



The *Investigatio Praevia* (Part I)

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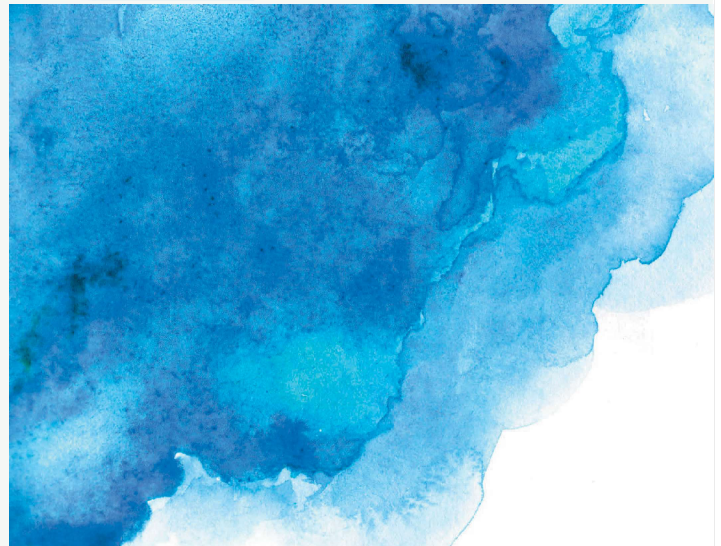
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The *Investigatio Praevia* (Part I)

- Book VII - Trials in the Church
- Before trials, it speaks of preliminary investigation, or *Investigatio Praevia*, cann. 1717-1719.
- Aim = to gather elements to verify the probable existence of criminal behaviour.
- Goal = to decide whether or not to open a penal trial.
- In Part 1 we'll see the objective and subjective element of *Investigatio Praevia*; its legal nature, the subjects involved. Later, in Part 2, will be the practical procedure to conduct this important phase.



The *Investigatio Praevia* (Part I)


A Look at Previous Legislation

- The 1917 Code devoted particular attention to this initial Phase.
- Despite repeal of previous legislation we can get from it useful integrative elements.
- 1917 code gives particular importance to the *Notitia Criminis*.
- This *Notitia* can reach the Ordinary in several ways: e.g., when the Bishop has direct knowledge of the probable delict or he receives a complaint from a member of the faithful.

The *Investigatio Praevia* (Part I)

The 1917 *Codex* spoke about the faculty and not about the duty or obligation of denunciation.

Consider the moral point of view: if I know about a probable delict I have the moral duty to report this.



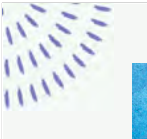
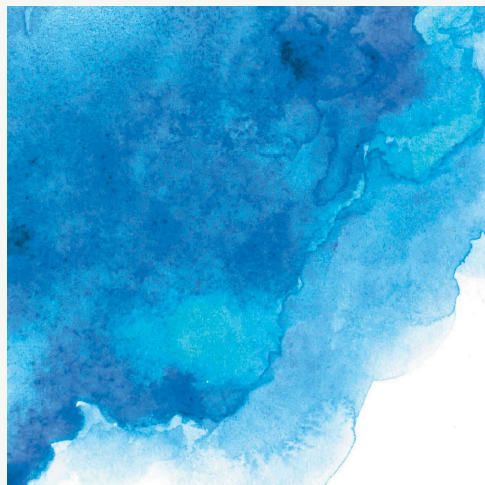
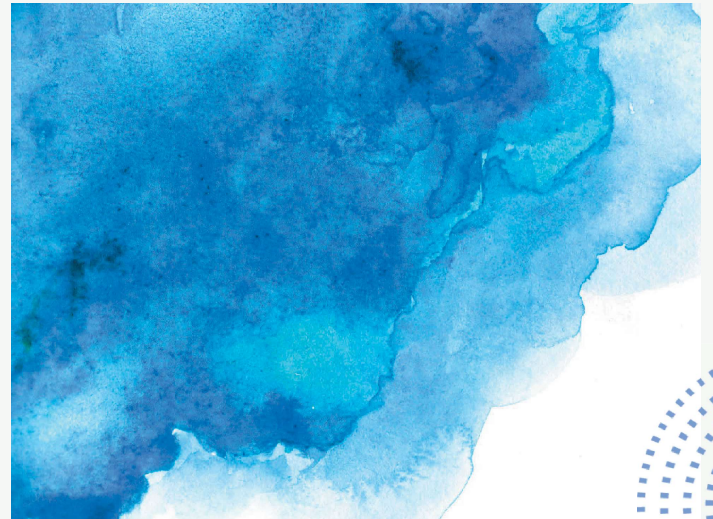
The *Investigatio Praevia* (Part I)

Denunciation had to be

- in writing,
- signed by the complainant and
- addressed to the local Ordinary directly or through the Vicars, the Chancellor, the Parish Priest.

1917 code urged : denunciations coming from a *manifest enemy* of the denounced, those presented by a *vile and unworthy* man and, anonymous denunciations lacking sufficient elements to make the accusation probable

SHOULD NOT BE CONSIDERED.



The *Investigatio Praevia* (Part I)

In this phase = not necessary to prove guilt but

- to provide the names of witnesses and
- to suggest all the tools for the *Investigatio*.





