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REFLECTION ON THE EXCEPTIONS TO THE GENERAL NORM ON DOLUS IN THE PIO-BENEDICTINE CODE OF CANON LAW

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Abstract. Canon 103, § 2 of the 1917 Pio-Benedictine Code of Canon Law stated that juridical acts placed out of *dolus* were valid, if the law did not state otherwise. However, there were four instances when the law did state otherwise, namely; in case of canonical election, if the voter was subject to *dolus* in order to vote for a certain person, the vote was invalid (canon 169, § 1); in the case of resignation, the law stated that the resignation was invalid if it was made out of *dolus* (185); in the case of novitiate, the law stated that the novitiate was invalid if the person who entered into religious life would have been induced by *dolus* to do that, or if the Religious Superior would have been induced by *dolus* to receive a candidate into religious life (542, l°); and in the case of religious profession, the law stated that the religious profession had to be given without *dolus* (572, § 1, 4°) in order to be valid. Yet, the canonical commentators pointed out that there were some requirements in each case for *dolus* to invalidate the juridical act. Thus, in the case of canonical election it must be proved that the voter voted being deceived by either substantial *dolus* or antecedent *dolus*. Merely concomitant *dolus* had no effect on voting. In the case of a resignation from an office again it must be proved that either substantial or antecedent *dolus* was involved. The same thing was true in the case of the admission to the novitiate and in the case of religious profession, i.e. either substantial or antecedent *dolus* must be involved.

Keywords: Dolus, Juridical Act, Valid, Invalid, Canonical election, Resignation, Novitiate, Religious profession, Canon Law, Canonical Commentators.

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Introduction

Canon 103, § 2 of the 1917 Code of Canon Law[2] states the general norm regarding juridical acts placed out of *dolus,* that is, juridical acts placed out of *dolus* are valid „unless the law states otherwise.[3]" Yet, there are certain instances when the law states that a juridical act placed out of *dolus* is invalid. These instances will be treated in this paper.

The aim of this paper is to analyze exceptions to the general rule governing the impact of *dolus* on legal acts, exceptions found in the 1917 Code and analyzed by a variety of commentators.

This analysis will follow a consistent procedure: the presentation of each exception to the general norm with an explanation for that exception based upon canonical commentaries. One point must be kept in mind: for the most part, commentators directed their attention to four exceptions to the norm governing *dolus,* namely, those exceptions found in canons 169, § 1; 185; 542, l°; 572, § 1, 4°[4]. In the light of this fact, the analysis shall focus upon these four key exceptions and then refer to the exception given scant attention, namely, that found in canon 677. The paper will end with a summary of the issues treated throughout it.

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2 Henceforth cited as the 1917 Code.

3 1917 Code, c. 103, § 2: *nisi aliud iure caveatur. Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus,* Rome. English translation from *The Pio-Benedictine Code of Canon Law, in English Translation with Extensive Scholarly Apparatus*, San Francisco 2001. All subsequent English translation of canons from this code will be taken from this source unless otherwise indicated.

4 Gérard Fransen, *Le dol dans la conclusion des actes juridiques: évolution des doctrines et système du code canonique*, Gembloux 1946, 391-403. Maximilian Lemosse, "Dolus (Évolution historique de la théorie du)," In *Dictionnaire de droit canonique contenant tous les terms du droit canonique avec un sommaire de 1 histoire et des institutions et 1 état actuel de la discipline,* ed. R. Naz, 1357-1372. vol. 4, Paris: Letouzey et Ané, 1949, 1350-1351. Caesare Badii, "Il dolo nel Codice di Diritto Canonico," *Il Diritto Ecclesiastico* 40, Florence: Casa Editrice Leo S. Olschki, 1929, 312-314. Mattheus Conte Coronata, A. *Institutiones Iuris Canonici.* 4 edition, vol. 1, Rome: Marietti, 1950, 183.

The impact of dolus on canonical election

Canon 169, § 1, l° of the 1917 Code states: „A vote is null unless it was: Free; and therefore, the vote is invalid if the electors, directly or indirectly, were subjected to grave fear or *dolus* in order to vote for a certain person or for several together"[5].

Before explaining this canon, it is important to describe a canonical election. Ayrinhac provides the following description for a canonical election: „a canonical election, as distinct from other modes of appointment to offices, is the canonical calling of a fit person to a vacant ecclesiastical office or benefice, by the votes of the lawful electors"[6].

