

THE PROCESS FOR DECLARING THE NULLITY OF SACRED ORDINATION

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Chapter II of Title XXVI, Canons 1385, 1386 and 1387 of the *CCEO* sets forth a process for the declaration of nullity of sacred ordination which is provided for those rare situations in which any other process is inadequate. There being little experience in the application of this process, its successful use will require canonists, dicastery officials and jurists to develop and articulate the relevant jurisprudence, some of which is suggested in this article.

Introduction

There is a dearth of jurisprudence on the topic of the declaration of nullity of Sacred Ordination. This is probably due to the well-known and strong, long-standing preference of the Apostolic See that the clerical state be lost either by means of a voluntary request by the cleric or else by imposition as a penalty in a penal process or some special process which is similar to a penal process.⁶ This preference is undoubtedly due to the fact that it is unnecessary in those processes to address the subject of the validity of priestly acts performed by the clerics. Nevertheless, the Supreme Legislator has seen fit to provide a clear process for the declaration of nullity of Sacred Ordination, which must, therefore, be appropriate in certain unique cases. This process is found in Chapter II of Title XXVI of the *Codex Canonum Ecclesiarum Orientalium* (the *CCEO*). In the *CCEO*, the chapter consists of only three canons (*CCEO* cc. 1385, 1386 and 1387), which establish a process for the declaration of the nullity of sacred ordination similar, but not identical, to the process for the declaration of the nullity of marriage. The correlative provisions in the current (1983) *Codex Iuris Canonici* (the *CIC*) are found in Book VII, Part III, Title II, canons 1708 through 1712 inclusive. Both codes are based on the provisions of the prior Oriental legislation⁷ and the prior Latin codification, the Pio-

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⁶Such as the employment of the Special Faculties conceded to the Congregation for the Clergy under certain circumstances.

Benedictine Code (the 1917 *CIC*).⁸ Although the prior provisions were explicit in differentiating between a petition which attacks the validity of sacred ordination and a petition which attacks only the obligations attached to sacred ordination,⁹ the present Eastern and Latin Codes appear to no longer distinguish between the two for the purposes of this process.

1. Standing to Initiate the Process

CCEO c. 1385 states who has the right or "standing" to commence the process for the declaration of the nullity of sacred ordination.¹⁰ The canon confers the right to bring a challenge to the validity of sacred ordination to three (3) and only three (3) persons: 1) the cleric himself; and 2) the hierarch to whom the cleric is subject at the present time; and 3) the hierarch in whose eparchy the cleric was ordained. Although this is similar to the canon on standing for marriage nullity cases, due to the very nature of the subject matter, it is not identical to the provision in marriage nullity cases, and in one important respect it is very different.¹¹ For secular clerics, i.e., clerics who are not monks or other religious, the hierarch to whom the cleric is subject will usually be an eparchial Bishop, and often he may be the same eparchial Bishop in whose eparchy the cleric was ordained, however he may be any of the hierarchs mentioned in *CCEO* c. 984 §§1 and 2. In the case of monks and clerics who are members of institutes of consecrated life, *CCEO* c. 984 §3 provides that the hierarch to whom the cleric is subject is the major superior if the major superior enjoys the ordinary power of governance, i.e. is ordained to a sacred order.¹² In the case of both secular and religious clerics, the hierarch of the place of ordination is always the eparchial Bishop or other hierarch of the eparchy in which the cleric was ordained. In situations in which a cleric has abandoned his sacred ministry, the hierarch to whom the

⁷Pius XII, M.p. *Sollicitudinem Nostram*, cc. 501 to 506, 6 January 1950, AAS 42 (1950) 5-120.

⁸Benedict XV, *Codex Iuris Canonici*, cc. 1993 to 1998, 27 May 1917, AAS 9/2 (1917) 11-521.

⁹M.p. *Sollicitudinem Nostram*, cc. 501 and 1917 *CIC* c. 1993.