The *Investigatio Praevia* (Part I)

Once ascertained that the *Notitia Criminis* was justified the *Inquisitio* could be carried out personally by the Ordinary or through a Delegate *ad casum*.

The Code asked that the *inquisitor* was not delegated *ad universitatem causarum*.

The *Inquisitor* could not be Judge in a subsequent trial.



Investigations:

- not to harm the good reputation of the suspect and
- to avoid the spread of information about the *fumus delicti*.

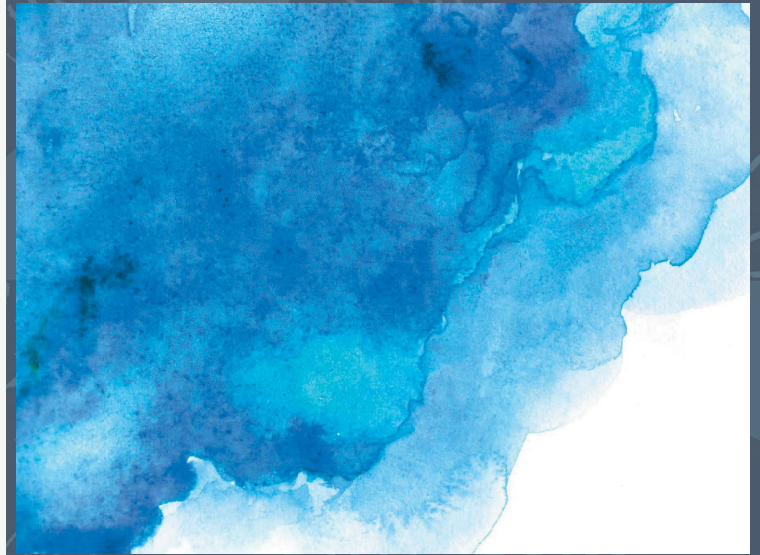
Interrogations: witnesses were asked to observe absolute secrecy.

In such phase we can consider social media such as Facebook, Twitter, Instagram. I always suggest to my students to avoid written documents; witnesses and people involved could be called by a phone call.

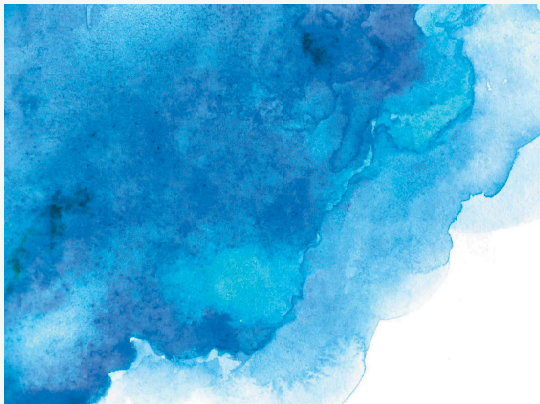
The *Codex* provided one exception to secrecy: the investigator could seek advice from the Promoter of Justice by forwarding him the acts.

Once the *inquisitio* was concluded, the acts were forwarded to the Ordinary together with the investigator's opinion.

At this point, the Ordinary was faced with a threefold possibility provided for by the *Codex* :



The possibilities in the Codex of 1917



- In case of the lack of sufficient elements to prove the plausible commission of the crime; a decree dismissing the case.
- The possibility of the presence of evidence against the suspect insufficient to support a judicial procedure; case archived and records kept.
- Finally, the possibility of the presence of all the elements to proceed with the interrogation of the suspect following a regular summons to appear before the Ordinary.



Investigatio Praevia in 1983 Code

It constitutes an “autonomous juridical institution, common to the judicial and administrative ways (...). It is a procedure of an administrative nature that is not to be confused with other preliminary stages for specific procedures, such as the removal of parish priests (can. 1742 § 1), the dismissal of religious (can. 694 § 2; 695 § 2; 697, 1°) and the application of criminal remedies (can. 50 in relation to can. 1342 § 1).”

M. MOSCONI, *L'indagine previa e l'applicazione della pena in via amministrativa*, in GRUPPO ITALIANO DOCENTI DI DIRITTO CANONICO (curr.), *I giudizi nella Chiesa. Processi e procedure speciali*, XXV Incontro di Studio Villa S. Giuseppe - Turin, 29 June-3 July 1988, Glossa, 192.

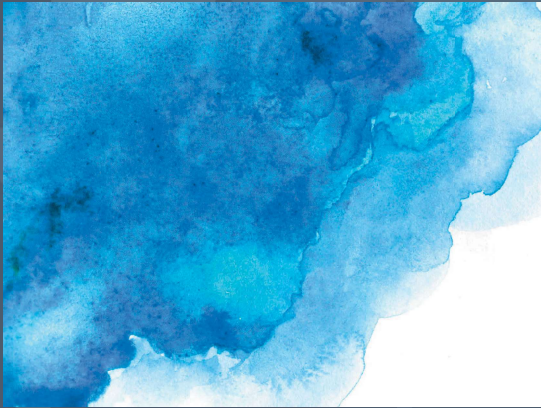


Preliminary investigation \neq constitute a formal process but = moment when data is collected to verify whether there are elements and reasonable grounds to initiate criminal proceedings.

