

# PRELIMINARY INVESTIGATION AND THE APPLICATION OF CCEO c. 1473 (CIC c. 1722): A REFLECTION IN THE LIGHT OF VADEMECUM (2020)

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## Abstract

Preliminary investigation is a prerequisite for the development of a penal trial to find the credibility of the alleged delict. The proper Hierarch is empowered to initiate a preliminary investigation and to impose an administrative leave on the accused from the outset of the investigation. Although administrative leave is not a penalty, it restricts the exercise of the accused's right. The *Vademecum-2020* establishes that the "administrative leave" at the investigation should not be a 'suspension' but only a 'prohibition.'

**Key Words:** Preliminary investigation, Administrative leave, Penal trial, Hierarch, Credibility, Delict, Accused, Victim, Prohibition, Penalty

## Introduction

The title, "Preliminary Investigation and the Application of CCEO c. 1473 (CIC c. 1722): A Reflection in the Light of *Vademecum* (2020)," expresses that it contains three composite canonical reflections. The preliminary investigation is seen as a prerequisite for developing a penal trial (the course of the process). Through the preliminary investigation, the competent ecclesiastical authority ascertains the

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facts and the truth regarding the alleged delict to determine whether to carry out a penal trial. In CCEO the pertinent canons (cc. 1468-1470) come under the *Penal Trial*, and in CIC the canons on the preliminary investigation (cc. 717-719) are placed under *Penal Process*. Though the titles are different in phrasings, the meaning and content are the same in both the Codes.

The application of CCEO c. 1473 (CIC c. 1722) is considered for the disciplinary action imposed on the person accused. The disciplinary measure imposed on the accused could be in the form of a prohibition or a penalty, as the case may be. Although this particular canon is placed as part of the 'development of the penal trial' ('the course of the penal process'), it is often applied in the context of preliminary investigation. When applied during the preliminary investigation, the act becomes a 'prohibition', and the same application during the development of penal trial is considered a 'penalty.' In this work, the application of the law is considered only in connection with the preliminary investigation.

Both the preliminary investigation and the disciplinary action are reflected in the light of the *Vademecum -2020 (On Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics)*. This document is chosen since it contains the latest norms pertinent to the study.

This study inquires: (1) Can the preliminary investigation be considered as a constitutive part of penal trial? (2) Is it canonically just to apply the disciplinary canon at all cases during the preliminary investigation? (3) Can the disciplinary measure imposed on the accused continue to be in force after the preliminary investigation has been concluded? (4) Is it legitimate to announce the conclusion of the preliminary investigation without a proper decision of the Hierarchy?

## **1. The Implications of the Preliminary Investigation**

The preliminary investigation is a prerequisite for any penal trial to ascertain the facts regarding an alleged case. The norms in both the Codes of Canon Law<sup>1</sup> state that, when information of a delict (*notitia de delicto*) is received, a preliminary investigation should ensue,

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<sup>1</sup> Cf. CCEO c. 1468 (CIC c. 1717).

provided that the report is verisimilar (*saltem verisimilis*).<sup>2</sup> The preliminary investigation gathers detailed information about the facts, circumstances, and imputability of the case in question. It is not necessarily required to assemble complete elements of proof as part of the preliminary investigation.<sup>3</sup> The investigation is only a preliminary phase before a possible process<sup>4</sup> to determine if there should be a penal trial conducted on the alleged case.

## 2. The Purpose of the Preliminary Investigation

The primary purpose of the preliminary investigation is to gather data valid for a more detailed examination of the accused delict to determine the credibility and the truth of the accusation both in law and fact.<sup>5</sup> Based on the preliminary investigation's final report, the decision is made by the Hierarch whether to conduct a penal trial of the case.<sup>6</sup> This investigation is prescribed to avoid useless or harmful processes or processes with insufficient grounds in law or in fact.<sup>7</sup> "The important thing is to reconstruct, to the extent possible, the facts on which the accusation is based, the number and time of the criminal acts, the circumstances in which they took place, and general details about the alleged victims, together with a preliminary evaluation of the eventual physical, psychological and moral harm inflicted."<sup>8</sup>

The Church makes it clear that "the preliminary investigation is not a trial, nor does it seek to attain moral certitude as to whether the alleged events occurred."<sup>9</sup> The preliminary investigation will study three issues surrounding the alleged delict: the facts, the

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<sup>2</sup> Congregation for the Doctrine of the Faith, *Vademecum*, On Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics, 2020, art. 16.

<sup>3</sup> *Vademecum*, 2020, art. 34.

<sup>4</sup> *Vademecum*, 2020, art. 54.

<sup>5</sup> *Vademecum*, 2020, art. 33.

<sup>6</sup> John D. Faris, "Penal Law in the Catholic Churches," in *Folia Canonica* 2 (1999), 53-93, 88.

<sup>7</sup> Carmelo de Diego-Lora, "Process," in Ernest Caparros, et al., (eds.), *Code of Canon Law Annotated*, 1059.

<sup>8</sup> *Vademecum*, 2020, art. 34.

<sup>9</sup> *Vademecum*, 2020, art. 33.

circumstances, and the imputability of the party being investigated.<sup>10</sup> As mentioned above, the investigation also determines the eventual physical, psychological and moral harm inflicted to the victim. It means, a preliminary investigation does not necessarily make a constitutive or integral phase of the penal trial, but only prerequisite to begin the penal trail. Hence, no punitive action can be imposed on an accused during a preliminary investigation.