¹⁰The text of the canon is: (*CCEO* c. 1385) The cleric himself, the hierarch to whom he is subject, or the hierarch in whose eparchy he was ordained have the right to challenge the validity of sacred ordination.

¹¹Unlike the marriage nullity process, the Promotor of Justice is **not** competent to challenge sacred ordination even if the probable nullity has already become public.

¹²See, *CCEO* c. 979 §1.

cleric is actually subject may be the hierarch of the eparchy where he has a domicile or quasi-domicile, even if he is not actually enrolled in that eparchy.¹³ In other words, a cleric may be “subject to” more than one hierarch at the same time, in which case any of those hierarchs has the right to initiate the process. Under the prior Oriental legislation and Pio-Benedictine Code, the Hierarchs/Ordinaries had standing to initiate a process only for the declaration of the ordination itself; and the cleric alone could commence a process attacking the obligations attached to sacred ordination.¹⁴

2. The Specifics of the Process

2.1. The Proper Forum

Section 1 of *CCEO* c. 1386 addresses the forum for the processing of a petition for the declaration the nullity of sacred ordination.¹⁵ The canon does not itself confer competence, but merely directs that the petition is to be transmitted to the dicastery of the Roman Curia which is competent to decide it. Therefore, in order to determine which dicastery is competent, reference must be made to other authorities.

The competence of the various dicasteries of the Roman Curia is primarily found in the Apostolic Constitution of Pope Saint John Paul II of 28 June 1988, *Pastor Bonus*.¹⁶ Prior to 1 October 2011, competence in cases for the declaration of the nullity of sacred ordination was vested in the Congregation for Divine Worship and the Discipline of the Sacraments for a cleric of the Latin Church *sui iuris*,¹⁷ and for a cleric of one of the Eastern Catholic Churches *sui iuris*, competence was vested in the Congregation for the Eastern Churches under its general grant of competence contained in art 58 §1 of *Pastor Bonus*¹⁸ and because there is no exception to that competence mentioned in *PB* art.

¹³See, *CCEO* c. 916.

¹⁴M.p. *Sollicitudinem Nostram*, c. 502 §2 and 1917 *CIC* c. 1994 §2.

¹⁵The text of the canon (*CCEO* c. 1386 §1) is: The libellus challenging the validity of sacred ordination must be sent to the competent dicastery of the Roman Curia, which will decide whether the dicastery itself or by a tribunal designated by it is to handle the case.

¹⁶AAS 80 (1988) 841-912.

¹⁷Ap. Const. *Pastor Bonus*, art. 68.

¹⁸Ap. Const. *Pastor Bonus*, art. 51 §1. The competence of this Congregation [for the Oriental Churches] extends to all matters which are proper to the Oriental Churches and which are to be referred to the Apostolic See, whether concerning the structure and organization of the Churches, the exercise of the office of teaching, sanctifying and governing, or the status, rights, and obligations of persons. It also handles everything that has to be done concerning quinquennial reports and the ad limina visits in accordance with arts. 31-32.

58 §2 for nullity of sacred ordination cases. Since 1 October 2011, competence for all nullity of sacred ordination cases rests in a special office of the Tribunal of the Roman Rota.¹⁹ This new competence of the Tribunal of the Roman Rota extends to "cases concerning the nullity of sacred ordination, in accordance with both universal and proper law, *congrua congruis referendo*." Thus nullity of sacred ordination cases that formerly would have gone to the Congregation for the Eastern Churches now go to the Tribunal of the Roman Rota since there is an exception to the Oriental Congregation's competence contained in *PB* art. 58 §2 for matters within the exclusive competence of the Tribunal of the Roman Rota. Thus, the general competence of the Tribunal of the Roman Rota extends to all cases seeking a declaration of nullity of sacred ordination. Notwithstanding the aforesaid general competence of the Tribunal of the Roman Rota, if the *libellus* for declaration of the nullity of sacred ordination alleges a "more grave delict"²⁰ in the celebration of the ordination itself, then the competence is vested in the Congregation for the Doctrine of the Faith pursuant to *PB* art. 52.

