PROSECUTORIAL DISCRETION AND PRE-TRIAL PROCESS: A COMPARISON OF STANDARDS IN INTERNATIONAL LAW AND CANON LAW

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Resumen. La discreción del Fiscal es crucial para un juicio justo, ya que es el tamiz que filtra los casos que van a ir a juicio y que los casos no lo son. Un juicio justo no sólo busca la protección de los acusados, pero también toma en consideración el orden público y la satisfacción de la víctima. Partiendo de este presupuesto, el propósito de este artículo consiste en el análisis comparativo de las normas internacionales que rigen la discrecionalidad fiscal (como en el Pacto Internacional de Derechos Civiles y Políticos y la Convención Europea sobre Derechos Humanos) y las reglas aplicables al proceso penal en el Derecho Canónico y en los Derechos internos de las Iglesias que forman parte de la Comunión Anglicana.

Palabras clave. Fiscalía, Episcopado, discreción, Derecho Internacional, Derecho de la Iglesia de Inglaterra, Derecho canónico, Pacto Internacional de Derechos Civiles y Políticos, Convenio Europeo de Derechos Humanos, imputabilidad.

Abstract. Prosecutorial discretion is crucial to a fair trial, since it is the sieve that filters which cases are to go for trial and which cases are not. A fair trial seeks not merely the protection of the accused but also takes into consideration public order and the satisfaction of the victim. This article traces the development of international norms governing prosecutorial discretion (as found in the International Covenant on Civil and Political Rights and the European Convention on Human Rights) and compares these with standards applicable to penal process in the canon law systems of the Roman Catholic Church and the member churches of the Anglican Communion.

Key words. Prosecutorial discretion, international standards, Anglican Canon Law, Catholic Canon Law, International Covenant on Civil and Political Rights (ICCPR), European Convention on Human Righs (ECHR), Imputability, Episcopal discretion.

Prosecutorial discretion is crucial to a fair trial, since it is the sieve that filters which cases are to go for trial and which cases are not. A fair trial seeks not merely the protection of the accused but also takes into consideration public order and the satisfaction of the victim. The importance of proper prosecutorial discretion in providing fair trial was asserted in a very recent decision of the Human Rights Committee in the case of *Victor Ivan Kankanamage v Sri Lanka.*[1]

1. INTERNATIONAL NORMS.

The role of the prosecutor in a State is fundamental to the administration of justice. This has been clearly recognised in international law. In Belgium, for example, the department of the *Procureur General* acts at two levels: before original and appeal

1 Communication No. 909/2000: Sri Lanka. 26/08/2004. CCPR/C/81/D/909/2000. (Jurisprudence). Date of initial communication: 17 December 1999 (initial submission). Decided during the sessions held between 5 - 30 July 2004. UNITED NATIONS<?xml:namespace prefix = o ns = "urn:schemas-microsoft-com:office:office" />. The full text of the decision appears under "News Briefs" of the section dealing with recent development in this volume of the journal. In this case the Human Rights Committee found: "(para. 9.2) On the merits, the Committee first notes that, according to the material submitted by the parties, three indictments were served on the author on 26 June 1996, 31 March 1997, and 30 September 1997 respectively. At the time of the final submissions made by the parties, none of these indictments had been finally adjudicated by the High Court. The indictments were thus pending for a period of several years from the entry into force of the Optional Protocol. In the absence of any explanation by the State party that would justify the procedural delays and although the author has not raised such a claim in his initial communication, the Committee, consistent with its previous jurisprudence, is of the opinion that the proceedings have been unreasonably prolonged, and are therefore in violation of article 14, paragraph 3 (c), of the Covenant".

courts, when it acts as the investigator and prosecutor, and before the Court of Cassation, when it acts in an independent and impartial advisory capacity.[2] The European Courts of Human Rights affirmed the acceptability of this long-standing practice and concluded that the presence of the *Procureur General* in the Court of Cassation may not necessarily be detrimental to the rights of an accused in a criminal case; indeed, the *Procureur* sometimes makes submissions in favour of the accused.[3] However, merging the prosecutorial role with the judicial function may sometimes endanger a fair trial, as was noted in *Tierce et al. v San Marino,* where the person who acted as the prosecutor *(Commissario della Legge)* for two years later became the judge in the same case.[4] In any event, under the European

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[2] *Delcourt v Belgium*, (1970) 1 EHRR 355, para.33: "The tasks of the Procureur General's department at the courts of first instance and appeal...were to *investigate and prosecute* criminal offences in order to protect the safety of society": para.34, "*Procureur General's* department at the Court of Cassation acted as an adviser to the court...(at the court) the *Procureur General* himself was independent and impartial".

[3] *Delcourt v Belgium*, (1970) 1 EHRR 355: in this case the applicant, a Belgian national, was convicted and sentenced for forgery and fraud: his sentence was increased on appeal. Subsequently the Court of Cassation after deliberating in private dismissed the appeal. The issue that was to be determined by the European Commission and the Court of Human Rights was whether the Belgian law, which allows the *Procureur General* to be present at the Court of Cassation in private deliberation of the Court, violates the independence of the tribunal as envisaged in Art.6 (1).

[4] *Tierce et al. v San Marino,* (2002) 34 EHRR 25, p.672: In this case, the three applicants were convicted of fraud: the first applicant pleaded that he was denied the right to an impartial tribunal: the European Court considered only the issue of objective impartiality (since the applicant himself did not contest the judge's personal bias). A member of the public prosecutor's department *(Consilio della Legge)* conducted the investigation against the accused for two years, interrogated the accused, his accuser, and certain witnesses, examined the expert and made two preventive attachments. The same person later committed the case for trial and convicted the applicant: in this case the applicant's fear of judicial bias was justified (para.81). In common with other European countries, San Marino also has an inquisitorial system, where the prosecutor also acts as an investigating judge. The applicant does not contest the personal integrity of the judge (i.e. subjective bias or impartiality is not in issue), but the institutional arrangements.

Convention on Human Rights, misuse of prosecutorial discretion may result in violation of Article 6.[5] In *Funke*, in order to gather information to prosecute the applicant for certain customs offences, the prosecutor secured an initial conviction of the applicant for not producing documents necessary to prove those

[5] *Weber v Switzerland,* (1990) 177 E.Ct.HR 4. In this case the applicant was the private prosecutor alleging defamation made by the defendant (RM) that the applicant was engaged in fraudulent dealings. The investigating judge of the District of Vevy-Lavaux ordered the applicant to disclose the accounts of his organisation (*Helvetia Nostra).* Dissatisfied with this order, the applicant lodged a criminal complaint against him before an investigating judge of the Canton of Vaud, alleging that the first judge was misusing his official authority and using coercion. The second investigating judge refused to take action on the complaint, without any hearing. Thereafter, the applicant gave a press interview stating that he had challenged the investigating judge. Based on this press coverage, the Vaud Cantonal Court instituted a summary investigation under Art.185(3) of the Vaud Cantonal Code of Criminal Procedure against the applicant on its own motion charging that he 'has breached the confidentiality of judicial proceedings' and required the applicant to reveal what his press statement was. By letter addressed to the Vaud Cantonal Court, he denied having given any "information about the investigation proceedings". No public hearing was required by Art.185(3) of the Code. He was fined 300 Swiss Francs, and imprisonment in default of payment. [The relevant domestic law: *The Vaud Cantonal Fines (Recovery & Conversion into Imprisonment) Order of January 23, 1942*].The applicant's appeal against the Vaud investigating judge were dismissed first by the Criminal Cassation division of the Vaud Cantonal Court and thereafter by Federal Court. The domestic courts maintained all along that Art.185(3) of the Code classified the proceedings as a disciplinary matter and hence was not subject to compliance with Art.6 of the European Convention. The European Commission on Human Rights agreed with the Swiss government that in pursuance of the reservation to Art.6 of the European Convention, that there was no violation. The European Court on Human Rights taking up the issue of the reservation stated that Art.64(2) of the European Convention, which deals with reservation, must be interpreted in a manner that will not defeat the very purpose of the treaty. Since the Swiss government had not provided the Court with relevant domestic law indicating the extent of the reservation, the Court found that the reservation was inapplicable in the instant case. Applying the *Engel* criteria, the Court found that Art.6 guarantees apply in this case [The three criteria adopted in *Engel and Others v The Netherlands,* (1976) 1 EHRR 649, para 82, in ascertaining whether a charge attracts Art.6 ECHR were: (1) the classification of the offence as criminal in the legal system of the respondent State; (2) the nature of the violation; and (3) the severity of the penalty imposed or threatened.].