### 3. The Ecclesiastical Authority Competent to Initiate a Preliminary Investigation

The task of initiating a preliminary investigation belongs to the Hierarchy/ Ordinary of the accused or, the Hierarchy/ Ordinary of the place where the alleged delicts took place.<sup>11</sup> In case the preliminary investigation is carried out not by the Ordinary of the place where the suspected delict was committed, he is to be communicated the results of the investigation.<sup>12</sup>

The Codes of Canon Law (CCEO c. 1468, §1 and CIC c. 1717, §1) indicate that the Hierarchy/Ordinary<sup>13</sup> is the proper person to receive such a notice.<sup>14</sup> The Hierarchy should receive this notice since he is the one who is responsible for the welfare of all those committed to his care.<sup>15</sup> The Hierarchy has the competency to investigate the case by himself or appoint another suitable person<sup>16</sup> through a decree. "If the investigation has been carried out by a suitable person appointed by

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<sup>10</sup> John Anthony Renken, et al., *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, 391.

<sup>11</sup> *Vademecum*, 2020, art. 22.

<sup>12</sup> *Vademecum*, 2020, art. 71.

<sup>13</sup> See, CCEO c. 984 (CIC c. 134).

<sup>14</sup> *Vademecum*, 2020, art. 21 states: "According to canon 1717 CIC and canon 1468 CCEO, responsibility for the preliminary investigation belongs to the Ordinary or Hierarchy who received the *notitia de delicto*, or to a suitable person selected by him. The eventual omission of this duty could constitute a delict subject to a canonical procedure in conformity with the Code of Canon Law and the Motu Proprio *Come una Madre amorevole*, (as a loving mother) as well as art. 1 § 1, b VELM."

<sup>15</sup> William H. Woestman, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law*, 156.

<sup>16</sup> CCEO c. 1468 §1 (CIC c. 1717 §1).

the Ordinary or Hierarch, he or she is to consign all the acts of the investigation, together with a personal evaluation of its results."<sup>17</sup>

It is the responsibility of the Hierarch to make the final decision concerning the information of the cases. The Hierarch issues a decree opening the preliminary investigation, in which he names the person conducting the investigation and indicates in the text that he or she enjoys the powers referred to in CCEO c. 1468 §3 (CIC c. 1717 §3).<sup>18</sup>

In the cases of the sexual abuse of minors by clerics, the Hierarch who has determined that the times for prescription have elapsed must still respond to the *notitia de delicto* and carry out the eventual preliminary investigation, communicating its results to the CDF. The CDF is the competent ecclesiastical authority to decide whether the prescription must be retained or to grant a derogation from it.<sup>19</sup> During the handling of a case, the Hierarch "can seek the advice of the CDF and freely consult with experts in canonical penal matters."<sup>20</sup> In the latter case, however, care should be taken to avoid any inappropriate or illicit diffusion of information to the public that could prejudice subsequent investigations or give the impression that the facts or the guilt of the cleric in question have already been determined with certainty.<sup>21</sup>

#### 4. The Semblance of Truth

The Hierarch is bound to open an investigation if he finds at least the semblance of truth in the accused delict, "unless this inquiry would appear to be entirely superfluous."<sup>22</sup> It is for the discernment of the Hierarch to determine whether the notification of a delict possesses a semblance of truth. The Hierarch has to examine the overall credibility of the *notitia criminis* (notice of delict). It would be helpful to find the semblance of truth by determining whether the relevant information gathered ascertaining the possible presence of delict, contains the name of the accuser and the accused, and the date, place, circumstances of the alleged action. It is not always necessary that the name of the accuser be known. Hence, it is advisable,

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<sup>17</sup> *Vademecum*, 2020, art. 67

<sup>18</sup> *Vademecum*, 2020, art. 40.

<sup>19</sup> *Vademecum*, 2020, art. 28.

<sup>20</sup> *Vademecum*, 2020, art. 29.

<sup>21</sup> *Vademecum*, 2020, art. 29.

<sup>22</sup> CCEO c. 1468 §1 (CIC c. 1717 §1).

especially in the case of a grave delict, for the Hierarch to open a preliminary investigation when there is an anonymous accusation. In a case of sexual abuse, the age of the parties involved in this action should be taken note to help establish whether the suspect or the alleged victims were in their minority at the time of the alleged delict.<sup>23</sup>

The semblance of truth also counts on the names of possible witnesses, other potential victims, information specific to the accusation, and the circumstances.

Given the sensitive nature of the matter, ... a determination that the *notitia* lacks the semblance of truth will be made only in the case of the manifest impossibility of proceeding according to the norms of canon law... Even in these cases, however, it is advisable that the Ordinary or Hierarch communicates to the CDF the *notitia de delicto* and the decision made to forego the preliminary investigation due to the manifest lack of the semblance of truth.<sup>24</sup>

## 5. The Credibility of the Accusations

While CCEO c. 1468 §1 (CIC c. 1717 §1) tells us that the Hierarch must receive the notice, it does not mention the person who delivers this notice. However, the Codes define that the Christian faithful, conscious of their own responsibility, are free to make known their needs and desires to their pastors.<sup>25</sup> Further, given common good, all have the right, and the moral duty, to make a denunciation when necessary.<sup>26</sup>

The canon does not distinguish between anonymous and signed accusations about the credibility of an accuser. A few canonists, drawing the spirit of the previous legislation,<sup>27</sup> opine that there is no obligation to conduct a preliminary investigation for a denunciation

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<sup>23</sup> William H. Woestman, "Offence by a Cleric Against the Sixth Commandment with a Minor," in Arthur J. Espelage, (ed.), *CLSA Advisory Opinions 2001- 2005* (Alexandria: CLSA, 2006), 349.

