Penal Law in the Church Today: Recent Jurisprudence and Instructions

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

Advocacy Vademecum
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Introduction

In addition to the actual legislation relating to penal law, we must also take into account the jurisprudence of the various Roman dicasteries, for their decisions will tell us how the law is to be applied.

It is evident that we are dealing with a part of law that is still under construction–*de iure condendo*–and so, it must be kept in mind that this jurisprudence will most likely change as trends are recognized and as jurisprudence becomes more unified.

I. Certain replies from the CDF

A number of replies in individual cases have been received from the Congregation for the Doctrine of the Faith.

1. In one case (September 18, 2003), the CDF gave this answer to the recourse of a priest:

> I wish to inform Your Excellency that the Congregation, having carefully studied the case, and noting that the delict committed was an isolated event, that no other accusations have been made against Father X after 1987, and that he, though having suffered for his actions, still enjoys the support of the faithful, kindly requests that you return Fr. X to the exercise of priestly ministry.

The reasons for the positive reply are important to note: there was but one event, there is support of the faithful, 17 years have elapsed since the event, there have been no other accusations.

Note also that the Congregation "requests" that the priest be returned to ministry; it is the diocesan Bishop's prerogative to assign a priest to ministry (in collaboration with the Major Superior, in the case of a religious).

2. In another case (July 22, 2003), the CDF gave a similar reply, but added a clause (there had been two young victims):

> Accordingly, having thoroughly examined all the documentation transmitted to this Dicastery, and that Your Excellency has also supplied, I would like to inform you that this Congregation has decided to accept the Petitioner's recourse. Consequently.
>
> Your Excellency is kindly requested to give Rev. XX an opportunity to exercise his priestly ministry in the diocese of YY on condition that he does not constitute a risk to minors and that his ministry does not cause scandal among the faithful.

Then, reference is made to possible recourse: "Your Excellency may request a review of this decision from this Congregation, and may also make recourse to the Ordinary Session of the Cardinals and Bishops Members of this Dicastery (*Feria IV*), within the peremptory time limit of thirty canonical days from the receipt of this letter."

3. In a third case, March 30, 2004, the timing of the delict was important:

> In the particular case of Fr. X, it was noted that the presumed crime is said to have occurred eight years prior to his ordination to the priesthood. According to the law of the Church, this is not a delict. Furthermore, according to the psychological report included in the Acta, it would appear that Fr. X is not considered to be a risk to young people.
>
> In order to assist you in this difficult area regarding *graviora delicta*, I respectfully offer some guidance by suggesting that moral certainty is a necessary element in making a judgment. If this case indeed did contain a delict, then corroboration of the fact by reliable witnesses would have been beneficial.

4. A fourth reply, May 2004, concerns the financial situation of the priest:

> Having learned of the continuing impasse between Your Excellency and Father X, and having studied the recourse made by the same priest, this Congregation, therefore, once again asks Your Excellency to kindly contact Father X or his advocate, so that proper financial sustenance be provided to Father X. As an incardinated priest, he has a right to benefits and pension.

5. A fifth reply, August 2004, concerns the retroactivity of the existing law in the USA. It contains important distinctions.

> It is your understanding that Norm 8 required his permanent removal from ministry because he had admitted his guilt.
>
> It is necessary to understand that there is a discrepancy between the Charter for the Protection of Young People, Article 5 and the Essential Norms, Norm 8. The former, which has no force of law, explicitly mentions the condition of admitted guilt in the past, present or future. The latter, which is law, does not include the condition of past, present or future, precisely because laws always envision the future, unless they expressly state otherwise (can. 9 CIC). Therefore, Norm 8 envisions the situation of an Ordinary who, having received notice after the promulgation of the Essential Norms of a possible delict and having followed the necessary penal procedure, is faced with a priest who has admitted his guilt or who has been found guilty of a delict by a judicial process. In the future, that is from the time of the Essential Norms and onward, an Ordinary must permanently remove the priest from ministry. The Essential Norms cannot be construed retroactively, as this would be in conflict with the principle of *ne bis in idem*, and cann. 221.3 and 1313.1.
>
> Thus, Fr. X's case does not fall within the category of Norm 8. The Archdiocese of XX had not received any new allegations for which it would have been necessary to implement the new procedural law of the Essential Norms and the motu proprio *Sacramentorum sanctitatis tutela*. To deal with extraordinarily egregious cases of the past, this Dicastery has, on a case by case basis, allowed, by special faculty of the Supreme Pontiff, Ordinaries to

