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Experts' Report on Abuse for the Archdiocese of Munich and Freising dated 20.01.2022

- Conceptual outline: Methodology as well as legal and other problem areas -

Lecture on the occasion of the 8th Day of Forensic Psychology

on April 1st, 2022

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The Impossible Fact

And he comes to the conclusion:
"His mishap was an illusion,
for", he reasons pointedly,
"that which must not, cannot be." [1]

I. Introduction

The so-called 'Munich Abuse Report'[2] was published on 20.01.2022. The subject of this investigation are cases of (suspected) abuse within the sphere of the Archdiocese of Munich and Freising during the period from 1945 to 2019. The underlying mandate was to name systemic deficits from the experts' standpoint[3], and to make recommendations for further optimising the way in which cases of sexual abuse are handled.[4] The particular challenge ultimately consisted in specifically naming, within the scope of the report to be published, and so far as legally possible, persons responsible on the level of the diocesan management who have acted in breach of their duties and/or improperly in conjunction with cases of sexual abuse.[5]

A number of comments about the methodology of the report (II.) and its empirical principles and findings (III.) will first be made against this background.

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* Information on the authors is given at the end of the text.
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[1] *Christian Morgenstern,* „Die unmögliche Tatsache", Gedichte, 5. Edition 2021, Insel Verlag, Frankfurt am Main and Leipzig, p. 78 f (Translation).
[2] *Westpfahl / Wastl / Pusch / Gladstein / Schenke,* Sexueller Missbrauch Minderjähriger und erwachsener Schutzbefohlener durch Kleriker sowie hauptamtliche Bedienstete im Bereich der Erzdiözese München und Freising von 1945 bis 2019 – Gutachten vom 20.01.2022, available at https://westpfahl-spilker.de/wp-content/uploads/2022/01/WSW-Gutachten-Erzdioezese-Muenchen-und-Freising-vom-20.-Januar-2022.pdf,accessed on April 19, 2022.
[3] *Westpfahl et. al.*, loc. cit. (Fn. 2), p. 402 ff.
[4] *Westpfahl et. al.*, loc. cit. (Fn. 2), p. 1160 ff.
[5] *Westpfahl et. al.*, loc. cit. (Fn. 2), p. 433 ff.

These are followed by statements about three central legal problem areas in conjunction with the creation and publication of the report and which raise general questions about the future handling of internal findings[6], and, in particular also with the publication of reports that are based on those findings (IV.). Four essential legal key questions relating to the treatment of cases of sexual abuse are then examined in Section V. In particular, these concern the relationship between state law and church law, issues of evidence, considerations on the criminality of diocesan leaders acting in breach of their duties, and the need to strengthen the rights of victims. In so far as questions for psychology and psychiatry are formulated below (VI.), this is done from the viewpoint of the lawyer and with the intention of encouraging an intradisciplinary as well as an interdisciplinary discussion based on the expert findings. The contribution is concluded with a judgemental summary in eleven theses which go in part beyond the scope of sexual abuse (VII.).

II. Some methodical principles

As regards method, the experts' approach was initially to examine and analyse all files of (suspected) cases of sexual abuse made available to them. The many existing national and international studies on sexual abuse in the Catholic church were also evaluated. Based on the impression gained from analysing the files, well over 50 contemporary witnesses were then interviewed in a first step. Beside initial information about individual cases of sexual abuse and their treatment by members of management, the subject of these interviews was in the first instance information about general systemic framework conditions. Starting from the knowledge acquired through the described audit procedures, the conceivable ecclesiastical persons responsible to be named and/or identified as part of the report to be published were confronted in writing with the existing accusations of their behaving in breach of their duties and/or improperly. The corresponding statements were attached to the published report where these persons gave their consent.[7] If and in so far as such consent was not given, the statements made by the persons responsible concerned were reproduced in summary form in the text section of the report. Finally, the statements received from the persons responsible were then evaluated by the experts. This procedure ensures that any reader of the report can form their own comprehensive idea as to the allocations of responsibility that have been made.

It should also be noted that a particularly exposed case of sexual abuse was made the object of a very wide-ranging explanation of all (accompanying) circumstances for over nearly four decades. The related results are described in a special volume comprising over 370 pages.[8] Among other things, this uses examples to make clear

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[6] For an introduction, see *Moosmayer / Hartwig*, Interne Untersuchungen – Praxisleitfaden für Unternehmen, 2. Edition. 2018, *Rotsch* (Hrsg.), Criminal Compliance, 2. Edition 2015, p. 1234 ff. as well as *Wastl*, in *Petersen / Zwirner* (Hrsg.), Handbuch Bilanzrecht, 2. Edition 2018, p. 485 ff. (generally on the topic of compliance), in particular p. 504 ff. (specifically on internal investigations), each with numerous other pieces of evidence.

[7] Appendix volume to *Westpfahl et. al.*, loc. cit. (Fn. 2), available at https://westpfahl-spilker.de/wp-content/uploads/2022/01/WSW-Gutachten-Erzdioezese-Muenchen-und-Freising-vom-20.-Januar-2022.pdf, accessed on April 19, 2022.

[8] *Wastl / Gladstein,* Sexueller Missbrauch Minderjähriger und erwachsener Schutzbefohlener durch

the effort which a very comprehensive appraisal comparable to a preliminary investigation by a public prosecutor's office would have required. This case also shows the number of unreported cases that is to be expected as regards the actual number of victims.

III. Some empirical principles and findings

There are now a large number of studies and reports on the issue of sexual abuse in the Catholic Church, and in this respect numerous studies and investigations have already been published relating to German (arch-)dioceses alone. For example, a total of four reports have been created and published – with some limitations – by this author's law firm alone: in 2010 for the Archdiocese of Munich and Freising[9], in 2020 for the Archdiocese of Cologne[10] and the Diocese of Aachen[11], and finally on 20.01.2022 for the Archdiocese of Munich and Freising again, this time with an investigating mandate that was broadened by time and subject. Empirical and legally factual fundamentals of sexual abuse in the church are already described in a remarkably dense scope by these German investigations[12] and the international studies that are so far available.[13]

At this point the following parameters relating to the 'Munich Abuse Report' of 20.01.2022 should be mentioned by way of example:[14]

- Overall, personal and - where available - case files, as well as a large number of additional records such as meeting memoranda, file notes and archives relating to 261 persons were examined and assessed. In all, and according

Kleriker sowie hauptamtliche Bedienstete im Bereich der Erzdiözese München und Freising von 1945 bis 2019 – Special volume: Der Fall X., available at https://westpfahl-spilker.de/wp-content/uploads/2022/01/WSW-Gutachten-Erzdioezese-Muenchen-und-Freising-vom-20.-Januar-2022.pdf, accessed on April 19, 2022.

[9] *Westpfahl / Pusch*, Sexuelle und sonstige körperliche Übergriffe durch Priester, Diakone und sonstige pastorale Mitarbeiter im Verantwortungsbereich der Erzdiözese München und Freising in der Zeit von 1945 bis 2009 – Gutachten vom 02.12.2010, Kernaussagen, available at https://www.erzbistum-muenchen.de/cms-media/media-14418720.pdf, accessed on April 19, 2022.