<sup>24</sup> *Vademecum*, 2020, arts. 18 and 19.

<sup>25</sup> Cf. CCEO c. 15 §§2-3 (CIC c. 212 §§2-3).

<sup>26</sup> John J. Foley, "Preliminary Investigation: Considerations and Options," in Patricia M. Dugan, (ed.), *Towards Future Developments in Penal Law: U.S. Theory and Practice* (Montréal: Wilson & Lafleur, 2010), 36.

<sup>27</sup> CIC (1917) c. 1942 §2.

received anonymously.<sup>28</sup> Both CCEO and CIC are silent about how notices of a delict may be received. In the given socio-political situation, the Hierarch might likely receive a notice from civil authority, or mainstream media or through social media. Whatever be the source of information, considering the gravity of the case, the Hierarch should conduct his preliminary investigation to verify the facts.

If the notification of a case is received verbally, the Hierarch should encourage the person to give it in writing or with the person's knowledge to record the voice. This is to help determine the credibility and the documentation of the case. In case, the petition is received through some electronic means, the Hierarch or his delegate should have a printout of the same with signature and date. All the documents obtained from the accuser are to be signed and dated by the Hierarch or his delegate, indicating when it was received, making sure that all relevant ecclesiastical and civil practices are followed.<sup>29</sup>

## 6. The Role of the CDF in the Preliminary Investigation

In the cases regarding the clerical abuse of minors, the preliminary investigation can be directly taken up by the CDF. In the cases where the Hierarch encounters difficulties in initiating or carrying out the preliminary investigation, the *notitia de delicto* comes directly to the CDF.<sup>30</sup> "If a case is referred directly to the Congregation without a preliminary investigation having been undertaken, the steps preliminary to the process, which fall by common law to the Hierarch, may be carried out by the Congregation itself."<sup>31</sup> However, "the CDF, according to its own judgment, by explicit request or by necessity, can also ask any other Ordinary or Hierarch to carry out the preliminary investigation."<sup>32</sup>

Concerning the abuse of minors by clerics, if a Hierarch initiates the preliminary investigation, and it is found that there is an appearance

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<sup>28</sup> R. Lucian Millette, "An Analysis of the Preliminary Investigation of the Accused," 146.

<sup>29</sup> Daniel Smilanic, "Clergy Personnel Files and the Instruction of an Allegation," in *CLSA Proceedings* 69 (2007), 200-202.

<sup>30</sup> *Vademecum*, 2020, arts. 22-24.

<sup>31</sup> SST, 17.

<sup>32</sup> *Vademecum*, 2020, art. 25.

of truth, a copy of the acts is sent to the CDF. The CDF immediately sends an acknowledgment to the Hierarch communicating the protocol number corresponding to the case.<sup>33</sup> Suppose the investigation is done under the initiative of a provincial superior, the act is sent to the CDF through the superior general, and the CDF responds to the superior general.

After attentively examining the acts, the CDF can then choose to act in a variety of ways: it can archive the case; request a more thorough preliminary investigation; impose nonpenal disciplinary measures, ordinarily by a penal precept; impose penal remedies or penances, or warnings or rebukes; initiate a penal process, or identify other means of pastoral response. The decision, once made, is then communicated to the Ordinary with suitable instructions for its execution.<sup>34</sup>

## **7. The Canonical Investigation in Compliance with the Civil Investigation**

The Church, respecting the civil law in force at every place, issues that the canonical “investigation should be carried out with respect for the civil laws of each state.”<sup>35</sup> Pope Francis, through the *motu proprio*, *Vos estis lux mundi*, has established that the norms regarding penal trial against the crimes of sexual abuse “apply without prejudice to the rights and obligations set in each place by state laws, particularly those concerning any reporting obligations to the competent civil authorities.”<sup>36</sup> However, the Church strictly forbids any joint investigation by the ecclesiastical and civil authorities. In a situation where the civil law does not permit a parallel investigation by the ecclesiastical authority, the Hierarch is to differ the case to the CDF or wait for the conclusion of the civil investigation.<sup>37</sup>

The testimonies and documents of investigations or trials carried out by civil authorities may be collected, which may prove helpful for substantiating and validating the plausibility of the accusation.<sup>38</sup> In case the criteria used in the canonical investigation vary significantly

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<sup>33</sup> *Vademecum*, 2020, art. 76.

<sup>34</sup> *Vademecum*, 2020, art. 77.

<sup>35</sup> *Vademecum*, 2020, art. 27.

<sup>36</sup> Pope Francis, *motu proprio Vos estis lux mundi* (VELM), 2019, art. 19.

<sup>37</sup> *Vademecum*, 2020, art. 26.

<sup>38</sup> *Vademecum*, 2020, art. 34.



concerning the norms of canon law, the Church encourages that due care must be taken in considering the results of civil investigations. In case of doubt regarding such circumstances, the CDF is to be consulted regarding the investigation proceedings.<sup>39</sup> If the acquisition of the civil proceedings has established the notorious crime indisputably and the accused has admitted the same, a preliminary investigation may not be required.<sup>40</sup>

Although the office of secrecy binds the preliminary investigation, it "does not prevent persons reporting – especially if they also intend to inform the civil authorities – from making public their actions."<sup>41</sup> "It is absolutely necessary to avoid in this phase any act that could be interpreted by the alleged victim as an obstacle to the exercise of his or her civil rights vis-à-vis the civil authorities."<sup>42</sup> The Hierarchy, if he is obliged by the civil law, must inform the reception of the *notitia de delicto* and the opening of the preliminary investigation to the civil authority. Further, he must encourage the alleged victims to exercise their rights and duties under civil law.