deal with such historical cases according to the new procedural law, but this exception was for the good of the Church and only for extraordinary cases. As praxis, however, such historical cases as Fr. X's have been dealt with by requesting that the Bishop make use of his ordinary power in a disciplinary, non-penal way. It was with this in mind that Your Excellency was asked to determine a just and equitable solution to a case that seems already to have been solved equitably in the past. Concern about future risk, if it truly exists in fact, must be taken into consideration by Your Excellency if and when you are assigning Fr. X to any ministry. Furthermore, the *ius vigens* would certainly apply to any future delict. As a pastoral measure, Your Excellency may feel it advisable to issue a penal precept against future violations of the law. Such a measure is surely to be seen as taking due precaution within the limits of the law.

6. Another set of responses refers to dismissal from clerical state imposed by the CDF.

In cases referred to the CDF in virtue of the SST norms and procedures, the current practice of the CDF is described as follows by Monsignor C. Scicluna, Promoter of Justice:

> The CDF may 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.
>
> It is the praxis of the CDF to request that the Ordinary ask the guilty cleric if he would prefer to seek himself a dispensation from his priestly obligations. If the cleric refuses, or does not respond, the case proceeds.
>
> The Disciplinary Section of the CDF prepares a report for the Holy Father who himself decides the case on the occasion of the audience granted generally on a Friday to the Cardinal Prefect or to the Secretary of the Congregation.
>
> The rescript will be communicated to the Ordinary. There is no appeal or recourse against the decision of the Holy Father.

A recent letter (May 2004) from the CDF raises the question of imposing the dismissal from clerical state in instances other than in cases arising from sexual abuse:

> Furthermore, this Dicastery would like to reiterate the prudence of clarifying the canonical status of Father X. With regard to this, the Congregation wishes to advise Your Excellency of the possibility that Father X can be released from his priestly obligations *ex officio*, if he himself is unwilling to seek the grace of a dispensation.
>
> This Dicastery hastens to point out that such an *ex officio* decision is not penal in nature. Given Father X's psychological problems, it is inconceivable that he should be dismissed in a penal fashion. On the other hand, his condition does make him unsuitable for the exercise of ministry.
>
> Therefore, if Your Excellency wishes to proceed in this manner to clarify the canonical status of Father X, a *votum* to that effect will need to be submitted to this Dicastery. The Congregation will consider it incumbent upon you to provide for Father X's financial sustenance regardless of how Your Excellency wishes to clarify his canonical status.
>
> Finally, Your Excellency is requested to notify this Dicastery, within three months, of how the difficulties of Father X's canonical status, and his sustenance, have been resolved.

This letter raises some problems which will have to be addressed along the way:

- Does this mean that a diocese is responsible financially on an indefinite basis for a priest who has been released from his clerical obligations?
- We notice that a number of the responses raise the question of financial subsidy. This is a question of justice, of course; but justice must function for both sides.
- Does it mean that a priest who is psychologically ill, even though he hasn't committed any crime related to sexual abuse of minors, can be dismissed from the clerical state against his will?

II. The practice of the Congregation for the Clergy

Father Augustine Mendonça, in the paper presented to the Canadian Canon Law Society in Halifax, October 21–24, 2002, *The Bishop as the Mirror of Justice and Equity in his Particular Church: Some Practical Reflections on Episcopal Ministry*, analysed a number of recent decisions of the Congregation for the Clergy. He drew attention to the jurisprudence of the Congregation.

1. In a first case, the Congregation decreed that the Bishop's decision to remove faculties and place the priest on administrative leave "is null and void and without juridical effect because of serious flaws *in procedendo* and *in decernendo*." Furthermore, because the procedure used was *sui generis* which compelled the priest recurrent to employ civil advocacy for an adequate defence against the accusations, the Archdiocese was ordered to pay the costs of the priest ($75,000) although an assessment of further damages was not deemed appropriate. The decree of the Congregation also declared that the execution of the Ordinary's decree was stayed by law itself pending recourse in accord with the norm of canon 1353.

