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Sex Offenses—Offensive Sex: Some Observations on the Recent Reform of Ecclesiastical Penal Law

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Abstract: In recent years, the sexual abuse of minors and vulnerable adults in the Catholic Church has received much attention. This is also true of the related changes to ecclesiastical legislation. Less attention, however, has been paid to other aspects of the reform. The revised penal law of the Code of Canon Law, in any case, demands closer study from the point of critical legal studies. It is striking that while the reform focused on improving the legal protection of minors, it also had rather detrimental effects on the legal standing of women in the church. Reading the revised law, it appears that the reform missed the chance to improve the legal situation of the mostly female adult victims of clerical sex offenses and abuses of power. It rather spotlighted "female" offenses such as abortion in contrast to typical "male" offenses such as homicide, and it moreover criminalized women who attempt ordination. Thus, the regulations of the reformed penal law not only generally leave the systemic causes of abuse untouched, but also establish norms which reinvent or even exacerbate abusive structures. The latter finally sustain clericalism and reinstitutionalize gender inequality, commonly identified as factors fostering abuse.

Keywords: canon law; Code of Canon Law; penal law; sexual abuse of minors; sex offenses; celibacy; women in church; ordination of women; abortion; presumption of innocence

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1. Introduction

The sexual abuse of minors and vulnerable adults in the Catholic Church has received much attention over the past couple of years. The devastating findings on sexual violence in church have brought attention not merely to the pastoral and institutional structures where the abuse took place but also to the law which enabled them to solidify. Hence, when faced with the need to react to abuse in church, ecclesiastical authorities were also confronted with the task of a legal reform. On the one hand, the law had proven unfit to protect minors and vulnerable adults in church, and on the other, it had failed to effectively sanction sex offenders. It took about ten years for the reform of canonical penal law to be realized. The specific reform of Book VI of the Code of Canon Law was highly anticipated when the new norms were published in June 2021 (see Francis 2021a). As expected, they show greater sensitivity to the sexual abuse of minors and vulnerable adults. Nevertheless, it is particularly noteworthy that while the reform focuses on improving the legal protection of minors, it is detrimental with regard to women in church. Indeed, when reading the revised norms through the lens of critical legal studies, it becomes clear that the reformed penal law of the Code not only fails to improve the legal standing of women in church but even tends to increase their marginalization. In the following, I examine this issue in three steps. First, I analyze how the revised penal law expresses a reformed view of sexual abuse and spiritual violence against individuals in church: minors and vulnerable adults on the one hand (Section 2), and adults on the other (Section 3). Second, I study the regulations which fall short of this aspiration. A closer look at the reformed penal law reveals regulations which mostly leave the systemic causes of abuse untouched, but also norms which reinvent or even exacerbate abusive structures. Such structures, in fact, sustain clericalism and reinstitutionalize gender inequality, factors that are identified in a

large part of the professional public (of which some authors are listed below) as facilitating abuse. The revised penal law is arguably even more restrictive to women than it used to be, as it now spotlights "female" offenses such as abortion in contrast to typical "male" offenses such as homicide. It moreover specifically targets female attempts to penetrate the privileged circles of male clergy by criminalizing women who attempt ordination (Section 4). Third, I examine some procedural consequences deriving from the recent reform of penal law (Section 5). I then conclude by summing up my findings. Despite the many merits of the recent reform of ecclesiastical penal law, some parts of canon law may still be regarded as a support for abusive structures in church, particularly with regard to its view on violence, both sexual and spiritual, and its use of violence against women (Section 6).

2. Sexual Abuse of Minors and Vulnerable Adults

The new penal law of the church has attracted particular attention for readapting the legislator's view of the sexual abuse of minors and vulnerable adults.

2.1. Revised Qualification of Child Abuse

Sexual abuse used to be part of a list of diverse criminal offenses by clerics who violated their duty to lead a celibate life (see former canon 1395 §2 CIC/1983). Here, the abuse of minors was one of several offenses "against the sixth commandment of the Decalogue", coming after references to sex offenses committed by force or threats and public sex offenses. These offenses were all to be punished by commensurate penalties, including, in severe cases, dismissal from the clerical state. Under the old legislation, the offenses were clearly understood as delicts against clerical chastity. Hence, the focus of the law in the former canon 1395 §2 CIC/1983 was not on the victims and their sexual integrity, but on clerics and their obligation to lead a celibate life. This classification created much criticism, not merely among canonists but also among state bodies examining the institutional responses to the sexual abuse of minors. Among these bodies, the Australian Royal Commission into Institutional Responses to Child Sexual Abuse was the most prominent. In its final recommendations, the Royal Commission in fact suggested that Australian bishops "request the Holy See to amend the 1983 Code of Canon Law to create a new canon or series of canons specifically relating to child sexual abuse" (Recommendation 16.9, Commonwealth of Australia 2017, p. 51). The suggestion to integrate the sexual abuse of minors into its own norm or complex of norms also entailed qualifying these offenses differently, the legislative focus shifting from celibacy to the integrity of minors. The Commission proposed that "[a]ll delicts relating to child sexual abuse should be articulated as canonical crimes against the child, not as moral failings or as breaches of the 'special obligation' of clerics and religious to observe celibacy" (Recommendation 16.9, Commonwealth of Australia 2017, p. 51; on these recommendations, see also Costigane 2020, pp. 305–7). Similarly, when questioning canonist Gordon Francis Read as an expert witness in a public hearing during the Independent Inquiry into Child Sexual Abuse in England and Wales in 2019, the interrogator criticized the common classification of sexual abuse as an offense against celibacy. In responding, Read acknowledged the unfortunate classification of the Code and its dealing with sexual abuse; he suggested removing sexual abuse from the list of clerical offenses against celibacy and inserting it into the section of offenses against human life and freedom. Read states, "There's another section, slightly later on, which deals with offences against human life and freedom, including, for example, abortion, physical assault, and so on. To me, as with the Australian Commission, it seems to me that would be a much better place to locate this particular area of legislation, not least because, of course, it applies not only to clergy, but to, indeed, anyone" (IICSA 2019, p. 135). Read goes on to add, "I think the law, as it is structured, focuses on the perpetrator and not on the victim, and I think that that's a balance that perhaps could, and should, be addressed in future changes" (IICSA 2019, p. 173). In the recent reform of penal law, the qualification of the sexual abuse of minors was revised in the recommended way. The mention of sexual abuse