It is clear then from the text of the canon, read *in pari materia* with the relevant articles of *Pastor Bonus* and subsequent legislation, that the precise basis alleged for the nullity of sacred ordination is what determines which dicastery is competent; but only in the most general of terms, viz.: if a *delictum gravius* or "more grave delict" in the celebration of the ordination is alleged, the Congregation for the Doctrine of the Faith is competent in the cases of all clerics; and for all other cases, the Tribunal of the Roman Rota is competent. What the canon does not set forth with precision is what grounds may be asserted for the declaration of nullity.

2.2. The Competence of the Congregation for the Doctrine of the Faith

In regard to the competence of the Congregation for the Doctrine of the Faith, the obvious example of an alleged *delictum gravius* or more grave delict or defect in the ordination ritual is the attempted ordination of a woman to the priesthood, which has been explicitly defined as a

¹⁹Benedict XVI, M.p. *Quaerit semper*, 30 August 2011, AAS 103 (2011) 570, art. 2 §3.

²⁰The term *delictum gravius* in art. 52 of *Pastor Bonus* appears to be a reformulation of what was called a *defectum substantialis* in the former Oriental legislation, M.p. *Sollicitudinem Nostram*, c. 501 §1, which reserved such cases to the Congregation for the Doctrine of the Faith under its former title of the "Holy Office (of the Inquisition)"; accord 1917 *CIC* c. 1993 §1.

delictum gravius reserved to the Congregation for the Doctrine of the Faith.²¹ This is the only *delictum gravius* in regard to sacred ordination officially recognized at the present time. However, since the attempted ordination of a woman was explicitly recognized as a *delictum gravius* only after the ordination of women was attempted,²² it is likely that other substantial defects in the ordination ritual will be officially recognized in the future as *delicta graviora* in regard to sacred ordination. Examples of such substantial defects might include the attempted ordination of a man by a cleric or clerics not in episcopal orders, the attempted ordination of a married man to the episcopacy, an attempted ordination that does not utilize the form of the sacrament specified in the ritual of ordination of the Church *sui iuris* of the ordaining prelate, syncretism or mixing of ordination rituals and/or forms, etc. If such defects were determined to be *delicta graviora*, then cases alleging such defects would be processed by the Congregation for the Doctrine of the Faith.

Some of these situations have already occurred and have been resolved by the Apostolic See, sometimes by the mutual agreement of all interested parties and sometimes not. The best known, but probably not the only, example of this approach is the solution of the so-called “secret ordinations” of priests, at least two of whom were women²³ and the “secret consecrations” of Bishops of the Latin Church, some of whom were married,²⁴ in Czechoslovakia during the Communist era.²⁵ This was accomplished by the Congregation for the Doctrine of the Faith under the prefecture of Joseph Cardinal Ratzinger during the pontificate of Pope Saint John Paul II, who, as Archbishop of Krakow, had secretly ordained some priests for Czechoslovakia. Not all of the documents have been published by the Holy See, but it seems that

²¹Article 5 of the revised Substantive Norms of the M.p. *Sacramentorum sanctitatis tutela* as approved by Pope Benedict XVI on 21 May 2011, AAS 102 (2010) 423-424.

²²The ordination of seven women was attempted on 29 June 2002 on a boat cruising on the Danube River in Austria, by reason of which they are sometimes referred to as the “Danube Seven.”

²³This fact was admitted in 1991 by the Czech Primate, Archbishop Miloslav Vlk and confirmed by Vatican spokesman Dr. Joaquin Navarro-Valls.

