

Penal Law in the Church Today:  
New Roman Documents  
Complementing  
*the Code of Canon Law*

Reverend Francis G. MORRISEY, O.M.I.

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## Introduction

One of the most difficult areas of canon law to study is Book VI (of the Latin Code) on penalties, because there are so many conditions to be kept in mind when applying the canons. Exceptions are numerous; excusing causes (age, drunkenness, etc.), external factors (public pressure), and the like, all influence the way in which the law is to be applied.

In addition, many of the canons allow discretionary power to the Ordinary or, in the case of a penal trial, to the judge(s). In other words, one size does not fit all.

To complicate matters further, the intense media pressure in some places has forced Church authorities to take decisions that were not always appropriate. Many of the decisions relating to penal cases were taken in panic or in haste, at times without appropriate consideration of the long-term consequences. Hopefully, with time, the pendulum will swing back to a more neutral position.

A new factor to be kept in mind is that the authority of diocesan bishops and major superiors has been seriously curtailed by the fact that many cases are now reserved to the Holy See, more particularly, to the Congregation for the Doctrine of the Faith (CDF). Because of the unexpected abundance of instances of accusation, there have been lengthy delays in adjudicating cases, and the persons accused have sometimes been left hanging in a canonical limbo for more than two years, with little sign of a speedy resolution to the overall situation.

We must recognize that the law has been changing radically over the past few years. Issues that no one heard of 10 years ago, such as addiction to pornography on the Internet, are now rather common. But, in addition to the changes in the law itself, there is also a developing jurisprudence. One of the difficulties practitioners in canon law are facing is that, since most of these cases are subject to pontifical secrecy, it is very difficult to see what approach the Holy See is taking in individual cases. Our documentation at this time is anecdotal. No one would say that we have the final answer on the way the canons and norms are being applied. I will try here to examine the legislation and jurisprudence presently in effect, keeping in mind that particular legislation, either at the national or diocesan level, can affect significantly the way that matters are to be addressed.

It should be noted that most of the documents being studied refer to "clerics," i.e., bishops, priests, and deacons. However, in these presentations we intend to focus our attention primarily on priests. Other instances could be handled in a similar way.

## I. The canons of the *Code of Canon Law*

Two sections in the *Code of Canon Law* are of particular significance when it comes to penal processes. (I am not referring to the Oriental Code here.)

### A- The canons of Book VI

The canons of Book VI of the Latin Code remain the basic legislative norms upon which to judge whether a delict has been committed, and what punishment is to be imposed, if appropriate. Of course, the canons have to be applied and interpreted today in the light of the documents which will be mentioned subsequently.

### B- The particular norms for penal processes

In Book VII of the Code, canons 1717 to 1731 provide special norms applicable to any penal process. However, these norms must be applied keeping in mind the other procedural norms of Book VII, more particularly those concerning the public good.

Although they retain their legal effect, the procedural norms of Book VII must now be supplemented by the procedural norms

promulgated by Pope John Paul II in April 2001. Likewise, we must take into account the jurisprudence of the Holy See which applies the norms to practical situations.

## II. The recent Roman documents applying the canons

There are four sets of official Roman documents applying the recent canonical norms.

### A- The Motu Proprio *Sacramentorum sanctitatis tutela* (April 30, 2001)

The Motu Proprio *Sacramentorum sanctitatis tutela* (SST), although dated April 30, 2001, in order to predate the circular letter from the Congregation of the Doctrine of the Faith, May 18, 2001, was published on November 5, 2001.<sup>1</sup> It determines that procedural norms relating to more serious offences are promulgated and come into effect the date of promulgation. However, the accompanying procedural norms were not published in the *Acta*, and were never made public officially.

### B- The circular letter of the CDF, "Ad exsequendam ecclesiasticam legem" (May 18, 2001)

The circular letter of the CDF,<sup>2</sup> building on previous legislative documents, such as the March 16, 1962 instruction on the processing of cases of solicitation and homosexuality, determines that a certain number of delicts in matters relating to the celebration of the sacraments and to morals are now reserved exclusively to it. Canon 1362 provided for such possibilities.