customs offences. The European Court of Human Rights found this first conviction was a sham and that the prosecutor wrongly exercised his discretion in respect of concealment of the documents being unable or unwilling to procure them by other means. In the view of the Court the special features of customs law could not justify this infringement of the right of someone 'charged' with a 'criminal offence' to remain silent and the Court concluded that there had been a violation of Art. 6(1).[6]

Whilst the safeguards in ECHR Art. 6 refer specifically to a fair hearing at trial,[7] they have also been applied to the pre-trial stage, including the point of investigation carried out by the police.[8] The pre-trial rights of the accused represent important limitations on the prosecution. The accused must be informed of an investigation.[9] The right of the accused to an adequate

[6] *Funke's* case, *British YBIL* 64 (1993) p.310-11. Article 6 of the ECHR provides as follows: 6(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law... 6(2) Everyone charged with criminal offence shall be presumed innocent until proved guilty according to law. 6(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understand in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court. Article 14 of the International Covenant on Civil and Political Rights (hereafter called ICCPR) provide for similar rights in connection with fair trial, with some modifications.

[7] It is contended that in the UN system under ICCPR fair-trial guarantees apply at the pre-trial stage: *Reports of Libya, USSR and Finland*, A/33/44 and A/41/40.

[8] Imbroscia v Switzerland, 17 EHRR 441.

[9] *Brozieck v Italy*, Series A, no.167 (1989): In this case a German national residing in Germany received a judicial notification in Italian on a criminal charge. In the absence of at least a summary of the notification of the charge in a language the accused understood, the Court found that there was a violation of Art. 6(3).

preparation of his defence at the pre-trial stage is limited.[10] Nevertheless, the right of the accused to communicate freely and privately with his counsel is guaranteed in Art. 14(3)(b) of ICCPR.[11] Whilst the ECHR is silent on this matter, for the Commission the protection under Art.6(3)(c) necessarily begets the right to a counsel even at the pre-indictment stage.[12] Moreover, "severity of the penalty threatened and the complexity of the charges could justify on their own the appointment of a legal aid counsel who may have an important role to play at a stage where plenty of fresh evidence may be found".[13]

A leading case is *Can v Austria*. The applicant complained about a prohibition of unsupervised interviews with his counsel for a considerable part of his detention. The Austrian Code of Procedure required the presence of a court official at conversations with the defence counsel until the communication of the indictment. The Commission found that Art.6(3)(b) and (c) had been violated; by such prohibition Austria had (1) failed to allow the accused to lay an early foundation for his defence; (2) obstructed him in shaping the trial framework, either by participating in the investigation or challenging its conclusions before confirmation of the decision to prosecute; and (3) denied his right to challenge any coercive measures ordered during the preliminary investigation.[14] Legitimate coercive measures at the pre-trial stage may consist of interrogation, search and seizure,

[10] Koplinger v Austria, App.No. 1850/63, 12 YB 438 (1968).

[11] Several UN Human Rights Committee decisions maintain the existence of this right. Communication Nos. 43/79 Calidas v Uruuguay; 80/80 Vasiliskis v Uruguay; 124/82 Muteba v Zaire; 49/79 Marais v Madagascar; 176/84 Lafuenta Penarrieta v Bolivia. See also, Stavros, p.58.

[12] Stavros, S., *The Guarantees for accused Persons under Article 6 of the European Convention on Human Rights*, publisher, Nijhoff, the Netherlands, 1993 (hereafter referred as Stavros), p.57.

[13] *Quaranta v Switzerland,* Series A, no.205 (1991).

[14] *App.No.5049/71*, 43 CD 38 (1973).

arrest, detention, blood and breathalyser tests and the like, provided they do not offend the dignity of the person.[15]

From the Strasbourg jurisprudence one could glean two types of excess in the exercise of prosecutorial discretion. The first is a declaration by a public official that somebody is responsible for criminal acts before adjudication by a competent court. This would amount to a violation of Art.6 (2).[16] Nonetheless, the authorities are not precluded from informing the public about criminal investigations and their progress by disclosing information about the existence of suspicion from arrests, confessions or the dangerous character of the accused.[17] Secondly, statements that can lead to a misinterpretation of the innocence of a suspect which results in influence upon judges and witnesses could fall foul of Art. 6(2) of the ECHR.[18]

The right of the prosecution to enter a *nolle prosequi* and of the court to enter a discharge (a non-suit not amounting to an acquittal) is acceptable both under the European Convention on Human Rights and general international law. However, this discretion is not unlimited. Discontinuance of proceedings is permitted in cases of relatively insignificant charges with a view to graver charges being filed on the same or similar facts,[19] the

[15] *Deweer v Belgium,* Series A, no.35 (1980): Series B, no.33 (1980) for the *Commission* report.

[16] *Krause v Switzerland,* App.no.7986/77, 13 DR 73 (1978): In this case the Swiss Chancellor at the pre-trial stage said of the suspect: "(the applicant)...had committed common law explosive offences and...must take responsibility...Petra Krause is not a freedom fighter...one cannot fight terrorism by releasing terrorists". The Commission refrained from considering this as a violation, in the context of rampant terrorism and the applicant was not able to show actual prejudice in her trial.

[17] In the *App. No.9077/80 v Austria*, the investigating officer made the following statement: "it emerged from the investigation that the baby in question had in all probability been killed by its grandmother who denying having committed the crime had been temporarily admitted to a neurology clinic for psychiatric examination". Such a tendentious statement was in excess of the legitimate discretion of the prosecutor and was found to be incompatible with Art. 6(2).

[18] *Krause v Switzerland,* App.no.7986/77, 13 DR 73 (1978): see note 16 above.

[19] See, STAVROS, p.118.

death of the accused, or expiration of a limitation period.[20] Permissible discontinuance does not make a State liable for compensation,[21] reimbursement of the necessary expenses,[22] or costs of proceedings.

With discontinuance, decisions as to costs must not undermine the presumption of innocence, under ECHR Art. 6(2), by giving the impression of guilt.. This arose in *Minelli*. The applicant, a journalist, published an article containing accusations of fraud against certain persons. The latter instituted a private action against him for criminal defamation but the proceedings were terminated as the statutory limitation period had expired. According to the Zurich Code of Criminal Procedure, the losing party (here, the plaintiffs) had in principle to bear the cost. The national court, however, directed that the applicant should bear two thirds of the legal costs, permitting a departure from the statutory principle on the footing that had it not been for the "limitation of time" requirement, the applicant would have been found guilty.[23] The applicant complained that the order amounted to a punishment on suspicion in violation of Art. 6(2). Both Convention organs upheld his claim. The Court reasoned as follows: the presumption of innocence would be violated if, without the accused having previously been proved guilty according to law and notably without his having had the opportunity to exercise a right of defence, a judicial decision against him as to costs reflected the opinion that he was guilty.[24]

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[20]Minelli v Switzeland (1983) 5 EHRR 554

[21]The right to compensation arises if there is miscarriage of justice, and if the person is convicted illegally. This right is guaranteed by Art. 3 of the Protocol No. 7 to the European Convention on Human Rights. Thus discharge or discontinuance of proceedings are not covered by the Protocol No.7: Stavros, pp.116,299.

[22]*Nolkenbockhoff v FRG,* Series A, no.123 (1987).

[23]*Minelli v Switzeland* (1983) 5 EHRR 554: To reach this decision the court relied primarily on the conviction of another journalist in criminal proceedings brought by the same plaintiff for similar allegations.

[24] *Minelli v Switzeland* (1983) 5 EHRR 554.