²⁴The fact that some of the Bishops secretly consecrated in Czechoslovakia were married was explicitly stated in an official document of the Congregation for the Doctrine of the Faith. See, Congregazione per la Dottrina della Fede, Dichiarazione sulla «chiesa clandestina» nella Repubblica Ceca. 11 February 2000, *Boll Sala St 14/02/2000; RegnoDoc 5/2000, 166-167.*

²⁵Felix Corley, “The Secret Clergy in Communist Czechoslovakia,” *Religion, State and Society* 21, No. 2, (1993): 171-206 at 194.

there were seventeen bishops and over two hundred priests secretly ordained. Of the seventeen bishops, four were married. Of these four married bishops, two signed a declaration renouncing the exercise of episcopal ministry. Decisions on the other two, who did not renounce their episcopal ministry, were left to the local bishops, who were empowered, if they considered it appropriate, to give them conditional ordination as priests but not as bishops. Eleven, whose priestly ordination was accepted, would be asked to renounce the exercise of their episcopal ministry, but could remain in their current ministry (eight of the eleven were already parish priests and one was superior of a religious order). Decisions on the other two of the eleven, who were not engaged in pastoral work apparently because of age and health, were left to the local bishops.²⁶ This author cannot locate any record of the formal disposition of the cases of the women secretly ordained in Czechoslovakia, but it appears that the attempted ordinations were simply considered to be invalid consistent with the later public disposition of the so-called Danube seven.

Some of the Bishops had been consecrated secretly using special faculties communicated to the Bishops of Czechoslovakia by the papal internuncio, Monsignor Gennaro Verolino,²⁷ before his expulsion from the country by the Communist government, a methodology originally authorized by Pope Pius XI during the persecution of the Catholic Church in Mexico in the 1920s.²⁸ The extension of the so-called "Mexican Faculties" in Czechoslovakia was supposedly authorized by Pope Pius XII, but in order to safeguard the secrecy and security of all

²⁶Corley, "The Secret Clergy in Communist Czechoslovakia" at p. 195.

²⁷Vatican career diplomat Monsignor, later Archbishop, Gennaro Verolino (1906-2005), replaced Archbishop Saverio Ritter as *chargé d'affaires* and Apostolic Internuncio for Czechoslovakia and served in that capacity from February to November 1948.

²⁸"Mexican faculties" is the collective term for certain dispensations enabling priests and bishops to independently perform acts that would otherwise need approval from their competent superiors, and provide further relief from formal rules which are applied in the Catholic Church under usual conditions. The "faculties" included establishing an alternative hierarchy, the secret study of theology, secret ordinations, celebration of the Mass even in difficult prison conditions, etc. Mexican faculties were usually granted in those cases when the church in a particular area was under persecution and following normal procedures would threaten lives and the maintenance of church structures. The name is derived from the first known concession of such faculties by Pope Pius XI when the Catholic Church was under severe persecution in Mexico in the 1920s.

involved, no documentation exists to verify the concession of this extraordinary permission. It seems that the same special faculties were also conceded in the case of Soviet Russia and Soviet dominated Romania.

Since doubts about the validity of the consecrations of some of the secretly consecrated Czechoslovakian bishops put in doubt the ordinations of priests they had conducted, the Holy See empowered local bishops to reordain *sub conditione* those they considered suitable. In the case of Latin Rite priests, they would have to be celibate. Secretly ordained Latin Rite priests who were married could transfer to an Eastern Rite and be eligible for conditional reordination, but they could be granted biritual Latin faculties and essentially function as married priests in the Latin Rite although incardinated in an Eastern Rite eparchy.²⁹ Priests ordained by Bishops whose consecrations were not doubted were not addressed specifically because their priestly ordinations were certainly valid and it appears that none of them were married; however, if any of these Latin priests had been married, it may be assumed that they would have been treated similarly to the doubtfully ordained married Latin priests. It seems that there were not many secret ordinations of priests in Soviet Russia and most were educated at the Pontifical Russian College (Russicum) in Rome and then ordained in Rome as well. There were a few secret consecrations of Bishops conducted in Soviet Russia, but they did not remain secret for long and this experiment was considered a failure.³⁰ In Soviet dominated Romania, there is no evidence or record of any interventions by the Holy See, and this is not surprising inasmuch as it appears that all of the married priests secretly ordained were ascribed to the Romanian Greek Catholic Church wherein the bond of matrimony is not an impediment to sacred ordination, and none of the Bishops secretly consecrated pursuant to the “Mexican Faculties” or otherwise were married and the instructions from the Holy See requiring the approval of a candidate for episcopal ordination by the other Greek Catholic Bishops was able to be followed because the Bishops were able to communicate with each other even though they were all imprisoned.³¹

²⁹CDF, Dichiarazione sulla «chiesa clandestina» nella Repubblica Ceca.