was removed from the list of other sex offenses of former canon 1395 §2 CIC/1983 and given its own place in a new canon 1398 CIC/1983. This canon is now part of the so-called "offenses against human life, dignity, and liberty" (canons 1397–1398 CIC/1983). It follows canon 1397 with its penal norms on homicide, abduction, mutilation, and abortion. This new classification is an obvious and long overdue acknowledgment that sexual abuse is an offense that goes beyond the issue of celibacy as a violation of the victims' dignity and liberty.

2.2. Grooming and Child Pornography

The new ecclesiastical legislation also broadens the punishable offenses against minors in several respects in comparison to the old regulation in the Code. To the scope of sexual abuse, it adds grooming for pornographic purposes as well as the acquiring, retaining, exhibiting, and distributing of pornographic material (see canon 1398 §1 CIC/1983). The mention of grooming in ecclesiastical penal law is unprecedented. The new norm contains a problematic restriction, though. In commenting on the reform of ecclesiastical penal law, canonists Ed Condon and JD Flynn have criticized that the norm only renders grooming an offense when performed with pornographic purposes and not when performed with other sexual intentions (see Condon and Flynn 2021).

The new norm in the Code on the possession and distribution of pornographic material takes up an offense which was already punishable, following article 6 §1 no 2 of the Congregation for the Doctrine of the Faith's "Norms on Grave Delicts". However, while this regulation restricted the punishable offense to pornography of minors under the age of fourteen, the revision of penal law adjusted the age to include all minors, in accordance with concerns raised by the Australian Royal Commission. The Commission had suggested that the Australian bishops encourage the Apostolic See to change the law in this respect (see Recommendation 16.9, Commonwealth of Australia 2017, p. 51). The recent legal reform thus removed this age limitation so that possession and distribution of pornographic material of minors is now generally subject to punishment. The punishment for the mentioned offenses consists of removal from office and other penalties such as possible dismissal from the clerical state in severe cases.

2.3. A Broader View on Vulnerable Victims

In accordance with the legal revision introduced by the 2001 Motu Proprio *Sacramentorum Sanctitatis Tutela* (see John Paul II 2001), the offense of sexual abuse of minors was adjusted to include all minors under the age of eighteen. The original norm of the 1983 Code referred to the age of sixteen. Legislation following article 6 §1 no 1 of the Congregation for the Doctrine of the Faith's "Norms on Grave Delicts" also broadened the circle of possible victims to include persons "who habitually have an imperfect use of reason" as well as others to whom the law grants equal protection. It is interesting to note that the legislation refrained to use the term "vulnerable adults" as commonly used in the debates on sexual abuse in church and also used by Francis in his Apostolic Letter *Vos estis lux mundi*. Such an indeterminate expression, however, was probably deemed not suitable for codified law (on the problematic ambiguity of "vulnerability" see Costigane 2020, pp. 308–10). Nonetheless, this decision may be criticized for narrowing the scope of possible victims. While *Vos estis lux mundi* understands as deserving protection "any person in a state of infirmity, physical or mental deficiency, or deprivation of personal liberty which, in fact, even occasionally, limits their ability to understand or to want or otherwise resist the offense" (article 1 §2 lit b), the new canon 1398 CIC/1983 limits victims to adults who constantly have an imperfect use of reason.

2.4. Expanded Circle of Punishable Offenders

Where the old Code merely addressed clerics as possible offenders, the revised law also addresses those who enjoy an ecclesiastical dignity or hold an office or function in church (see canon 1398 §2 CIC/1983). The amendment of the offense of sexual abuse to

include members of religious institutions appeared in *Vos estis lux mundi*, yet the inclusion of ecclesiastical officeholders is unprecedented. This change is also consistent with the Australian Royal Commission's proposal that Australian bishops urge the Apostolic See to amend the law to include as possible offenders "any person holding a 'dignity, office or responsibility in the Church' regardless of whether they are ordained or not ordained" (Recommendation 16.9, Commonwealth of Australia 2017, p. 51).

2.5. The "Sixth Commandment of the Decalogue"

The reform of ecclesiastical penal law has received much praise for its more comprehensive view of sexual abuse with regard to possible offenses, victims, and offenders. What has sparked continuous criticism, however, is the fact that the law still speaks of sexual abuse as an "offense against the sixth commandment of the Decalogue". This expression has been long criticized for being both opaque and misleading (on the history and use of the expression in canon law as well as on its widespread criticism, see (Provost 1995)). The wording is opaque insofar as it fails to use a clear terminology to describe the punishable offense. Linguistic ambiguity, in any case, is particularly problematic in penal norms, as it is a key principle of legal fairness to precisely convey to legal subjects which acts are punishable offenses. Furthermore, the phrase "offense against the sixth commandment of the Decalogue" is fundamentally misleading for the offense that appears in the sixth commandment of the Decalogue, which is, in fact, adultery. However, the ecclesiastical magisterium and the legislator have used this expression as an umbrella term to denote all kinds of sexual misconduct for centuries. As Gordon Read notes in his hearing during the Independent Inquiry into Child Sexual Abuse in England and Wales, "I mean, historically, the church has always seen any kind of sexual sin as an unfolding of the sixth Commandment" (IICSA 2019, p. 131). Canonist Ronny Jenkins has rightly criticized that this practice of using one expression to cover all kind of sexual offenses is unusual compared to secular legislation, which frequently provides for a detailed classification of sexual offenses (see Jenkins 2004, p. 121). In church, some clarity nonetheless derives from jurisprudence which has worked out a list of sexual abuse offenses against minors covered by "the sixth commandment of the Decalogue". The Congregation for the Doctrine of the Faith's (2020) *Vademecum* provides a list of offenses under no 2, which mentions "sexual relations (consensual or non-consensual), physical contact for sexual gratification, exhibitionism, masturbation, the production of pornography, inducement to prostitution, conversations and/or propositions of a sexual nature, which can also occur through various means of communication". Canonist Brendan Daly explains, "This description reflects the jurisprudence of the Congregation [of the Doctrine of the Faith, addition by the author]. These offenses include all actions that have a clear sexual intent, including any sexual activity the minor consents to or not" (Daly 2020, p. 198). Hence, the expression "offense against the sixth commandment of the Decalogue" has gained greater precision in ecclesiastical jurisprudence, while it is nevertheless not a helpful expression to add to the clarity of the penal norm of canon 1398 CIC/1983. In the end, however, recent legislation, which realizes many of the demands for reform with respect to the sexual abuse of minors, was evidently unwilling to revise the traditional language referring to sex offenses.