[10] *Westpfahl / Wastl / Pusch*, Sexueller Missbrauch Minderjähriger und erwachsener Schutzbefohlener durch Kleriker und sonstige pastorale Mitarbeitende im Bereich des Erzbistums Köln im Zeitraum 1975 bis 2018 – Report from October 1st, 2020, inspection possible by appointment with the Archdiocese of Cologne.

[11] *Wastl / Pusch / Gladstein*, Sexueller Missbrauch Minderjähriger und erwachsener Schutzbefohlener durch Kleriker im Bereich des Bistums Aachen im Zeitraum 1965 bis 2019 - Verantwortlichkeiten, systemische Ursachen, Konsequenzen und Empfehlungen, Report from November 12, 2020, available at https://westpfahl-spilker.de/wp-content/uploads/2020/11/Gutachten_Bistum_Aachen.pdf, accessed on April 19, 2022.

[12] In addition to the studies mentioned above, the report on the research project "Sexual abuse of minors by Catholic priests, deacons and members of religious orders in the area of the German Bishops' Conference" from 2018 (so-called "MHG study"), available at https://www.dbk.de/fileadmin/redaktion/diverse_downloads/dosiers_2018/MHG-Studie-gesamt.pdf, accessed on Aprol 20, 2022; zu weiteren nationalen Untersuchungen vgl. *Westpfahl et. al.*., a.a.O. (Fn. 2), p. 261 ff.

[13] Most recently, for example, the "Summary of the Final Report" of the "Independent Commission on Sexual Abuse in the Catholic Church (CIASE)" on the investigation "Sexual Violance in the Catholic Church France 1950 - 2020 from the year 2021, available at https://www.ciase.fr/medias/Ciase-Summary-of-the-Final-Report-5-october-2021.pdf, accessed on April 20, 2022, for further international studies see *Westpfahl et al.*, loc.cit., (fn. 2), p. 261 ff.

[14] *Westpfahl et. al.*, loc. cit. (Fn. 2), p. 340 ff.

to the experts' assessment, culpable behaviour by senior clerical personnel must be assumed with regard to more than 65 actual or putative abusers.

- With 235 persons there were indications of conduct the object of investigation within the field of sexual abuse. A minimum number of 497 victims must be assumed based on the various investigations.

- Based on the experts' experience however it is quite certain that this is a statistical result of only very limited significance. It only describes the 'light field'. The number of (suspected) offenders and victims is far higher according to all the studies available so far and based on the findings of the experts, who do not believe that a reliable statistical extrapolation of the 'dark field' is possible.[15]

- Out of the total of 363 relevant cases involving suspected sexual abuse as defined by the investigating mandate, in 211 cases the experts assessed the accusation as being proven or plausible based on the assessment criteria explained in more detail in the report.

- In line with comparable investigations the experts have concluded that the victims of sexual abuse were mainly male. To be specific, 247 victims were male and 182 were female, with 68 cases not being reliably assignable. Regarding an assignment to individual age groups, we can state that almost 60% of the male victims are in the 8 to 14-year age group, while the proportion of female victims in this age group is only one-third.

IV. Some legal requirements for the creation and publication of the experts' report

Three legal problems regarding the creation and publication of the 'Munich Abuse Report' are discussed below. It should be remembered that the issues dealt with in the report go far beyond the scope of reports on sexual abuse. Instead, it describes typical problems which for some time now expert reports must take into account to an increasing degree; this is because the interested party makes increasing use of the corresponding legal principles to prevent – from the outset – the creation and publication of a report which it sees as detrimental, or at least to discredit the report and its respective authors. Current examples now frequently under public discussion include the attacks on historians relating to the desires of the Hohenzollerns to regain assets expropriated in the past in the territory of the former German Democratic Republic[16], and the so-called 'Cologne Turmoil' whose point of departure was the decision by Cardinal Woelki to prevent the publication

[15] The CIASE arrived by extrapolation at 330,000 under-age victims for example, cf. CIASE, loc. cit. (Fn. 13), p. 9.

[16] For more information, see *Brandt / Lothar*, Süddeutsche Zeitung vom 17.06.2021 unter dem Titel „Familie Preußen" available at https://www.sueddeutsche.de/kultur/hohenzollern-monarchie-enteignung-preussen-weimarer-republik-historiker-1.5324092?reduced=true, accessed on April 26, 2022 as well as *Bahrens*, Frankfurter Allgemeine Zeitung from June 17, 2021 titled „So schnell schießen die Anwälte der Preußen", available at https://www.faz.net/aktuell/feuilleton/debatten/klagen-der-hohenzollern-internet-datenbank-der-rechtsstreitigkeiten-17392793.html, accessed on April 19, 2022.

of an independent abuse report.[17] The following briefly described legal attacks on an independent report creation and publication are part of a development which has been observed for a number of years now, where lawyers acting in this matter wish to make even threats to journalists socially acceptable and justifiable.[18]

1. Internal investigations – Alleged problems due to a lack of legal framework: Palmström Logic I?

The collection of facts by independent experts – in this instance lawyers – for the purpose of creating an independent abuse report constitutes a so-called 'internal investigation'.[19] This form of internal and/or private enquiry (which has also been known and commonplace in Germany since the Siemens corruption affair[20] at the latest) into cases that are often also criminally relevant has to this day still not been explicitly legally regulated despite demands[21] to this effect. The result is a large numerous of legal uncertainties, especially regarding labour, employment, data protection and administrative offences as well as criminal regulations. Even so, the fundamental admissibility of such internal enquiries is generally recognised, and certain (minimum) standards have emerged in practice to this effect.[22] However it is this very legal uncertainty which is also used by interested groups regarding the creation of reports on sexual abuse in the church in order to put pressure on experts, threaten them with legal action and so attempt to prevent the report from being created and/or published in the first place. Regarding the creation of the 'Munich Abuse Report', advisers of one member of management even went so far as to generally deny the admissibility of such internal enquiries in the ecclesiastical sphere. Apart from the apodictic claim that an (arch-)diocese is not permitted to conduct such a private internal enquiry because of a vague reference to its status as a public law body, no understandable or even specific further information was offered on this issue. To say it with Palmström: "That which must not, cannot be."[23]

From this, some parties have concluded that responsibilities could be clarified as part of a formal disciplinary procedure if need be. The deviousness of this view is

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[17] For an introduction, see *Deckers*, Frankfurter Allgemeine Zeitung from February 14, 2021 titled „Kölner Wirren", available at https://www.faz.net/aktuell/politik/inland/missbrauch-im-erzbistum-koelner-wirren-um-rainer-maria-kardinal-woelki-17194724.html?premium, accessed on April 26, 2022.