From this description it is clear that canon 169, § 1, 1° requires freedom for the electors in electing a suitable person to an ecclesiastical office or benefice. This freedom required by the canon can be canceled by the use of *dolus.* Seen from this point of view, Fransen states that the canon offers no difficulty in providing a clear understanding of its meaning[7]. However, Badii says that this canon includes the fundamental distinction between antecedent and concomitant *dolus* and between direct and indirect *dolus.* Also, Badii points out that this canon punishes antecedent *dolus* and not merely concomitant *dolus*[8].

Furthermore, Badii indicates that there are two requirements for *dolus* to invalidate a vote.

Firstly, it must be proven that the elector, because he or she was deceived by fraudulent means, voted for a certain person or a group of determined persons for whom he or she would not have voted otherwise.

Secondly, it must be proven that the fraudulent means employed either directly or indirectly by the deceiver to deceive the elector succeeded in deceiving the elector to vote for a certain person or for several persons together. In other words, it must be proved that the voting is the outcome of *dolus*[9]. Ayrinhac says that it

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5 1917 Code, c. 169, § 1, 1°: *Suffragium est nullum, nisi furit: si elector metu gravi aut dolo, directe ve1 indirecte, adactus fuerit ad eligendam certam personam aut plures disiunctive.*

6 Henry A. Ayrinhac, *General Legislation in the New Code of Canon Law*, New York: Joseph F. Wagner, 1923, 329.

7 Fransen, 393-394.

8 Badii, 312.

9 Badii, 312.

must be proven that *dolus* had „a determining effect on the vote, whether this had been intended or not"[10].

Additionally, it is noteworthy to point out that according to canon 169, § 1, 1°, the influence of *dolus* can be either direct or indirect on the vote cast by the voter. *Dolus* influences directly the vote when its purpose, „clearly intimated to the elector, aims precisely at determining his choice"[11]. On the other hand, *dolus* affects indirectly the vote „when either the precise purpose is absent or it is not clearly intimated to the elector, though the effect is the same as if the influences were direct"[12]. Abbo and Hannan give the following example in this regard: „the elector, suffering from the injustice of Luke, hopes to be freed from it by voting for the latter's friend"[13]. Moreover, there are certain canonical commentators who point out that *dolus* also indirectly influences the vote when it is brought against the relatives of the voter or other members of the voter's household[14]. Unfortunately, they provide no examples in this regard to help us understand better their point.

Finally, Abbo and Hannan point out that a whole canonical election can be invalidated by *dolus* if its influences „were brought to bear on the entire body of electors or a majority of them, or even on only one of them if his vote were needed for the decisive majority attained in the election"[15].

In succinct form, canon 169, § 1, 1° establishes that *dolus* invalidates a vote in as much as *dolus* negatively affects the absolute freedom of the voter in the act of election.

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10 Ayrinhac, 335.

11 John A. Abbo – Jerome D. Hannan, *The Sacred Canons. A Concise Presentation of the Current Disciplinary Norms of the Church,* vol. 1, Revised Edition, Milwaukee: The Bruce Publishing Company, 1957, 229.

12 Abbo – Hannan, 229.

13 Abbo – Hannan, 229.

14 Ioannes Chelodi, *Ius canonicum de personis praemissis notionibus de iure publico ecclesiastico de principiis et fontibus iuris canonici*, 3rd ed., Vicenza 1957, 225. See also Udalricus Beste, *Introductio in Codicem*, 3rd ed., Collegeville MN 1946, 213; Abbo and Hannan, *The Sacred Canons.' A Concise Presentation of the Current Disciplinary Norms of the Church,* vol. 1, 229-230.

15 Abbo – Hannan, 230. Unfortunately, Abbo and Hannan offer no example for their final remark.

The Impact of Dolus on Resignation

A second instance in which *dolus* invalidates a juridical act is found in the case of resignation by which one loses an ecclesiastical office. According to Abbo and Hannan resignation is „a natural or juridical fact by which the incumbent ceases to hold title to his office with its accompanying rights and obligations"[16]. Also, according to Vermeersch and Creusen, „resignation is the free dismissal from an ecclesiastical office"[17]. Wernz and Vidal provide an even more complete description for resignation, namely, „Resignation is the free dismissal from his own office or ecclesiastical benefice for a just cause and it is legitimately done with the acceptance of the competent ecclesiastical superior"[18].

The canonical understanding of resignation provides a means to assess canon 185 of the 1917 Code and the impact of *dolus:* „Resignation is invalid by law if it was made out of grave fear unjustly inflicted, [or from] fraud, substantial error, or simony"[19].