³⁰Hansjakob Stehle, *Eastern Politics of the Vatican, 1917-1979* (Ohio University Press, Athens, Ohio, 1981), pp. 128ff; Walter J. Ciszek, *With God in Russia* (Peter Davies, London, 1965), pp. 6ff. and Antoine Wenger, *Rome et Moscou, 1900-1950* (Desclee de Brouwer, Paris, 1987).

³¹This information was obtained from one of the Romanian Greek Catholic priest canonists who worked on the investigations in the causes of the Seven Romanian Greek Catholic Bishop martyrs.

That being said, if similar situations should arise in the future in which mutual agreement or other accommodation cannot be reached, the process of declaration of nullity of sacred ordination might be the only available remedy, in which event, the competence question will have to be resolved. If any of these or other cases are determined to be *delicta graviora*, then it is probable that cases alleging such defects would be processed by the Congregation for the Doctrine of the Faith since it would seem from the cases of the married men secretly ordained as Latin priests and secretly consecrated as Bishops in Czechoslovakia, that the Congregation for the Doctrine of the Faith has already exercised *de facto* competence in such cases.

2.3. The Competence of the Tribunal of the Roman Rota

In regard to the competence of the Tribunal of the Roman Rota, the grounds which could be alleged to justify a declaration of nullity of ordination have to be identified by the use of common sense, the similarity of such cases to marriage nullity cases, and the Oriental and Latin norms and instructions previously identified which were in force prior to the *CCEO*. In this regard, the *Instruction* of the Sacred Congregation for the Sacraments of 9 June 1931³² and especially the form documents contained in the Appendix of Formularies to the *Instruction*³³ are very enlightening. The *Instruction* itself is not too explicit, but the formularies are much more detailed and give valuable insights into the process. For instance, the formulary for the voluntary *libellus* or petition of the cleric to the Supreme Pontiff requesting a declaration of nullity of his ordination states as follows:

SUPPLEX LIBELLUS ACTORIS

Beatissime Pater,

N.N., filius..., conditione..., e dioecesi..., natus die..., domicilium habens..., et munus modo exercens..., ad pedes Sanctitatis Vestrae humillime provolutus, quae sequuntur exponit. Annum agens... in Seminario ... collocatus fuit, ut studia... perageret. Ibi manens, assiduis suasionibus, **instigationibus contra suam voluntatem, ut studia conficeret sacra, a parentibus impulsus fuit, ea ratione ut sacrum exinde susciperet presbyteratus ordinem. Quamvis ipse omnem moverit lapidem ut sacros ordines declinaret... importunis tamen precibus, suasionibus, instigationibus et minis... ad eosdem sacros ordines suscipiendos coactus, hos suscepit invitus, quin**

³²The *Instruction* is found in AAS 23 (1931) at pp. 457-473.

³³The Appendix of Formularies is found in AAS 23 (1931) at pp. 473-492.

coactioni obsistere potuerit. Iisdem initis ordinibus, per annos... ipsos exercuit, munus gerens... quin tamen onerum susceptionem ratam habuerit uti par esset, bonumque exemplum praebuerit. **Exinde sentiens se nullimode oneribus in sacra ordinatione susceptis satisfacere posse,** de petenda declaratione nullitatis sacrae ordinationis vel onerum sacris ordinibus adnexorum ob allatas causas cogitavit. Ad hanc autem nullitatem demonstrandam testium elenchum exhibet ». — [Hunc libellum, a S. O. ad Ordinarium exinde transmittendum, actor particularibus circumstantiis, si opus fuerit, additis, fusius, nec tamen sobrietate posthabita, conficere poterit].