[18] See, just as an example, *Höcker*, Journalisten bedrohen ist okay!, in: Internationaler Club Frankfurter Wirtschaftsjournalisten Deutsche Gesellschaft Qualitätsjournalismus (Hrsg.), die Vierte Gewalt, p. 26.

[19] The terms "internal investigations" or "internal investigations" are also often used in this respect.

[20] See *Leyendecker*, Süddeutsche Zeitung of 14.01.2011 under the title „Das ist wie bei der Mafia" ('It's like with the Mafia'); *Werres*, Manager Magazin, No. 7/2008, p. 40. But also from a legal point of view *Wastl*, Das Agieren der SEC und US-amerikanischer Anwälte in der „Siemens-Korruptionsaffäre" (I.) und Ersetzung von Recht durch Verhaltensregeln (II.), in: *Hof / Götz von Olenhusen*, Rechtsgestaltung – Rechtskritik – Konkurrenz von Rechtsordnungen, 2012, p. 94 (I.) and p. 412 (II.).

[21] See as an example, *Wastl*, loc.cit. (Fn. 6), p. 504 ff., *Wastl*, ZRP 2011, 57, *Wastl / Litzka / Pusch*, NStZ, 2009, 68. The attempt to close this gap within the framework of the planned Association Sanctions Act, which the authors believe failed, ultimately failed in 2021. A new legislative project would be all the more desirable, which is primarily limited to regulating the numerous (procedural) legal problems with a view to internal investigations.

[22] Cf. *Moosmayer / Hartung*, Interne Untersuchungen, 2. Edition 2018.

[23] *Morgenstern,* Gedichte, p. 79.

self-evident from the fact that on the one hand there is no apparent standard that prohibits an (arch-)diocese from commissioning an internal enquiry, and on the other that an ecclesiastical disciplinary law simply does not exist.

2. Right to free speech: Palmström Logic II?

One area of law which is being used more and more by law firms specialised in it to build legal threat scenarios and prevent justified expressions of opinion and/or (scientific) expert reports is the right to free speech.[24] This area of law is particularly suited to this purpose if only because the legal questions that have to be decided here must be regularly answered on the basis of conflicting fundamental constitutional rights. In particular this is about the protection of the general privacy rights on the one hand, and on the other the freedom of expression and/or academic freedom according to Basic Law Article 5 Paragraph 1 and Paragraph 3.[25] In addition, according to the jurisdiction of the Federal Constitutional Court in this area, it always depends – or must logically depend – on the particularities of the individual case that is to be decided.[26] This naturally results in an increase in legal uncertainty and so provides possibilities for creating corresponding threatening scenarios in conjunction with the planned publication of a report.

However, this cannot obscure the fact that there are of course limits when it comes to the public naming of persons of responsibility who have acted in breach of their duties and/or improperly. Thus, normally only persons of public interest[27] can be named because only a public (publicity) interest which justifies the intervention in the general privacy law of the particular person of responsibility can exist in the naming of persons exposed in this way. It was on this basis that the experts named (arch-)bishops and vicars general almost exclusively as personally responsible officials in the 'Munich Abuse Report' and in the Cologne and Aachen reports as well. So far as lower-ranking persons were named by way of exception, this is based on the fact that they were largely responsible for improper and/or illegitimate behaviour because of their – at least – de facto position of power and their other position within the (arch-)diocese, and that they also occupied a 'high-profile' position justifying public interest in the publication of their name. Meticulous care was of course also taken to prevent the victims being identifiable from the outset. But even the (abuse) perpetrators were not allowed to be identifiable from the outset and in particular because of their 'right to forget'[28] in the published version of the report.[29]

The question of whether and how far the principles developed by the BGH (Federal

[24] As an introduction, see *Rixen / Schüller / Wagner*, NJW 2021, 1702.
[25] Cf. in particular on the weighing of goods and interests in this area Grüneberg/Sprau, BGB, 81. Edition 2022, § 823 Rn. 95 ff.
[26] As an introduction, see *Grüneberg / Sprau*, loc.cit. (Fn. 25), § 823 Rn. 95 ff. as well as *Stollwerck*, in: *Götting / Schertz / Seitz*, 2. Edition 2019, p. 539 ff., especially p. 544 ff.
[27] Cf. BGH, judgment of December 7th, 1999, VI ZR 51/99.
[28] See the recent BVerfG, decision of November 6th, 2019, 1 BvR 16/13 (Recht auf Vergessen I) and BVerfG, decision of November 6th, 2018, 1 BvR, 276/17 (Recht auf Vergessen II).
[29] Cf. on the criteria for naming suspected abusers by name in the report for the Archdiocese of Munich and Freising from 2022 *Westpfahl et al.*, loc.cit. (Fn. 2), p. 438 ff.

Supreme Court) for suspicion reporting[30] can be applied – including applied to the publication of an experts' report – is debatable, however. This fundamental question is important because additional imponderables and legal risks that must not be underestimated would be associated with a duty to observe the principles of suspicion reporting.

The experts assume that the principles of suspicion reporting are generally not applicable to their reports, if only because it is apparent to any reader of an experts' report that it is only an experts' assessment and hence an opinion expressed on the basis of facts presented to them. This is also the essential intention of the BGH in its fundamental decision on this matter which rejects the application of principles of suspicion reporting to experts' reports.[31] As regards legal policy it must also be pointed out at this juncture that a different assessment and evaluation of reports would involve significant risks to the conflict of opinion that is indispensable from the viewpoint of a democracy. This is because science and truth exist essentially on the independence of opinion expression, on the need for discourse and then, if necessary, also on the need to admit a mistake that might emerge in the discussion. This has nothing to do with the principles of suspicion reporting developed in the relationship between high-profile criminal cases and corresponding powerfully effective press reporting. Not to mention that the application of these principles can be the result of the necessary balancing between general personal/privacy rights on the one hand and the freedom of expression/academic freedom on the other.[32]

Nevertheless, as regards all three reports created by them in 2020 and 2022 and to be published, the expert reporters have decided to adhere to the principles of suspicion reporting as a highly precautionary measure.[33]

Independently of all that, the principle applies of course that the ascertained facts must withstand critical examination.[34] The expert assessments and/or value judgements made based on these (connecting) facts are covered by freedom of expression and academic freedom however.[35]

3. Data protection and archive law: Knockout argument/Palmström Logic III?

In 2010 a mixture of data protection and employment law objections were raised against the creation of the report for the Archdiocese of Munich and Freising which was published on 03.12.2010. The objection was that external lawyers should not be permitted to inspect the various personnel and other files containing references to occurrences of abuse. This objection was initially lifted but was not

[30] Cf. BGH, ruling of October 30th, 2012, VI ZR 4/12 for an example of these principles.
[31] BGH, judgment of July 2nd, 2019, VI ZR 494/17.
[32] As a result, *Rixen / Schüller / Wagner*, NJW 2021, 1702, 1705 ff.
[33] Cf., for example, the report for the Archdiocese of Munich and Freising regarding the criteria for naming *Westpfahl et al.*, loc.cit. (Fn. 2), p. 438 ff. as well as with regard to the opportunity for the responsible persons to comment in *Westpfahl et. al.*, loc.cit. (Fn. 2), p. 38 ff.
[34] Cf. on the requirements for factual research BGH judgment of December 11, 2012, VI ZR 314/10.
[35] The Federal Court of Justice has made a detailed statement on the subjective scope for assessment based on a sufficient factual basis in a fundamental decision, cf. Federal Court of Justice, judgment of July 2nd, 2019, VI ZR 494/17.

