The Pio-Benedictine Code dedicated a chapter (can. 1947-1953) especially to «*correptio delinquentis*». In disciplining the «*iudicium criminale*» the legislation in force admitted that, when the offender confessed his offence - excluding the cases envisaged by can. 1948 relating to more serious crimes or punished with *latae sententiae* penalties – the Ordinary could resort to *correptio delinquentis*, instead of proceeding in court until the pronouncement of the judgement and relative infliction of the penalty. On this point, see, F.X. Wernz-P. Vidal, *Ius canonicum*, vol. II, pars 2<sup>a</sup>, Roma, 1928, p. 683 ss. Again, for an examination of the nature of the penal remedies at the disposal of the Ordinary, see: Suchecki, *Le sanzioni penali...*, cit., pp. 108 ss.; A. Miziński, *Il ruolo dell'Ordinario nell'ambito penale*, in *Apollinaris*, 2004, pp. 336 ss.; Ventura, *Pena e penitenza...*, cit., pp. 87 ss.

<sup>72</sup> As can be expressly extracted from the provisions of can. 1312 CJC of 1983.

<sup>73</sup> In harmony with this interpretation, see, among others, De Paolis, *L'applicazione della pena...*, cit., p. 75 and M. Mosconi, *L'indagine previa e l'applicazione della pena in via amministrativa*, in *I giudizi nella Chiesa. Processi e procedure speciali* (by the Italian group of canon law lecturers), Milano, 1999, p. 207 and more recently Z. Suchecki, *Le privazioni e le proibizioni nel Codice di Diritto Canonico del 1983*, Roma, 2010, pp. 38-39.

<sup>74</sup> A further hypothesis of possible application is that envisaged by can. 1348. In the latter case – once the judicial procedure has finished with the acquittal of the accused, i.e. with his conviction which is, however, not followed by the imposing of the penalty – it is up to the discretionary evaluation of the Ordinary to make a decision to adopt further steps choosing between penal remedies, including *correptio*, for the «*delinquens*», or, alternatively, to resort to «*opportunitis monitis aliisque pastoralis sollicitudinibus viis*» which can, in practice, be translated into rather varied remedies, such as, for example imposing some specific obligations; offering a particular time for personal reflection and prayer, potentially suspension from a certain office; resorting to disciplinary procedures, also within the reality in which the investigated subject operates; revoking some powers... should it be considered that his spiritual good or the good of the community require it. From this point of view, see Mosconi, *L'indagine previa...*, cit., p. 208.

<sup>75</sup> In relation to the traditional institution of *monitio*, it is worth noting that the discipline of the Code for the Eastern Churches establishes that the penalty cannot be inflicted before the

In this case, in exercising executive power<sup>76</sup>, the Ordinary expresses a judgement of reprehension and blame which is required to be proportional to the subjective condition of the errant believer and to the objective ones of the historical fact<sup>77</sup>.

On the contrary, the *correctio* and *correptio* envisaged by can. 1341 are evangelical tools with a fraternal approach used for the recovery of the *errans ovis*, which precisely due to the nature that the legislator has given to them, must be kept distinct from penal remedies<sup>78</sup>.

In can. 1341 the other ways dictated by pastoral solicitude are finally indicated. It does not appear that any doubt can be cast on the fact that they cover all the moral or legal means, even of a penal nature (think of the

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perpetrator of the deviant behaviour has been cautioned at least once to desist from the offence, giving him suitable time for reformation (can. 1407 § 1 CCEO). In the code for the Latin Church, this provision is significantly limited to the infliction of the medicinal penalty, to obtain the withdrawal of the offender from contumacy (can. 1347 § 1. However, it is necessary to underline that there are people who do not attribute any nature of penal remedy to cautioning for stopping contumacy, but who would prefer a conceptual distinction from the *monitio* envisaged by can. 1399 § 1. See G.P. Montini, *I rimedi penali e le penitenze: un'alternativa alle pene*, in *Il processo penale...*, cit., pp. 80 ss.). On the other hand, it has already been noted how the Eastern codification is more imbued with the pastoral spirit that informs the penal system than the Latin codification. It is to be observed how it clearly emerges from preparatory works that *monitio* must always be motivated; see *Communicationes*, 16 (1984), p. 44.