The objectives of the investigation =

- determining the fact of the crime;
- verifying imputability of perpetrator;
- gathering material that could justify the presentation of the accusatory *libellus*; and
- analysing the circumstances in which the probable crime would have been committed.

THE PREPARATORY ELEMENTS OF THE PRELIMINARY INVESTIGATION



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First element to consider = the competent subject is not only the diocesan bishop but the Ordinary or Ordinary of the place.

Per c. 1717, the preliminary investigation arises from at least probable *knowledge* of the commission of a crime.

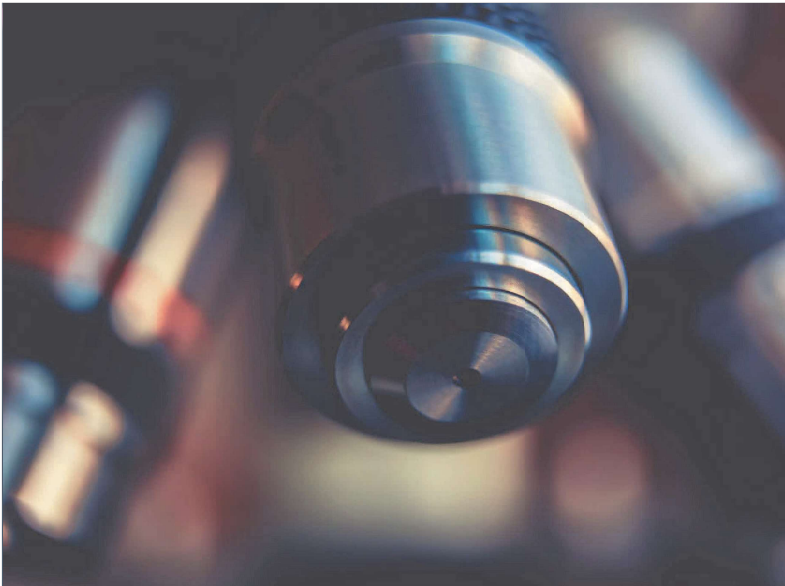
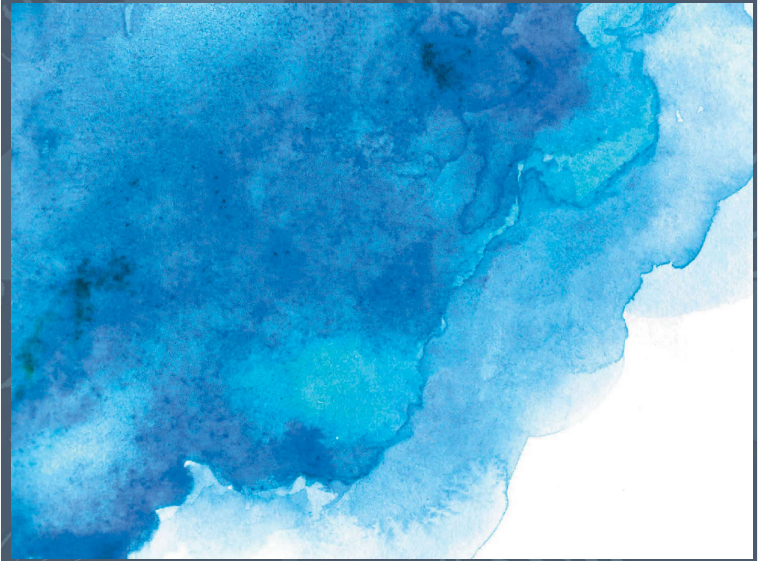
In the *Codex*, more possibilities were envisaged, such as “rumors,” public fame, simple denunciation, the complaint.

1983 CIC does not speak expressly of ways in which the Ordinary learns the facts; “the principles established by the old *Codex* remain applicable in the new legislation, even if it is clear that the silence on this institute corresponds to a desire to place it in lesser evidence.”



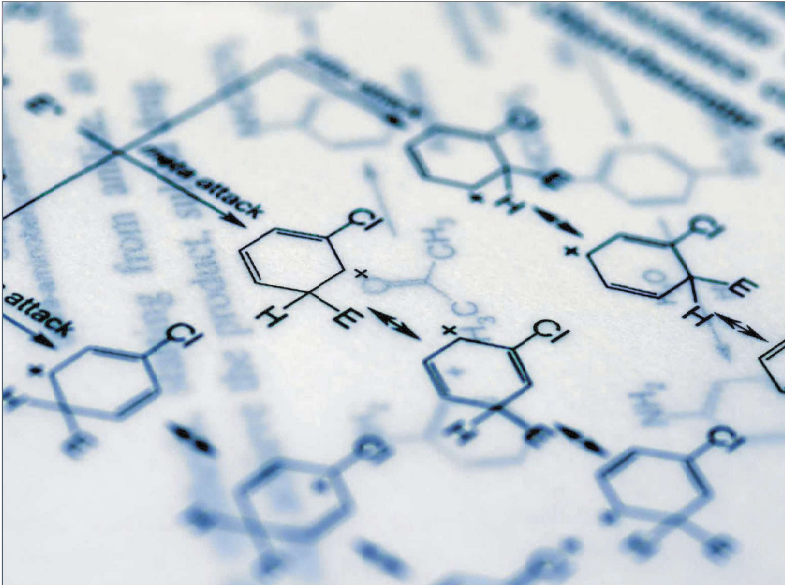
Regarding the modalities/written form, the authority subordinate to the Ordinary to which it can be submitted, we refer to the previous paragraph as these instruments are still valid.