2. In a second case, a similar decision was reached:

> The investigation was carried out in the name of the diocese by individuals not appointed in accordance with the law. They had not followed procedures consistent with the norms of the Code. The acts had no identification of the accusers. There was no written sworn testimony from any of the accusers indicating dates, times, places and witnesses of the alleged abuse. Individual accusations could not be verified by recognizable legal means. It seems that the accusations had been taken by the Ordinary at face value, overturning any presumption of innocence to be afforded by natural law to any accused. Public statements made by the diocesan officials had apparently harmed the good reputation of the accused (cfr. canons 220 and 1717, § 2).

3. In a third case, the acts of the case contained no decree opening either an administrative or judicial process (see cc. 1720, 1721), which would have allowed the application of the provisions of canon 1722 in order to exclude the priest from active ministry through the entire process.

The preliminary investigation was begun in accord with canon 1717 on November 19, 1997 and the Ordinary issued his decision in a decree dated August 7, 1998, in which he required Father Z. "as a prerequisite to any further [evaluation of a] psychological nature at an institute named 'EA.'" This decision was made in contravention of the norms of canons 1717 and following.

> [T]he recourse of Fr. Z. against the administrative act dated 7 August 1998 issued by the Ordinary of the diocese, is upheld due to lack of compliance, *in procedendo*, with the norms of the Code of Canon Law for canonical process, and in regard to *in decernendo*, it lacked basis in law and in fact, thus the said decree lacks any juridic effect; furthermore, in keeping with the discipline of canon 128, Fr. Z. is to be restored immediately to the full exercise of his priestly ministry in the diocese and restitution is to be made of that which he was deprived in keeping with the diocesan norms for remuneration of Clergy and canon 281.

4. In addition to the cases which Father Mendonça noted, in a more recent case (2004), a priest had recourse to the Congregation for the Clergy after his faculties had been removed–following well-founded complaints from five women. His Bishop had stated that this removal was temporary–pending a psychological evaluation of the priest to determine his suitability for ministry (which the priest refused to take). The Bishop wished to proceed administratively, not by penal process.

However, following upon its jurisprudence as outlined above, the Congregation was of the opinion that even if this case were to be handled administratively–and not as a penal action–the provisions of canon 1717 had to be observed because of the practical consequences arising from the removal of faculties. It provided some very helpful guidelines to the Bishop, explaining what the Congregation would be looking for if a priest had recourse to it against a decision of his Bishop. Although the Code does not require a "canon 1717" investigation, except for penal cases, if there is to be disciplinary action against a priest, it might be worthwhile to follow these procedures, so as to avoid difficulties down the line.

Describing the action to be taken in virtue of canon 1717, the Congregation wrote privately to the Bishop:

Canon 221, number 3, states that *Christ's faithful have the right that no canonical penalties be inflicted upon them except in accordance with the law.* This means the rigid adherence to the dictates of canon 1717. The bishop or a **person**, not a committee, delegated by him, investigates, in a preliminary fashion, after the Bishop receives information that has the "semblance of truth."

This is a perfunctory investigation, which can be concluded in a matter of hours. The purpose is merely to determine whether or not there is something worth investigating and if there is, how it is to be investigated, either administratively or judicially. This "Preliminary Investigation" is NOT a canonical "process" (nor is it "a trial within a trial"), but it MUST be **opened** by a decree of the Bishop, and subsequent **action** to be taken must then be DECREED by the bishop (canon 1718), and the Preliminary Investigation must be **closed** by DECREE (canon 1719), and the discipline indicated in the canon followed. (The necessary decrees indicated in this Preliminary Investigation do not seem to form part of the Acta presented by the Diocese, thus we have an immediate procedural problem).

Next step, the Ordinary, having by DECREE indicated whether he is following an administrative (canon 1720) or judicial process (canon 1721), proceeds accordingly.