The position taken by Strasbourg is that discontinuation orders which amount to "disguised convictions" are outlawed by Art.6(2). *Minelli* decision was followed by the Commission but narrowly construed by the Court: in *Nolkenbocckhoff* the domestic court had stated that had it not been for the death of the accused, the outcome would have been his conviction being confirmed by the appeal courts.[25] Under German law, the applicant was entitled to compensation and reimbursement of necessary expenses. Since the national courts found that there had been a reasonable suspicion (though no conviction), such expenses or compensation were not paid to them.

Stavros makes the following observations in respect of the two cases stated above: (1) The reasoning of the national courts was perfectly capable of being understood as meaning that the accused were in fact guilty; (2) Such a pronouncement of guilt is sufficient to find that Art.6(2) has been violated; (3) an innocent person should not be subjected to any unnecessary prejudice (there may be situations where measures of suspicion cannot be excluded, but these should be justified by showing a clear case of necessity in the circumstances of each case); (4) an accused person whose presumption of innocence had not been destroyed by a final conviction should not normally be expected to bear the costs of a prosecution (unless the accused is clearly responsible for protractions leading to a time bar or other serious lapses); and, (5) the right to reimbursement of expenses and compensation for detention or remand should be secured, especially where the prosecution *ab initio* was totally unfounded, arbitrary or *mala fide*.[26]

[25] *Nolkenbockhoff v FRG,* Series A, no.123 (1987): in this case, the applicant was one of the heirs, who claimed reimbursement of the costs of proceedings from the State.

[26] STAVROS, p.124.

2. ROMAN CATHOLIC CANON LAW. [27]

Whenever the Ordinary[28] receives from any person information of an alleged offence under the Code of Canon Law 1983, he must cautiously inquire personally or through another suitable person about the facts and circumstances. Prudence suggests that investigation through a delegate of the Ordinary will better guarantee the objectivity and impartiality of the process.[29] The preliminary investigation must be completed within the shortest time.[30] The information may come to the attention of the Ordinary in a variety of ways, e.g. a denunciation made directly to him in writing or in person, or a complaint made to a parish priest or other official. The Ordinary must be satisfied that there is reasonable suspicion about the communication of the offence

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[27] Cans.1717-1719 deal with preliminary investigation. The comparable provisions in the 1917 Code are found in Cans.1939-1946. According to these canons, the Ordinary is called upon to decide whether the facts so far collected merit a penal process. If so, he has the option to use pastoral methods of warning, reprimand etc or proceed with penal process (administrative or judicial). If the evidence is insufficient or evidence does not establish the imputability or the case is frivolous, he must discharge the accused immediately. There is no indication during the drafting of the 1983 Code to show that the accused has the right to demand a formal trial: *Communicationes from the Vatican*, 12 (1980) 191 at Can.381(1). See, CLSGB, p.954; and Lover, L., "The Juridical value of Pre-trial Proof" (dissertation No.18, Pontifical University of St. Thomas, Rome).

[28] The term Ordinary means the bishop of a diocese to who it entrusted the care of the diocese. A bishop who is not the Ordinary may be a titular bishop (Can..376). Diocesan bishop is called the Ordinary since he has ordinary, proper and immediate power required to exercise is pastoral office (Can.381).

[29]Can.1717 (3). See, *Communicationes* 12 (1980) 189-190 at Can.380 (1): the Ordinary either by himself or through a body delegated by him embark on this investigation to ascertain whether there will be grounds to impute the accused. In the 1917 Code, Can.1940 states: "The investigation, although it can be conducted by the Ordinary, as a general rule is to be committed to one of the synodal judges ".

[30] See, MCGRATH , *A Comparative Study of Crime in Ecclesiastical Criminal Law and in American Criminal Law*, CLS No.385, 1957, p.158 and CLSA Comm. p.1024. Suitable person means (not a private individual) a Bishop (according to Can.134 includes a diocesan bishop, vicar general or Episcopal vicar) or in the case of a religious, the religious superior or their delegates, who is a religious.

and that the information is not solely based on gossip or rumour.[31]

The Code does not provide for the accused to be heard or to present a defence at the investigatory stage of the process,[32] a key feature of the classical inquisitorial model (in which the investigator must be independent and does not represent the interests of the prosecuting party).[33] Investigations should be dropped if they appear to be unfounded, with care being taken not to endanger the good name of any person.[34] In as much as the conviction of the guilty is necessitated for the good of the community, safeguarding reputation is equally warranted by law

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[31] *The Canon Law: Letter and Spirit,* Commentary by the Canon Law Society of Great Britain and Ireland, 1995 (hereafter called CLSGB), para. 3342, commentary on Can.1717 (1): "Before starting a penal process, the Ordinary must first have received information which has at least the semblance of truth...".

[32] PAULSON, "The Clinical and Canonical Considerations in Cases of Pedophilia: The Bishop's Role" in (1988) 22 *Studia Canonica* 77 at p.105, suggests that the bishop may be helped by team of experts consisting of canonists, lawyers, doctors etc. He also suggests the establishment of a contingency fund as well as a media unit to provide unbiased information to counter gossip. See also, Cafardi, "Stones instead of Bread: Sexually Abusive Priests in Ministry" *Studia Canonica* vol. 27/1 (1993) p.152 at p.204.

[33] The essential features of the continental inquisitorial criminal procedure are: 1. Though there are three parties, only one of them is the most active, and he is the investigating magistrate (in France he is called *juge d'instruction),* who is a professional within a judicial career service: 2. The police carries out the directions or rogatories issued by the magistrate: 3. Process is more investigative as distinguished from the adversarial (the Latin word *inquisitus* gives the name to this procedure): 4. The public trial is only a shadow of the pre-trial investigation, since the dossier of the magistrate contains all the relevant material needed to find the accused guilty or innocent: 5. Hence there is the 'presumption of guilt' that operates against the accused when he is brought to trial: 6. Lawyers have a minimal role to play, since there is no cross-examination, and questions to the opponents are channelled through the judge: 7. Juries have a nominal role, the real decision makers being the judges and the experts in law; Damaska, p.1, 28-38.

[34] Can.1717 (1): the comparable provision in the 1917 Code, Can.1942 states: "Nothing is to be done with denunciation from obvious enemies or that comes from vile or unworthy or anonymous persons..." See, MORRISEY, "Procedures to be Applied in Cases of Alleged Sexual Misconduct by a Priest", *Studia Canonica* 26 (1992) 35 at p.56.

(Canon 220). Protection of reputation includes not only that of the accused but also of the victim. Due attention must always be given when the civil law requires certain offences to be reported to civil authorities. Since reporting procedures vary from country to country, legal counsel be sought so that confidentiality is procured to the highest possible degree.[35]

Offences against the faith, serious offences against morals and those committed in the celebration of the sacraments are investigated by the Congregation for the Doctrine of Faith (CDF), which is competent to render judgment in such matters and to impose or declare penalties when appropriate. For example, the crime of solicitation (when a confessor uses the sacrament of penance to allure a penitent to sexual activity). is regulated by an instruction which details the procedures to be followed. This instruction, which is to be retained in the secret archive of the diocesan curia, was issued by the CDF in 1962, and is still normative for the investigation of crime.[36]

The Ordinary, having initiated the preliminary investigation, must himself make the final determinations and render the decrees related to the process, although the Ordinary himself need not conduct the entire investigation personally. The person delegated to conduct the investigation should be a cleric when the accused is a cleric.[37] In the interests of objectivity, the

[35] CALVO, p.217.

[36] Pastor Bonus, article 52.