<sup>76</sup> That we are dealing with executive power can be deduced from the same canon 1339 § 1 which recognises the competence of the Ordinary, who can delegate the exercise of the same power to others. In actual fact, in some hypotheses it is not even a question of executive power in the technical sense. Think, by way of example, about the possibility of the remedy of the inflicted penance, on a subject, by the Superior General of a non-exempt clerical institution of papal law, through the instrument of the individual precept. In this case, the application of the mentioned remedy would originate from the special connection that links the perpetrator of the deviant behaviour with his own superior, who would be exclusively equipped with the power that canon 501 § 1 of the Pio-Benedictine Code reserved for the superiors and chapters of non-exempt religious congregations, on their subjects «*ad normam constitutionum et iuris communis*». The so-called dominating power – which, right from the start, gave way to the problem as to which *ius commune* was applicable – has undergone a long evolutionary process, which has led to its gradual dilation, in practice leading to the granting, to Superiors General of non-exempt clerical institutions of papal law, of an increasingly extensive series of actions mainly of jurisdiction, similar to regular Major Superiors, for the internal system and discipline (see the papal rescript *Cum Adnotae*, of 6 November 1964 in *Acta Apostolicae Sedis*, 59 (1967), pp. 374-378. For this aspect see J. L. Gutiérrez, *Dalla potestà dominativa alla giurisdizione*, in *Ephemerides iuris canonici*, 39 (1983), pp. 76 ss.; in particular p. 89, on the nature of this power.

<sup>77</sup> The penal remedy nature would also be confirmed by the fact that both *monitio* and *correptio*, by the provisions of the last paragraph of can. 1339 must always be in writing (see also can. 37) and precisely this circumstance: «las diferencias de otros tipos de advertencias, amonestaciones o correcciones... no formales, como pueden ser la corrección fraterna... y otros posibles medios de la solicitud pastoral (see cc. 1341 y 1348)». See J. Sanchis, *Comentario a los cánones. 1399-1340*, in *Comentario Exegético al Código de Derecho Canónico*, vol. IV/1, Pamplona, 1996, p. 386.

<sup>78</sup> Considering the admonition of can. 1341 in the same way as a penal remedy «...si uscirebbe fuori da questa prospettiva pastorale e si entrerebbe in quella penale, che la norma vuole evitare proprio tramite questi mezzi pastorali, sebbene nella forma esterna non differiscano dai corrispondenti rimedi penali». See Calabrese, *Diritto penale...*, cit., p. 132 ss. and, in the strict sense, Papale, *op. ult. cit.*, p. 61.

penances<sup>79</sup>) – available to the Church before arriving at the application of actual penalties<sup>80</sup>.

Hence we have further confirmation of the scope of discretionary power that the canon order confers to the Ordinary. From the provisions of canons 1341 and 1718 § 1, no. 2 it can, in fact, be deduced that there is no case in which it is absolutely compulsory to hold a penal trial hearing, since the decision on the opportunity to punish the unlawful conduct is always referred to the discretionary power of the ecclesiastical authority<sup>81</sup>.

*Recibido el 23 de noviembre de 2013 y aceptado el 28 de marzo de 2014.*

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<sup>79</sup> On the nature and applicability of the penances see ample details in Ventura, *op. ult. cit.*, pp. 72 ss.; Montini, *I rimedi penali...*, cit., pp. 92 ss; Calabrese, *Diritto penale...*, cit., pp. 137 ss.

<sup>80</sup> As has been seen in note 72, the provisions of can. 1348 also suggest keeping penal remedies separate from the means dictated by pastoral solicitude. On the contrary, see De Paolis, *Il processo penale...*, cit., p. 485 and also V. De Paolis-D. Cito, *Le sanzioni penali nella Chiesa. Commento al codice di diritto Canonico. Libro VI*, Città del Vaticano, 2000, p. 213.

<sup>81</sup> Commenting on the perplexities that have arisen from various parties on the ample discretionary power of the ecclesiastical authority, it has been stated that: «...Particolarmente nel campo penale si richiede... che il legislatore regoli l'esercizio della potestà entro confini sufficientemente precisi, sia per assicurare la disciplina della Chiesa, sia per non correre il rischio di favoritismi o di discriminazioni, di rigorismo o rilassatezza. La difficoltà non sembra essere senza fondamento. Anzi i diciassette anni di vita del codice sembra abbiano messo in luce una certa insufficienza dell'ordinamento penale a fronteggiare situazioni di pericolo e di danno alle anime per comportamenti indisciplinati ai quali non si è posto riparo a tempo. Anche se si devono tenere gli occhi aperti per conoscere fatti e situazioni e senso ed equilibrio per una loro valutazione, sembra essere ancora troppo presto per dare giudizi sicuri. Non si è lontani dalla verità se si afferma che le deficienze denunciate più che dalla mitezza e flessibilità della norma derivano dal fatto che si è semplicemente disatteso il diritto penale della Chiesa». See De Paolis, *L'applicazione della pena (cann. 1341-1353)*, in *Le sanzioni penali nella chiesa...*, cit., p. 210.