3. Sexual Violence with Adult Victims

The retaining of this wording was not merely an editorial oversight, as shown by the fact that legislation relies on the very same phrasing in other norms as well. It reappears in canon 1385 CIC/1983 in the regulation of the so-called *crimen sollicitationis* as the offense of priests who use confession to seduce penitents "to commit a sin against the sixth commandment of the Decalogue". Moreover, it emerges three times in all three paragraphs of canon 1395 CIC/1983 dealing with clerical offenses against celibacy.

3.1. Sexual Violence as a Disciplinary Issue

As mentioned, the reform of canonical penal law removed the sexual abuse of minors from the list of clerical offenses against celibacy and made it part of the “offenses against human life, dignity, and liberty”. In this context, it is thus all the more striking that sexual violence against adults was not added to this particular section. Whenever a cleric “by force, threats, or abuse of his authority commits an offense against the sixth commandment of the Decalogue or forces someone to perform or submit to sexual acts” (canon 1395 §3 CIC/1983), these offenses, which fall under the section on “offenses against special obligations”, are regarded as worthy of punishment insofar as they violate the clerical obligation to lead a celibate life. As they do not belong to the “offenses against human life, dignity, and liberty”, legislation according to its current classification regards rape and sexual assault as punishable primarily because these offenses are incompatible with a celibate lifestyle. Consequently, they are mainly disciplinary issues. As offenses against clerical discipline, they are to be punished with just penalties, not excluding dismissal from the clerical state. As the reform left the regulations on sexual misconduct of clerics with or against adults widely untouched, one could dismiss this as insignificant. Nevertheless, one should not miss the implication of this decision to leave the regulations largely as they were. In such a major reform of legislation, particularly revolving around clerical sex offenses, it is striking that the reformers left the issue of sex offenses against adult victims who are not generally vulnerable widely untouched. It is incomprehensible that this was an editorial mishap. Rather, one must assume that legislation intentionally kept sexual violence against adults a mere issue of clerical discipline. The revised law accordingly does not view adults who fall prey to clerical sex offenders and who are capable of a sound use of reason as deserving of special protection or attention in church. Unlike minor victims of sexual abuse, the legislator does not take into account the sexual integrity of adult victims or their right of self-determination.

3.2. Clerical Authority and Abuse of Power

What is new, however, in the revised canon 1395 §3 CIC/1983 is that it includes as deserving of punishment not merely the use of force or threat in matters sexual, as mentioned by the former norm, but also the abuse of clerical authority to commit a sex offense. This idea already appeared in *Vos estis lux mundi* (see article 1 §1 lit a). It has raised criticism among canonists due to the problem of uncertainty of what constitutes abuse of authority. As canonist Helen Costigane observed with regard to *Vos estis*, “the question is raised as to how widely the term ‘abuse of authority’ is interpreted, whether it applies to a member of the clergy just because they are in a position of authority, and the extent of the vulnerability in the alleged victim” (Costigane 2020, p. 310). Ed Condon and JD Flynn, in commenting on the recent reform of penal law, further noted “that the legal notion of the abuse of authority is a concept with relatively little canonical jurisprudence, and room for a great deal of subjective disagreement—in short, something that can be difficult to prove, or disprove” (Condon and Flynn 2021). Condon and Flynn acknowledge that there are rather unambiguous cases of abuse of office with sexual intent, as in the case of former Archbishop of Washington Theodore McCarrick. However, in many other cases, it is arguably more difficult to distinguish what role is played in the sexual misconduct by the fact that the offenders are officeholders. Condon and Flynn see a practical legal challenge emerging from the regulation, stating, “priests and defense advocates are likely to continue to argue that it’s unjust for an allegation like abuse of authority, which can seem legally nebulous, to be the deciding factor between losing or not losing the clerical state permanently, especially in allegations involving a single occurrence of misconduct, or as a compounding factor in an otherwise consensual but prohibited relationship” (Condon and Flynn 2021). Their remark is valid with regard to the current law and its application. What their remark also reveals, however, is that the problems derive precisely from the qualification of transgressions regulated in canon 1395 §3 CIC/1983 as offenses against celibacy. If one reads the norm through the lens of celibacy, one may come to Condon

and Flynn's conclusion that "abuse of authority" might play a role in "in an otherwise consensual but prohibited relationship". On the other hand, if we understand the norm as referring to offenses against the sexual integrity and self-determination of adult victims, it is hardly possible to imagine a "consensual" relationship whenever sex is based on the abuse of power. Abuse of authority, then, is exactly the factor that makes the notion of a consensual sexual relationship between adults untenable. Similar to the use of force or threats, it is the abuse of power derived from a position of authority, such as clerical status or an ecclesiastical office, which compels adult victims to engage in a sexual relationship without their free consent. The lack of clarity on this point in current law is precisely because canon 1395 §3 CIC/1983 is tied to clerical obligations such as celibacy. In fact, in the same way as the sexual abuse of minors, its rightful place is among the "offenses against human life, dignity, and liberty". Admittedly, such a re-classification would not solve the practical problem noted by Condon and Flynn of proving whether sexual acts were ultimately forced by an abuse of power. Nevertheless, this is equally difficult to prove in cases of force or threats in sexual relations between adults. While proving the use of force, threats, or abusive power to compel adult victims into sexual actions can be extremely difficult, each of these three strategies of enforcing sex overrides the free will of adults, compelling them into non-consensual sex.