subsequently pursued further with corresponding legal consequences. Even today however, the attempt is still made, if not to actually prevent similar reports with a reference to data protection, archive and employment law regulations, then to impede them significantly. In this respect the not-so-clear-cut data protection law (DSGVO)[36] offers a variety of ways of creating confusion at least. Essentially however the data protection law problems can be avoided in advance with a certain sensitivity. As regards creating and publishing reports on sexual abuse in the church there is the added element that the church has its own data protection law.[37] This offers the one or other more clearly defined discretionary power when it comes to examining and evaluating data. It has also been proven to be beneficial if the files are examined by persons legally obliged to maintain secrecy, such as auditors, lawyers etc., since from the perspective of the (data) manager[38], even greater protection of the data made available is documented and guaranteed from the outset thanks to the duty of confidentiality imposed on the person charged with the internal investigation, a duty that is sanctioned by criminal law.

V. Some fundamental legal questions concerning the treatment of cases of sexual abuse

A number of fundamental legal questions concerning the treatment of cases of sexual abuse have arisen during the creation of the report. It would go beyond the limits of the present 'conceptual outline' if we were to want to discuss or only draft out all of these (detail) questions here, which is why this section is limited to four key questions.

1. Canon law and state law versus church law: A problem or a chimera?

The question of the relationship between state law and church law cropped up again and again particularly in conjunction with the creation of the 'Munich Abuse Report' and the discussions which were had about it. Ultimately the question arose as to whether, as regards the treatment of cases of sexual abuse, there was a special church law that precluded state law. This must be denied in all clarity. The pursuit of acts of sexual abuse by the state's law enforcement agencies is not restricted by church law in legislative terms. This legal finding is only half the truth however, for the experts find it hard to resist the impression that in the past, whether in Munich, Cologne, or Aachen, close and trusting co-operation between state/judiciary and church was thoroughly common practice. To this extent the 'Munich Abuse Report' contains an equally classic and exemplary testament when – in the case of a priest accused of multiple acts of sexual abuse – the vicar general triumphantly reports that the deciding judge is Catholic and so the court can be expected to adopt a church-friendly approach. To quote the vicar general's words:

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[36] Also in the Gola assessment, GDPR 2nd edition 2018, introduction Rn. 20 ff., in particular para. 23, with further evidence.

[37] Law on Church Data Protection (KDG) in the version of the unanimous resolution of the General Assembly of the Association of German Diocese of November 20, 2017, available at https://www.katholisches-datenschutzzentrum.de/wp-content/uploads/2018/06/KDG-Beschlussfasssung-der-Vollversammlung-der-BK-vom-20.11.2017.pdf; accessed on April 20, 2022.

[38] The natural person or legal entity, authority, establishment or other body which, alone or jointly with others, decides on the purpose and means of the processing of personal data, Art. 4 No. 7 DSGVO or Section 4 No. 9 KDG.

> "The chief judge will be Mr […]. **He is a practising Catholic […].** There is the justified hope that all participants will avoid public attention."[39]

The extremely lenient sentencing of the priest who had already made an appearance relating to sexual abuse – sentencing which was justified among other things by a mitigating consideration of his paedophilia – also suggests a closeness between court and church that cannot be underestimated, and an understanding for the church and the priest's acts that is difficult to comprehend.[40]

The issue of the necessary appraisal of the former relationship between church and state/judiciary, and which has only been dealt with by way of example at this point, could not (yet) be substantiated within the scope of the reports that currently exist with the necessary seriousness and the required density of facts. Consequently, this is of course also not possible within the scope of the present 'conceptual outline'. The experts believe that this topic and its appraisal should not be deferred *ad infinitum* however.

2. Burden-of-proof issues – Victims versus offenders: Palmström Logic IV?

One of the basic problems with which the experts were repeatedly confronted is the inferiority of the victims in their efforts to gain appraisal and recognition, an inferiority which the experts did not just feel but which they estimate as being an actual fact. The jurisprudence of the 1st BGH Criminal Division on the assessment of witness statements by the victims also plays a part that cannot be underestimated in this context.[41] With this decision, the BGH postulates the so-called 'null hypothesis', on the basis of which in a 'statement versus statement situation', it must be assumed that the victim's testimony is incorrect. This approach should not be challenged at this point from a statistical/psychological standpoint. It must be stated however that in judicial practice this method is quite manifestly understood not just as a feasible possibility and/or method of judging the truth content of victims' statements, but is miraculously, and at least factually, mutated to become a burden-of-proof rule that inverts the burden of proof.[42] This appears to be misguided in different ways, and leads to numerous problems in practice. For on the one hand the victim now also experiences his structural inferiority before the courts. In his perception this rule of evidence constitutes none other than a requirement for the victim to prove that he is not lying. In legal terms this null hypothesis – admittedly without being stylised as a rule of evidence – may just be acceptable in criminal proceedings under certain circumstances. Otherwise, the little-reflected adoption of this jurisprudence of the 1st BGH Criminal Division, especially by the social courts but also, as far as can be seen, by other judicial branches, appears to be misguided.[43]

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[39] Cf. *Wastl / Gladstein*, loc.cit. (Fn. 8), p. 33.

[40] In this respect, this situation is not an isolated case. Rather, the experts were repeatedly confronted with decisions by judicial bodies that at least suggest a certain closeness between them and the church.

[41] See the fundamental leading decision of the Federal Court of Justice with judgment of July 30th, 1999, 1 StR 618/98 (BGHSt 45, 164).

[42] Cf. *Bublitz*, ZIS 2021, 210, 213.

[43] Similar in the assessment Bublitz, ZIS, 2021, 210 in particular, 211 ff.; more reserved in contrast Makepeace, ZIS 2021, 489.