The complaint is of a purely informative nature. Its submission does not presuppose the automatic exercise of criminal proceedings, which is the sole responsibility of the Promoter of Justice (cann. 1430, 1721 §1), having obtained the mandate from the Ordinary.



- Canon 1717: having had probable news of a crime, one must investigate the *facts, circumstances* and *imputability*. That is, one is asked to inquire into the existence of the constituent elements of the canonical crime, provided for by law. All elements must be present.
- Remember: we are not in a court of law; therefore, the investigation is not to be confused “with the search for the culprit of a specific crime (police investigation) nor with the preliminary investigation that accompanies the conduct of a criminal trial (judicial collection of evidence), but is rather a procedure for ascertaining whether a piece of news is simply suspected: the investigation seeks to ascertain whether the information received is such as to justify the initiation of criminal proceedings against the suspect.”

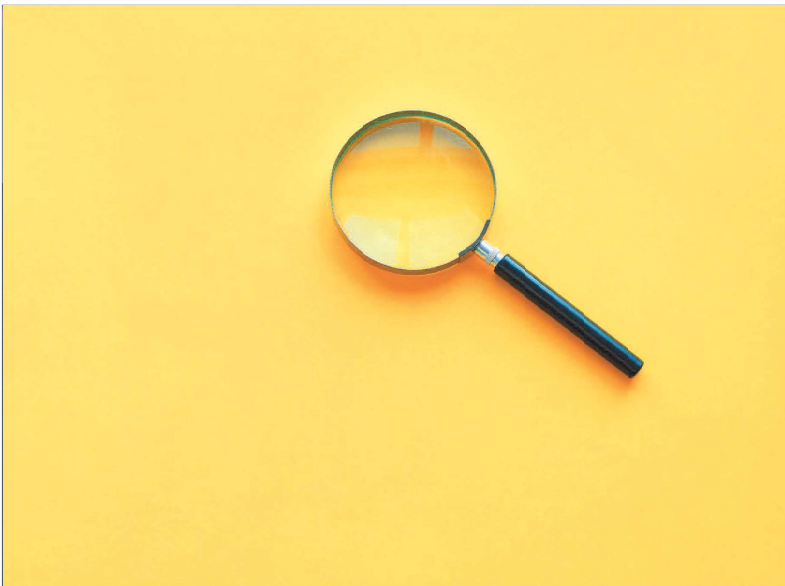
THE OBJECT OF THE INVESTIGATION



In practice, the following must be investigated:

- a) whether the report of the crime is sufficiently well-founded (*fumus veri facti*);
- b) what the circumstances are;
- c) whether the action is seriously imputable to its author.

THE OBJECT OF THE INVESTIGATION



Purpose = provide the Ordinary with the necessary information to ascertain the truth of the facts reported and its author, if any; the purpose of the preliminary investigation is to verify whether or not the report of the crime is well-founded and thus to rule on the measures to be taken.

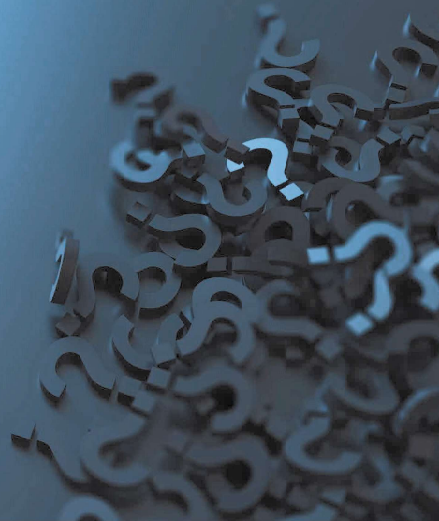
THE OBJECT OF THE INVESTIGATION



Francisco J. Ramos offers important reflections: although there have been steps forward in the regulation of the criminal process, one must still complain of an imperfect awareness of the contents of the prior investigation, and this is not due to a lack of legislative certainty and literature but due to a lack of trained personnel in the appropriate venues.

Cf. F. J. RAMOS, *La investigación previa en el Código de derecho canónico (CIC, CANN. 1717-1719)*, in J. KOWAL - J. LLOBELL, *Iustitia et Iudicium. Studi di diritto matrimoniale e procedurale canonico in onore di Antoni Stankiewicz*, Vol. IV, Coll. *Studi Giuridici LXXXIX*, LEV, 2010, 2110.

THE OBJECT OF THE INVESTIGATION



Regarding the content of the prior investigation, Ramos says its purpose = to gather sufficient elements about facts, circumstances and imputability to be in a position to decide whether or not to initiate a criminal proceeding against the suspect.