The mentioned confusion to mistake abuse of authority to be a possible factor in a consensual relationship, in any case, is supported by the law itself. The failure of recent legislation to pay attention to the sexual integrity and self-determination of adults obscures that the insertion of "abuse of authority" into the law mentions an element that turns adult sex into an offense. It draws a red line which differentiates a regular use of power and authority from an *abusive* exercise of power, which turns adult sex into non-consensual sex. Secular legislation and adjudication have a long tradition of defining this distinction. The church could easily benefit from their findings if it were to acknowledge that adult sex also deserves protection from acts which violate the sexual integrity and self-determination of others.

4. Targeting Female Offenders

4.1. Attempted Ordination of Women

The Catholic public paid much attention to the changes in ecclesiastical legislation with regard to the sexual abuse of minors. Due to this focus, there was a tendency to overlook the fact that the recent reform of penal law also introduced a new offense into the Code of Canon Law: the attempt to confer ordination on a woman (see new canon 1379 §3 CIC/1983). This particular sanction is not new. It was introduced into canon law in 2007 (see Congregation for the Doctrine of the Faith 2007; Congregation for the Doctrine of the Faith 2010, article 5). What is novel is that the recent reform of penal law inserted the attempted ordination of women as a penal norm into the Code. The norm dictates that both the minister who attempts to confer ordination on a woman and the woman who attempts to receive the ordination incur a *latae sententiae* excommunication reserved to the Apostolic See. This legislation accordingly qualified female ordination as one of the most gruesome ecclesiastical offenses on the order of sexual abuse of minors, violation of the sacramental seal, and desecration of consecrated hosts. Offending clerics may even be punished by dismissal from the clerical state. Theologian Denise Starkey observed with regard to this similar treatment by the Congregation for the Doctrine of the Faith, "Many were stunned when the church not only included women's ordination in the document, but also equated the ordination of women with the evil of pedophilia" (Starkey 2015, p. 184).

4.2. A Prominent Placing in the Code

As the content of the norm is not new, it is again important to ask why it deserves special consideration. Formal changes, however, can have serious implications. When legislation arranges norms, alters legal contexts, and couples certain norms, it is often not coincidental. To fully comprehend a law, it is necessary to pay attention to compositional

and editorial decisions. Hence, in this instance, one may ask what the legislation intended to communicate by not merely inserting an existing penal norm into the Code but by giving the violation of ordaining women a most prominent place among the "offenses against the sacraments". The attempted ordination of women is now part of the *first* canon in the relatively long list of offenses against the sacraments (see canons 1379–1389 CIC/1983). It directly follows the norms which criminalize the attempt to celebrate the Eucharist without having received priestly ordination (see canon 1379 §1 no 1 CIC/1983) and to administer the sacrament of penance without being capable to do so (see canon 1379 §1 no 2 CIC/1983). As the third offense against the sacraments mentioned in this list, the attempted ordination of women has a more visible place in the law than the desecration of consecrated species (see canon 1382 §1 CIC/1983). It is also more exposed than *crimen sollicitationis*, the offense of priests using the occasion of confession to seduce a penitent (see canon 1385 CIC/1983). It thus appears that discouraging women from attempting to enter the ranks of the clergy and of ecclesiastical hierarchy is imperative to the legislator. He not only found the penal norm to deserve a central place in the current Code, but also in the list of offenses against the sacramental structure of the church. The message is clear: Attempting to ordain women is not merely an attack on ecclesiastical discipline, such as sexual violence of clerics against adult victims, but an attack on the sacramental constitution of the church itself.

4.3. Ending the Debates on Women's Ordination

One may also interpret this particular legal reform to be politically motivated. Ed Condon and JD Flynn suggest as much in their comment on the reform of ecclesiastical penal law. The authors interpret the insertion into the Code of the attempted ordination of women as mainly a political signal to end the recent debates, especially those voices in the local churches which insist on the possibility of female ordination. As Condon and Flynn write, "Given recent debate about the possibility of ordaining women to the diaconate, and the calls from some German bishops to move forward on the ordination of women—first to the diaconate and later to the priesthood—the new text of the canon could be a signal from Rome that any attempt to forge ahead with these plans will be treated as a breach of ecclesial communion, and punished accordingly" (Condon and Flynn 2021).

4.4. Abortion as a Female Offense

In this political light, it is interesting to study those norms where recent legislation evidently saw the need to change the law either by revising old norms or adding norms to the Code which had not been part of the codified law. Yet it is similarly revealing to study some of the norms where the legal reform, despite reasonable expectations, provided no change at all. The ecclesiastical offense of abortion is one example. Many canonists such as James Coriden have long argued that "there is an urgent need to reform the Church's law on the crime of abortion" (Coriden 1973, p. 195). The offense of abortion nevertheless survived the reform of canonical penal law unchanged. The regulation reads, "A person who actually procures an abortion incurs a *latae sententiae* excommunication" (former canon 1398, now canon 1397 §2 CIC/1983). This norm in fact falls within "offenses against human life, dignity, and liberty", a classification which was denied to sexual offenses against adults, as discussed in Section 3. While the Code dedicated a separate canon to the offense of abortion before the reform, the norm is now part of a canon which contains several offenses such as homicide, abduction, imprisonment, mutilation, and grievous bodily harm (see canon 1397 §1 CIC/1983). This connection is striking as it couples the typical "female" offense of abortion with typical "male" offenses. Canon law admittedly punishes not only women who undergo an abortion but also men who carry out an abortion (e.g., medical personnel); nevertheless, the offense as such revolves around the female body and, thus, primarily directs punishment at women. The offense exists because the church perceives women and their procreative duties in a particular normative light that necessitates the moral condemnation of a women's decision to terminate pregnancy. In any case, to emphasize the heinousness of abortion, ecclesiastical legislation traditionally