[37] A cleric is a person ordained and is incardinated to a diocese or a congregation, which has a similar status (Can. 265). See, *Appollinaris* 43 (1970) p.454-456: in this there is a private response, which was issued by the Apostolic Signatura on June 11, 1968. The question of utilizing only clerics in the prior investigation of clerical misconduct is discussed in the *animadversiones*: see, Calvo, p.214. The lay members of the church are entitled to hold offices: Can.228. However they may be selected as investigators where the lay members are tried.

preliminary investigator may not be a judge if a formal process is initiated subsequently.[38]

The person who conducts a prior investigation "has the same powers and obligations as an auditor in the process of matrimonial action".[39] In effect, this means that he is bound by the principles of canon law regarding the gathering and efficacy of documents, statements of witnesses, and other proofs that are to be used in this process.[40] Care must be taken not to compromise the right of defence of the accused, especially in regard to self-incrimination,[41] or to compromise canonical principles which govern inadmissibility of certain types of evidence such as those associated with the sacramental seal of confession.[42]

Information gathered by a non-canonical investigation (e.g. the Police) may be used in the canonical investigation in so far as such utilisation does not conflict with canonical principles regarding the accuser's right of defence or the efficacy and admissibility of proofs in a canonical forum.[43]

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[38] See, CLSGB, para. 3344 (commentary to Can.1717(3)): "The investigator ...is to gather evidence...and then present them to the Ordinary. In the 1917 Code Can. 1428 (3), the investigator was required to give an opinion about the case. This is not explicitly required by the present law (i.e. the 1983 Code)".

[39] Can.1717 (3): Can.1941 (2) of the 1917 Code is similar.

[40] Cans. 1526-1573 (1917 Cans.1747-1805). See, Hughes, J., "Witnesses in Criminal Trials" CLS No. 106 (1937).

[41] Can. 1728 (2): no comparable provision in the 1917 Code.

[42] Can.1550 (2). Paul VI, Allocution to the Roman Rota on "Avoiding Every Appearance of Injustice and Providing Free Legal Aid", January 11, 1965, in *AAS* 57 (1965) pp.233-236: "Injustices could exist in the preparation of trial, when through the intrigues of unscrupulous professionals, cases would be presented to you once they have been fundamentally modified in their juridical reality, with unfounded documents, inconclusive proofs, suborned witnesses, counterfeit or altered documents. In the inquiry phase great caution and prudence must be exercised". See, CALVO, p.216 and WOESTMAN, p.80.

[43] This is implicit in the attitude of the Catholic canon law towards the secular law as stated in Can. 1933 (3) of the 1917 Code. The Church honours the secular law as long as it is not contrary to divine or canon law. See, KELLY, Ch.1.

If a *prima facie*[44] case is made against the accused, the Ordinary has one of four options:[45] (1) to determine the nature of the penalty: in making this determination, it must be ascertained that the offence itself provides for the application of a penalty,[46] and that the person who has been accused has actually committed the offence and appears to have acted with imputability;[47] (2) to drop the sentencing process in favour of other pastoral options, such as fraternal correction, rebuke, etc;[48] (3) to have recourse either to administrative action or to a judicial process;[49] and (4) if the claim is only one of damages, the Bishop or the investigator may equitably resolve the matter with the consent of the parties.[50]

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[44] *Prima facie* means the ascertainment by the Ordinary after the preliminary inquiry that the fact elicited warrant a penal process. If the facts so far elicited show that the suspect is innocent, or at least insufficient to proceed to a penal process or the evidence shows a lack of imputability, then there is no *prima facie* case. In any of these cases there will be no penal process, although other measures such as pastoral help, vigilance and warnings may be used. See, CLSGB, para.3345, p.954.

[45] Can.1718. The 1917 Code, Can.1946 (3) merely states that the Ordinary may proceed to make the citation according to canon law, without giving the variety of options as stated in the new Code. See, Alesandro, at p.45: this author outlines the options briefly. His entire article deals with penal and non-penal pastoral options prior to dismissal of a cleric for graver offences as stated in Can.1395. He also deals with the requests made by the National Council of Catholic Bishops of the USA to derogate from the can.1395, which makes judicial process mandatory in case of dismissal for graver crimes. See also, Beal, pp.660-6 and 672-682.

[46] Can.1399 (1917 Can. 2222).

[47] Can.1321 (1) compares with Can. 2195 of the 1917 Code.

[48] Can 1341 (1917 Can.2214).

[49] The judicial process is resorted to when there is likelihood of a perpetual penalty in the nature of a dismissal from clerical state or a declaration of an excommunication Can.1342 (2). Offences involving such penalties must be tried by a collegiate tribunal of three or five judges depending on the gravity and complexity of the case: Can.1425 (1). The comparable provisions in the 1917 Code are Cans. 1933 and 1576.

[50] Can.1718 (4). There is no provision similar to this in the 1917 Code. However, Can. 1942 of the 1917 Code leaves the discretion to the Ordinary to proceed or not with the judicial trial and Can. 1946 (1) required the investigator to submit his opinion to the Ordinary. See, CLSGB, p.954, para.3344.

At the conclusion of the prior investigation, the Ordinary must issue a decree to the effect that the prior investigation is concluded and the result is one of the following: first, to have recourse to administrative action; second, to have recourse to a judicial process; third, to have recourse to neither administrative action nor judicial process. Before that the Ordinary should hear two or more judges or experts.[51] The Ordinary can revoke or change this determination, which he has made should new evidence call for a different decision.[52]

Upon conclusion of the prior investigation, the determination not to resort to administrative action or judicial process does not necessarily mean that the suspect has not committed the alleged offence. A number of reasons may call for such determination: (1) the absence of *sufficient proof* renders the Ordinary unable to arrive with moral certitude at a decision to impose a penalty; (2) even though there is evidence of the commission of the offence, the requisite *imputability* to attribute to the suspect has not been elicited in the prior investigation; (3) even if there is sufficient proof of commission of the offence and imputability, the Ordinary finds that the alleged offence has neither reached the necessary degree of severity and scandal nor deprived the rights of the faithful gravely as to merit a penalty (Can.1341).[53]

[51] Can.1718 (3) [1917 Can.1942].

[52]Can.1718 (2): the comparable provision in the 1917 Code, Can.1946 (2) Para. 3 required the ordinary to cite the accused at this stage of the investigative process if it appeared certain or at least probable that an offence had taken place. It is interesting to note that the Code of Canons of the Eastern Churches, Can.1469 (3), continues to require the ordinary ("hierarch") to hear the one accused of offence and to hear the promoter of justice prior to coming to any determination regarding initiating a process by which a penalty is to be declared or imposed. This additional step in Eastern Code serves to emphasise the key role of the prior investigation and the degree of certitude, which the ordinary must attain in arriving at his decision.

[53] CALVO, p.222. Refraining from continuance of proceedings in such a instance may be considered as the application of the principle, *de minimis lex non curat.*

The documents pertaining to the investigations should be kept in secret archives,[54] unless a trial is decreed.[55] In the event of a trial, the documents will be presented before the tribunal. There is agreement among jurists that the preliminary investigation is meant to achieve the ends of justice, namely, imposing penalties upon the delinquent and bringing solace to the victim. It is important that the good name of all those involved in the process, including the accused, must be protected.[56]

If a *prima facie* case is made out, and the Bishop has decided to proceed either by administrative or judicial action, he may impose certain interim measures.[57] These measures may take one or more of the following forms or forms similar to them: issuance of a penal precept; surveillance; and professional evaluation and treatment.[58]

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[54] The manner in which these secret documents be secured in the archives is provided in Can.489. Each year documents of criminal cases concerning moral matters are to be destroyed whenever the guilty parties have died, or ten years have elapsed since condemnatory sentence concluded the affair. A short summary of the facts is to be kept, together with the text of the definitive judgment.

[55] Can. 1719 (1917 Can.1946).

[56] See. ALESANDRO, p.43; and PROVOST, p.627.

[57] Can.1722 provides: "At any stage of the process...Ordinary can...after consulting the promoter of justice... prohibit the accused from exercising the ministry...or ecclesiastical office...etc.". See, also Paulson, p.106: according to him these measures amount to a kind of "leave of absence". Leave of absence does not imply guilt but is a procedure similar to that used by many organisations, when a member is under investigation for some reason or other.