The reserved delicts originally indicated in the letter concern:

#### Delicts against the Eucharist:

- profanation of the Sacred Species (c. 1367); this includes any action which voluntarily and gravely offends the Sacred Species;

1. Cf. AAS 93 [2001] 737-739.

2. Cf. AAS 93 [2001] 785-788.

- attempting to celebrate the Eucharist by someone not in Holy Orders (c. 1378, § 2);
- the simulation of the liturgical celebration of the Eucharist (c. 1379); although the simulation of ANY sacrament is a delict, only the simulation of the Eucharist is subject to the norms of SST;
- the concelebration of the Eucharist with a minister of an ecclesial community which does not have the Apostolic Succession and which does not recognize the sacramental dignity of priestly ordination (cc. 908 and 1365); in practice, this means with Protestant clergy; it does not apply to Orthodox priests;
- the consecration, for a sacrilegious purpose, of one of the Eucharistic species without the other in the Eucharistic celebration, or of both outside the Eucharistic celebration (see c. 927); this delict is very similar to a profanation of the Sacred Species.

#### Delicts against the Sacrament of Penance:

- absolution of an accomplice in a sin against the Sixth Commandment (c. 1378, § 1);
- the solicitation to sin against the Sixth Commandment with the confessor himself (c. 1387). [Note: *sollicitatio inchoata*, whereby a confessor begins an apparently innocent conversation leading to a meeting with the penitent outside of confession where sexual or indecent behaviour occurs, falls under this reservation]; it is important to note that the special reservation applies to sin with the confessor personally, while the general norm on solicitation applies also to third parties;
- the direct violation of the sacramental seal (c. 1388, § 1);
- [as will be noted below, indirect violation was also added to the list on February 7, 2003, because it is often difficult to distinguish between the two acts];
- there was also added (on February 7, 2003) the delict of recording, divulging by means of social communication, of that which has been said, whether by the priest or the penitent, in confession (special norm of September 23, 1988).

#### Delicts against morals:

- a delict against the Sixth Commandment with a minor under 18 (see what will be mentioned later regarding the content of this delict in current jurisprudence) (c. 1395). This does not mean only physical contact or direct abuse, but includes indirect abuse also (for example, showing pornography to minors, lewd indecent exposure in front of minors);
- as will be noted later, the procurement and possession of pedophilic pornography, was added to the list on October 15, 2004.

#### **C- The procedural norms accompanying the motu proprio**

The Procedural norms promulgated by Pope John Paul II, as noted above, have not been officially published. However, an unofficial English translation was made available in February 2003.

The CDF<sup>3</sup> stated that if a Conference wished to prepare a translation in French, the CDF would be willing to review it, keeping in mind that, in all circumstances, the Latin text would remain the normative text.

#### **D- The 2002 and 2003 derogations and changes to the procedural norms issued by Pope John Paul II**

As the revised norms were being applied, it became evident that a number of them would need to be adjusted to meet the unexpected number of cases that had to be examined and to address practical situations that had arisen in dioceses and religious institutes.

Some of the changes are as follows:

- Indirect violation of the sacramental seal was added to the list of reserved delicts (February 2, 2003).
- The recording and the broadcast/transmission of what is said in sacramental confession by the confessor or the penitent is also reserved (February 2, 2003).
- The CDF was authorized to derogate from prescription (see art. 5 of the procedural norms) on a case by case basis,

3. February 27, 2004, Prot. no. 361/2002-18471.

after having considered the request of the Bishop and the reasons for such request (November 2, 2002).