According to this canon, if a person resigns from an ecclesiastical office due to *dolus,* the resignation is invalid by the law itself.

Badii states that this canon does not encompass all the cases in which a resignation is achieved through *dolus.* Yet, he points out that this canon encompasses only those cases in which the resignation was done out of antecedent[20] *dolus.* He insists that this canon does not include those cases in which resignation was done out of concomitant *dolus.* Moreover, Badii states that *dolus* must be the determining cause of resignation in order to invalidate the resignation, which means that only antecedent *dolus* can be the cause of a resignation. Also, he states that a resignation done out of concomitant[21]

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16 Abbo – Hannan, 242.

17 *Renuntiatio est libera dimissio officii ecclesiastici.* In Arthur Vermeersch – Joseph Creusen, *Epitome Iuris Canonici*, 8'h ed., vol. 1, Mechlini – Rome: H. Dessain, 1963, 288.

18 *Renuntiatio est libera dimissio proprii officii seu beneficii eclesiastici ex iusta causa et cum acceptatione competentis Superioris ecclesiastici legitime facta.* In Franz X Wernz – Petri Vidal, *Ius Canonicum,* vol. 2, Rome: Gregorian University Press, 1927, 389.

19 1917 Code, c. 185: *Renuntiatio ex metu gravi, iniuste incusso, dolo aut errore substantiali ve1 simoniace facta, irrita est ipso iure.*

20 Badii calls antecedent *dolus* also substantial *dolus.* See Badii, 312.

21 Badii states that concomitant *dolus* is equivalent to incidental *dolus* in this case. See Badii, 312.

dolus does not render the resignation invalid, but, in such a case, an action of reparation of damage can be brought against the perpetrator of concomitant *dolus*[22].

Furthermore, Badii states that the fraudulent means used to deceive must succeed in deceiving the person to resign. In other words, *dolus* must be the cause for resignation so that the juridical act of resignation lacks one of its essential elements[23], which renders the resignation invalid. Additionally, Badii points out that the enticements used to convince a person who holds an ecclesiastical office to resign or the mere reticence in presenting the whole truth when the law does not require it and other similar cases cannot be considered acts of *dolus* capable of invalidating the juridical act of resignation[24].

However, Fransen does not agree with the explanation provided by Badii for a resignation done out of *dolus*.

Fransen begins his explanation of the canon by admitting he does not agree with Badii that substantial *dolus* is equivalent to antecedent *dolus*. He insists that this is contrary both to the canonical tradition and to the text of the Code. Fransen points out that the canonical tradition has always held that substantial *dolus* produces a substantial error, and an antecedent *dolus* does not always produce a substantial error[25]. Also, Fransen states that the text itself of canon 185 indicates that a resignation caused by a substantial error is invalid. Therefore, he points out that canon 185 encompasses also all the cases in which resignation was done out of accidental *dolus*.

Fransen bases his explanation in this regard on a parallel between fear and *dolus,* both present in canon 185. He states that the prior law on resignation (that is prior to the 1917 Code), fear did not invalidate the resignation by the law itself. However, the law did not explicitly treat the issue of whether or not *dolus* invalidated resignation. Yet, since the 1917 Code clearly states that a juridical act of resignation placed out of fear is invalid, it can be easily concluded that the law invalidates also juridical act of resignation placed out of accidental *dolus.* Additionally, Fransen points out that his opinion is shared also by other weighty authors[26].

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22 Badii, 312.

23 For the essential elements ofa juridical act of resignation see cc. 183-191 of the 1917 Code.

24 Badii, 312-213.

25 Fransen, 394.

26 Fransen, 394-395. See also Coronata, 183.

Augustine gives some examples in which *dolus* would invalidate the juridical act of resignation: „the promise of a pension or sum of money, or a fraudulent description of conditions which supposedly exist in a parish"[27].

In addition, it is important to indicate that Lemosse agrees with Fransen that accidental *dolus* can invalidate resignation. Yet, he states that the only type of accidental *dolus* which invalidates resignation is antecedent *dolus.* According to Lemosse, mere concomitant *dolus* does not invalidate resignation[28].

In succinct form, given the above analysis concerning resignation arising from *dolus,* it can be concluded that not only substantial *dolus,* but also accidental *dolus* can invalidate the juridical act of resignation. Yet, accidental *dolus* invalidates resignation only when *dolus* is antecedent and not merely concomitant.