... It is often felt here that [you], in North America, have super-complicated the canonical processes regarding discipline by not applying the simple canonical procedures, developing instead a mish mash hybrid of processes containing aspects of canon law, common law and social welfare procedures, that cause endless problems.

Unfortunately, when a case is appealed to Rome, it is looked at only through the prism of canon law. The result is often that a decision goes against a Diocese, not because it didn't have reason to proceed, but because of the way it proceeded, i.e., because of the procedures employed. The Congregation is constrained to apply only the template of Canon Law over the procedures followed by a diocese, and this is where the problems begin to arise if these do not match those found in the Code. Thus, a guilty priest can sometimes be upheld

against his Diocese, not because the Congregation favours guilty priests over Bishops, but because we are required to evaluate not only the merit of a situation but the procedures used in a given situation.

III. The Congregation for the Discipline of the Sacraments

For years, bishops have been requesting that priests who cannot be returned to ministry after having served jail sentences, but who refuse to request dispensation from clerical obligations, be imposed the sanction of loosing the clerical state by decree of the Pope. One of the reasons for this was to reduce liability on the part of the diocese for further abusive actions by the priest if such were committed.

After much discussion, a policy to this effect was indeed put into effect, although no formal document on the subject has been officially issued (we have to rely on private replies). Some cases received much publicity in the secular press.

Incidentally, around the same time, a relaxation of the procedures for voluntary request of release from the clerical obligations was put in effect.[1] The document was very well received by bishops and by persons who were making such requests for relief from clerical obligations, or by widowed deacons who were asking for permission to remarry.

However, as to the new administrative procedures, the reaction has been rather muted. Already there are cases of priests who, they say, have been dismissed from the clerical state against their will, without a chance for input on their part or without having heard that the process was underway. We all recognize that the priest has rights in this regard that should be respected or taken into consideration, according to circumstances. If there are no rights, a procedure that was initially instituted to deal with cases of child molesters might also be extended to apply to other instances. For example, a priest who opposes his Bishop or Major Superior (and perhaps rightly so) might one day have his case presented for dismissal from clerical state (an example of this will be given

1. CONG. FOR SACRAMENTS AND DIVINE WORSHIP, Circular Letter, June 6, 1997, in *Origins* 27 [1997–1998] 169, 172.

below). Of course, this does not mean that the request would be accepted by the Holy See, but the danger is there.

Because of the risk of abuses, the Congregation for Divine Worship and the Discipline of the Sacraments, in a private reply, has recently spelled out for a diocesan Bishop certain procedures to be observed when such cases are presented.[2] It would be worthwhile reviewing them here since the document has not been made readily available.

> ... this Dicastery would like to confirm that there is the possibility of seeking, through these same offices, dismissal from the clerical state *ex officio* and *in pœnam* from the Holy Father for priests who refuse to freely request the dispensation. The judgement of the exceptional nature of a particular case is based upon thorough examination of the merits of each one. ... The following documentation would need to be provided verifying the completion of the necessary steps referred to below:
>
> (1) Your own request as the Diocesan Bishop for the use of the process *ex officio* and *in pœnam*. The request should give a complete explanation of the case, including the reasons why Your Excellency would be unable to use the ordinary, judicial, penal process as outlined in the *Codex Iuris Canonici*;
>
> (2) A copy of your renewed request (in the form of a letter) to the priest in question asking him to present his own personal request to the Holy Father for return to the lay state along with dispensation from the obligations of the clerical state including celibacy. The priest could well be reminded that there would be more dignity in making such a request than there would be in being dismissed *in pœnam* from the clerical state;
>
> (3) Should the priest continue refusing to petition for the dispensation, a copy of his negative response to Your Excellency is to be enclosed. The priest is to be asked to provide in this response a written defense of himself and of his actions, as well as his reasons for refusing to petition for return to the lay state. This letter of refusal could

2. See Prot. no. 2169/98, November 11, 1998.

> be written with the help of his advocate should he so choose;
>
> (4) A copy of the sentence(s) of conviction of the civil law tribunal(s);
>
> (5) Attestation documenting the ordination of the priest in question;
>
> (6) The *votum* of the Promoter of Justice of the Diocesan Tribunal.
>
> Should any further information be necessary be assured of the prompt assistance of this Congregation in resolving these sad cases.