regards it as necessary to add a *legal* disqualification to the moral condemnation. Here, abortion is not merely treated as a sin but also as a crime. Hence, the law criminalizes women as the natural offenders of abortion, and it also criminalizes men supporting them as their technical partners in crime. Thus, even though punishment includes men, it seems fair to understand abortion as a typical "female" offense. It therefore stands in clear contrast to the typical "male" offenses criminalized in the preceding §1 of canon 1397 CIC/1983. The 2020 criminal statistic for Germany, for instance, notes 2610 male suspects compared to 571 female suspects of homicide, 122,408 male suspects compared to 21,643 female suspects of deprivation of liberty, and 280,436 male suspects compared to 73,515 female suspects of bodily harm (see Bundeskriminalamt 2020b).

4.5. Different Standards of Punishment

Bearing in mind the sex difference regarding the offenses of canon 1397 CIC/1983, it is worth noting how the punishments for the offenses differ as well. While abortion is sanctioned with *latae sententiae* excommunication, ipso facto bringing about the excommunication on the offender upon successfully committing the offense, the other more "male" offenses are to be punished ("*puniatur*") with just penalties. Hence, the related punishments do not befall the offenders upon committing the offense but require an ecclesiastical ordinary to prosecute the offenses and impose sanctions—which is extremely rare in ecclesiastical practice. Consequently, abortion as a typical female offense is punished ipso facto with one of the most severe penal instruments of ecclesiastical penal law, the *latae sententiae* excommunication. In contrast, most male offenses against human life, dignity, and liberty are in theory punished with an undetermined "just" penalty, but in practice, frequently remain wholly unpunished. It is therefore apparent that ecclesiastical penal law treats abortion more strictly than even first-degree murder (see also Coriden 1973, p. 195). That is rather surprising, considering that ecclesiastical authorities tend to compare abortion with murder. Indeed, quite recently, Pope Francis called abortion precisely that in a press conference on the return flight to Rome after the Apostolic Journey to Slovakia (see Francis 2021b). Theologian Gina Menzies, in the Irish Times, noted that the way ecclesiastical legislation treats abortion in comparison to other offenses signals that "the Catholic Church considers that abortion is the worst sin that a human can commit, and that terrorism and child sexual abuse are less serious sins", taking into account that suspects of these other offenses are "entitled to due process before any penalty is imposed" (Menzies 2018). While the overwhelming male majority of murderers never face ecclesiastical sanctions, women who undergo an abortion incur excommunication. Critical voices such as Menzies' have repeatedly addressed this injustice over several decades. Their criticism, in any case, has not moved legislation to address the issue in the recent reform of ecclesiastical penal law. On the contrary, recent legislation has even emphasized the unequal treatment of "male" and "female" offenses by coupling them in one canon.

4.6. Different Papal Policies

The legislator's decision to abide with criminalizing abortion has a particular sting in light of the current debates in the United States. In June 2021, a majority of the United States Conference of Catholic Bishops voted in favor of preparing a document on the Eucharist which could pave the way for denying communion to Catholic politicians who support pro-choice positions such as the current U.S. President Joe Biden. The decision appears to have been made against the advice from Rome. Francis recently openly opposed the idea of denying communion to politicians who support pro-choice positions. Instead, the pope suggested that the pastors should deal with these issues in a pastoral instead of a political or legal way (see Francis 2021b). The U.S. bishops, in the meantime, seem to have relented, stating, "There will be no national policy on withholding Communion from politicians" (United States Conference of Catholic Bishops 2021). They were apparently persuaded by the papal wish to avoid political confrontation. Francis as a politician and a pastor seems to oppose treating abortion as a legal matter whenever political leaders and their access

to communion are concerned. On the other hand, as a legislator, he avoided tackling the situation of women who undergo an abortion and ipso facto incur an excommunication excluding them from communion. Obviously, in this case, he did not see the pastoral solution as appropriate and decided instead to abide by the law's severe response.

5. The Impact of Procedural Issues

The recent reform of ecclesiastical penal law was merely a revision of Book VI on the substantial penal law of the church, not a reform of procedural law. The legislation thus left Book VII on ecclesiastical processes untouched, including its norms on the penal process (see canons 1717–1728 CIC/1983). It is nevertheless worth considering to what extent reforming penal law may be successful in improving the treatment of sexual abuse and violence cases if the reform does not involve procedural law. After all, procedural law is what guides church authorities' response to ecclesiastical offenses. Therefore, special attention should be paid to the suitability of existent procedural law for ensuring due process and fair trial both to suspects of ecclesiastical offenses as well as to their victims. It is also important to consider if and to what extent the new substantial norms touch upon procedural issues regarding the prosecution of sexual offenses in church.

5.1. Priests Prosecuting Clerics

As elaborated in Section 2, the recent reform of penal law took pains to revise canon law to respond more effectively to cases of sexual abuse of minors in church. Nonetheless, it failed to address some of the procedural challenges of these cases. One problem is that the abuse proceedings against clerics are entirely run by priests. Following the Congregation for the Doctrine of the Faith's "Norms on Grave Delicts", only priests may be called upon as judges, promotors of justice, notaries, procurators, and advocates in these cases (see articles 10–14). While the Congregation for the Doctrine of the Faith can grant a dispensation from this requirement for the aforementioned offices and functions (see article 15), church authorities rarely make use of this option. Ultimately, the regular restriction of these offices and functions to priests attests to the congregation's and church authorities' reluctance to include laypeople, and even deacons, in abuse cases against clerics. Helen Costigane has critically commented on the "non-involvement of independent laypeople" (Costigane 2020, p. 313) by noting that it is evidence of clericalism. She observes, "those who have expressed concerns about the effect and impact of clericalism on the whole sexual abuse crisis cannot fail to notice that the process ... can be carried out entirely by clerics" (Costigane 2020, p. 312).