The Hierarchy has to cooperate with the civil authorities if he is to surrender the documents regarding the cases to the civil judicial authorities. If the Hierarchy is doubtful about the legitimacy of the same, he is to consult legal experts and inform the papal representative immediately.<sup>43</sup> "In cases where it proves necessary to hear minors or persons equivalent to them, the civil norms of the country should be followed."<sup>44</sup>

## 8. Different Collaborative Roles in the Preliminary Investigation

Besides the competent Hierarchy, different persons, with specific roles, collaborate with him in the preliminary investigation. They are the investigator, the promoter of justice, the notary, the accused, and the injured party.

### 8.1 The Investigator

With the provision of CCEO c. 1093 (CIC c. 1428 §§ 1-2), the Congregation for the Doctrine of the Faith determines that if the

<sup>39</sup> *Vademecum*, 2020, art. 36.

<sup>40</sup> *Vademecum*, 2020, art. 37.

<sup>41</sup> *Vademecum*, 2020, art. 47.

<sup>42</sup> *Vademecum*, 2020, art. 56.

<sup>43</sup> *Vademecum*, 2020, arts. 48-50.

<sup>44</sup> *Vademecum*, 2020, art. 51.

competent Hierarchy considers it appropriate to enlist another suitable person to carry out the investigation, he is to select him or her using the criteria indicated by canons<sup>45</sup> The competent Hierarchy must officially name the investigator of the preliminary investigation through a decree. This mandate should instruct the person to investigate the allegation's facts, circumstances, and imputability before reporting to the Hierarchy. This investigation should be made clear that only the specific action in question. Other acts on the part of the accused can only be examined if they are uncovered during the investigation.<sup>46</sup>

According to the norm, a person's suitability for an ecclesiastical office rests upon being in communion with the Church and the possession of the requisite qualities required for the office by the universal or particular law.<sup>47</sup> In this specific situation, the office calls for someone who can operate with prudence and discretion such that the good reputation of the accused will be protected. In addition, the investigator must maintain, as much as is possible, confidentiality about the things discovered in the preliminary investigation such that the good reputation of the accused is not unduly harmed. The investigators should be having competence in dealing with the matter and have good interviewing skills. However, they need not be licensed or an expert in canon law, although they should be qualified in the necessary aspects of penal law.

Both the Codes state that the person who performs the investigation has the same powers as the auditor in a process, but they cannot participate in a later judicial process as a judge.<sup>48</sup> This restriction exists since there are very few protections against the power of an investigator, and they would struggle to remain impartial in the later judicial process, burdened as they are with the knowledge of information that had been collected without procedural safeguards.<sup>49</sup>

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<sup>45</sup> *Vademecum*, 2020, art. 38.

<sup>46</sup> R. Lucian Millette, "An Analysis of the Preliminary Investigation of the Accused," in *The Jurist* 75 (2015), 147. John P. Beal, "To Be or Not to be, that is the Question: The Rights of the Accused in the Canonical Process," in *CLSA Proceedings* 53 (1991), 85.

<sup>47</sup> CCEO c. 940 (CIC c. 149 §1).

<sup>48</sup> CCEO c. 1468 §3 (CIC c. 1717 §3).

<sup>49</sup> Astigueta, "L'investigazione previa: alcune problematiche," in *Periodica* 98 (2009), 89. R. Lucian Millette, "An Analysis of the Preliminary Investigation of the Accused," in *The Jurist* 75 (2015), 148.

However, they don't need to be already appointed previously as auditors. Since they have the power of an auditor, they can determine which proofs are to be collected and how they should be collected.<sup>50</sup> The investigator does not need to achieve moral certitude that the matter being investigated is imputable. The investigator needs only to verify the authenticity of the accusation. While the Codes of Canon Law do not explicitly require a written report from the investigator, it is implicitly presupposed.<sup>51</sup>

The Codes of Canon Law regulate that a layperson with legal qualifications<sup>52</sup> be admitted by the competent authority for the ecclesiastical functions that are not reserved to those in sacred orders. Considering this canonical provision, the *motu proprio Vos estis lux mundi* stated that a qualified layperson might be chosen "to assist in the investigation, according to the individual case's needs."<sup>53</sup> Considering the provision of CCEO c. 1468 §3 (CIC c. 1717 §3), the Congregation for the Doctrine of the Faith states: "if a penal judicial process is then initiated, that same person cannot act as a judge in the matter." The same norm also states: "Sound practice suggests that the same criterion be used in appointing the Delegate and the Assessors in the case of an extrajudicial process."<sup>54</sup>

## 8.2 The Notary

CCEO c. 253 (CIC c. 483) establishes the role of a notary. The part of the notary is to authenticate a public document.<sup>55</sup> The norm regulates that the notary must "be of unblemished reputation and above suspicion."<sup>56</sup> The presence of a notary at every judicial hearing is so essential that the acts are null unless signed by the notary.<sup>57</sup>

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<sup>50</sup> CCEO c. 1093 §3 and CIC c. 1428 §3. R. Lucian Millette, "An Analysis of the Preliminary Investigation of the Accused," in *The Jurist* 75 (2015), 148.

<sup>51</sup> CCEO c. 1470 (CIC c. 1719).