- The CDF may dispense from the requirement of priesthood, and the requirement of a doctorate in canon law mentioned in articles 8 to 12 of the procedural norms (Judges, Promoter of Justice, Notaries and Chancellors, Advocates and procurators, Patrons in other tribunals) (February 7, 2003).  
In the case of dispensation from a JCD, the person must hold a JCL and have worked in ecclesiastical tribunals for a reasonable period of time.  
In the case of judges, the provisions of canon 1421 shall apply: provided the Conference of Bishops has approved the use of lay judges, one lay judge can be chosen to complete the college (February 7, 2003).
- The CDF may, in grave and clear cases, dispense from article 17 of the Procedural Norms which provided that the delicts reserved to the CDF may be tried only in a judicial process. This applies in two situations:
  - when such cases may be referred directly to the Holy Father for an *ex officio* dismissal from the clerical state;
  - when such cases may be treated under the summary process of canon 1720 by the Ordinary who, in case he is of the opinion that the accused should be dismissed from the clerical state, will ask the CDF to impose dismissal by force (February 7, 2003).
- The CDF may, in cases legitimately brought to it, sanate acts, if procedural laws had been violated by inferior tribunals acting on the mandate of the CDF or under article 13 of SST (February 7, 2003).
- A request for revocation of administrative acts of the CDF, and all other recourses against these acts, shall be referred to the *Feria IV* (Wednesday) meeting of the CDF which will decide on the merits and on questions of lawfulness. Any other recourse, including recourse to the Apostolic Signatura is excluded (February 14, 2003).
- Since 2004, penal cases against bishops have been heard by the Tribunal of the CDF (as provided in canon 1405, § 2, which reserved such cases to the Roman Pontiff personally).

- Although the norms of SST are not retroactive, any question involving the application of penalties at the present time for past incidents can be resolved only by the CDF. Hence, allegations received after April 30, 2001, even if the alleged acts took place prior to April 30, 2001, are to be investigated in accord with SST, which requires the diocesan Bishop or Major Superior to refer the case to the CDF, which will then direct him how to proceed (art. 13).
- On July 14, 2004, the CDF wrote as follows:  
As of the Solemnity of Christ the King, 21 November 2004, this Dicastery will no longer accept cases referred to it in which *graviora delicta* have been denounced to an Ordinary prior to the promulgation of the *motu proprio Sacramentorum sanctitatis tutela* (30 April 2001) and in which the said delicts are bound by prescription. Both conditions must be present for this Dicastery to refuse referral. ... After that date Ordinaries will be responsible for addressing such cases according to the norm of law both universal and particular (cfr. can. 223, 2) but will not be authorized to take canonical penal action whether judicial or administrative concerning the said delicts. This new policy notwithstanding, the right of making recourse to this Dicastery remains open to any cleric who is aggrieved by decisions of his Ordinary in this regard.
- On October 15, 2004, the Pope determined that the downloading of child pornography is to be considered as a grave delict to be included under SST, because creating a market for such pornography directly contributes to child abuse and exploitation. Pornography of children is an injury to the broader community's value of human life. There is no specific canonical standard establishing which child pornography cases should be sent, but where a civil legal case has been pursued, such facts would warrant review by the CDF as outlined in SST.

### III. Procedural guidelines

In order to assist canonists in applying the norms listed above, the CDF prepared and distributed to Bishops' Conferences an outline of the procedure and points to be kept in mind. The principal points of this document are noted below.

In addition, the Canon Law Society of America, in close collaboration with the CDF, issued the most helpful *Revised Guide to the Implementation of the U.S. Bishops' Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons*. While this document is addressed to the USA, much of what it contains is fully applicable elsewhere. The revised edition, taking into account certain recent developments, was issued in May 2004 and is available on the Net.<sup>4</sup>

Another helpful instrument is *A Resource or Handbook for Canonical Processes for the Resolution of Complaints of Clerical Sexual Abuse of Minors*.<sup>5</sup> Again, we must keep in mind that this document applies in the USA and that other countries are not subject to the particular norms applicable in the USA. Nevertheless, this handbook contains very handy sample formularies.

The CDF Procedural Guidelines first outline what constitutes a "*delictum cum minore*":

This does not mean only physical contact or direct abuse, but includes indirect abuse also (for example: showing pornography to minors; lewd indecent exposure in front of minors). Included also is the possession of, or downloading from the Internet of pedophilic pornography. This type of behaviour is also a civil crime in some nations. While 'browsing' may be involuntary, it is difficult to see how 'downloading' could be considered so, since not only does it involve making a choice or choosing a specific option, but often involves payment by credit card and the furnishing of personal information by the purchaser which can be traced back to him. ... according to the praxis of the CDF [and the approval of Pope John Paul II] such behaviour is considered a *delictum gravius*.