5.2. Prescription in Abuse Cases

When looking closer at the revised norms of penal law, one can find that the recent legislation tackled some procedural issues. One obvious change is the new regulation on prescription in the Code, which sets a twenty-year time period for the prescription of abuse cases (see canon 1362 §1 no 2 CIC/1983) in accordance with the Congregation for the Doctrine of the Faith's "Norms on Grave Delicts" (see article 7). The Code originally stipulated a period of five years before these cases came under the statute of limitations. The extended period for abuse cases is not new per se, but its insertion into the Code is an important signal. By extending the time frame, the legislator acknowledges the particular challenge for minor victims of sex abuse to come forward with accusations.

5.3. The Obligation to Take Action

While the old canon 1341 CIC/1983 was rather hesitant in obliging the ordinaries to initiate judicial or administrative procedures in penal cases, namely only after other pastoral means had failed to repair the scandal, restore justice, and better the offenders ("*proceduram ... promovendam curet*"), the revised canon 1341 CIC/1983 emphasizes that the ordinaries *must* take action and initiate procedures when they find that pastoral means have failed to achieve the intended purposes ("*proceduram ... promovere debet*"). Hence, with

current canon law, diocesan bishops and other authorities who preside over communities of the faithful can hardly ignore accusations of sexual misconduct against their clergy anymore. Otherwise, they might become liable to prosecution themselves (see new canon 1371 §6 CIC/1983; see Francis 2016; see Francis 2019, article 1 §1 lit b).

5.4. The Presumption of Innocence

Another obvious amendment of ecclesiastical penal law with procedural implications is the introduction of the presumption of innocence into the current Code. Many voices have rightly emphasized the importance of the reform of ecclesiastical penal law, which finally implements the presumption of innocence into the law (e.g., Condon and Flynn 2021). The old law did not explicitly contain the presumption. However, as Ronny Jenkins has shown, it also did not contain any presumption of guilt. As canonical procedural law obliges the accuser to meet the burden of proof (see canon 1526 §1 CIC/1983), defendants are to be acquitted whenever their culpability is not proven in a way that makes the judges morally certain of guilt (see canon 1608 §4 CIC/1983). While one might interpret these provisions as effectively containing the presumption of innocence (see Jenkins 2004, pp. 117–18; Brown 2018; Renken 2020, pp. 228–29), Jenkins is critical of this interpretation. He notes that an acquittal due to a lack of proof that a defendant is guilty is not identical with presuming his or her innocence. The insertion of the presumption of innocence into the Code responds to that dearth. This development of canon law thus seems to accord with the principle of due process common in most secular legal orders. The revised canon 1321 §1 CIC/1983 now starts off the section on "Those who are liable to penal sanctions" with declaring, "Any person is considered innocent until the contrary is proved".

5.5. Why Now?

Modern procedural law typically requires that criminal courts prosecuting a crime presume the defendant to be innocent until proven otherwise. In any case, the history of ecclesiastical penal law and penal procedural law has long survived without positivizing this principle of due process. Given how long it took for the ecclesiastical legislator to incorporate the presumption of innocence into positive canon law, it is worth asking why it was expedient for the legislator in the last reform of canonical penal law to finally implement the principle into the Code. Examining the context, one can observe that legislation obviously began to see the necessity to do so, after the past two decades have put increasing pressure on ecclesiastical authorities to prosecute allegations of sexual abuse against clerics. While never before in the history of ecclesiastical penal law did legislation see the need to positivize the presumption of innocence, it seemingly found this a necessary step now, as ecclesiastical penal procedures are merely engaged in trying clerics for abuse. Ronny Jenkins noted shortly after the U.S. American Bishops' Conference had taken radical action to address sexual abuse in 2002 that the presumption of innocence was rather limited in canon law. Jenkins observed how the legislation changed the bishops' practice, whereby their new policy of "zero tolerance" in fact established a "presumption of guilt" that has dominated the authorities' dealing with suspects ever since. Jenkins remarked, "once an allegation is received, the presumption of bishops is not that the cleric is innocent until proven guilty, but that something did, in fact happen. Such a conclusion then leads to swift and exaggerated steps to remove the cleric from public ministry and view" (Jenkins 2004, p. 116). Ed Condon and JD Flynn, in their recent observations on the reform of ecclesiastical penal law, similarly interpret the implementation of the presumption of innocence into the Code as motivated by the problem deriving from "zero tolerance" policies against clerics accused of sexual abuse. Not only has it become standard procedure in U.S. American dioceses to promptly remove accused clerics from office (see also Coughlin 2003, pp. 990–92), but bishops often refuse to reinstall them later if the allegations are not proven. "In many dioceses", Condon and Flynn write, "the desire to be seen to act swiftly and without hesitation to remove priests accused of serious misconduct has created a class of what many canonists refer to as 'unassignables'—priests whom bishops refuse to

return to ministry even after a canonical process has failed to sustain the allegations against them, because of the possibility of public outcry" (Condon and Flynn 2021). The authors therefore assess the incorporation of the presumption of innocence into the Code as directed to deal with these cases. This is also quite plausible considering that *Vos estis lux mundi* mentions the presumption of innocence when speaking about suspects of sexual abuse under investigation in article 12 §7. It specifically admonishes the investigators that "[t]he person under investigation enjoys the presumption of innocence". One can thus easily see why legislation found the introduction of the presumption of innocence into the Code was deemed necessary in the recent reform of penal law. This decision, however, is also questionable, as it seems to be motivated entirely by the desire to protect accused clerics from prejudgment. Consequently, while this constitutes an important step in due process in church, it is nevertheless unfortunate that pressure must be placed on clerics—clerics accused of sexual misconduct and bishops accused of covering up these cases—to induce ecclesiastical legislation to accord with modern procedural standards.