[58] There is agreement among the jurists that the bishop is empowered to resort to these interim measures by administrative decree under Can.1722 This interim decree is to be distinguished from the final administrative decree, which he may impose after a summary inquiry with two assessors under Can.1720. See, GRIFFIN, "Imposition of Administrative Leave against and Accused" *Roman Replies and CLSA Advisory Opinions*, 1988, ed. SCHUMACHER, W. and CUNEO, J. (Washington: CLSA); see also, Beal (2), p.293.

Penal precept: for instance, in the case of a sexual offence, the Bishop may issue a directive forbidding the suspect unsupervised contact with certain types of person.[59]

Surveillance: in the case of a parish pastor who is accused of an offence, the Bishop can dispense with the right to live in the parish.[60]

Professional evaluation and treatment: the accused cannot be coerced into this measure, since that would violate his right to privacy under Can. 220. However, Paulson is of the view that if evidence against the accused is strong, then the Bishop can invoke Can.1044 (2) to declare the accused as "impeded to exercise orders" and issue a directive accordingly.[61]

3. ANGLICAN APPROACHES.

The details of penal process in disciplinary matters vary as between the legal systems of the forty-four autonomous churches of the Anglican Communion.[62] However, the following represents a description of the general principles which emerge from these legal systems. Prosecutorial discretion in disciplinary matters largely rests with the Ordinary of the diocese (typically the bishop). Usually, on receipt of a complaint, the Bishop seeks an explanation from the suspect either in writing or by personal

[59] Can.277 (3) empowers the bishop to provide rules and enforce them so as to protect his clergy from having dangerous acquaintances. Under the 1917 Code, Can.2310 provides for a precept or injunction. See, ROCCA, p.581.

[60] Normally change of residence is by way of expiatory penalty (Can.1336). However Cans.1740-1747 give authority to the bishop to take appropriate measures upon, "Pastors whose ministry has become detrimental or ineffective". Administrative leave under Can. 1722 is an exception to the rule stated in Can.1336. See, Paulson, p.665. Under the 1917 Code, Can. 2311, there was a similar provision for surveillance *(vigilantes).* LOVER "Penal Remedies of the Code of Canon Law" in *Canon Law Studies* 404 (Catholic University, Washington, 1960), p.155-162.

[61] PAULSON, p.666. His position conforms with the commentary of CLSGB, para.2036, p.566

[62] See generally DOE, N. *Canon Law in the Anglican Communion* (Oxford, 1998).

interview. Depending on the nature of the complaint, the Bishop may appoint another (typically the archdeacon) to conduct a preliminary investigation to determine whether the case is one which should go forward for trial in the appropriate tribunal (commonly the diocesan court) or one which can be dealt with in some other way with greater advantage to the interests of the Church and greater benefit to the members of the church who are especially concerned.[63]

Those who present a charge must do so in writing (commonly called the 'Articles of Presentment') and referred to the Bishop's court, which is the final arbiter whether action should proceed or not. Provision may also exist for complainants to lodge an appeal against the decision of the Bishop.[64] In cases involving bishops, the metropolitan or other designated authority

[63] Sri Lanka, Const. Ch. 41 Rule 10; Hong Kong, Can.33.4: House of Bishops or the standing committee of the diocese decides whether a prima facie case is made out: Hong Kong, Can.33.5, if the cleric or the bishop is convicted by a secular court, this case should be inquired by the standing committee of the Diocese prior to action to be taken by the church; North India, Const., Ch. V, section ix, clauses 1 & 3; Nigeria, Can.35: the bishop makes the initial decision whether to abandon proceedings or not, which is subject to appeal, first to the Primate and then to the General Synod.

[64] Nigeria, Can.XIV. 3,5&35; Ireland, Const.VIII.15: the bishop must appoint a commission of inquiry to determine whether a *prima facie* case is established: based on the report the bishop makes the final decision: if the bishop does not stay proceedings within one month after the issue of the report, the matter will go for trial; Hong Kong, Can.33.4, the House of Bishops (when a bishop is the accused) or the standing committee of the Diocese will decide whether a *prima facie* case is made out; South Africa, Can.39.3; Australia, Const.IX.54.3; Papua New Guinea, Can.3 & 5(b): if the accused is a bishop, then the House of Bishops decides whether to proceed to trial and in the case of a cleric the bishop's decision via the diocesan court is subject to an appeal to the Provincial Court; North India, Const.II.V.IX.3 (similar to Papua New Guinea); New Zealand, Can. D.XII.1 & D.III.4; ECUSA. IV.3.14 (in the case of a priest or deacon) and ECUSA IV.3. 42 (in the case of a bishop) provide that the Review Committee must render a confidential report to the Church Attorney whether a prima facie case is made out or not.

determines whether a *prima facie* case exists.[65] With laypersons, the Bishop decides on the course of action to be taken.[66]

3.1. THE POSITION IN THE CHURCH OF ENGLAND

In the Church of England, in conduct cases, on receipt of an allegation against a priest or deacon, the Bishop must ascertain whether the suspicion is justified by summoning both parties for an interview.[67] Further action will not follow if the Bishop finds that the suspicion is unjustified.[68] If in his opinion the suspicion is justified, he may appoint an examiner to determine whether there is a *prima facie* case to go to trial. At this stage an adviser may aid the parties.[69] The examiner must request affidavits to be

[65] Sri Lanka, Ch. 43 Rule 8; Wales, Rule III.5: whether or not a petition and statement shows a *prima facie* case is determined by the President of the Provincial court; ECUSA, Can. IV.3.27 &42: a review committee consisting of five bishops, two priests and two lay communicants will determine whether there is a prima face case: a confidential report of the church attorney is to be given to the committee within 120 days after receiving the statement: the committee will deliver its decision whether a prima facie case is made out or not.

[66] Sri Lanka Const. Ch.40 rule 2.

[67] Ecclesiastical Jurisdiction Measure 1963, s. 23(1): Doe, p.146: Hill (2), p.131: Moore p.120: examiners are appointed for each diocese, and must be barristers or solicitors: An examiner's task closely resembles that of a committing magistrate. For Rule 17 (according to which the investigatory committee decides whether there is a case to answer) of the Rules of the Church in Wales Disciplinary Tribunal, see Doe, *The Law of the Church in Wales* (2002) 355. Formerly, the comparable provisions in the Church in Wales stated that on submission of the notice by the Registrar to the President of the Provincial Court, the latter determined whether a *prima facie* case was maintainable against the respondent: the President was allowed to permit the parties to present oral arguments: Wales *Rule* III.5; ECUSA Can.IV.3.5,14 &15: the Diocesan Review Committee by majority vote determines whether a *prima facie* case is made out.

[68] EJM, s.23 (1); EJMRule 5(1964): the Bishop must communicate the dismissal of the complaint to the accused, the complainant and the Registrar.

[69] EJM, s.23 (1): EJMRule 6(1964): the Bishop must notify the Registrar about the reference to an examiner, who it to be selected according to the Second Schedule of the of the 1963 Measure: the Registrar then within 7 days of the receipt of the Bishop's communication must inform the complainant and the accused that they should be present before the Examiner on a specified day.

presented by both parties.[70] He may also require the parties to be present in person to give evidence on oath.[71] The examiner must reduce his decision to writing and deliver copies to the parties, the Bishop and the Registrar of the diocese where the case is to be heard.[72] The accused at this stage may plead guilty, in which case the Bishop may pass the censure.[73] If the accused maintains innocence, process continues to trial in the Consistory Court of the diocese.[74] The Bishop's discretion to veto proceedings had not been recommended by the Lloyd Jacob's Report which led to the enactment of the relevant legislation.[75] There is no appeal against the Bishop's veto nor is he required to give reasons for his decision.

In the event that the accused is a Bishop, similar provisions will apply, except that a Committee of three Bishops, including the Archbishop, should conduct the inquiry .[76] If the accused is

[70] EJM, s.24 (1); EJM Rule 7 (1) (1964): within 14 days after receiving notice of the name of the Examiner, the complainant shall lodge with the registrar the original and one copy of the evidence and two copies of the list of witnesses he intends calling; EJM Rule 7(3) (1964) provides for similar information to be deposited with the Registrar 14 days after the service of copies and lists by the complainant.