3. Criminality of responsible parties acting illegally: Palmström Logic V?

One of the emphases in judging the behaviour of ecclesiastical leaders is their criminal responsibility in connection with their treatment of cases of sexual abuse. In this respect, criminality can arise from the perspective of negligent or deliberate physical injury with regard to future victims of sexual abuse by clergy and/or employees of the particular (arch-)diocese. The obstruction of justice according to Section 257 of the Penal Code and/or corresponding document frauds come into question as further starting points for criminally relevant conduct by persons responsible acting at diocesan level.[44]

Within the scope of this 'draft' however it should be noted primarily that diocesan leaders – to wit the diocesan bishop and his vicar general – can also make themselves punishable from the point of view of aiding sexual abuse. The justification for this is based on the fact that the principal leaders of the (arch-)diocese (the diocesan bishop/vicar general), and under certain circumstances other high-ranking members of management, bear criminally relevant responsibility for the abuse of other future victims with as a result of their decisions in this field. The corresponding legal principles and judicial assessments cannot be comprehensively presented in the course of this 'conceptual outline'.[45] Nevertheless it must be pointed out that in the opinion of the experts, the criminality of the highest-ranking members of management of the respective (arch-)diocese comes into question, especially regarding the re-deployment of priests who have previously been 'prominent' in connection with sexual abuse.[46] Especially the area of so-called 'transfer cases', of which the case of priest X provides impressive proof,[47] shows in all clarity – and despite all of the existing legal problems – exactly what the criminally relevant and ultimately justified massive allegation consists of. But there are also other cases in which a related criminality on the part of the involved high-ranking diocese leaders is not only conceivable but also a frequent fact. Contrary to the experts' assessment, the 'second report' on the treatment of cases of sexual abuse in the Archbishopric of Cologne[48] arrives at a different conclusion. There it is denied from the outset that the preconditions for the affirmation of complicity in sexual abuse by diocese leaders on the basis of an omission can be at all satisfied. The commitment of this (complicity) crime by active conduct is also manifestly not considered to be relevant from the outset.[49] However the arguments relating to this issue are not convincing, and in the view of the experts clearly constitute an attempt at a defence

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[44] Cf. *Westpfahl et. al.,* loc. cit. (Fn. 2), p. 155.
[45] Cf. in detail on state criminal law *Westpfahl et al.*, loc.cit. (Fn. 2), p. 64 ff.
[46] Cf. *Westpfahl et. al.*, loc. cit. (Fn. 2.) p. 107 ff.
[47] See the description of the course of events in case X in *Wastl / Gladstein*, loc.cit. (Fn. 8), p. 23 ff.
[48] Cf. *Gercke / Stirner / Reckmann / Nosthoff - Horstmann*, Pflichtverletzungen von Diözesanverantw ortlichen des Erzbistums Köln im Umgang mit Fällen sexuellen Missbrauchs von Minderjährigen und Schutzbefohlenen durch Kleriker oder sonstige pastorale Mitarbeitende des Erzbistums Köln im Zeitraum von 1975 bis 2019 – Report from March 2021, available at https://mam.erzbistum-koeln.de/m/2fce82a0f87ee070/original/Gutachten-Pflichtverletzungen-von-Diozesanverantwortlichen-im-Erzbistum-Koln-im-Umgang-mit-Fallen-sexuellen-Missbrauchs-zwischen-1975-und-2018.pdf, accessed on April 20, 2022, p. 148.
[49] Cf. *Gercke et. al.*, loc. cit. (Fn. 51), p. 155 ff.

after the event.[50]

A number of questions arise from the principles of the criminality of diocese leaders due to their aiding of sexual abuse, as comprehensively described in the 'Munich Abuse Report', as well as other crimes. This applies all the more so given that the delay in clarifying cases of sexual abuse from 2002 onward, but from no later than 2010 onward – a delay that is difficult to explain from the viewpoint of the experts – has resulted in corresponding (criminal) offences being regularly statute-barred. Regarding the 'Munich Abuse Report' at any rate it must be stated that in the opinion of the experts, all offences that are specifically relevant in this respect are already statute-barred.[51] Nevertheless, in the current cases that are being dealt with, there are wholly conceivable situations in which a criminal offence for aiding sexual abuse and/or deliberate or negligent assault of abuse victims by members of management could still be considered. A deciding criterion for this would be the date of the sexual abuse of another future and so far unknown victim, and their age.[52]

4. Strengthening the rights of victims – An absolute necessity?

For someone dealing with cases of sexual abuse of children and minors it should in the opinion of the experts be self-evident that it is essential to strengthen the rights of victims so far as is at all possible. In state law this insight into a continuing process has already led to a significant strengthening of the rights of victims.[53] However this still does not apply to church law procedures which make no provision for the rights of victims to participate.[54] Based on numerous discussions with victims, the experts believe that it is essential to entitle those affected to examine not only documentary records relating to church law procedures but also generally to examine files kept by the (arch-)dioceses. This demand does not overlook the fact that this is associated with tricky legal questions in terms of data protection and other considerations relating to the protection of the general privacy rights of the offenders and third parties. The associated problems are manageable, however. If by nothing else, this is demonstrated by the Stasi Records Law (StUG) and the Federal Archive Law (BArchG) which form the legal basis for access – including by victims – to the records of the Ministry for State Security of the former German Democratic Republic. For based on these legal rules it is possible to easily develop principles which permit victims of sexual abuse to examine their personal abuse records within a legally secure framework. This applies all the more so as in the course of developing this legal framework, the church should be less bound than the state which is responsible for processing the injustice in the former GDR and which is not legally capable.

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[50] Cf. in this respect the explanations on aid through omissions and here in particular on the question of the so-called employer's liability at *Westpfahl et al.*, loc.cit. (Fn. 2), p. 115 ff.
[51] Cf. *Wastl / Gladstein*, loc.cit. (Fn. 8), p. 119.
[52] Cf. *Westpfahl et. al.,* loc. cit. (Fn. 2), p. 95 ff.
[53] On the historical genesis of victims' rights in the criminal case, *Westpfahl et al.*, loc.cit. (Fn. 2), p. 155 ff.
[54] On the requirement for a strengthening of the victims ecclesiastical criminal procedural law *Westpfahl et. al.*, loc. cit. (Fn. 2), p. 1770 ff.

VI. Some questions for psychology and psychiatry

As already mentioned at the start, some questions should finally be put to psychology and psychiatry. Even if initial expert theses may form a basis in this respect, this should not be misconstrued as a scientific assault by a lawyer. The ultimate answers to all of these questions rests with psychology and psychiatry, if necessary, in interaction with other affected fields.

1. Expert pool

As the experts were dealing with cases of sexual abuse in Munich, Cologne, and Aachen, they noted that the church had already created a pool of a small number of psychiatric experts early on. After reading many psychiatric reports and other related documents the experts assumed – and assume – that establishing a more comprehensive and more heterogeneous expert pool could be very much worth considering, not so much to direct criticism at the experts acting in this respect, but rather to ensure broader scientific expertise and discussion.

2. Analysis of forensic reports issued between 2000 and 2010

In 2012 the psychiatric/forensic experts primarily commissioned by the church published a so-called 'final report' entitled 'Sexuelle Übergriffe durch katholische Geistliche in Deutschland – eine Analyse forensischer Gutachten 2000 bis 2010".[55] The experts here are certainly not authorised in technical terms to criticise or question this report scientifically in detail, but a number of questions nevertheless arise regarding it. Only the following statement from this analysis is quoted at this point:

> "If we consider international findings in cases of sexually aggressive Catholic clerics who took part in outpatient treatment, then a relatively small proportion (approx. 5 %) committed further sexual assault. The extent to which untreated sexually aggressive clerics display a lower or higher rate of relapse is so far not known. If sexually aggressive Catholic clerics remain within their church then they have a social control and support network which can be regarded as a protective factor in terms of relapse prevention. These findings are in line with the recommendations of the forensic reports. Only in a minority of cases (15%) was further employment in the service of the church totally discouraged."