The Impact of Dolus on Novitiate

Novitiate is a third example of a juridical act that may be rendered invalid if done out of *dolus.* First, however, a proper canonical understanding of novitiate is essential.

In his commentary, Raoul Naz states:

> If postulancy is a period of trial during which the superiors verify the aptitudes of a candidate for religious life, the novitiate is an intermediary state during which, the aptitudes having been recognized, the same candidate exercises the practices of this life and gets ready to declare (make) his profession[29].

Servo Goyeneche states that the aim of the novitiate is a mutual probation and knowledge, i.e. the religious superior examines and probes the candidate to novitiate and the candidate examines and probes the religious life[30]. Also,

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27 Charles A. Augustine, 157.

28 Lemosse, 395.

29 „Si le postulat est une periode d'essai pendant laquelle les supérieurs verifient les aptitudes d'un candidat à la vie religieuse, le noviciat est un état intermédiaire pendant lequel, ses aptitudes ayant été reconnues, le même candidat s'exerce aux pratiques de cette vie et se prépare à émettre sa profession". In Raoul Naz, *Traité de droit canonique,* Paris, 1946, 600.

30 Servo Goyeneche, *Iuris canonici summa principia, sen breves codicis iuris canonici commentarii scholis accomodati,* Rome: Pontificia Università Gregoriana, 1936, 80.

Timotheus Schaefer points out that the novitiate is made in a designated religious house[31].

Furthermore, canon 542, 1°, [c] refers to admission to the novitiate which is done from *dolus:*

> With due regard for the prescriptions of Canons 539-41 and those others [found] in the constitutions of each religious [institute]:
>
> They are invalidly admitted to the novitiate:
>
> Who enter religious [life] induced by force, grave fear, or *dolus,* or whom a Superior receives having been induced in the same manner[32].

This canon points out that if entrance into the novitiate is caused by *dolus,* then the entrance is invalid by the law itself.

James Brown describes *dolus* in this canon as „the deception of a candidate or a superior, deliberately and maliciously induced or sustained through the use of apt fraudulent devices, so as to entice the former on the one hand to seek entry into religion, or to dupe the latter on the other to receive him"[33]. As is evident, Brown's description contains the elements of *dolus*. Moreover, Brown explains each of these elements in the particular case of the novitiate. Given that, it is important to present succinctly how he explains each element of *dolus* in the case of the novitiate[34].

The first element of *dolus* in this case is constituted by the means employed to deceive either the candidate or the religious superior. The fraudulent means used to deceive, in order to qualify as being able to deceive, must be such as to influence a *vir prudens*. Therefore, Brown states that in analyzing the fraudulent means special attention should be paid to the character of the person using them and the circumstances in which the means are used, in so far as they can render the

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31 Timotheus Schaefer, *De religiosis ad normam codicis iuris canonici,* third edition revised and updated, Rome : Pontificia Università Gregoriana, 1940, 461.

32 1917 Code, c. 542, 1°: *Firmo praescripto can. 539-541, aliisque in propriis cuiusque religionis constitutionibus, Invalide ad novitiatum adhaeserunt; Qui religionem ingrediuntur vi, metu gravi aut dolo inducti, ve1 quos Superior eodem modo inductus recipit*.

33 James V. Brown, *The Invalidating Effects of Force, Fear, and Fraud Upon the Canonical Novitiate: A Historical Conspectus and a Commentary,* Canon Law Studies 311, Washington, D.C.: The Catholic University of America Press, 1951, 125.

34 Brown, 126-142.

fraudulent means more or less plausible to the candidate or the superior against whom they are employed[35], „i.e., whether the mendacious statement which led to error was made in the course of light banter, or in a serious conversation or solemn attestation"[36]. Also, the personal characteristics of the candidate and the superior should be taken into account because they can influence the final decision. Thus, it is necessary to check „whether the one deceived is young and inexperienced or mature and well versed in affairs; their natural character, whether he or she is naive or adroit; their natural culture, whether they are learned or unread"[37], and other factors that can influence the decision of the candidate or of the superior.

The second element of *dolus* according to Brown arises when the fraudulent means employed to deceive constitutes a grave violation of good faith[38]. Yet, Brown states: „The precise circumstances and conditions under which a ruse must be considered as having exceeded the recognized limits so as to become anti-juridic seem to be one of those factors in fraud which of necessity must be left to the prudent estimation of the one rendering a judgment in this matter"[39]. Also, Michiels points out that the fraudulent means employed to deceive are anti-juridical because they violate the good faith which must be the foundation upon which all juridical affairs are carried on[40].