<sup>52</sup> "Lay persons who excel in the necessary knowledge, experience and integrity, should be heard as experts or consultors by ecclesiastical authorities, whether individually or as members of various councils and assemblies, whether parochial, eparchial or patriarchal." CCEO c. 408 §1 (CIC 228 §2).

<sup>53</sup> VELM, art. 13 §1.

<sup>54</sup> *Vademecum*, 2020, art. 39.

<sup>55</sup> CCEO 253 §1 (CIC c. 483 §1).

<sup>56</sup> CCEO 253 §2 (CIC c. 483 § 2).

<sup>57</sup> CCEO c. 1101 (CIC c. 1437, §1).

However, in the case of a preliminary investigation, the CDF establishes: "since these are not the acts of a process, the presence of the notary is not necessary for their validity."<sup>58</sup> Where a case is regarding the reputation of a cleric, the SST specifies that the notary must be a priest unless the CDF grants a dispensation. "For the functions of Notary and Chancellor, priests are appointed, whether or not they are officials of this Congregation."<sup>59</sup> In compliance with CCEO 253 §2 (CIC c. 483 §2), the CDF has reiterated that in such cases, the notary be a priest.<sup>60</sup> The CDF also states that it is helpful if a notary authenticates the acts of the preliminary investigation.<sup>61</sup>

### 8.3. The Promoter of Justice

Regarding the role of a promoter of justice, the *Vademecum* states: "In the investigative phase, the appointment of a promoter of justice is not foreseen."<sup>62</sup> However, the Hierarch consults a promoter of justice before he imposed an administrative leave on the accused.

### 8.4 The Accused

Accusation refers to the delict that the alleged victim or other person claims to have occurred.<sup>63</sup> The accused is a person with an allegation that he or she has committed an offence. The Codes of Canon Law do not mention whether the investigator has to speak to the accused person during the preliminary investigation. It is left to the investigator's discretion to decide whether to interview the suspect/accused as part of the preliminary investigation. The investigator may start the investigation with the party who denounced the delict and others whom the aggrieved party suggested knowing the act. The accused is informed of the delict attributed to him and any attendant details, for example, the place where it occurred, the number and eventual names of the alleged victims, the circumstances, etc.<sup>64</sup>

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<sup>58</sup> *Vademecum*, 2020, art. 42.

<sup>59</sup> SST, 12.

<sup>60</sup> *Vademecum*, 2020, art. 41.

<sup>61</sup> *Vademecum*, 2020, art. 72.

<sup>62</sup> *Vademecum*, 2020, art. 43.

<sup>63</sup> *Vademecum*, 2020, art. 105.

<sup>64</sup> *Vademecum*, 2020, art. 105.

Respecting the canonical provision,<sup>65</sup> an oath cannot be imposed on the accused person. Since this is a preliminary phase before a possible process, it is not obligatory to name an official advocate for the accused person. However, if he considers it helpful, he can be assisted by a patron of his choice.<sup>66</sup> The norm respects the right of information of the accused regarding the investigation report. For, it states: "On the day and time of the session in which the accusations and proofs are made known, the file containing the acts of the preliminary investigation is shown to the accused and his advocate, if the latter is present. The obligation to respect the secret of office should be made known."<sup>67</sup>

#### 8.4.1 Death or Loss of the Canonical Status of the Accused

If the person accused dies during the preliminary investigation, opening a subsequent penal procedure would not be possible. In the case of the sexual abuse of the minor by a cleric, it is recommended that the Hierarchy inform the matter to the CDF.<sup>68</sup> The document also states:

If, in the phase of the preliminary investigation, an accused cleric has lost his canonical status as a result of a dispensation or a penalty imposed in another proceeding, the Ordinary or Hierarchy should assess whether it is suitable to carry on the preliminary investigation, for the sake of pastoral charity and the demands of justice concerning the alleged victims. If the loss of canonical status occurs once a penal process has already begun, the process can, in any case, be brought to its conclusion, if for no other reason than to determine responsibility in the possible delict and to impose potential penalties. It should be remembered that, in the determination of a more serious delict (*delictum gravius*), what matters is that the accused was a cleric at the time of the alleged delict, not at the time of the proceeding.<sup>69</sup>

#### 8.4.2 The Right of Self-Defence of the Accused

In the common Codes, we do not find any law that explicitly mentions self-defence. However, CCEO c. 1469 §3 requires the

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<sup>65</sup> CCEO c.1471 §2 (CIC c.1728 §2).

<sup>66</sup> *Vademecum*, 2020, art. 54.

<sup>67</sup> *Vademecum*, 2020, art. 101.

<sup>68</sup> *Vademecum*, 2020, art. 161.

<sup>69</sup> *Vademecum*, 2020, art. 163.

Hierarch to hear the accused party and the promoter of justice before the Hierarch decides on the next step following the preliminary investigation. We do not come across any parallel norm in CIC/1983. Nevertheless, the requirement is fulfilled by interrogating the accused in the investigation process.<sup>70</sup> The letter to the episcopal conferences in developing guidelines for dealing with cases of sexual abuse of minor states:

Unless there are serious contrary indications before a case is referred to CDF, the accused cleric should be informed of the accusation which has been made and given the opportunity to respond to it. The prudence of the bishop will determine what information will be communicated to the accused in the course of the preliminary investigation.<sup>71</sup>

After the preliminary investigation, in the case of *delicta graviora* reserved to the CDF, the Hierarch has to forward the acts of the case with his personal opinion to the CDF with a personal statement describing the ability of the accused to exercise the right of self-defence.<sup>72</sup>

## 9. The Protection of the Good Name

The protection of the good name of the people involved during the preliminary investigation, namely, the accused, the alleged victims, and the witnesses, is considered a complementary act.<sup>73</sup> It is the canonical right of every individual to protect his or her good name.<sup>74</sup> Therefore, the *Vademecum* states that it is the obligation of the one who carries out the preliminary investigation to “be particularly careful to take every possible precaution to this end since the right to a good name is one of the rights of the faithful upheld by canons 220 CIC and 23 CCEO.”<sup>75</sup> However, the same obligation does not bind

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<sup>70</sup> Cf. John Anthony Renken, et al., *The Penal Law of the Roman Catholic Church: Commentary on Canons 1311-1399 and 1717-1731 and Other Sources of Penal Law*, 393.