Ramos poses some questions: what, concretely, should be investigated? by what means and following what formalities? who and how should this investigation be carried out? Ramos states that can. 1717 answers these questions but leaves open questions which produce a certain amount of confusion in its concrete application.

Can. 1717 is clear; the problem arises because the enquiry into the facts, circumstances, and imputability concerns the same evidentiary phase in the trial proper; so what is the proper characteristic of the enquiry?

THE OBJECT OF THE INVESTIGATION



Given the difference in the legislative texts for the Latin Church and the Eastern Church, the question arises as to whether or not imputability forms part of the prior investigation. Ramos emphasises that, in view of the fact that the CCEO does not place imputability in the object of the prior investigation, it must be borne in mind that it does not correspond with the pre-trial phase of the trial; imputability will play a decisive role in deciding whether the crime has been committed, all the elements being present.

THE OBJECT OF THE INVESTIGATION

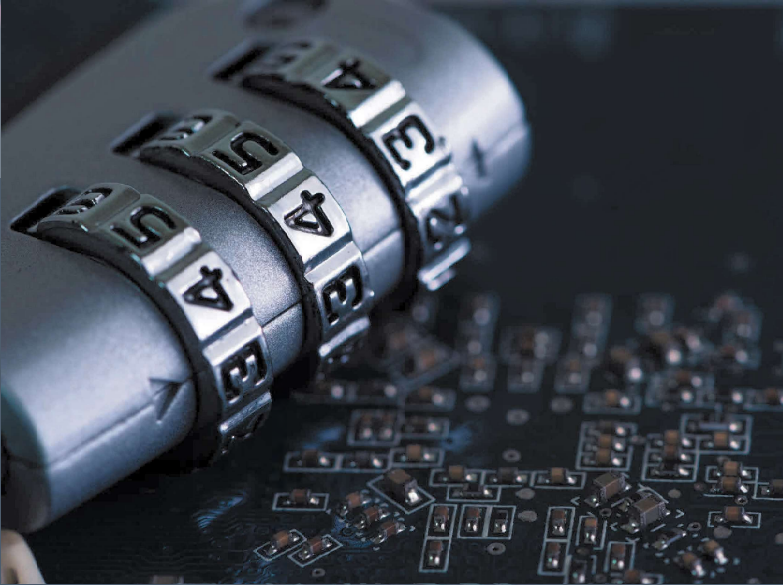


Despite their different modes of expression the aforementioned legislative texts express, the same basic idea also constitutes our opinion on the subject matter: the preliminary investigation will, therefore, cautiously, i.e. “provisionally” and discreetly investigate the facts, circumstances, and imputability in order to provide the Ordinary *not with* moral certainty as to the commission of the crime (which is to be achieved through the criminal trial) but with the elements for deciding whether or not to hold a trial.

It may also be that moral certainty is achieved by the preliminary investigation, but this does not detract from the need for the criminal trial to be conducted in the light of the due process of law that must be accorded to every person.

The preliminary investigation may make use of the normal means of proof, but with discretion so as not to jeopardise the good reputation and good name of the suspect, also avoiding scandal among the faithful.

THE OBJECT OF THE INVESTIGATION



Therefore, the object does not change in relation to the trial, but rather the manner in which the investigation itself is conducted, the objective of which, I repeat, is not the attainment of moral certainty about the crime, but only the ascertainment that, in all probability, the crime was committed by presuming, by the external violation of the criminal law, imputability.

The investigation must also verify the circumstances in which the alleged crime was committed; in other words, it must verify the existence or otherwise of aggravating, mitigating or exempting circumstances.

The investigator must also verify the date of the alleged crime; if in fact the criminal action were extinguished it would be useless to commence it.

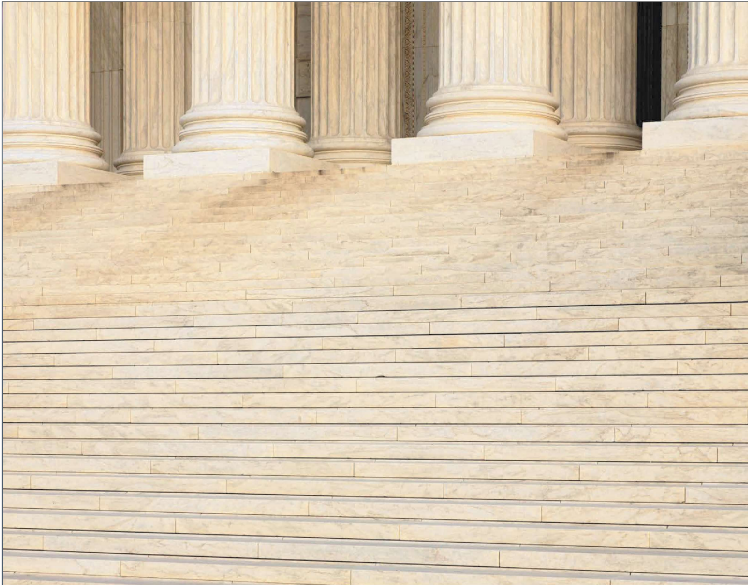
THE OBJECT OF THE INVESTIGATION



The investigation mainly involves three parties:

- a) the Ordinary,
- b) the investigator and
- c) the suspect

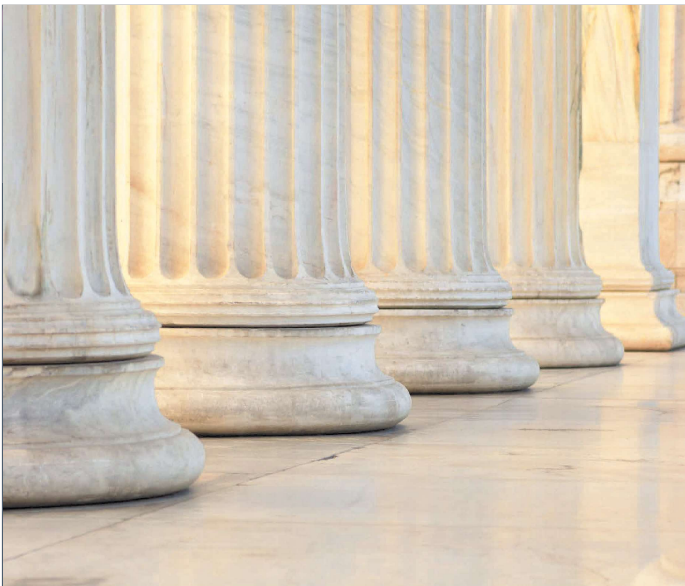
THE SUBJECTS OF THE INVESTIGATION



As far as the Ordinary's jurisdiction, the rules on jurisdiction, concerning criminal cases, must be considered on the basis of territory, persons and subject matter:

It is worth recalling the titles of absolute and relative jurisdiction, which “in every case entitle the judge to exercise his power” inasmuch as “he who is the holder of a power finds the possibility of producing binding acts circumscribed to the material, personal and spatial scope of his jurisdiction.” In the sphere of judicial power, in fact, jurisdiction circumscribes the possibility of hearing certain cases and not others, thus leading to the fact that, applying the various titles, only one court can hear a case and not others. Thus, the criteria of absolute jurisdiction and those of relative jurisdiction must be taken into account when determining jurisdiction.

THE SUBJECTS OF THE INVESTIGATION



With regard to absolute jurisdiction, let us recall the titles of the *pontifical forum* and the *apostolic forum*. The pontifical forum, is that which belongs exclusively to the person of the Pope, which does not mean that it is the Roman Pontiff himself who judges, but that the title by virtue of which one judges is a pontifical title.

The situations indicated in canon 1405 §§1-3 belong to this forum, i.e., *heads of state* who, at the time the trial begins, legitimately hold that role; *cardinals* by virtue of their membership of the College of Cardinals, which begins with the publication in the Consistory; *apostolic legates* for acts performed in the exercise of their office even if at the time of the trial they have lost it; *bishops* for the penal sphere. We ask ourselves whether this norm includes all those who are not vested with episcopal status but are equated with them by law: we can answer both questions in the affirmative because the contrary is not inferred from the norm.

THE SUBJECTS OF THE INVESTIGATION



The personal criterion for the determination of the competent forum also brings us back to the fact that for religious of clerical institutes of pontifical right and for members of societies of apostolic life of pontifical right, the competent Ordinaries are their major superiors *ex* canons 134 §1 and 1427 §1 even though, we must say, their competence is not exclusive (can. 1427 §3). Canon 1427 also specifies, then, according to the personal quality of a religious, which is the court of first and subsequent instance. Cf. A. G. MIZIŃSKI, *The Prior Inquiry* (cc. 1717-1719), 179.

THE SUBJECTS OF THE INVESTIGATION



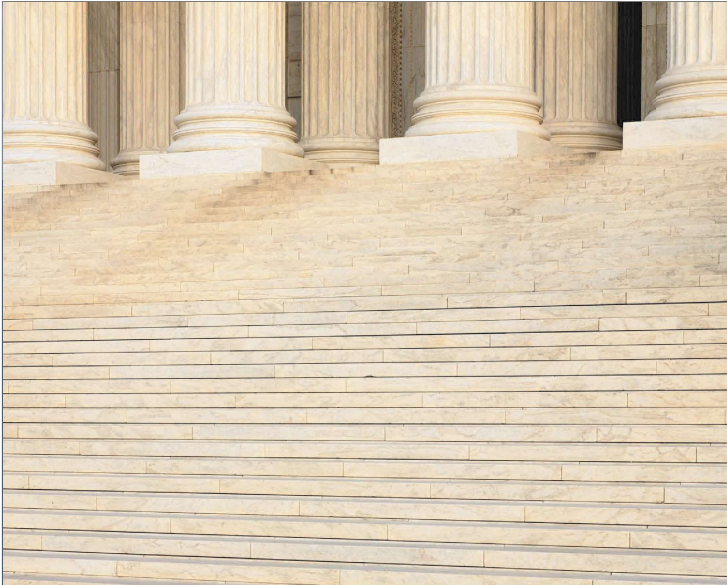
Canon 1405 §1, 4^o emphasises the *primatial forum* for which the Roman Pontiff can reserve a concrete case for himself through the possibility of '*motu proprio*' *avocation*, *initial avocation ad instantiam partis* and *posterior avocation ad instantiam partis*. Cf. M. J. ARROBA CONDE, *Canon Procedural Law*, 112-114.