Nevertheless, in Brown's opinion, good faith requires on the part of the candidate seeking to enter into novitiate to make known to the superior not only those things which according to the universal or particular law would render the novitiate invalid, but also those things which are of grave importance as these assist the superior in determining whether or not the candidate is suitable for religious life[41]. On the other hand, good faith requires that the superior make known to the candidate not only those things which are of grave importance in religious life, „but also to refrain from any intrigue which may in any way tend to

35 Brown, 126-127.

36 Brown, 127-128.

37 Brown, 128.

38 Brown, 129-131.

39 Brown, 129.

40 Gommarus Michiels, *Principia generalia de personis in Ecclesia.' commentarius libri II Codicis iuris canonici, canones preliminares 87-106,* Paris: Desclée de Brouwer & Cie, 1955, 661.

41 Brown, 130.

make the individual's choice of the religious state less free or less spontaneous"[42]. Brown insists that the consent to enter into novitiate must be free and spontaneous.

The third element of *dolus* in the case of novitiate is malice[43]. The means used by the deceiver must be „deliberately and maliciously set to work for the precise purpose of creating a deception"[44]. According to Brown, the deceiver must have the precise intention to use fraudulent means in order to create an error in the mind of the deceived person. Also, „the intention of the deceiver need not extend to the evil effects, material or spiritual, which may in fact flow from the act which he intends to extort through the erroneous judgment fraudulently induced"[45]. Brown provides the following hypothetical example in this regard: parents, deeply religious and wanting to have one of their children in religious life, use a trick to convince one of the children to enter into religious life. The parents tell the child that he has a moral obligation to enter into religious life because he had been dedicated to God as a child[46]. It is obvious that the parents do not want any evil effects that may result from their action „yet the malice needed to qualify their maneuver as fraudulent, and invalidating if it takes effect, is fully realized"[47].

Additionally, Brown states that it is necessary for the deceiver to have knowledge that „the truth or the object of deception is of grave importance to the individual from whom it is to be withheld or to whom it is misrepresented, as well as the means which are utilized to obscure or misrepresent this fact are fraudulent"[48].

The fourth element of *dolus* according to Brown is the deception itself, i.e., the fraudulent means employed to deceive must succeed in creating an error in the mind of the deceived person[49]. The fraudulent means must „succeed in efficaciously interfering with the consent of a candidate or a superior in placing it"[50]. Furthermore, Brown states:

But, since the proximate medium through which fraud works upon the will in soliciting consent is the erroneous judgment which is created or sustained

42 Brown, 130.
43 Brown, 131-134.
44 Brown, 131.
45 Brown, 132.
46 Brown, 132-133,
47 Brown, 133.
48 Brown, 133.
49 Brown, 134-136.
50 Brown, 134.

in the mind of the victim, unless this objective trickery does in reality result in the deception of the candidate or the superior, neither can be said to be induced to perform this act through fraud. For, it is to be remembered that fraud and fraudulent error are identical terms in law when one speaks of this element as a source of defective consent. Hence, the commonly recognized rule — *scienti dolus non fit* — is likewise fully valid with regard to fraud as an invalidating impediment to entry in the canonical novitiate[51].

The fifth element of *dolus* is the causal relationship between the fraudulent means and the act of consent[52]. Brown points out that a causal relationship must exist between „the deceitful artifice which may have been present in the act of entering or admitting a candidate to the novitiate and the causal consent given to this act, so that the latter must be considered to have been placed in fact *ex dolo*"[53]. In order to highlight the connection between the fraudulent means and the act of consent, Brown provided the following example. If the candidate were asked by the superior in the formal acceptance whether or not he suffers from pulmonary tuberculosis, explicitly telling the candidate that he would not be accepted if he suffers of this illness, and the candidate having this illness lies to the superior using a forged medical certificate, then the act of admission is invalid[54]. Brown states that in such a case the error created in the mind of the superior with regard to the health condition of the candidate is not only unjust, but „is deliberately directed to the procuring of consent to this one act"[55].

After this presentation of the elements of *dolus,* it is important to determine who can be the perpetrator of *dolus.* The canonical commentators agree that the perpetrator of *dolus* can be either the candidate or the superior or even a third party[56]. Thus, the candidate is the deceiver if, for instance, he "pretended to be

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51 Brown, 134.

52 Brown, 136-142.

53 Brown, 136.

54 Brown, 137.

55 Brown, 137. For more examples about the connection between the fraudulent means and the consent regarding entering into novitiate see Brown, 137-141.