<sup>71</sup> Congregation for the Doctrine of the Faith, “Circular Letter to Assist Episcopal Conferences in Developing Guidelines for Dealing with Cases of Sexual Abuses of Minors Perpetrated by Clerics,” in AAS 103 (2011), 406-412.

<sup>72</sup> *Vademecum*, 2020, art. 28.

<sup>73</sup> *Vademecum*, 2020, art. 44.

<sup>74</sup> CCEO c. 1468 §2 (CIC c. 1717 §2) and VELM, arts 4 §2 and 5 §2.

<sup>75</sup> *Vademecum*, 2020, art. 44.

the one who carries out the preliminary investigation indiscriminately.<sup>76</sup>

During the preliminary investigation, in cases where public statements must be made, great caution should be exercised in providing information about the facts respecting privacy expressed by the alleged victims and avoiding the anticipation of judgment on the merits of the facts.<sup>77</sup> "In addition to the protection of the good name of the persons involved, consideration must also be given, for example, to the risk of compromising the preliminary investigation or giving scandal to the faithful, and the advantage of collecting beforehand all evidence that could prove useful or necessary."<sup>78</sup>

The law determines that the ecclesiastical authorities must ensure that the alleged victims and their families "are treated with dignity and respect, and offer them welcome, attentive hearing and support, also through specific services, as well as spiritual, medical and psychological help, as required by the specific case."<sup>79</sup>

## 10. Hearing Minors or Persons Equivalent to Them

The CDF makes clear guidelines in interrogating minors or persons equivalent to them. Accordingly, the law states: "In cases where it proves necessary to hear minors or persons equivalent to them, the civil norms of the country should be followed, as well as methods suited to their age or condition, permitting, for example, that the minor is accompanied by a trusted adult and avoiding any direct contact with the person accused."<sup>80</sup>

## 11. The Proofs of the Case

The materials collected during the preliminary investigation are known as "Proofs." The material that may be collected as proof are:

1. The record of the accusations made by the alleged victims;
2. Other pertinent documents, like, medical records, correspondence, photographs, proofs of purchase, bank records, testimonies of the witnesses.

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<sup>76</sup> *Vademecum*, 2020, art. 44.

<sup>77</sup> *Vademecum*, 2020, arts. 45 and 46.

<sup>78</sup> *Vademecum*, 2020, art. 53.

<sup>79</sup> VELM, 5; *Vademecum*, 2020, art. 55.

<sup>80</sup> *Vademecum*, 2020, art. 51.

3. Expert opinions: medical, including psychiatric, psychological and graphological.
4. Any rules of confidentiality imposed by civil law should be observed.<sup>81</sup>
5. If other delicts attributed to the accused come to light.
6. Any indication of problematic facts emerging from his biographical profile.
7. The results of investigations or trials carried out by civil authorities.
8. Eventual exempting, mitigating, or aggravating factors, as provided for by law.
9. Testimonials of credibility with regard to the complainants and the alleged victims.<sup>82</sup>

The documents collected during the preliminary investigation are considered as proof. However, from the moment the extrajudicial process is opened, they automatically become a body of evidence.<sup>83</sup> Based on the preliminary investigation results, it is appropriate that the Hierarch or his delegate can ask for the collection of further proof.<sup>84</sup>

## 12. The *Votum* of the Hierarch

A *votum* is given by the Hierarch at the end of the preliminary investigation and placed along with the acts of the investigation. The *votum* is to address all pertinent issues and to express an opinion about the disposition of the case by the Hierarch. The individual conclusions in the *votum* should be argued and documented, with cross-references to relevant documents contained in the case proceedings. This documentation should include the decrees initiating the preliminary investigation, concluding the investigation, restricting ministry, etc. Indications should also be given concerning the current status of the accused cleric, especially whether he is continuing in ministry, whether the restrictions of CCEO c. 1473 (CIC c. 1722) have been applied, and information regarding the cleric's

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<sup>81</sup> *Vademecum*, 2020, art. 106.

<sup>82</sup> *Vademecum*, 2020, art. 34.

<sup>83</sup> *Vademecum*, 2020, art. 107.

<sup>84</sup> *Vademecum*, 2020, art. 108.



residence and support.<sup>85</sup> The *votum* should refer specifically to the information and any proof associated with the prior investigation. It must address the accusation and the imputability of the accused. It must also indicate what procedure is recommended to resolve the issue and explain why it is requested. It must explain the status of the civil proceedings, if any. The age of the accused and his prospects for future ministry are addressed in the *votum*. When the Hierarch addresses the question of the suitability for ministry, he must present all relevant information, including other problematic issues.