[71] EJM, s.24 (3); EJM Rule 8 (1964): the Examiner shall fix the date and place of the inquiry not less than 28 days after his election. The Registrar must give not less than 14 days' notice in writing of the time and place so fixed to the complainant and the accused. The Examiner is empowered to adjourn the inquiry and the parties may apply to the Registrar for postponements. The Examiner may allow such requests and the Registrar will give notice to the parties of the postponements.

[72] EJM, s. 24(3): EJM Rule 10 (1964): Hill (2), p.131.

[73] EJM, s. 31: EJM Rule 11(1964): See also the section on guilty pleas.

[74] EJM Rules 12-19(1964).

[75] EJM, s.23; Doe, p.146; HL Deb, Vol.249, 1963, p.1435 at 1455-70; HC Deb, Vol.680, 1963, p.1164ff. Vol.681, p.343 at 350.

[76] EJM, s. 33(3): EJM Rule 19 (1964): the Registrar shall communicate to the parties the composition of the Committee of Inquiry and the Assessor: within 14 days of the receipt of this information, the complainant shall lodge the original and 5 copies of the affidavits of evidence and the list of witnesses: within 14 days after the service by the complainant of the copies of affidavits, the accused shall

an Archbishop, the three senior diocesan Bishops (other than the complainant) constitute the panel. The Committee of Inquiry (as distinguished from an Examiner in the case of priests and deacons) must be aided by an assessor.[77] Evidence is received and the Committee hears the parties.[78] The majority decision is communicated to the archbishop of the other province (in the case of an accused archbishop) or to the Upper House of Convocation of the relevant province (in the case of any other bishop).[79] If there is a case to answer, then the Committee will specify the offence and nominate a promoter (equivalent to a prosecutor in secular law) to proceed with the trial before the Commission of Convocation, which is the court of original jurisdiction in conduct cases for bishops.[80]

In the Church of England for offences involving doctrine, ritual or ceremonial, the bishop of the diocese before whose registrar the complaint is laid must afford to the accused (a deacon or a priest) and the complainant an opportunity for an interview in private with him either separately or together. Thereafter, the Bishop shall decide whether to abandon proceedings or present the matter for trial or shall refer the complaint to a further inquiry to ascertain whether there is a *prima facie* case.[81]

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lodge with the Registrar original and 4 copies of the affidavits and the list of witnesses.

[77] EJM, s. 33: who is a barrister at law with ten years experience and a communicant.

[78] EJM, s. 33(6): EJM Rules 20-21 (1964): adjournments and postponements are allowed in a manner similar to the provisions stated earlier in the case of clerics and deacons.

[79] EJM, s. 33(9); EJM Rule 22 (1964): Copies of the decision shall be sent to the parties as well.

[80] EJM, s.33 (7).

[81] EJM, s 39(1); EJM Rule 29 (1964): If the bishop of the diocese decides that no further step be taken in the matter of the complaint, he must notify the complainant, the accused and the Registrar; ECUSA IV.3.21 (a) On charges against a bishop for doctrinal offences, the "statement of disassociation" signed by

If the accused is a bishop such determination will be made by the Archbishop, who may refer the complaint to an inquiry.[82] If the accused is an archbishop the decision whether there is a *prima facie* case is determined by a formal preliminary inquiry.[83] The (preliminary) inquiry may be conducted by a committee. When the accused is a priest or deacon the committee of inquiry will consist of a member of the Lower House of Convocation, two from the Upper House and two chancellors appointed by the Dean of the Arches and the Auditor. If the accused is a bishop or an archbishop the committee will consist of an even number of persons appointed by the Upper House of Convocation, the Dean of the Arches and the Auditor, and a Barrister or a person who holds or has held a high judicial office.[84] On receipt of the affidavits[85] from the complainant and the accused, the Committee of Inquiry must proceed to fix the time and place at which the inquiry will be held.[86]

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10 bishops will be examined by the House of Bishops: unless one-third of the bishops consent for further action, proceedings are brought to rest.

[82] EJM, s. 40; EJM Rule 29 (1964):If the Archbishop of the diocese decides that no further step to be taken in the matter of the complaint, he must notify the complainant, the accused and the Registrar; Hill (2), p.134.

[83] EJM, s. 41.

[84] EJM,s. 42; EJM Rule 30(1) (1964); The Registrar must, as soon as he knows the composition of the Committee constituted under s. 42(3) of the Measure 1963 to enquire into the complaint, give notice in writing of names of the Committee to complainant and the accused.

[85] EJM Rules 30(2)-(4) (1964): Within 14 days of the receipt of the notice of the appointment of the Committee of Inquiry, the complainant must lodge originals and the necessary number of copies of the evidence in the form of affidavits which he proposes to lead and a list of witnesses he intends to summon under Section 42(5) of the Measure 1963: within 14 days after the receipt of the complainant's affidavits, the accused must lodge with the Registrar the necessary number of copies of the affidavits and the list of witnesses which he proposes to present as evidence.

[86] EJM Rule 31(1)-(4) (1964): The Committee is empowered to adjourn or postpone as and when necessary, but at least 7 days notice must be given of the changed dates.

The Committee of Inquiry may decide that there is no case to answer or it may decide that there is, in which case it must specify the offence for trial by the Court of Ecclesiastical Causes Reserved.[87] The Upper House of Convocation then appoints a person to prosecute the complaint.[88] There is yet a third option available to the Committee: it may decide there is a case to answer but nonetheless dismiss the complaint on one of three grounds, namely, (a) that the complaint is too trivial: (b) that the offence was committed under extenuating circumstances; or (c) that further proceedings would not be in the interests of the Church of England.[89]

A draft Measure, which seeks to reform the system of clergy discipline in the Church of England, proposes retention of the Bishop's veto. On receipt of a complaint against a cleric after the initial scrutiny by the Registrar, it is the Bishop who decides to take one of five options: (1) to drop further action; (2) to conditionally defer (which can be revived if the accused commits another offence; (3) to direct conciliation; (4) to impose a penalty by consent; and (5) to direct further investigation with a view to proceed for trial.[90]

3.2. A JUSTIFICATION FOR THE EPISCOPAL DISCRETION TO PROSECUTE.

With respect to the Church of England, Helmholz sees the prosecutorial discretion reposed in the Bishop by the Ecclesiastical Jurisdiction Measure 1963 as one of the cogent

[87] EJM Rule 33 (1964): Copies of the decision must be sent to the Registrar, the complainant and others as specified in Section 42(9) of the Measure of 1963.

[88] EJM, s. 43; Hill (2), p.135.

[89] EJM, s. 42 (7); Hill (2), p. 135.

[90] DCDM, ss.11 and 12; Under Authority, p. 67, 72-80: it was the intention of "Under Authority" "to bring the bishop into potential disciplinary matters right from the beginning": the Draft Measure takes up the suggestions made by the Under Authority.

means of preventing irresponsible accusations.[91] For Helmholz this rule, generally common throughout the Anglican Communion, which reserves clerical discipline (and in some churches lay discipline) to the bishop, reflects the classical canon law.[92] It is contended that there is no inherent violation of fairness to allow an official of the status of a bishop at the pre-trial stage to use his discretion, where other safeguards, which will be discussed later, are brought into play.

By way of contrast, Evans sees certain dangers in reposing too much reliance in the bishop with regard to prosecutorial discretion, without adequate safeguards: "There have been worrying recent cases, such as that where a bishop refused to investigate a serious complaint from a lay member of the church; the cleric concerned was a senior priest in the diocese with whom the bishop 'had to continue to work' and it seems *prima facie* not unlikely that this fact influenced the Bishop's decision". There ought in such cases to be "a place of resort for the complainant".[93]

In the matter of prosecutorial discretion, it is important to have consistency and accountability. Some concerns over the

[91] HELMHOLZ, "Discipline of the Clergy: Medieval and Modern" in 2002 *Ecc.LJ* 189 at p.197 (hereafter cited as Helmholz); EJM, s.19 (b): "(i)t is the bishop who 'shall either decide that no further step be taken' or else 'refer the complaint for inquiry by an examiner'...if the bishop decides against proceeding, 'no further action shall be taken by any person in regard thereto".