56 Fransen, 397; Augustine, 208-209; Abbo – Hannan, 559; Naz, 601; Lemosse, 1350; Joseph Creusen, *Religions Men and Women in the Code,* third English edition, Milwaukee 1940, 134-135; Vemz – Vidal, 199-200; Bidagor, 65-71; Coronata, 179; Vermeersch – Creusen, 544.

intelligent, healthy or rich, whilst in reality he is the opposite[57]. Yet, Augustine points out that „mere lack of riches or brain — unless the candidate were too dull for any occupation — would not be sufficient to make the admission invalid"[58]. In his commentary, Joseph Creusen indicates that admission to the novitiate is also invalid if the candidate has concealed „a family disgrace which would certainly have caused his exclusion"[59].

The religious superior can also be the perpetrator of *dolus,* for example, „by holding out a good and pleasant position, honors and dignities, or, as the saying is, a good time, or by hiding the truth and the real conditions of the community"[60]. Abbo and Hannan point also out that the admission to novitiate would be invalid if the superior would promise to the candidate „exemptions and privileges incompatible with the rule or the constitutions"[61].

A third party can be involved in perpetrating *dolus* as well. Thus, an example in this regard would be „if parents made their child believe that they had promised to God that he would enter religion when, as a matter of fact, they had made no such promise"[62]. Another example when a third party is involved would be „if someone falsely persuaded another that he had the evident signs of a divine vocation"[63].

Finally, it is important to indicate the type of *dolus* that invalidates admission to the novitiate.

Prior to the 1917 Code, canonical commentators shared the opinion that only substantial *dolus* invalidates entrance into the novitiate. According to them accidental *dolus* would not invalidate such admission[64].

The canonical commentators on the 1917 Code universally agree with the pre- 1917 Code commentators that substantial *dolus* invalidates entrance into the novitiate. Moreover, Wernz and Vidal point out that since substantial *dolus* produces a substantial error in the mind of the deceived person, the admission to novitiate is invalid by natural law itself[65]. Yet, in general, the 1917 commentators

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57 Augustine, 209.

58 Augustine, 209.

59 Creusen, 135.

60 Augustine, 208.

61 Abbo – Hannan, 559.

62 Creusen, 135.

63 Creusen, 135.

64 Brown, 148-156.

65 Wernz – Vidal, 199.

do not agree with the pre-1917 commentators that only substantial *dolus* invalidates the admission to novitiate.

Bidagor is one author that agrees with the pre-1917 commentators. He points out that canon 542, 1° on *dolus* is an expression of the traditional teaching on *dolus* and, consequently, only substantial *dolus* invalidates the admission to the novitiate[66]. He insists that accidental *dolus,* even if it is antecedent, cannot invalidate admission to the novitiate when it is used against the candidate because it disappears during the novitiate. During the novitiate the candidate will find out the truth anyway and, consequently, there is no reason to punish *dolus* in this case. However, Bidagor indicates that if antecedent *dolus* is used against the superior and it can be demonstrated that the superior would not have admitted the candidate unless antecedent *dolus* were used against him, then the admission is invalid. This however is the only exception when antecedent *dolus* invalidates the admission to novitiate[67].

Fransen does not agree with Bidagor and states that antecedent *dolus* invalidates in both cases; namely, when brought against the candidate or against the superior because the key principle that lies behind the law is that admission to novitiate must be free and spontaneous[68]. Brown agrees with Fransen stating:

If a novice is enticed into the novitiate ofa religious institute through a deliberate and gross misrepresentation of the nature of the religious life, or concerning some factor of the religious life as it is lived in the particular institute, even though not substantial, and this factor plays a determining influence upon his will in choosing to enter the novitiate, his novitiate is thereby rendered automatically invalid[69].

In fact, and in general, the canonical commentators agree with Fransen that whenever antecedent *dolus* is involved the admission to the novitiate is invalid[70]. However, no author argues that concomitant *dolus* can invalidate the admission to the novitiate. It is obvious that concomitant *dolus* does not render the admission to the novitiate invalid.

In short, it can be concluded from what was said so far that not only substantial *dolus,* but also accidental *dolus* can render entrance into the novitiate invalid. Yet,

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66 See Bidagor, 65-71.