The accused and his advocate have no right to examine the *votum* of the bishop since it is not a judgment but a preliminary personal evaluation of the case for the exclusive perusal of the CDF. If the Hierarch, in his *votum*, is recommending the dismissal of a cleric, he is to inform the cleric about his right to request a dispensation from all obligations arising from ordination, including that of clerical celibacy, and the cleric's response to this information is indicated in the *votum*.<sup>86</sup>

### 13. The Conclusion of the Preliminary Investigation

As per the provision of the law<sup>87</sup>, the Hierarch must decree the conclusion of the preliminary investigation.<sup>88</sup> Regarding the conclusion of the preliminary investigation, the *Vademecum* places the following norms:<sup>89</sup> There should not be an unjustified delay in the preliminary investigation. Suppose the investigation has been carried out by a person other than the Hierarch, he or she is to consign all the acts of the investigation, together with a personal

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<sup>85</sup> "To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases" CCEO c. 1473 (CIC c. 1722).

<sup>86</sup> Canon Law Society of America, "*Sacremtorum Sanctitatis Tutela: Processing Cases of Graviora Delicta*," in Sharon A. Euart, John A. Alesandro and Paul B.R. Hartmann, (eds.), *Roman Replies and CLSA Advisory Opinions* (Washington: Canon Law Society of America, 2010) 63-65, 63-64.

<sup>87</sup> CCEO c. 1470 (CIC c. 1719).

<sup>88</sup> *Vademecum*, 2020, art. 68.

<sup>89</sup> *Vademecum*, 2020, art. 66- 75.

evaluation of its results. The Hierarchy must decree the conclusion of the preliminary investigation.

Once the preliminary investigation has concluded and if it is found that there is a semblance of truth with regard to the clerical abuse of minors, the Hierarchy is obliged to send, without delay, an authentic copy of the relative acts to the CDF with his own evaluation of the results of the investigation (*votum*). In cases the preliminary investigation is carried out by a competent major Superior, he has to transmit a copy of all documentation related to the investigation to the supreme Moderator/superior General or to the bishop (for the eparchial congregations). He, in turn, with his own *votum* regarding the finding of the investigation, has to send it to the CDF. The acts are to be sent in a single copy authenticated by a notary.

The investigation results are to be communicated to the Hierarchy of the place where the alleged delict was committed. The original of all the acts is to be kept in the secret archive of the curia. Once the acts of the preliminary investigation have been sent to the CDF, the Hierarchy is to await communications or instructions in this regard from the CDF.

After having submitted the acts, if other elements are to be added to it or new accusations emerge, these are to be forwarded to the CDF as quickly as possible to be added to what is already in its possession. If it appears useful to reopen the preliminary investigation based on those elements, the CDF is to be informed immediately.

The documents sent to the CDF must include a *curriculum vitae* and the name of the eparchy of the accused cleric. The *curriculum vitae* should include the date of the cleric's ordination, years of ministry, the diocese into which the cleric has been incardinated, and a list of his assignments. The contact address of the accused, the name of his procurator, his contact information, and the original mandate signed and authorized by the procurator. Besides the list of the accusations, it should include the notation of any civil proceedings which have occurred or are occurring, all measures taken by the eparchy, including all decrees, all the acts of the preliminary investigations, and any decrees concerning "administrative leave" or penal precepts or any other imposed restrictions. Any response or recourse that the suspect made, information regarding the sustenance that the accused

cleric is receiving and additional relevant information discovered during the preliminary investigation are included in the file.

#### 14. The Application of CCEO c. 1473 and CIC c. 1722

The Hierarch may exercise his right to impose from the outset of the preliminary investigation those measures which are established in CCEO c. 1473 (CIC c. 1722).<sup>90</sup> The respective presiding judge may, at the request of the Promotor of Justice, exercise the same power under the same conditions determined in the canons themselves.<sup>91</sup> The focus of the canon is the restriction imposed on the accused. Its immediate and ultimate purpose is to protect the public welfare and integrity of the penal process by shielding the freedom of the witnesses. Therefore, the canon begins with the statement: "to prevent scandal, to protect the freedom of witnesses and to safeguard the course of justice, the hierarch can, at any stage and grade of the trial, after hearing the promoter of justice."<sup>92</sup> This disciplinary measure is called "administrative leave" when applied to a cleric, although it is not a canonical term.<sup>93</sup>

Hence, the canon empowers the Hierarch to restrain the exercise of any ecclesiastical office or restrict the place of residence<sup>94</sup> that may cause potential scandal to the spiritual life of the public. In such cases, if there arises a conflict of interests between the right of the accused and the public good, the latter is to be respected in applying the law. Nevertheless, the accused has the right to challenge the alleged reason for the restrictions placed. The Hierarch imposes it as an "administrative leave" through a decree<sup>95</sup> as part of the administrative act.<sup>96</sup> The Codes of Canon Law provides the recourse against the administrative decrees.<sup>97</sup> As the application of the law,

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<sup>90</sup> *Vademecum*, 2020, art. 58.

<sup>91</sup> SST, 19.

<sup>92</sup> CCEO c. 1473 (CIC c. 1722).

<sup>93</sup> Frederic C. Easton, "Title XXVII: The Procedure for Imposing Penalties, Canons 1468-1487," in Faris and Abbass (eds.), *A Practical Commentary to the Code of the Eastern Churches*, Vol. II, (Chambly (Qc): Wilson & Lafleur, 2019), 2629.

<sup>94</sup> *Vademecum*, 2020, art. 63.

<sup>95</sup> The precautionary measures are imposed by a singular precept, legitimately made known (*Vademecum*, 2020, art. 64).

<sup>96</sup> Ref. CCEO cc. 1510-1516 (CIC cc. 35-38).