- This document addresses a number of the complaints that had arisen regarding the process and makes appropriate provisions. Among these, we could note:
- the right of defence on the part of the priest;
- the right of the priest to have an advocate and to prepare an explanation;
- the right of the priest to be aware of the proceedings and to know the grounds;
- the intervention of the Promoter of Justice.

It could also be noted that a return to the lay state *in pœnam* does not automatically entail a dispensation from the obligations of the clerical state (see c. 291).

These rights, not surprisingly, correspond to those of respondents in marriage nullity cases. The only thing that is different is that there is no appeal against the decision of the Holy Father. There could always be recourse asking for re-consideration, but it would probably be of little avail since the matter is carefully studied beforehand. At least, if the procedures outlined above are followed, then there is the implementation of the right of defence before the final decision is taken.

A lengthier and more recent document from the Congregation for Divine Worship and the Discipline of the Sacraments,[3] outlines further the thinking of the Holy See on the matter:

3. See October 21, 2002, Prot. no. 1890/02/S.

... Recourse to [administrative dismissal from the clerical state] is made only *ad hoc*, in the most exceptional of cases, namely, when the cleric is guilty of a delict for which the *Codex Iuris Canonici* 1983 foresees dismissal from the clerical state as described in can. 1395, § 1–2, and *ex officio Pontificis Romani*. It is consequently referred to as a process for dismissal from [the] clerical state *ex officio et in pœnam*.

It is worth noting that the ordinary process for dispensation from the obligations of the clerical state is based upon the priest's freely asking for such a dispensation. However, in the most exceptional of cases, recourse may be made by a particular Bishop to this Dicastery to request application of the process *ex officio et in pœnam* (i.e., dismissal from the clerical state involuntarily). As the name implies, the decision to dismiss or not dismiss the priest in question from the clerical state rests solely with the person of the Roman Pontiff.

Previous to making such a request, it is necessary to establish that the priest in question has definitively rejected making a voluntary personal request to the Holy Father for the grace of dispensation. Therefore, the priest would need to have been explicitly invited by the Bishop to petition voluntarily for dispensation from the obligations of the priesthood. The Bishop may not force the priest into making such a decision, however, he may certainly call upon the conscience of the priest to give careful consideration to whether the circumstances permitting dispensation would be applicable to him. In any case, the response of the priest to this invitation is then to be precisely documented. This occasion would also afford the priest an opportunity to offer some defense of himself, should he so desire.

In the event that the priest would accept an invitation to request dispensation from the obligations of the clerical state, the instruction of the case would proceed in accord with the *Substantial and Procedural Norms* of the Congregation for the Doctrine of the Faith (*AAS* 72 [October 14, 1980] 1132–1137.).

Should the priest, however, refuse such a request for dispensation, the local Bishop may make a request for his dismissal from the clerical state *ex officio et in pœnam* in

the event that (1) it could be proven that this priest is guilty of a delict for which the *Codex Iuris Canonici* 1983 foresees dismissal from the clerical state as described in can. 1395, §§ 1–2; and (2) it would be at least morally impossible to conduct a judicial trial for the consideration of the dismissal of this man from the clerical state, which is the way foreseen by law of proceeding to the application of all perpetual penalties (cf. can. 1342, § 2).

With respect to the first requirement above, it is normally necessary that documentary evidence (e.g., police reports, sentences from civil courts of law, etc.), together with the testimony of at least two or three witnesses, would be presented, which would establish with moral certitude that the priest in question in guilty of the grave violations against the sixth commandment described in can. 1395, §§ 1–2. With respect to the second requirement, the Bishop would be asked to provide his own personal *votum de rei veritate* explaining why it would not be possible to constitute a collegial tribunal, even *ad hoc*, to decide the case.

In the case of a priest proven by the aforementioned means to be guilty of a delict as described in can. 1395, §§ 1–2, for which the *Codex Iuris Canonici* 1983 foresees dismissal from the clerical state, such a request for a priest's dismissal from the clerical state *ex officio et in pœnam*, could be presented to this Dicastery, which would then study the case and, if appropriate, forward it for the consideration of the Holy Father...