As an example, it should only be noted here in the view of the experts that it is surprising if "only in a minority of cases (15%) ... was further employment in the service of the church totally discouraged".

To this extent we may well ask why continued employment in the service of the

[55] *Leygraf / König / Kröber / Pfäfflin,* Sexuelle Übergriffe durch katholische Geistliche in Deutschland – Eine Analyse forensischer Gutachten 2000 – 2010, available at https://www.dbk.de/fileadmin/redaktion/diverse_downloads/Dossiers_2012/2012_Sexuelle-Uebergriffe-durch-katholische-Geistliche_Leygraf-Studie.pdf, accessed on April 20, 2022.

church was psychiatrically appropriate in 85 % of cases. The question why "sexually aggressive Catholic clerics" who remain "within their church" have access to a social "control and support network" also goes unanswered. This also on the premise that this "can be regarded as a protective factor in terms of relapse prevention". In the mind of the experts, these statements raise the question of whether and how far a priest who has become so hugely conspicuous for sexual abuse should actually continue to work in pastoral care. These statements do not answer this question, because inclusion in a Catholic social environment can also be guaranteed without any further pastoral work being done. In other words: according to the experts' findings, a kindergarten teacher in a Catholic kindergarten who has been guilty of assaulting children will – rightly – no longer be able to work in that kind of environment. So where should there now be the difference from a 'Catholic cleric'? In terms of general prevention, we should instead ask the question of whether a comprehensive ban on pastoral activities would be far and away more justified, for an offender can still be included in a secure social environment without continuing to work as a pastor. To this extent the church would have to develop corresponding models in cooperation with psychology and psychiatry.

It should be deliberately left with this question without naming any other problems arising from this study that require clarification. This is and remains the reserve of the psychological and psychiatric assessment of the corresponding 'analysis'.

3. Duty of disclosure

From a psychological and psychiatric viewpoint it seems to be the case that the quite overwhelming opinion goes against a state sanctioned duty of disclosure when it comes to cases of sexual abuse.[56] Based on the experience of the experts in their dealings with victims, it should remain the case that a duty of disclosure in this regard only comes into consideration when the affected victims also consent. This should also be strictly upheld regarding the church's guidelines.[57]

4. Null hypothesis

The so-called null hypothesis has already been the subject of a critical discussion from the perspective of the at least factual establishment of a reversal of the burden of proof.[58] From a psychological and psychiatric standpoint however there are many questions that go beyond this legal issue of establishing a burden of proof rule. Statistically speaking the question must be asked whether and to what extent adequate empirical findings exist to show that – regarding the sexual abuse of

[56] Cf. the statement of the Berufsverband der psychosozialen Berufe concerning committed abuse cases, available at https://www.dgvt-bv.de/news-details/?tx_ttnews%5Btt_news%5D=910&cHash=e415decf330b1dcb62f6e59bf94dc038, accessed on Mai 2, 2022; It was for this reason among others that the Committee on Legal Affairs of the German Bundestag recommended not extending the duty of disclosure of Section 138 StGB to threatening acts of abuse, cf. BT-Drs. 15/1311, p. 23.

[57] Cf. the current regulations in No. 33 et seq. of the regulation of the regulation for dealing with sexual abuse of minors and adults in need of protection or help by clerics and other employees in church service from November 18, 2019, available at https://www.dbk.de/fileadmin/redaktion/diverse_downloads/dossiers_2019/2019-207a-Ordnung-fuer-den-Umgang-mit-sexuellem-Missbrauch-Minderjaehriger.pdf, accessed on April 20, 2022.

[58] See above V.2

minors – the assumption is only partially justified that the affected victims are ultimately burdened with the assumption that their claims are unfounded. The knowledge gained by the experts during the course of their various reports in particular, but not only, from the existing files makes this appear to be doubtful. From a psychological and psychiatric standpoint, the question also arises of whether such a (null) hypothesis is acceptable to the children and adolescents affected, for this methodical approach ultimately suggests, no more and no less as a fact, that the victims are not believed. In the view of the experts therefore it would make sense to gather empirical findings from a psychological and psychiatric as well as a forensic standpoint as to whether and how far children and minors who are victims of sexual abuse actually make false statements accusing the offender. This issue becomes particularly 'explosive' against the background that because of the approach under the premise of the null hypothesis, victims are being deterred – even by state investigative authorities – from taking immediately urgently necessary psychotherapeutic treatment, since this could entail the risk, not least given the relevant jurisdiction[59], that the initially suspected implausibility of a witness statement can no longer be rebutted. Among other factors this is based on the consideration that the concept of corresponding crimes could be generated in the first place as part of the – urgently necessary – psychotherapeutic treatment of sexually abused children and adolescents.[60] In psychological and psychiatric terms this consequence represents an oath of disclosure when applying the so-called null hypothesis from a therapeutic standpoint, because appropriate therapies should begin as quickly as possible, especially in cases of sexual abuse of children and adolescents.[61] It would have to be all the more possible to justify the null hypothesis with corresponding statistical evidence.

5. Victim participation

In the view of the experts, procedural participation by victims of sexual abuse in the church is already assured as far as possible in state law by the fact that they can adopt the position of co-plaintiff. This ensures that comprehensive rights to examine files and, in general, to participate in criminal proceedings, are guaranteed.[62] In church law proceedings however, victims are given no adequate consideration to this day.[63] They are not allowed to appear as co-plaintiffs, and there is still no guaranteed right to examine relevant court and personal records.[64] It seems imperative that what in state practice corresponds to the 'state of the art'

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[59] BGH judgment of July 30, 1999, 1 StR 618/98 (BGHSt 45, 164).

[60] Cf. BGH judgment of July 30, 1999, 1 StR 618/98 (BGHSt 45, 164, 171 f.); BGH judgment of May 20, 2015, 2 StR 445/14 (StV 2017, 9, 10); Makepeace, ZIS 2021, 489, 493 f.; Fegert, Thinking about child protection from the child's point of view, Frankfurter Allgemeine Zeitung 2020, p. 6.

[61] Urgently and instructively *Fegert*, loc.cit. (Fn. 60).

[62] On the historical genesis of victims' rights in the criminal case, *Westpfahl et al.*, loc.cit. (Fn. 2), p. 155 ff.

[63] The injured parties are still just "objects" in church (criminal) proceedings and have no rights of participation, so that there is also a risk here that they will again see themselves exposed to a foreign exercise of power; cf. on the demand for a strengthening of the injured party in ecclesiastical criminal procedural law *Westpfahl et al.*, loc.cit. (Fn. 2), p. 1770 ff.