[92] HELMHOLZ, pp.189-195: the author traces numerous occasions commencing from eleventh and twelfth centuries where the clerical discipline were made by the bishops: exceptions being when a cleric feloniously took a layman's wife or for notorious crime (*crimina excepta)*, such as simony, heresy and treason (p.191): though the Act Book contain numerous cases brought by laymen to secure redress for misconduct by clergy (e.g. John Pay who was caught committing adultery in a field: the vicar of Malling in the diocese of Rochester who refused last rites; clerics who heard confession in taverns), it was the bishop who technically prosecuted clerics: the reason being that the medieval court proceedings were essentially inquisitorial, as introduced by Pope Innocent III in 1216 AD, the formal accusation still rested with the bishop (p.195): in inquisitorial proceedings the accuser is also the judge.

[93] EVANS, p.88.

episcopal discretion have been expressed judicially. In *Julius v Lord Bishop of Oxford*: "Individual discretion might lead to the exhibition of total disregard of uniformity in the administration of Ecclesiastical Law, which would be at odds with the principle of the law in any similar matter".[94] Hence the happy medium in the prosecutorial discretion suggested by Evans merits consideration:[95] "In law, the claim that legitimate expectation has not been met provides a notion of 'concerns', which can be set beside that of 'rights'. A person with a legitimate expectation does not have a right, but he has an interest in an outcome, which he can reasonably hope for, and if he is unfairly denied that outcome he may have grounds for redress. So substantively as well as procedurally, a priest ought to be told of his rights and helped to understand what he can legitimately expect".

3.3. INTERIM MEASURES PENDENTE LITE.

In many churches of the Anglican Communion, the Bishop is empowered to suspend or inhibit a cleric from office pending action (*pendente lite)*, typically: "If the Bishop finds that suspicion is warranted, then the Bishop may withdraw the licence (in the case of a cleric) pending trial".[96] The Church of Nigeria adds a salutary clause in relation to suspension pending trial only

[94] Julius v Lord Bishop of Oxford [1880] 5 HL 216.

[95] EVANS, p.92.

[96] Sri Lanka, Const. Ch. 41 Rules 3 and 9 (b); Doe (1), p.87; the Church of Ireland seems to have no provisions relating to interim measures; Scotland, Can.54.11; New Zealand, Can.D.III.9: the primate may even suspend a bishop in a grave matter; South Africa, Can.39.7; Canada, Const.IV.2-7 provides detailed provision governing temporary inhibitions: bishop must give the order in writing: the accused can seek a review of this decision from committee: after 90 days of original order the bishop can extend it for another 90 days; ECUSA,Can.IV.1.2-4 deal with inhibition of clerics: ECUSA,Can.IV.1.5-7: extensive and detailed provisions are included: in the case of a cleric, the bishop at first issues a temporary inhibition specifying reasons and terms describing acts inhibited: there is a hearing before the review committee of the diocese if requested by the accused: certain conditions are stipulated for inhibition: reviewable after 90 days: similar provisions apply in case of inhibition of a bishop pending trial.

in the case of immoral conduct "provided that a trial on the charge shall take place as soon as possible".[97]

In the Church of England, when an action is pending in an ecclesiastical or secular court, the bishop may by notice inhibit the cleric from performing services.[98] The priest so inhibited may within fourteen days nominate a fit and proper person to perform his duties. The Bishop is at liberty to accept this nomination or appoint any other person as he deems fit. Any interference by the accused with the substitute cleric would amount to a new offence.[99] The draft Measure retains similar interim measures with a qualification: "suspension shall continue until the expiry of three months following service of notice or until the end of proceedings...but if proceedings are not concluded, a further notice of suspension may be served".[100] It had been suggested that the suspension order should be subject to review by the tribunal at the behest of the accused or to be dispensed with *in*

[97] Nigeria, Can.XIV.37: Any priest....accused of immoral conduct ...may be suspended from the exercise of ministerial duties by the bishop...for the prevention of scandal ...provided that a trial ...takes place as soon as possible"; DCM, s.36 (an accused priest or deacon), s.37 (an accused bishop) may be suspended according to the Draft Clergy Measure; Wales, Const.XI.27: the Disciplinary Tribunal "shall have power to suspend..."; Hong Kong, Can.33.7: "If a priest or deacon who is charged with an offence...the bishop in whose jurisdiction the priest is working...upon probable cause, suspend the priest...until judgement..."; Ireland, Const.VIII.57 & 58: 'diocesan court or the Court of the General Synod may inhibit a person...from office *pendente lite*".

[98] EJM, s.77.

[99] EJM, s77 (2), (3); Wales, Const.XI.27& 28: the bishop or the Disciplinary Tribunal has power to suspend any person under investigation pending action: under Rule 9, the Investigating Committee too has similar powers: the bishop of the diocese may make suitable arrangements for a substitute.

[100] DCDM, s.36; When the accused is a bishop or an archbishop, the suspension is imposed by the archbishop of the province in the case of the former, and in the latter case it is imposed by the archbishop of the other province with the consent of two most senior bishops of the province where the accused archbishop holds office.

lieu of an undertaking by the accused. The draft Measure does not take up the suggestion.[101]

4. COMPARATIVE ANALYSIS.

1. In both international law and Catholic and Anglican canon law, prosecutorial discretion takes place in the environment of a pre-trial stage, at which point the relevant authorities must determine whether there is *prima facie* case before the accused is presented for trial.

2. The formal documents of international law, namely the ECHR and the ICCPR, do not deal comprehensively with prosecutorial discretion. In contrast, the canonical systems of the Roman Catholic Church and the churches of the Anglican Communion, particularly in England and Sri Lanka, have extensive provisions on this matter.

3. In contrast to international law, canonical tradition provides justifications for prosecutorial discretion: to achieve the ends of justice, correction of the offender, and maintenance of the good name of the innocent.[102]

4. Both in the Roman Church and in the Anglican churches, the Ordinary is invested with a considerable discretion as to how to conduct the pre-trial inquiry. The Roman Catholic Church which adopts an inquisitorial approach, with the Ordinary or his delegate acting in a manner similar to an inquiring magistrate *(juge d'instruction)* in European continental jurisdictions. However, churches in the Anglican Communion invoke an adversarial approach requiring the prosecuting officer and the suspect to present their cases before the Ordinary or his delegate. The Ordinary in both communions ultimately decides whether there is a *prima facie* case.

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[101] UNDER AUTH.. p.90; ECUSA IV.12.1 (c): suspension imposed by the trial court must be passed by a two-third vote of the Vestry and approved by the Ecclesiastical Authority.

[102] 1983 Code Cans.220 & 1717. ECUSA IV.3.27.

5. Even though the formal documents international law do not contain explicit provisions on prosecutorial discretion, the international tribunals have implicitly recognised the prevalence of this feature in the pre-trial process. Connected with the pre-trial prosecutorial discretion are certain rights that are available to the accused, one of which is the right to legal assistance: lawyers must have access to the suspect unsupervised by prison authorities;[103] and the trials must take place without delay.[104] In the case of the Roman Catholic pre-trial, the suspect does not have a right to legal assistance, whereas in many of the Anglican churches, there is provision for legal aid, Church of England being typical.[105]

6. The formal documents of international law, ECHR and the ICCPR, do not provide guarantees to a suspect at the pre-trial stage.[106] However, several key guarantees are the outcome of international judicial decisions.

7. One of the fundamental pre-trial rights spelt out by the European Court of Human Rights is the right to be free from disguised convictions.[107] When an accused is subject to an investigation for a particular offence, he must be made aware for what offence he is being investigated. This fair trial norm is mirrored in the Code of Roman Catholic canon law, since the Ordinary must be assured that there is "at least semblance of truth", which in effect means that there should reasonable suspicion of an offence.[108] In the Anglican churches the complainant must submit a written complaint to avoid vexatious

[103] *Can v Austria,* App.No.5049/71, 43 CD 38 (1973).