67 Bidagor, 70-72.

68 Fransen, 397.

69 Brown, 156.

70 See for instance Augustine, 208; Naz, 601; Lemosse, 1350; Brown, 148-184; Badii, 313; Coronata, 696.

in the case of accidental *dolus,* the authors universally agree that only antecedent *dolus* can render the admission invalid and not merely concomitant *dolus.* Also, when the judgment is made with regard to the presence of *dolus* in the admission to the novitiate it is essential to check out if all the elements of *dolus* are present.

The Impact of Dolus on Religious Profession

Fintan Geser points out that religious profession „means a public statement by which a person, in virtue of the chosen state of life, declares an intention to strive after perfection"[71]. In his book on consecrated life, Creusen describes the religious profession as being simply "the act by which a person embraces the religious state[72]. Bouscaren, Ellis and Korth, in their commentary on the 1917 Code, give a more complete description of religious profession. They state:

Religious profession is the act by which a person embraces the religious state by taking the three public vows of poverty, chastity, and obedience, thus entering upon an agreement made with the institute, which, when accepted by the competent superior, creates a whole series of reciprocal rights and obligations between the institute and the religious[73].

Very important in their description is the fact that religious profession is an agreement between the institute and the religious. Badii calls this agreement a contract between them[74]. Moreover, Abbo and Hannan state that the religious profession is „both a quasi-contract between the religious and God, legally recognized by the Church, and a bilateral contract between the religious and the institute"[75].

Given that religious profession is a contract, it is important to determine what canon 572, § 1, 4° states about the impact of *dolus* on religious life: „For the validity of any religious profession it is required that: The profession be given without force or grave fear or *dolus*"[76]. As can be easily noticed, this canon points out that if the

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71 Fintan Geser, *The Canon Law Governing Communities of sisters,* St. Louis, 1946, 244.

72 Creusen, 170.

73 Bouscaren et al., *Canon Law. A Text and Commentary*, 4th revised ed., Milwaukee: The Bruce Publishing Company, 1939, 278.

74 Badii, 313.

75 Abbo – Hannan, 589.

76 1917 Code, c. 572, § 1, 4°: *Ad validitatem cuiusvis religiosae profesionis requiritur ut: Professio sine vi aut metu aut dolo emittatur.*

religious profession is done out of *dolus,* the religious profession is invalid. Yet, in the light of canon 572, § 1, 4°, it is important to find out first of all, what type of *dolus* can invalidate religious profession according to the canonical commentators.

The canonical commentators universally are in agreement that substantial *dolus* invalidates the religious profession[77]. Additionally, Badii points out that whenever substantial *dolus* produces a substantial error with regard to the vows or the contractual obligations, the religious profession is invalid by natural law itself[78].

Also, it is worthy to indicate that Fransen points out in his commentary that only substantial *dolus* can invalidate religious profession and not merely accidental *dolus.* He bases his argument on the tradition derived from Suarez and which says that only substantial *dolus* which is brought against the superior or the candidate can invalidate religious profession. Accidental *dolus* has no effect on religious profession[79].

However, with regard to accidental *dolus,* it noteworthy to indicate that there is no consensus between the commentators.

Thus, for instance, Bidagor points out that antecedent *dolus,* which does not have the character of gravity and does not exercise a determinate influence on the mind of the candidate, does not invalidate religious profession[80]. He provides the following example in which antecedent *dolus* is involved: the parents of a candidate convince their son to make religious profession by misleading him to believe that their financial status is not good at all and that they cannot afford to provide the same conditions for their son that he used to have before he entered into religious life[81]. Bidagor insists that *dolus* does not invalidate in this case if the parents succeed in convincing their son to make religious profession. According to Bidagor and Fransen *dolus* in this case is not sufficient to render the religious profession invalid[82]. Nevertheless, Bidagor, like other commentators, admits that there may be cases in which antecedent *dolus* invalidates the religious profession[83].

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77 See for instance, Fransen, 397-400; Badii, 313; Lemosse, 1350; Vernz – Vidal, 269; Bidagor, 71.

78 Badii, 313. See also Bidagor, 71.

79 Fransen, 400-401.

80 Bidagor, 67. See also Fransen, 398.

81 Fransen, 401. See also, Bidagor, 67.

82 Bidagor, 67-71. See also Fransen, 401.

83 Bidagor, 67. See also Vermeersch – Creusen, 578; Vernz – Vidal, 269; Creusen, 173.

On the other hand, Badii states that whenever accidental *dolus* is involved and is the cause of the religious profession, religious profession is invalid. Yet, in such case, it is not the natural law but ecclesiastical law which invalidates the religious profession. Moreover, Badii states that the accidental error either antecedent or concomitant which is not produced by *dolus* does not affect religious profession at all. Such an error cannot invalidate the religious profession[84].