Canon 1395 § 2 of the CIC speaks of a delict with a minor under 16. The *motu proprio*, on the other hand, speaks of a delict with a minor under 18. Therefore the classification of the delict becomes more complex. ... The *motu proprio* stigmatizes as a delict every violation of the Sixth Commandment with a minor under eighteen years of

4. At <http://www/clsa.org/briefs.htm>.

5. Issued by the United States Conference of Catholic Bishops in 2003 (33 p.).

age whether based on pedophilia, ephebophilia, homosexuality or heterosexuality. [The distinctions ... ] help both the Ordinary and the judge in grasping the gravity of the delict and choosing the path necessary for the reform of the guilty cleric, the reparation of scandal and the restitution of justice.

The document notes that a few serious cases of sexual abuse of minors between the ages of 16 and 18 committed prior to April 30, 2001 were dealt with under canon 1399 on scandal.

The document then addresses some procedural issues:

- The *delicta graviora* are referred to the CDF by the Ordinary (i.e., diocesan or religious ordinary) in virtue of article 13 of the *motu proprio*. The first phase is identical to that envisaged by canon 1717. The Ordinary has the obligation to investigate both the credibility of the accusation as well as the substance or object of the alleged delict. "If the result of the '*investigatio praevia*' is that the accusation is credible, the Ordinary no longer has power or competence to treat the material in conformity with canon 1718, but he must refer the case to the CDF."
- After receiving the documentation from the Ordinary, the CDF will make one of the following decisions:
  - Decide that the facts of the case do not require any further penal action and propose, or confirm, some non-penal administrative provisions for the sake of the common good of the Church. Recourse against this decision is available only to the *Feria IV* meeting of the CDF, and not to the Apostolic Signatura.
  - Decide to present the case directly to the Holy Father for a *dimissio ex officio* of the accused cleric. This is reserved for particularly grave cases in which the guilt of the cleric is beyond doubt and well documented. There is no recourse against the decision of the Pope to laicize a priest.
  - Decide to authorize a penal administrative procedure according to canon 1720. If the Ordinary is of the opinion that the case merits the imposition of the penalty of dismissal from the clerical state, he must refer his opinion to the CDF which will, in turn, decide to impose the penalty of not. Recourse may be made to the *Feria IV* meeting.

- Decide to authorize the Ordinary to conduct a penal judicial process in the diocese, with the proviso that, in every case, an appeal will be reserved to the Tribunal of the CDF. The decision of the Tribunal of the CDF in second instance does not admit of appeal, and therefore, becomes a *res iudicata*.

The CDF Guidelines then address the question of the procedure to be followed when a religious cleric is involved:

Each time the competent Superior (can. 620) receives information about at least a probable *delictum gravius* committed by a religious cleric, he must carry out an *investigatio praevia* according to the norm of law. The religious must be informed of the outcome and given the opportunity to defend himself (cann. 1717; 695, § 2). All the acts must be handed over to the Supreme Moderator according to the norms laid down in can. 695, § 2. In turn, the Supreme Moderator will forward the aforementioned acts to the Congregation for the Doctrine of the Faith, along with his own *votum* and that of his council about both the merits of the case and the procedure to be followed.

Once it has received the necessary acts from the Supreme Moderator, the Congregation for the Doctrine of the Faith will indicate the procedure to be followed and the measures to be taken:

- When this Congregation indicates that the case should proceed by means of a **penal trial**, it can also indicate, according to circumstances, the competent tribunal to undertake the proceedings at first instance (cf. cc. 1427; 1408 with c. 103). The said tribunal may decree dismissal from the Institute as well as dismissal from the clerical state. The appeal judgement is reserved to the Supreme Tribunal of the Congregation of the Doctrine of the Faith.
- When this Congregation decides that the case should proceed in an **administrative manner**, it will ask the Supreme Moderator to proceed according to the norm of canon 699, § 1. With his council, the Supreme Moderator can decide not to order dismissal from the Institute but to issue disciplinary measures. It is the exclusive duty of the Congregation for the Doctrine of the Faith to confirm the decree of dismissal from the Institute according to the norm of canon 700. At the same time the Congregation will

also decide whether to impose upon the religious the penalty of dismissal from the clerical state. Copies of any decrees will be sent *ex officio* to the Congregation for Institutes of Consecrated Life and Societies of Apostolic Life. Appeals against decrees issued in cases of *delicta graviora* will be decided exclusively by the Ordinary Congregation of members of the Congregation for the Doctrine of the Faith (*Feria IV*). There is no recourse to the Apostolic Signatura. Recourses have a suspensive effect.