[104] Victor Ivan Kankanamage v Sri Lanka

[105] EJM 23(1).

[106] Pre-trial right under consideration in this comparative analysis are those closely connected with trial rights. Thus matters, like arrest, detention and the like which are guaranteed under Art.5 of the ECHR do not form a part of this thesis.

[107] *Funke's* case, *British.YBIL* 64 (1993) p.310-11

[108] 1983 Code Can.1717.

accusations.[109] Both communions seem to comply with this international fair trial norm.

8. International law includes the right to be free from statements in the case record to the effect that there is disguised conviction. Statements to the effect that the 'accused was very probably guilty' or 'if not for his death, the appeal court would have found him guilty' violate the pre-trial right of the accused.[110] Though this kind of right is not explicit in either of the formal documents of the churches of the two communions, the suspect would no doubt not be left with a record of guilt without a trial.[111]

9. The justification for pre-trial rights, in the nature of 'being free from disguised convictions' and 'being free from a record of probable guilt in the file without a trial', emerges from the right of presumption of innocence afforded to the accused under Art.6(2) of the ECHR and Art.14(2) of the ICCPR: until a person is found guilty by a competent authority beyond reasonable doubt, he must enjoy the right of liberty. On the one hand, an individual has the right to freedom, on the other there is also the requirement of public policy, that the wrong doers must be punished and the innocent set free. Since the State has bestowed on the prosecutor this duty, he also must be equipped with the accompanying powers to realise this objective. Therefore, the international fair trial norms intervene to strike a balance between these contending interests. The international tribunals have held that arrests, searches, detentions and use of other interim measures which are necessary for proper investigation of offence do not violate the right to a fair trial.[112]

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[109] Nigeria Can.XIV. 3,5&35; Irish Const.VIII.15; Hong Kong Can.33.4, South Africa Can.39.3; Australia Const.IX.54.3; Papua New Guniea Can.3& 5(b).

[110] *Nolkenbockhoff v FRG,* Series A, no.123 (1987): in this case, the applicant was one of the heirs, who claimed reimbursement of the costs of proceedings from the State.

[111] Can.200: "No one may unlawfully harm the good reputation which a person enjoys...".

[112] *Funke's* case, *British YBIL* 64 (1993), p.310

10. Churches in both communions provide for interim measures, such as suspension or inhibitions *pendente lite.*[113] Canonical provisions in both communions well accord with the international norms. The interim measures must be proportionate to the requirements necessitated in gathering evidence, prevent interferences by the accused on witnesses and destruction of incriminating evidence. Any excesses, such as in *Dweer v Belgium,* where a viable alternative was available, would be unfair and violate Art. 6(1) of the ECHR. The European Court of Human Rights said such excesses would be counter to the dignity of a person, which the Convention is required to guarantee. Though there are no decided cases in the churches as to excesses on interim measures, this international norm would well accommodate with the canonical provisions.

11. In international law, pre-trial investigation may result in two options: (1) if there is a *prima facie* case, then trial will proceed, unless the accused pleads guilty; and (2) if there is no case to answer, a *nolle prosequi* may be entered. If there is a *prima facie* case against the accused, the prosecutor has a discretion to resort to several courses of action. These are not spelt out by the international tribunals, but canon laws in the churches of both communions provide detailed provisions. The Ordinary in the Roman Catholic Church may decree: that a process to impose a penalty either by administrative action or judicial trial may be commenced; or any other extra-judicial procedure may be adopted.[114] Provisions in the Anglican churches are quite similar, except that there is no formal procedure similar to Catholic "administrative action".[115]

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[113] 1983 Code, Can.1722; EJM, s.77: Sri Lanka Const. Ch.41 rules 3 and 9. See the appropriate sections on "interim measures' under the two communions.

[114] Can.1718 (1).

[115] EJM, s. 23: the accused may plead guilty or the Ordinary may direct the prosecutor to commence trial. See also, EJM Rule 11 (1964).

12. The international tribunals have stated that the effects of *nolle prosequi* must be carried out without delay.[116] This means the prosecutor is required to discharge the accused. The formal documents of churches in both communions provide for *nolle prosequi.* In the Roman Catholic Church the Ordinary issues a decree to the effect that proceedings have been brought to an end.[117] In the Church of England there are more detailed provisions in respect of a *nolle prosequi*:[118] "The Committee of Inquiry may decide that there is no case to answer...even if there is a case to answer...(a) the complaint is too trivial; or (b) that the offence was committed under extenuating circumstances; or (c) that further proceedings would not be in the interests of the Church of England". Such canonical provisions governing *nolle prosequi* are compliant with international norms. Some concerns have been referred to with regard to the prosecutorial discretion exercised by the CDF, which may not conform with international standards.

13. The justification for reposing prosecutorial discretion on Ordinary is stated in the formal law of the Roman Catholic Church: "The Ordinary is to consider whether, to avoid useless trial, it would be expedient, with the parties' consent, for himself or the investigator to make a decision according to what is good and equitable, about the question of damages".[119] According to some Anglican canonists, placing prosecutorial discretion with the Ordinary aims to prevent irresponsible accusations.[120]

14. The following provisions governing pre-trial investigations under Roman Catholic canon law, as expressed in canonical literature, have no explicit parallels either in the

[116] *Englert v FRG:* Stavros, p.118.

[117] Can.1718 (3).

[118] EJM, s.42 (7).

[119] Can. 1718 (4).

[120] HELMHOLZ, p. 189. EVANS, p. 88 is of the view that reposing the ultimate discretion with the Ordinary may lead to certain practical problems: see the section dealing with "prosecutorial discretion" in this chapter.

international law or in the Anglican canon law, although they are quite compatible with each other: (1) preliminary investigations must be completed within the shortest time possible;[121] (2) where a cleric is accused of an offence, the investigator must be a cleric;[122] and (3) findings of civil procedure may be used in the canonical preliminary investigation.[123]

5. CONCLUSION.

A comparative study of prosecutorial discretion reveals the following similarities between international law and the canon laws of the Roman Catholic Church and the churches of the Anglican Communion.

1. Effective use of prosecutorial discretion is a *sine qua non* for a fair trial. This enables the parties to a trial, especially the accused, to be spared of violations of his fair trial rights. In other words, effective use of prosecutorial discretion enables the judicial and administrative systems to achieve the ends of justice: to punish the offender and spare the innocent. The difference is that the formal documents of international law do not speak of prosecutorial discretion explicitly, whereas the canonical documents do.

2. At the end of the preliminary investigation, the prosecutor has discretion to prosecute or use other alternatives such as extra-judicial procedures upon a suspect who becomes an accused provided a *prima facie* case is made. The prosecutor may enter a *nolle prosequi* depending on his discretion, even if there is certain amount of evidence, which in his judgment may not 'meet the demands of justice'. He has no option but to discharge a

[121] MCGRATH, p.158.

[122] *Appoliarus* 43 (1970).

[123] KELLY, Chapter 1. However, in the Church of England a conviction in a secular criminal court may be used as the basis for simplified disciplinary proceedings: EJM 1963, ss. 55 and 56.

suspect, no sooner he finds that there is no evidence to subject the suspect to a trial.

The following guarantees found in international law are not seen in the canon laws of the two Communions but nevertheless the systems are mutually compatible: the rule against 'disguised convictions', which is firmly established in international law, envisages: having the record of the suspect clean, when no conviction is procured; being free from the imposition of penalties or demand payment of costs for 'probable convictions' or 'most probable convictions', and the like.

The following features related to or consequent on prosecutorial discretion in the Roman Catholic Church have no parallels either in international law or in the Anglican canon laws. However, these too are quite compatible with international norms as well as Anglican canon law: (1) completion of the pre-trial investigation within the shortest possible time; (2) the investigation of a suspect cleric to be conducted by a cleric; (3) the use of civil (secular) investigations within the canonical process. Roman Catholic canon law has no space for legal assistance and aid to the suspect during pre-trial investigations, whereas in Anglican canon law, it would be the norm. Since international law caters for both inquisitorial and adversarial systems, the question of legal aid is open-ended.