[64] The extent to which the position of the victims in (ecclesiastical) criminal proceedings can and should be shaped in detail is a legal-political question that must be decided, taking into account a large number of factors, and which cannot be answered conclusively due to the given framework of this presentation.

which is now endorsed and supported by all sides is also established by the church.[65] In the view of the experts, the decisive argument to be worked out by psychology and psychiatry in this respect is that – as regards the imperative recording and processing of sexual abuse by the particular victim – this can be, and usually really is, an essential (therapeutic) building block.

6. Care of offenders

The Catholic church has so far had no uniform or considered concept for dealing with priests/offenders who have become conspicuous through sexual abuse. Up until 2010 at least, previous efforts were aimed primarily at re-deploying conspicuous offenders in the church's service, although this was in part flanked by accompanying measures that were often unconvincing. From a psychological and psychiatric standpoint, therefore, the question arises as to how perpetrators of sexual abuse should be dealt with in future. After decades of negative experience, and on the basis of an overall consideration of the pros and cons by the experts, continuing to employ the offender as a priest appears to be somewhat inappropriate. In terms of protecting presumptive further victims, this however raises the particular question of whether and how far a meaningful concept that facilitates an actual, comprehensive social control of priests who have become conspicuous through sexual abuse need not be developed. Herein lies one of the key challenges for the church and, in technical terms, for psychiatry and psychology: how to handle offenders who have become conspicuous through sexual abuse. In the requirement to develop such a system that guarantees the care of offenders and hence in the best case the protection of victims as well, the experts see one of the key challenges not just for the church but also and especially for psychology and psychiatry.[66]

VII. General conclusion in eleven theses

Eleven theses are now formulated in the following section in the form of a general conclusion based on the foregoing statements:

Thesis 1: Starting point

There are now a large number of national and international studies and reports on the issue of sexual abuse in the Catholic Church. In their central points, all of these investigations have so far produced a uniform picture. For decades the high-ranking church leaders have made it their top priority to protect offenders and especially the church as an institution. Victims were not even perceived initially, and this only changed in the different countries following the exposure of a large number of cases of sexual abuse and the resulting public pressure for the general need for sexual abuse to be dealt with in the Catholic Church. This finding also applies to the Catholic Church in Germany. Up until 2010 at any rate, and the public discussion about cases of sexual abuse at the Canisius College, the interests of victims were not adequately considered, at least not to any great extent.

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[65] For detailed information, see *Weigend*, ZStW 96 (1984), 761.

[66] See the corresponding recommendation in the report by *Westpfahl et al.*, loc.cit. (Fn. 2), p. 1184 ff.

Thesis 2: Failure of leaders and their advisers active up to 2010

As regards the situation in Germany (the only situation judged here), the finding formulated with Thesis 1 leads to the conclusion that clearly up until 2010 there was systemic total denial regarding the treatment of cases of sexual abuse. This reproach does not only relate to the highest-ranking parties responsible at diocese level, however. Rather, the question also arises as to how there could be such an error of judgement even though the German (arch-)bishops and their vicar generals had been advised comprehensively and especially also externally on this matter since 2002 at the latest, at any rate through the German Bishops' Conference/the VDD (German Association of Dioceses).[67]

Thesis 3: Misguided legal attempts at preventing an adequate analysis up until the very recent past

In so far as the experts can ultimately make this assessment, it must be assumed that up until today there has been a camp within the Catholic Church that tries to prevent necessary independent analyses using apparently legal objections. This development began in 2010 at the latest. In legal terms it appealed primarily to data protection and archive law, freedom of expression and the legal uncertainties surrounding the design of so-called 'internal investigations' as alleged points of departure. The fact is however that none of these three modes of attack was or is able to prevent or even merely discredit an adequate appraisal.

Thesis 4: Attempts at preventing an adequate appraisal as proof of a general tendency to suppress the necessary discourse

The attempts outlined above to prevent the publication of the 'Munich Abuse Report' by reference to alleged legal viewpoints must be seen as further proof of a generally observed development in public discourse or conflict of opinion. To describe this in detail as part of the present 'conceptual outline' would go way beyond the given parameters, so at this point it should be sufficient to say that attempts are increasingly made – in particular with the aid of not-so-clear-cut areas of the freedom of expression and data protection laws – to generally suppress 'inconvenient' assessments and factually well-founded opinions using corresponding threat scenarios out of court. If and in so far as this also happens regarding (scientific) reports, then it is a priori misguided, since it is clear to every reader when they read the respective report that it is about personal expert assessments and/or expressions of opinion. If successful, the attempts to suppress such expert assessments and/or expressions of opinion from the outset resulted in the corresponding conflict of opinion and/or (scientific) dispute being suppressed without difficulty. This would be the end not only of any social discourse supported by facts but also, and in particular, any scientific discourse.

Thesis 5: The relationship between State and Church

In legal terms, the state has treated, and treats, cases of sexual abuse quite

[67] Association of German Dioceses. The 27 legally and economically independent (Arch)Dioceses are united in the VDD.

independently of (canon law) church law questions. Let alone the fact that the primacy of church law is to be acknowledged in one point only. Instead, the actual problems that have only been publicly discussed as of late focus on a different question, for, so far as can already be judged by the experts, in the past at any rate there was a specific close relationship between the state on the one hand, and particularly its judicial bodies, and the church on the other. Today this should only apply to a very limited extent, if at all, owing to a wide range of changed attitudes. However, this should not obscure the fact that the clarification of this issue must also be an indispensable part of a (historic/legal) appraisal of sexual abuse in the Catholic Church. There is already wide-ranging evidence of a close, even supportive, relationship between the state/judiciary and the church in individual cases of sexual abuse. Further investigation and empirical findings would however be required for a necessary definitive assessment.

Thesis 6: Legal consequence of the so-called 'null hypothesis' when judging 'claim versus claim situations'

The so-called 'null hypothesis' also plays a special part particularly when it comes to judging cases of sexual abuse of children and adolescents. The subject of the null hypothesis is the fundamental assumption that the victim must convincingly argue, in a 'claim versus claim situation'[68], that they have not lied – whether or not deliberately – or that they can only have lied. When it comes to cases of sexual abuse, the null hypothesis has in fact mutated to become a burden-of-proof (reversal) rule. The existing empirical findings, so far as can be seen, do not justify this in the view of the experts. This could at best be justified relating to criminal procedure law because it ultimately corresponds with that law's presumption of innocence.[69] Nevertheless, this approach also appears to be thoroughly questionable in regard to criminal proceedings owing to a lack of adequate empirical findings.[70] As regards other conceivable branches of law such as civil and social jurisdiction for example, the approach of the null hypothesis cannot be convincing from the outset. Overall, and with regard to this thematic complex, what is needed is an in-depth scientific engagement with the empirical underpinning of the null hypothesis, especially for the issue of the sexual abuse of

[68] This note is all the more appropriate because, in addition to a "statement against a statement situation", there are regularly other pieces of evidence and signs of evidence that can ultimately and from the outset lead to a negation of the null hypothesis. In this respect, a variety of proof constellations are conceivable. It is conceivable, for example, that a witness could testify that the victim gave a account of the course of events that took place immediately after the crime.

