

The Procedure and Praxis of the Congregation for the Doctrine of the Faith regarding *Graviora Delicta*

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A. Some preliminary considerations regarding substantive law

With reference to art. 52 of the Apostolic Constitution *Pastor Bonus* of 28 June 1988, art. 1 of the *motu proprio Sacramentorum sanctitatis tutela* of 30 April 2001 distinguishes between two types of *graviora delicta*

- a) "*delicta in sacramentorum celebratione commissa*" (delicts committed in the celebration of the sacraments)
- b) "*delicta contra mores*" (delicts against morals).

Concerning the *delicta graviora in sacramentorum celebratione commissa*, the *motu proprio* takes into account only two sacraments: i) the Most Holy Sacrifice and Sacrament of the Eucharist ii) the sacrament of Penance.

The *motu proprio*, in art. 2, enumerates five (5) **delicts against the Eucharist**.

1. The profanation of the Sacred Species (art. 2, n. 1). The *motu proprio* makes explicit reference (cf. n. 9) to the authentic interpretation of 4 June 1999 which included in the definition of the verb "*abicere*", used in can. 1367 CIC and can. 1442 CCEO, "*quamlibet actionem Sacras Species voluntarie et graviter despicientem*" (any action which voluntarily and gravely offends the Sacred Species).
2. The attempt to celebrate the Eucharistic Sacrifice by someone not in Holy Orders (art. 2, n. 2; can. 1378 §2, n. 1 CIC). This delict, while not mentioned in the CCEO, is explicitly included in the *corpus canonum ecclesiarum orientalium* in virtue of the *motu proprio*.

3. The simulation of the liturgical celebration of the Eucharistic Sacrifice (art. 2, n. 2; can. 1379 CIC; can. 1443 CCEO). For both Codes, the simulation of any of the sacraments is a delict. The *motu proprio* only considers the simulation of Holy Mass or of the Divine Liturgy as a *delictum gravius*.
4. The concelebration of the Eucharistic Sacrifice 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 (art. 2, n. 3). The *motu proprio* explicitly mentions cann. 908 and 1365 CIC as well as cann. 702 and 1440 CCEO. The scope of these canons is broader than the norm of the *motu proprio*, which restricts a *delictum gravius* to the concelebration of the Eucharistic Sacrifice with "Protestant" ministers. It seems to me that the two elements (the absence of Apostolic Succession and the non-recognition of the sacramental dignity of priestly ordination) are indistinguishable in the description of this particular ecclesial community which is spoken of in art. 2, n. 3.
5. 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 (Art. 2 § 2). Note 19 makes reference to can. 927 CIC which utilizes the expression *nefas est* to forbid an action which is not a formal delict. It is important to note the *finis operantis* "in sacrilegum finem". I wonder whether such consecrations within the context of sacrilege verge on the delict of profanation of the Eucharist defined as "qualibet actio Sacras Species voluntarie et graviter despiciens".

Art. 3 of the *motu proprio* envisages four (4) delicts against the sanctity of the Sacrament of Penance.

1. the absolution of an accomplice in a sin against the Sixth Commandment (Art. 3, n. 1 can. 1378, § 1 CIC; can. 1457 CCEO).
2. the solicitation to sin against the Sixth Commandment (Art. 3, n. 2 can. 1387 CIC; can. 1458 CCEO). It is important to note that the *motu proprio* limits the *delictum gravius* to solicitation which is directed to sinning with the confessor himself ("*quae ad peccandum cum ipso confessario*

dirigitur”), while the classic definition of *sollicitatio* in the Code includes also the solicitation to sin against the Sixth Commandment with a third person. The jurisprudence concerning this delict has evolved substantially, in part because in the 1917 Code an obligation existed, under pain of excommunication, to denounce the soliciting confessor. Solicitation also includes the explicit encouragement to commit impure acts. Some cases of abusive behaviour show that some priests have used the Sacrament of Penance to identify their victims and to make their first contact with them. This behaviour could easily be included under *sollicitatio inchoata* in which the confessor begins an apparently innocent conversation leading to a meeting with the penitent outside of confession where sexual or indecent behaviour occurs.

3. the direct or indirect violation of the sacramental seal (Art.3, n. 3 can. 1388 § 1 CIC; can. 1456 § 1 CCEO). The *motu proprio* originally included only the direct violation of the seal. The Holy Father, in an audience granted to Cardinal Ratzinger on 7 February 2003, decided to include also the indirect violation. This decision of the Supreme Legislator certainly makes it easier for the Ordinary to decide which cases are to be referred to the CDF by reason of competence. It is often difficult to distinguish between the two species of delict in actual cases of violating the seal.
4. the recording, or divulging by means of social communication, of that which has been said, whether by the priest or by the penitent, in confession (Art. 3, n. 4 Decretum CDF, 23.09.1988 AAS 80 [1988] 1367). This *delictum gravius* was added by the Holy Father in a decision dated 7 February 2003. The decree of the CDF, establishing an excommunication *latae sententiae*, was published in 1988.

It is worth noting a principal of procedural law pertaining particularly to this type of delict. Art. 20 of the *motu proprio* provides that, in cases of delicts against the Sacrament of Penance, the name of the accuser cannot be made known to the accused or to his advocate without the explicit consent of the accuser. This traditional principle also has corollary norms in Art. 20: a) the question of the credibility of the accuser in these cases is of the

greatest importance; b) the need always to avoid any danger whatsoever of violating the sacramental seal.