<sup>97</sup> See CCEO cc. 996-1006 (CIC cc. 1732-1739).

the administrative leave imposed during the preliminary investigation is only a 'restriction' as a disciplinary measure and not a 'penalty'.

In treating cases of sexual abuse of minors committed by clerics, the *Vademecum* states that a precautionary measure is not a penalty since penalties are imposed only at the end of a penal process. "It should be clearly explained to the party in question that the measure is not penal in nature, lest he thinks that he has already been convicted and punished from the start. It must also be emphasized that precautionary measures must be revoked if the reason for them ceases and that they themselves cease with the conclusion of the eventual penal process. Furthermore, if circumstances so demand, they can be modified (made more or less severe). Still, particular prudence and discernment are urged in judging whether the reason that suggested them has ceased; nor is it excluded that - once revoked - they can be re-imposed."<sup>98</sup>

Unless there is an imminent grave danger, it is questionable if such restrictions are imposed during the preliminary investigation, which precedes the penal trial's actual development. J. Beal states that applying the norm (CIC c. 1722) can be operative only after a formal act has been initiated but not during the preliminary investigation.<sup>99</sup> The common law does not explicitly provide the application of the norm CCEO c. 1473 (CIC c. 1722) during the preliminary investigation. In this regard, Thomas J. Green observes:

If they are employed then, it would have to be according to particular law with appropriate protections of the accused. The community's welfare may indeed require limiting the exercise of some rights by the accused before the process begins. However, the sweeping restrictions of canon 1722 may be unjustified, since the concern underlying it may be able to be addressed onerous measure.<sup>100</sup>

In this regard, Frederic C. Easton comments: "According to this canon, these precautionary measures can be employed at any stage

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<sup>98</sup> *Vademecum*, 2020, art. 61.

<sup>99</sup> J. Beal, "Administrative: Canon 1722 Revisited," *Studia Canonica* 27 (1993), 314-315.

<sup>100</sup> Thomas J. Green, "Part IV: The Penal Process (cc. 1717-1731)," *New Commentary on the Code of Canon Law*, (Bangalore: TPI, 2003) 1813.

and grade of the penal trial, but only during the penal trial itself." According to him, "the penal trial actually begins with the citation of the accused." For, he states: "the Legislator intends the Hierarch to allow the accused to respond to the citation and to present any arguments he may have about the need to impose precaution. At this point in the process, the accused should have an advocate who can assist with the procedure for the application of the precautions. It is possible for the Hierarch, having heard the accused, to modify the precautions he had proposed to apply."<sup>101</sup> The *Vademecum* notes that if "a decision is made to modify or revoke preventive measures, this must be done by a corresponding decree, legitimately made known. However, this will not be necessary after the possible process, since at that moment those measures cease to have legal effect."<sup>102</sup>

The restrictions imposed on the accused are to be withdrawn when the reason for the same is no more in place. It "should automatically cease at the end of the process. It is illegitimate to impose them indefinitely on an accused without any real relationship to the process."<sup>103</sup>

The norm's application turns questionable when the Hierarch who initiates the case is biased against the accused. He likely consults the promoter of justice, who would confide his interest and interpret the accusation in such a manner so as to impose the restriction on the accused in favour of the personal benefit of the Hierarch himself. Of course, there is no doubt that the Hierarch exercises his right to apply the norm if the alleged case falls under *delicta graviora*, especially in cases of the sexual abuse of the minor. But, as per the spirit of the norm, the Hierarch cannot impose an administrative leave indiscreetly in all cases, especially during a preliminary investigation.

## Conclusion

It has been clearly established that the preliminary investigation is not a trial, nor does it seek to attain moral certainty as to whether the alleged events occurred. This is an investigation to ascertain the

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<sup>101</sup> Frederic C. Easton, *A Practical Commentary to the Code of the Eastern Churches*, 2630-2631.

<sup>102</sup> *Vademecum*, 2020, art. 65.

<sup>103</sup> Thomas J. Green, *New Commentary on the Code of Canon Law*, 1812.

credibility of the accusation and to find if there is an element of truth in the alleged delict.

Regarding the application of CCEO c. 1473 (CIC c. 1722), the Hierarch has the canonical power to impose an administrative leave on the accused from the outset of the preliminary investigation. We have seen, although administrative leave is not a penalty, it restricts the exercise of the accused's right. In this respect, the *Vademecum* clearly stated that administrative leave is not a 'suspension' but only a 'prohibition.' Hence, the Hierarch has the duty to make a strict interpretation in this regard.<sup>104</sup> The recourse against the administrative leave will not have a suspensive effect as in the case of a penalty.<sup>105</sup>

To bring to perspective the questions raised in the introduction: (1) It has been repeatedly made clear that the preliminary investigation does not constitute a penal trial unless the case proceeds to the second stage, namely, the development of the penal trial based on the finding of the preliminary investigation. (2) The legislator's mind is that CCEO c. 1473 (CIC c. 1722) shall not be applied as a penalty during the preliminary investigation. It may be applied during the preliminary investigation only as a preventive measure if the Hierarch finds the accuser a serious threat to the public good. However, the disciplinary action as "administrative leave" cannot carry the effect of a suspension. (3) Nevertheless, the disciplinary measure imposed on the accused shall not continue to be in force after the preliminary investigation has been concluded. It is unjust, and an act of negligence to delay the conclusion of the preliminary investigation or not make a proper decision by the Hierarch on the conclusion of the preliminary investigation.

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<sup>104</sup> CCEO c. 1500 (CIC c. 18).

<sup>105</sup> CCEO c. 1487 (CIC c. 1353).