6. Conclusions

Summing up the observations in the preceding sections, they merge into a more comprehensive picture of how the current law of the church deals with sex and violence. First of all, closer scrutiny reveals that legislation deals with sexual abuse and violence in an ambivalent way. In the context of *sex as violence*, it is noteworthy that the law now treats the sexual abuse of minors and vulnerable adults as offenses which violate the victims' life, dignity, and liberty. At the same time, however, it fails to precisely acknowledge this connection when adult victims are concerned. This failure is not editorial in nature, but rather points at a systemic problem. If adults are not part of the group of vulnerable adults, the law continues to view sexual violence of clerics against them merely in the light of clerical discipline. It continues to pay only minor attention to the sexual integrity of adult individuals and their right to sexual self-determination. It is therefore questionable whether the church can successfully fight sexual abuse among their clerical ranks if it is difficult to unambiguously identify from the above-mentioned canonical legal qualifications the recognition of sexual integrity and self-determination as rights of the individual, which are worthy of the church's protection.

A further aspect which deserves mention points to the systemic fostering of abusive structures. Specifically, current legislation contributes to the unequal treatment of male and female victims of sex offenses in church. The reform of the penal norms shows that recent legislation paid most attention to offenses where the victims are predominantly male, as with the sexual abuse of minors in church. Little attention, by contrast, was devoted to offenses where most victims are female, as with sexual violence against adults. One of the shocking findings of the German so-called MHG Study funded by the German Bishops' Conference is that 62.8 percent of those affected by child abuse were male, while only 34.9 percent of the victims were female (see MHG Study 2018, A.2). The numbers differ in other contexts, as evidenced by the 2020 criminal statistic for Germany. The report mentions 825 male victims compared to 7955 female victims of minor age, making 9.4 percent of the victims male, and 90.6 percent female. The debate as to why in church the victims are to a strikingly high degree male is ongoing. The authors of the MHG Study attributed the predominance of male victims in part to the fact that boys traditionally have been altar servers or entered Catholic boarding schools (see MHG Study 2018, A.3). However, they also noted that this explanation alone is not sufficient. The study's authors also cautiously indicated that factors such as celibacy and the Catholic stance on homosexuality might foster suppressed sexual inclinations among the clergy. Ultimately, we do not know enough at present about why clerical abusers have usually targeted boys. Still, the recent reform of penal law took the alarming numbers very seriously. The revision of the law accordingly emphasized the sexual abuse of minors as a heinous offense in church and sought to facilitate the prosecution of these cases.

As discussed in Section 3, sexual violence against adults did not receive the same degree of attention. With regard to these cases, there is no reason to assume that the ratio of victims in church with respect to sex does not mirror the typical breakdown in other criminal statistics. In particular with regard to sexual violence of clerics against adults, which is coupled with spiritual abuse, there is overwhelming evidence that these attacks are mostly launched against women (see Reisinger 2018). We may therefore assume that the vast majority of adult victims of sex offenses are female. For Germany, the 2020 criminal statistic noted 1460 male victims compared to 18,312 female adult victims of sexual violence, making 7.4 percent of the victims male, and 92.6 percent female (see Bundeskriminalamt 2020a). Assuming that the situation in church is similar, the legislation, which improved the law with regard to the predominantly male minor victims, did not do the same for the largely female victims of sex offenses against adults.

I am not comparing these numbers to devaluate the most important step of revising the law on the sexual abuse of minors in church. The reform was essential insofar as it qualified the sexual abuse of minors and of vulnerable adults as "offenses against human life, dignity, and liberty". However, the merit of this revised classification of sexual abuse casts in stark relief the fact that the legislation did not reassess sexual violence against adults in the same way. By not establishing sexual violence against adults as a transgression against human life, dignity, and liberty, the reform represents a failure to deal with a fundamental aspect of the abusive and violent structures in the church. The church, namely, still does not attribute sexual integrity and human self-determination in sexual matters a general value which deserves protection, independently of whether violence affects minors or adults. This legislation thus left one systemic factor of violence in church unchanged. One might also further doubt the value of the reform in fighting abuse against minors. After all, it is unlikely that systems which do not attribute sexual integrity and human self-determination in sexual issues a general value will be successful in protecting minors against sexual abuse. Similarly, it is also unlikely that systems which do not show greater concern for offenses which mostly victimize women will be particularly successful in fighting violence against children. From a critical legal studies perspective, there are many points of discussion for why ecclesiastical legislation did not pay more attention to the evident parallels and interdependencies between sexual violence against minors and against adults.

The view that recent legislation all but ignored women's suffering in church is supported by the fact that it retained abortion as an ecclesiastical offense. My article does not make an argument with regard to the church's general stance on abortion, but it nevertheless remains open to debate, from a critical legal studies' standpoint, as to why the church continues to criminalize abortion given that abortion is also frequently tied to the marginalization of women (see Bong 2021). The current pope in fact argues in other contexts that the problem of abortion should be addressed in pastoral settings, and yet legislation continues to address abortion as a legal issue that criminalizes women who undergo an abortion and the women and men who support them. In light of the current reform of penal law, this leads to an unsettling observation: Where legislation pays little attention to offenses which afflict mostly women as victims, it deals harshly with those cases in which women are the primary offenders. The penal norm on abortion did not merely remain unaltered throughout the reform, but is rather now coupled in one canon with typical "male" offenses such as homicide and grievous bodily harm. The latter, however, are punished less severely than abortion. Thus, while the magisterium often compares abortion with homicide, the law punishes abortion more strictly. Recent legislation even emphasizes this disparity by creating a more visible contrast of "male" and "female" offenses by coupling them in canon 1397 CIC/1983. In doing so, it effectively underscores the obvious imbalance of punishments. Gina Menzies speaks of a "misogynistic legacy" with regard to the church's legal dealing with abortion and suspects that " . . . the rationale for treating abortion as the most heinous sin lies in the fact that the Catholic Church only sees women in terms of maternity, and not as human beings with their own inalienable rights" (Menzies 2018). It is not necessary to speculate about reasons why legislation treats

women in the aforementioned way to ask why the unequal treatment of the sexes is openly spotlighted with contrasting "male" and "female" offenses in one canon.