[69] On the presumption of innocence and its scope, see *Westpfahl et al.*, loc.cit. (Fn. 2), p. 25 f. *Makepeace*, ZIS 2021, 489, 491, also cautiously arguing in this direction, when he states: „Mit dem Zweifelssatz hat die Nullhypothese daher streng genommen nichts gemein, mag sie auch mit ihm und der Unschuldsvermutung gewissermaßen korrelieren." [Strictly speaking, the null hypothesis therefore has nothing in common with the rule of doubt, even if it correlates to a certain extent with it and the presumption of innocence.] Ultimately, however, the experts believe that this is not convincing, since it interferes with the principle of the judge's comprehensive and free assessment of the evidence and the necessary equivalence of statements by victims and perpetrators is no longer maintained (See also *Bublitz*, ZIS 2021, 210, 211 ff.). In addition, from the expert's point of view, there is, as far as can be seen, a lack of empirical support for the null hypothesis, especially for cases of sexual abuse of children and young people.

[70] Cf. also arguing in this direction *Bublitz*, ZIS 2021, 410, 411 ff. and in particular *Fegert*, loc.cit. (Fn. 60).

children and adolescents. As well as the specific empirical findings, the psychological and psychiatric characteristics of under-age victims of sexual abuse would also have to be considered. There should also be an empirical assessment of any admissions by offenders in this area to increasingly gain an overall picture of the bases on which to judge cases of sexual abuse of children and adolescents.[71]

Thesis 7: Criminal offences by responsible parties acting illegally

Like all other organisations in whose sphere of influence there have been cases of sexual abuse of minors and adolescents,[72] the Catholic Church must face the fact that its highest-ranking leaders may have behaved in a criminally relevant manner because of any unsatisfactory handling of cases of sexual abuse. The attempts to generally deny this, especially in regard to the support for the (later and further) sexual abuse of children and adolescents which comes into consideration in this respect, are nothing more, but also nothing less, than the ineffectual attempt at a self-serving defensive lie.[73] In the present situation this creates the dilemma that the hesitant and inadequate treatment of cases of sexual abuse of children and adolescents resulted in the statute-barring of these crimes with almost no exception. This too must be regarded as a systemic error of principle which, together with the judgement of the action of church leaders, especially also regarding the (lack of) action by the state and in particular by the judiciary, raises many questions.

Thesis 8: Urgent need to strengthen victims' rights

The rights of victims of sexual abuse have been continuously strengthened over decades within the sphere of state criminal law. This has been convincingly justified in particular by the argument that strengthening the procedural rights of victims is an essential building block for an appraisal of events which is essential from a victim's viewpoint. The Catholic Church still denies the victims adequate access to information as is due to them even in (criminal) proceedings under church law. In this context it would finally be time to grant victims, in a generally binding way, comprehensive rights to examine files that concern their case, and which are kept by the church. The existing obstacles to this – for example based on the general privacy law for offenders and other victims as well as data protection law considerations – are easily manageable. There is only a lack of an internal ecclesiastical and binding legal basis as a general rule in this regard.

Thesis 9: Questions for psychology and psychiatry

Whether and to what extent a pool of experts appointed by the church and that is very limited can be truly meaningful in the interest of a further (scientific) gain in knowledge must first be considered and psychologically and psychiatrically critically examined. Previous, and especially empirical, results relating to the

[71] From the point of view of the experts, from the point of view of procedural "equality of arms", it should only be possible to justify the null hypothesis under this premise; cf. also *Bublitz*, ZIS 2021, 210, 213 f.
[72] On the social background of the sexual abuse of minors, *Westpfahl et. al.,* loc. cit. (Fn. 2), p. 44 ff.
[73] On the criminal law assessment of the actions of church leaders in detail *Westpfahl et.al.*, loc.cit. (Fn. 2), p. 100 ff.

judgement of perpetrators of sexual abuse of adolescents and children in the Catholic Church also require critical assessment. The specific question is if and how far the continued employment in pastoral care of a cleric who has become so hugely conspicuous for abuse is at all justifiable, or whether the comprehensive and permanent suspension of the offender from the very outset is advisable. All of these questions and considerations go hand-in-hand with the conclusion that adequate treatment of the particular perpetrator is also conceivable without their continuing to work in pastoral care. The aim of this treatment which the experts view as being adequate must be to continue to include the offender, whether actually identified or only suspected, in a social structure; this is because this alone can guarantee a best possible prevention for the indispensable protection of presumptive further victims. The development of corresponding models in the sphere of the Catholic Church – which can only be achieved in close cooperation with psychology and psychiatry – has been decades in coming.

The demand made again and again,[74] especially from a legal standpoint, for a duty of disclosure of deeds of sexual abuse of children and minors must continue to be denied. The determining consideration here is that the victim must always be the 'master' of introducing proceedings because otherwise there is the risk of them suffering existence-destroying re-traumatisation by a preliminary investigation conducted by the public prosecutor, among other factors. It would however be desirable if, in this context too, the victim were offered opportunities for comprehensive psychological/psychiatric and legal advice on this decision.

Thesis 10: Null hypothesis versus psychotherapy

The legal aberration relating to the application of the null hypothesis was discussed in Thesis 6 [*sic*] with the concept of the 'reversal of the burden of proof'. The empirical and statistical principles which are lacking in the opinion of the experts have also been examined. In psychological/psychiatric terms however it should also be said that from the viewpoint of children and adolescents who have been victims of sexual abuse, the use of the null hypothesis involves additional consequences which are difficult to justify. This aberration/development ranges from the fact that, during the particular court case, the victim must once again experience structural inferiority to the perpetrator, to the fact that – on supposedly legal grounds – they are initially denied the necessary psychotherapeutic treatment that they require as soon as possible.[75] The experts regard this latter factor as the most appalling finding from a psychotherapeutic standpoint. A method of ascertaining the truth which is not yet adequately proven statistically or empirically can lead to further avoidable harm to the affected victim. This will also often be the case in actual fact. This viewpoint should always be borne in mind when assessing the appropriateness of the null hypothesis and be a reason for making increased demands on scientific evidence of the efficiency of the null hypothesis in this sphere.

[74] In more detail on the relevant considerations *Westpfahl et.al.*, loc.cit. (Fn. 2), p. 144 ff.
[75] Cf. Bublitz, ZIS 2021, 210, 211, pointing out the danger of secondary victimization and Makepeace, ZIS 2021, 489, 493f on the danger of devaluing a statement through suggestion.

Thesis 11: Final conclusion – Palmström and its meaning when assessing cases of sexual abuse of children and minors

When creating their various reports for the Archdiocese of Munich and Freising, the Diocese of Aachen and the Archbishopric of Cologne, the experts were repeatedly confronted with the argumentation method used by of the opponents of a comprehensive appraisal who placed the Palmström logic at the heart of their own defence efforts. The motto is:

That which must not, cannot be.

In the experts' view this contrasts with the following programmatic sentence:

What is fact must be.

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