- As regards institutes of diocesan right, each presentation from the Supreme Moderator to the Congregation for the Doctrine of the Faith must be endorsed by the Bishop of the religious person's domicile or quasi-domicile according to the norms of canon 103.

#### IV. Some examples of particular law and responses to the situation

Many Conferences of Bishops in recent years have addressed the issue of child sexual abuse by members of the clergy. The responses of the Conferences have been varied and are subject to continual updating as new dimensions of the crisis come to light and as the law changes.

However, we must note that, in many instances, canonists raised serious objections against certain provisions of these "norms" and "policies." Hopefully, before too long, there will be some common approach taken in addressing the underlying canonical issues. A meeting in Rome, May 24-27, 2004, with representatives from a number of countries focussed on the current law, including "canonical procedures for dealing with abusive priests."<sup>6</sup>

##### A- The United States

In the USA, the much publicized "Dallas Charter" and the *Essential Norms for Diocesan/Eparchial Policies Dealing with Allegations of Sexual Abuse of Minors by Priests or Deacons* were approved by the Bishops. The Norms have been promulgated as particular law in the country. The *recognitio* of the Holy See was first granted for a

6. See *Catholic News Service*, May 28, 2004.

two-year period, and has been renewed. On March 14, 2005, it was announced that the extension had been granted until such time as the USCCB would provide new norms.

The CLSA *Revised Guide* referred to above integrates the provisions of these Norms into the general prescriptions of the law.

## B- The United Kingdom

In the United Kingdom, the Bishops, having operated under the provisions of the "Budd Report" (*Child Abuse: Pastoral and Procedural Guidelines; Catholic Bishops' Conference of England and Wales 1994*), committed themselves to implementing the "Nolan Report" (*Final Report*), published on September 17, 2001. However, this decision has not been promulgated as particular law.<sup>7</sup>

## C- Ireland

A somewhat similar situation prevails in Ireland. A Report of the Irish Catholic Bishops' Advisory Committee on Child Sexual Abuse by Priests and Religious, *Child Sexual Abuse: Framework for a Church Response*, was issued in 1996, but has not been promulgated as particular law. A number of "Child Protection Pilot Projects" are presently underway, but, again, to my knowledge, these do not constitute particular law.

## D- Canada

*From Pain to Hope* was issued by the CCCB in June 1992, and is now under revision. Work by the Special Task Force for the Revision of *From Pain to Hope* has begun following its first meeting of January 12, 2004. The Task Force will study three aspects in particular:

- the creation of safe environments for pastoral work;
- increased transparency in dealing with problems related to sexual abuse;
- encouraging accountability regarding sexual abuse.

7. See [www.nolanreview.org.uk](http://www.nolanreview.org.uk). For a detailed commentary on the canonical implications of this report and a critique of its recommendations, see R. BROWN, "Innocent or Guilty. What Changes our Presumptions?," in CANON LAW SOCIETY OF GREAT BRITAIN AND IRELAND, *Annual Conference 10-14 May 2004*, pp. 13-31.

However, as with many other countries, we must keep in mind that *From Pain to Hope* does not constitute particular law for Canada, because, to the best of my knowledge, it was never promulgated as such by any diocese.

## E- Australia

Two documents were issued by the Australian Bishops' Conference, and have recently been revised (November 2003): *Towards Healing. Principles and Procedures in Responding to Complaints of Abuse Against Personnel of the Catholic Church in Australia*, and *Integrity in Ministry. Standards to be Followed in Cases of Serious Violation of the Principles and Standards of the Document Integrity in Ministry*.<sup>8</sup>

## Conclusion

As can be seen from this overview, there is abundant universal and particular law, as well as other legal documents that are used by Bishops' Conferences to assist them in applying penal law.

Because the documents are changing so frequently, it is important to remain abreast of developments, either in the texts themselves, or in their application in jurisprudence.

8. See [www.catholic.org.au/media/integrity\\_in\\_ministry/iim\\_index.htm](http://www.catholic.org.au/media/integrity_in_ministry/iim_index.htm). These documents were prepared jointly by the Bishops and the Major Superiors.