To show how exceptional this procedure is, a rather recent negative decision of the Congregation for Sacraments,[4] in the case of a priest who spent a number of years in prison, states:

... The Cardinal Secretary of State has communicated to this Dicastery that the aforementioned acts [i.e., grave violations *de sexto* against minors for which he was convicted before a civil tribunal] ceased several years ago, with nearly nine years passing since these delicts were committed and nearly eight years passing since this priest's criminal conviction. With these intervening

4. November 15, 2002, Prot. no. 103/02/S.

years, the scandal that was provoked by these actions has subsided, particularly since he has changed residence. Likewise, the precarious state of health of this priest is a matter of no little concern.

In light of the foregoing, it has not been deemed appropriate to inflict such a serious penalty upon this priest, particularly in light of the demands of Christian charity toward a priest in danger of death. It has been indicated to this Congregation by Higher Authority that it would be odious to burden the conscience of the Holy Father by proposing that he would impose such a grave penalty in this situation. Indeed, His Eminence Cardinal Angelo Sodano concludes his letter to this Dicastery by urging that the Congregation of N.N. would not abandon Father X.X. in this terribly sad time of his life... .

While these documents come from the Congregation for Divine Worship and the Discipline of the Sacraments, we know now that some of the delicts covered by canon 1395 are now reserved to the CDF. However, similar procedures are followed by the CDF.

IV. The apostolic penitentiary

The norms accompanying the *motu proprio* SST, article 1, specifically mentioned that the competence of the Apostolic Penitentiary remains intact.

We must keep in mind that not every delict reserved to the CDF entails an excommunication, although most of them do. If there is no reserved censure, any confessor can absolve a penitent of the sin, pending the outcome of any eventual trial, so that the accused is not deprived of the sacraments in the meantime.

In the case where the CDF orders a trial in a matter for which there is an excommunication (for instance, absolution of an accomplice), although the excommunication most likely remains in the external forum (if the delict is proven to exist), the Apostolic Penitentiary can grant permission to absolve the penitent in the internal forum. This would mean, for instance, that a priest who was excommunicated, and who could not celebrate Mass, once absolved, could do so privately. Of course, he could not do so publicly if the excommunication is known (see c. 1352).

A private reply of the Apostolic Penitentiary, July 16, 2003, in a case of absolution of the accomplice, refers to this very situation. The CDF had ordered a penal trial against the priest who was accused of the delict. The diocese has had trouble organizing the trial, and they have been lengthy delays. The priest in question alleged that he had never been taught in the Seminary about the penalty attached to this crime, because they did not have canon law courses on crimes and penalties. [The situation might not be unique].

> As to the question posed, the Apostolic Penitentiary replies that canon 1357 retains its effect, since, in the case in question, there has not yet been a judicial sentence inflicting excommunication, nor an administrative act declaring it to exist. However, for your full peace of conscience, since you are assisting this priest in a spirit of charity, as well as for the priest's own peace of conscience, the Penitentiary grants to any confessor, which the priest in question will choose to hear his confession, the faculty to absolve him *ad cautelam* in the act of sacramental confession from all sins and censures... .
>
> As far as the process prescribed by the Congregation for the Doctrine of the Faith is concerned, the Penitentiary cannot judge. However, fully respecting the reverence due to the Sacrament of Penance, your *votum* should emphasize the diminished culpability of this priest (because of the fact that the schools where he studied did not give him the required knowledge).

The accompanying rescript stated that the absolution was to be given *ad cautelam* "because the grave malice of the penitent in committing the delict mentioned in canon 1378, § 1, taken together with canon 977, has not been proven; indeed, the penitent was subject to ignorance which was not imputable to him." (My translation from the Latin).

Conclusion

It is evident that the laws are not only abundant, but also that they call for very careful application.

If a Bishop or Major Superior is going to intervene against a priest, he must make certain that he is observing ALL the requisites of the law. Otherwise, his decision risks being overturned if the priest in question has recourse to the Holy See.