For the category of *delicta contra mores*, the *motu proprio* contains only one, in art. 4: the delict against the Sixth Commandment committed by a cleric with a minor under the age of eighteen (18) years.

With regard to this delict, some considerations of the praxis of the CDF, are relevant:

- a) the *motu proprio* speaks of 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. Some priests have been incarcerated for possession of thousands of pornographic photos of children and youth. According to the praxis of the CDF such behaviour is considered a *delictum gravius*.
- b) Can. 1395 § 2 CIC speaks of a delict with a minor under 16: “*cum minore infra aetatem sedecim annorum*”. The *motu proprio*, on the other hand, speaks of a delict with a minor under 18: “*delictum ... cum minore infra aetatem duodeviginti annorum*”. Therefore the classification of the delict becomes more complex. Some experts, in fact, speak not only of pedophilia (the sexual attraction to prepubescent children) but also of ephebophilia (the sexual attraction to adolescents), of homosexuality (the sexual attraction to adults of the same sex) and of heterosexuality (the sexual attraction to adults of the other sex). Between sixteen and eighteen years of age, some “minors” may indeed be perceived as objects of homosexual or heterosexual attraction. Some civil jurisdictions consider a person of sixteen years as capable of giving consent for sexual activity (whether hetero- or homosexual). The *motu*

proprio, however, stigmatizes as a delict every violation of the Sixth Commandment with a minor under eighteen years of age whether based on pedophilia, ephebophilia, homosexuality or heterosexuality. This differentiation has, nevertheless, an importance from the psychological, pastoral and juridical points of view. It helps, no doubt, 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 (cfr can. 1341).

- c) A few serious cases of sexual abuse of minors between the ages of sixteen and eighteen committed prior to 30 April 2001 were dealt with under can. 1399: In addition to the cases established here or in other laws, the external violation of a divine or canonical law can be punished by a just penalty only when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals (*"Praeter casus hac vel aliis legibus statutos, divinae vel canonicae legis externa violatio tunc tantum potest iusta quidem poena puniri, cum specialis violationis gravitas punitionem postulat, et necessitas urget scandala praeveniendi vel reparandi"*). As this canon speaks only of a *"iusta poena"*, according to can. 1349 a judge is not able, therefore, to inflict a perpetual penalty.

The question of prescription with regard to *graviora delicta* is once again much discussed after the *motu proprio* because, for the first time in history, a time limit has been imposed, after which the *actio criminalis* is extinguished for these delicts. Art. 5 § 1 indicates that a delict is bound by prescription after ten years, while Art. 5 § 2 establishes that this period of ten years runs according to the norm of can. 1362 § 2 CIC or of can. 1152 § 3 CCEO: Prescription runs from the day on which the delict was committed or, if the delict is continuous or habitual, from the day on which it ceased (*"praescriptio decurrit ex die quo delictum patratum est, vel, si delictum sit permanens vel habituale, ex die quo cessavit"*). In cases of sexual abuse, the period of ten years begins to run the day on which the minor completes his eighteenth year. Experience has shown that a term of ten years is inadequate for these types of cases and that it would be desirable to return to the former system in which these delicts were not subject to prescription at all. On 7

November 2002, the Holy Father granted to the CDF the faculty to derogate from prescription on a case by case basis upon request of an individual bishop.

B. Some Notes on Procedure

The *Notitia criminis*

Delicta graviora are referred to the CDF by the Ordinary in virtue of Art. 13 of the *motu proprio* which speaks of “notitia saltem verisimilem ... de delicto reservato” and of an “investigatio praevia”. The first phase is identical to that envisaged by can. 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 can. 1718, but he must refer the case to the CDF.

The Options of the CDF

The CDF studies the acts submitted by the Ordinary and, if no further information is requested in order to arrive at an informed decision, the Congregation proceeds to a very important first decision, namely, the method, *iter*, of resolving the case. Different possibilities are possible:

- a) the CDF may 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, including the good of the denounced cleric (cf. cann. 1718 § 1, nn. 1-2). Against such provisions of the CDF, it is not possible to make hierarchic recourse to the Apostolic Signatura but only to the Cardinal and Bishop members in Ordinary Session of the CDF, commonly known by the name *Feria Quarta*.
- b) 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.

- c) The CDF may decide to authorize a penal administrative procedure according to can. 1720 CIC (can. 1486 CCEO). 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 or not. Against such a decision recourse may be made to the *Feria IV*.
- d) The CDF may 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 judges, the promoter of justice, the notaries, as well as the advocates must be priests (Art. 12) or be dispensed from this prerequisite. Art. 22 further requires that the acts of the case be transmitted *ex officio* to the CDF at the conclusion of the first instance. The Promoter of Justice of the Congregation has the faculty to appeal the first instance sentence within thirty days "a die qua sententia primae instantiae ipsi Promotori nota facta sit". In these cases, the CDF has the faculty to senate any acts of procedural law of inferior tribunals. The decision of the Tribunal of the CDF in second instance does not admit of appeal, and therefore, becomes a *res iudicata* (Art. 23 n. 1 and n. 4).

As regards religious, the following procedural *iter* is foreseen:

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:

- a) 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. cann. 1427; 1408 with can. 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;
- b) 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 can. 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 can. 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.
- c) 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 can. 103.