The observation that legislation in the last reform paid less attention to female victims and more attention to female offenders is also supported by the introduction of a new female offense into the Code: the attempted ordination of women. Again, it must be noted that, as with abortion, offenders punished by the penal norm are also male. However, the offense as such revolves around women and their wish to enter the Catholic clergy. Women who actively oppose their exclusion from the clerical state are criminalized and likewise clerics who support them. Protecting the status quo by criminalizing energetic female attempts to become part of the clergy and thus the highest ranks of the church was evidently so important to the legislation that trespassing this norm was regarded as deserving one of the harshest punishments. Indeed, the sanction involves the Congregation for the Doctrine of the Faith in a similar way to cases of sexual abuse of minors. The message of this regulation is clear: Whenever the offensive sex attempts to enter the traditional male domain, she becomes subject to similar types of punishment as sex offenders. Women who fail to respect their place in church essentially violate the communion in such a profound way that they deserve to be sanctioned in the severest manner.

Besides the fact that the church's criminalizing of women for attempting ordination may be a problematic signal, the gender imbalance cemented by penalizing these attempts could also prove detrimental to the main interest of the past legal reform to improve the church's dealing with sexual abuse. This might be the case if the exclusion of women from the clergy, also with the help of penal norms, lends structural support to preserving church hierarchy as a clericalist system. The MHG Study and other studies on church abuse have suggested "clericalism" is one factor which has contributed to the high number of abuse cases overall. The MHG Study, for instance, described clericalism as male elitism and "a hierarchical-authoritarian system that can lead the priest to adopt an attitude of dominating non-ordained individuals in interactions because he holds a superior position by virtue of his ministry and ordination" (MHG Study 2018, A.3). Hence, the identity of members of the clerical elite is reinforced through the marginalization of laypeople and particularly women. The researchers further noted that they understand sexual abuse to be "an extreme manifestation of such dominance", as "[s]exual abuse is above all also an abuse of power" (MHG Study 2018, A.3). Therefore, the authors conclude that clericalism may be a key cause of abuse and "a specific structural feature of sexual abuse within the Catholic Church" (MHG Study 2018, A.3). They also connect clericalism with a system of covering up abuse, finding that "[a]n authoritarian-clerical understanding of the ministry can lead to church leaders regarding a priest who has committed sexualised violence more as a threat to their own clerical system than as a menace to other children or juveniles" (MHG Study 2018, A.3). This view, then, only encourages "[c]overing events up and protecting the system" (MHG Study 2018, A.3) rather than prosecuting the offenders. Hence, one systemic problem fortifying abusive structures may lie in group cohesion and solidarity among exclusive elites. It is not surprising that members of these circles protect each other to prevent the criminal prosecution of group members. Legislation which perpetuates a purely male clerical system, including with the help of a penal law that harshly sanctions women who want to break into these circles, may be regarded as supporting male elitism and clericalism as systemic features. These, in turn, have permitted abusive structures to flourish in church.

In light of this particular context, it is not easy to assess the recent introduction of the presumption of innocence into positive canon law. Remarkably, legislation only just recently saw the need to establish the presumption as part of positive law in the wake of stripping the ecclesiastical authorities of their earlier discretionary power in dealing with cases of sexual abuse and misconduct. For diocesan bishops and other authorities who preside over communities of the faithful, current canon law makes it nearly impossible to ignore accusations of sexual violence against their clergy. With the imminent risk of becoming liable to prosecution themselves, covering up offenses is hardly an option any

more. It is striking to note that in this precise historical moment where legislation had to oblige the local authorities to rigidly prosecute the cases and stripped them of much of their former flexibility in dealing with these issues, it also saw the need to emphasize the presumption of innocence. Certainly, the historical circumstances of its emergence do not devalue the presumption of innocence as one of the key principles of criminal prosecution. It is one of the major cornerstones of fair prosecution and trials and therefore also has its rightful place among the guiding principles of ecclesiastical penal prosecution and processes. Nonetheless, one may understandably hesitate to simply praise this legislative decision as one wise and long-overdue move to subject ecclesiastical processes to the rule of law and its standards of due process. Given the precise historical moment, some Catholics might have a hard time of suppressing doubts of whether this piece of reform was truly about ensuring due process for all offenders in church or about handing the ecclesiastical authorities a helpful tool to defend clerics against accusations of sexual misconduct and themselves against the accusation of prosecutorial negligence.

Summing up through the lens of critical legal studies: Ecclesiastical legislation rightly used the recent reform of penal law to improve the legal situation of mostly male minor victims of clerical abuse. At the same time, however, it missed the chance to improve the legal situation of mostly female adult victims of clerical sex offenses and abuse of power. Legislation continues to criminalize women who terminate their pregnancy. Moreover, while it draws an equivalence with murder, mostly committed by males, it punishes abortion more severely. Legislation further introduced a harsh punishment into the Code which criminalizes women who attempt to enter the clergy. All things considered, the reform of ecclesiastical penal law has improved the situation of minors in church. By the same token, it has exacerbated the situation of women. One can thus only wonder in this context what is more perplexing—how ecclesiastical legislation deals with women or the fact that nobody seems to care?

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