Furthermore, Eugenius A. Cervia points out that when accidental *dolus* is involved, the religious profession is not invalid, but it can be rescinded according to canon 103, § 2[85]. Yet, Fransen does not agree with Cervia, and he points out that such a position cannot be accepted because it is against the entire canonical tradition. Fransen states that religious profession like marriage exists or does not exist; it cannot be subject to rescission[86].

With regard to the victim of *dolus,* Creusen points out that *dolus* must be suffered by the candidate to the religious profession[87]. He states: „The Code has not judged it necessary to protect the superior in the same way. As a matter of fact, the superior who has been influenced by violence or fraud will easily have the power later on to dismiss the religious in question"[88]. Yet, there are other authors who state that since religious profession is a contract between two parties, the law is meant to protect both parties and not only the candidate[89].

Finally, an example of *dolus* which would invalidate the religious profession can be found in Augustine's commentary. He states: „*Deceit (dolus)* would be present if the one professing subscribed the formula of profession either in a faulty way or with the wrong name"[90].

In short, from what was said so far it can be concluded that according to the common opinion of the commentators, substantial *dolus* invalidates religious profession. Yet, there is no agreement among the commentators whether accidental *dolus* invalidates the religious profession or not. There are opinions both pros and cons. Also, there is no agreement between the commentators whether *dolus* is to

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84 Badii, ," 313.

85 Eugenius A Cervia, *De Professione Religiosa*, Bologna: Studium Bononiense, 1938, 96. See also Fransen, *Le dol dans la conclusion des actes juridiques,* 398.

86 Fransen, 401.

87 Creusen, 173.

88 Creusen, 173.

89 Lemosse, 1351. See also Vemz – Vidal, 270; Beste, 412; Fransen , 400-403.

90 Augustine, 256.

be brought against the candidate or against the superior in order to invalidate the religious profession. Again, there are opinions both pros and cons.

Conclusion

This paper dealt with four exceptions to the general norm on *dolus*[91] which are more commonly found in the canonical commentaries; namely, canon 169, § 1, 10 which deals with *dolus* in canonical election; canon 185 that deals with resignation from an office done out of *dolus;* canon 542, 1° [c] that deals with the admission into novitiate which is made due to *dolus,* and canon 572, § 1, 4° that deals with impact of *dolus* on religious profession. In each of these instances the law states that *dolus* invalidates the juridical act. Yet, the commentators point out that there are some requirements in each case for *dolus* in order to invalidate the juridical act. Thus, in the case of canonical election it must be proved that the voter voted being deceived by either substantial *dolus* or antecedent *dolus.* Merely concomitant *dolus* has no effect on voting. In the case of a resignation from an office again it must be proved that either substantial or antecedent *dolus* was involved. The same thing is true in the case of the admission to the novitiate, i.e. either substantial or antecedent *dolus* must be involved. Bidagor is one author who insists that only substantial *dolus* invalidates the admission to novitiate. However, in the case of religious profession it is a bit different. Here there is an author who states that only substantial *dolus* invalidates the religious profession; namely, Fransen. He bases his argumentation on the tradition that preceded the 1917 Code which held that only substantial *dolus* renders the religious profession invalid. On the other hand, there are other authors who point out that accidental *dolus* invalidates as well, but in order to invalidate *dolus* must be antecedent. Also, there are authors who state that only *dolus* which is brought against the candidate invalidates the religious profession and others who insists that *dolus* invalidates in both cases, i.e. when it is brought either against the candidate or the superior.

Looking at each canon and its explanation it can be easily noticed that the law states that *dolus* invalidates in each of these cases because the law is concerned to protect the liberty of the person placing the juridical act. In each case, the juridical act placed out of *dolus* can have grave consequences on the life of the person placing it.

[91] 1917 Code, c. 103, § 2.

Finally, as mentioned in the introduction, canon 677, though receiving little if any attention from canonical commentators, does pertain to the matter of this chapter. Canon 677 states: „In admitting candidates the constitutions are observed, with due regard for the prescription of Canon 542”[92]. Consequently, the above analysis concerning the impact of *dolus* on the admission to the novitiate also applies to the admission into societies of men or women living in common without vows.

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[92] 1917 Code, c. 677: *In admittendis candidatis serventur constitutiones, salvo praescripto can. 542.*

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