With reference to the criteria of relative jurisdiction, the *forum of the defendant's domicile*, of the *quasi-domicile* or *actual residence of the wanderer*, and the *forum of the crime* must be considered.

We must supplement what has been said by the m.p. *Sacramentorum Sanctitatis tutela* and subsequent additions and amendments, which reserves particular matters to the competence of the Dicastery for the Doctrine of the Faith.

Having ascertained its competence, the Ordinary may proceed to verify the verisimilitude of the *fumus delicti*, according to the criteria mentioned above, proceeding to appoint the investigator, if he doesn't want to act in person. The Ordinary's willingness to proceed with the investigation cannot be presumed but must be certified by a special Decree opening the investigation.

THE SUBJECTS OF THE INVESTIGATION



THE INVESTIGATOR

Canon 1717 states that once he has received probable news of the crime, the Ordinary, with prudence, must investigate *personally* or through a *suitable person*. Although the Ordinary has the faculty to direct the prior investigation, however, it is advisable to delegate.

This office can be performed by a man or a woman, lay or cleric as long as the general requisites for assuming offices in the Church are present, i.e., good morals, integrity, preparation, prudence, doctrine.

THE SUBJECTS OF THE INVESTIGATION



THE INVESTIGATOR

The office of investigator can also be carried out by the judge who, however, in a subsequent trial, for obvious reasons, will be excluded from it by the express mention of can. 1717 §3 CIC which places the term *nequit*: this term would constitute a clause incapacitating the investigator to then be a judge and would be placed *ad validitatem*

THE SUBJECTS OF THE INVESTIGATION



THE INVESTIGATOR

Appointment of the investigator = responsibility of the Ordinary, who may either sign a decree for the generality of cases or appoint investigators *ad casum*. Many support the need for stability, if only for greater specialization, as well as for greater fidelity to the concept of the ecclesiastical office as defined by canon 145. Canon 1941 §1 of the *Codex* did not provide for the possibility of the stable appointment of the *investigator*; even though in past literature some advocated the possibility in order to allow for greater specialisation of assignments. On this aspect the literature is divided between those who see a stable appointment of the investigator as possible. Others maintain that the investigator must be chosen on a *case-by-case basis*.

THE SUBJECTS OF THE INVESTIGATION



THE INVESTIGATOR

Canon 1717 §3 establishes for the investigator the same faculties, *ex can. 1428 §3*, as for the hearing judge, i.e.: “it is for the hearing judge, according to the mandate of the judge, only to gather evidence and once gathered to transmit it to the judge; he may also, unless the mandate of the judge is opposed, decide in the meantime what evidence is to be gathered and according to what method, if a dispute should arise in this regard during the exercise of his functions.”

THE SUBJECTS OF THE INVESTIGATION



THE INVESTIGATOR

The general obligations of the investigator, by analogy, are taken from the canons which refer to the auditor himself, canons 1446-1457: thus, he should not make the commitment if there are ties of consanguinity or affinity *according to* canon 1448 §§1-2; he is bound to secrecy of office according to canon 1455 §1 in conjunction with canon 1717 § 2; in relation to the performance of his duties he cannot accept gifts or gratuities according to canon 1456. Canon 1457 §§1-2 provides for appropriate punishment in the case of violation of official secrecy, through malice or gross negligence, with damage caused to the public interest or to the suspect.

THE SUBJECTS OF THE INVESTIGATION



SUBJECTS COOPERATING IN THE INVESTIGATION

PROMOTER OF JUSTICE AND NOTARY

Canon 1430, seeing the mandatory presence of the Promoter of Justice in the diocese (*constituatur*), attributes to him the function of protecting the public good. During the prior investigation, even if his intervention is not indispensable, he can also be involved: "if, therefore, before the prior investigation is completed (...) real or legal difficulties should arise, the person carrying out the investigation, being concerned for the public good, would have the right to ask the Promoter of Justice for his opinion, also providing him with the documents of the investigation. The investigator can ask him for help at any time during the investigation for both objective and subjective difficulties. We thus note that the prior investigation also involves the Promoter of Justice to a certain extent

THE SUBJECTS OF THE INVESTIGATION



SUBJECTS COOPERATING IN THE INVESTIGATION:

PROMOTER OF JUSTICE AND NOTARY

Another figure involved is the notary. Canon 1437 sees the notary as indispensable for the handling of all cases. “The notary is the public person constituted by the society, by provision of the ecclesiastical office, whose task is to sign the procedural acts, thus ensuring the fidelity and conformity of what has been carried out in his presence (...). His signature is required on all procedural acts. This requires the continuous presence of the notary in all the proceedings. His office corresponds to the social need to check the veracity of the judge's actions”...

THE SUBJECTS OF THE INVESTIGATION



SUBJECTS COOPERATING IN THE INVESTIGATION:

PROMOTER OF JUSTICE AND NOTARY

... In concrete terms: the acts, with only the judge's signature, have no value and require the signature of the notary who certifies their authenticity, giving them the characteristic of public acts *pursuant to canon 1437 §2 and canon 1540 §1*.

THE SUBJECTS OF THE INVESTIGATION

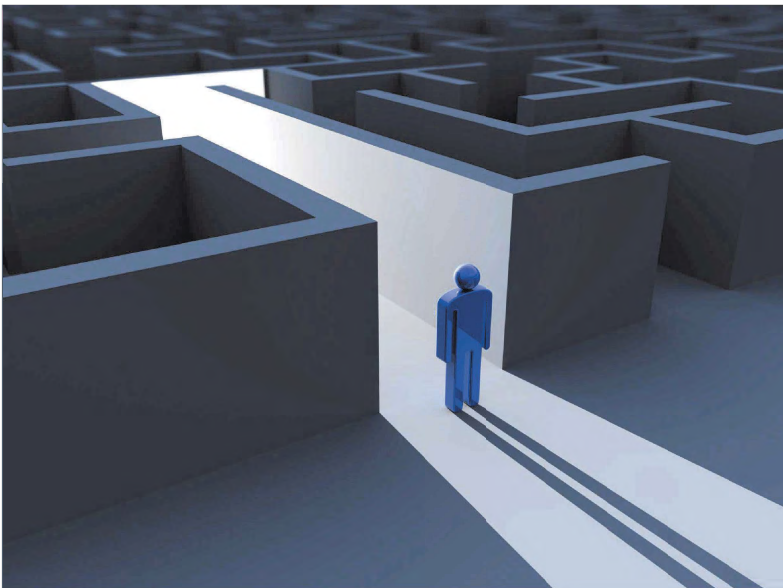


SUBJECTS COOPERATING IN THE INVESTIGATION:

PROMOTER OF JUSTICE AND NOTARY

Canon 1437 does not offer much detail regarding the trial notary; we apply to him the same norms provided for curia notaries in general and established by Book II, canon 470; Canons 482-483. The appointment of this office belongs to the bishop, although it belongs to the judicial vicar to appoint the notary for individual cases. The qualities foreseen for the diocesan notary must be applied to the judicial notary: integrity of reputation, which is particularly important in his case; lay or cleric for the generality of cases, no particular academic qualifications being necessary

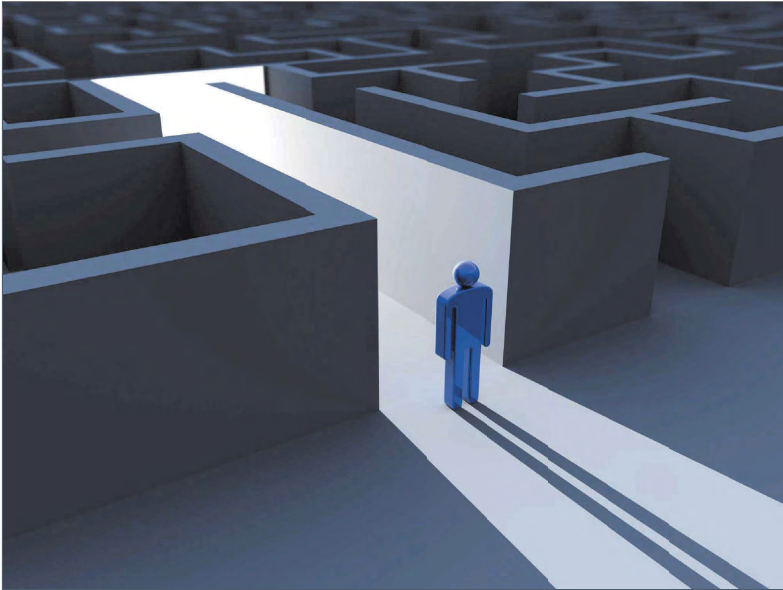
THE SUBJECTS OF THE INVESTIGATION



The suspect is not the *object* of the investigation but the *subject*. The suspect, in this pre-trial phase, remains unaware of the fact that investigations are being carried out into his account; he can only become aware of this when the Ordinary *ex can.* 1341 has to interact with him, before the commencement of the criminal action: in fact, it would be impossible to think of the amendment of the person without interaction with him, allowing him some active space at least in the last stages of the *praevia* investigation.

It should be recalled that the suspect until he is notified of the charge in the manner provided for by law cannot be considered an *accused person*.

THE SUSPECT



Finally, remember that can. 1717 §2 requires that good reputation not be endangered and, especially for this reason, the investigation requires prudence.

We shall offer, at the end of this Theme, some hints so that the plot with which to weave the prior investigation can be the paradigm of restorative justice, our model of reference, which, as we shall see, also provides for the participation of the suspect in the investigation

THE SUSPECT

THE PRESUMED VICTIM

- The injured party is the natural or legal person who has suffered the criminal conduct and the damage resulting therefrom. The party may give notice of the crime even if, subsequently, the criminal action, on the Ordinary's instructions, is exercised by the Promoter of Justice. The injured party will then offer all the means to prove that the crime has been committed; it may also, *pursuant to canon 1729*, in the course of the criminal judgement itself, bring a contentious action for reparation of the damage inflicted on it by the crime.



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