Et Deus, etc.

Datum..., die... mense... anno...

N. N. (Subscriptio facienda manu ipsius actoris).³⁴

From the allegations in the petition, it can readily be seen that the primary focus relates to the freedom of the cleric to choose ordination, but there is also an allegation that the cleric is unable to fulfill the obligations undertaken in sacred ordination. These general grounds are very similar to grounds often encountered in processes for the declaration of the nullity of marriage; namely, the grave lack of discretion of judgment,³⁵ the inability to assume the essential obligations of matrimony due to causes of a psychic nature³⁶ and entering marriage under force and fear (especially reverential fear).³⁷ There is extensive and recent jurisprudence on all of these marriage nullity grounds which could be applied *mutatis mutandis* to a process for the declaration of the nullity of sacred ordination.

Further grounds can be identified from the formulary for the examination of the petitioning cleric at the tribunal session, which by [extrapolation](#) are also applicable to the examination of a cleric whose ordination has been questioned by an Hierarch or Ordinary.

EXAMEN ACTORIS

Sessio...

In Dei nomine. Amen

Anno Domini..., mense..., die..., hora..., in urbe..., in aedibus..., coram, E. D. N.N., Iudice subdelegato, adstantibus E. D. N.N.,

³⁴Formulary II in the Appendix of Formularies (the emphasis is supplied by this author).

³⁵CCEO c. 818, 2 .

³⁶CCEO c. 818, 3 .

³⁷CCEO c. 825.

defensore sacrae ordinationis, et infrascripto actuario, comparuit D. N.N., actor in causa receptae sacrae ordinationis, pro hac die et hora rite citatus.

Iudex eundem in primis monet, quod in re tanti ponderis, quoties ea quae adducuntur haud veritati sunt consentanea, declaratio nullitatis sacrae ordinationis vel onerum huic adnexorum taliter obtenta, nullum sortitur effectum (iuxta *Monitum* in Appendice relatum n. I); deinde iusiurandum ab actore petit et accipit iuxta modum et formulam praescriptam (prout sub n. XVII).

Deinceps, postulante defensore sacrae ordinationis, Iudex schedam, quam idem defensor clausam exhibuerat, continentem interrogatoria oratori proponenda, reserat, et statim procedit, iuxta eadem interrogatoria, ad examen actoris, qui ad singulas quaestiones respondet ex ordine, ut sequitur.

Interrogationes generales

Iudex actorem interroget circa suum nomen, cognomen, nomen parentum, aetatem, conditionem familiae, dioecesim, cui inscriptus est, domicilium (urbem, viam, paroeciam), et locum hodiernae commorationis. Tum Iudex mandat actuario ut legat, pro norma actoris, nomina iudicis et ministrorum tribunalis. Deinde prosequitur:

Interrogationes particulares actori faciendae

1. Utrum confirmet necne supplicem exhibitum libellum in singulis partibus? Ubinam studia peregerit, et an in Seminarium ingressus sit libera voluntate; qua aetate, quo tempore, quamdiu in ipso permanserit, et an propositum revera haud habuerit statum clericalem ineundi.
2. Quaenam fuerit causa incitamentorum, saevitiarum, vel coactionis, pro eodem clericali amplectendo statu, et a quibus incitamenta, saevitias, vel coactionem passus sit.
3. Quinam fuerint specifici actus eorundem incitamentorum et coactionis, praesertim tempore proximo sacrae ordinationi.
4. Quaenam indoles parentum et sua.

5. Quenam ipse peregerit ut coactionem vitaret per se, et an opera aliorum ad hunc finem sit usus, et quinam isti.
6. Istum in Seminario degens, studiis theologalibus libenter operam dederit et an fuerit impeditus quominus ab studia perageret, et a quibus.
7. Istum, sive in Seminario sive extra, defectum suae voluntatis pro suscipiendis sacris ordinibus vel aversionem patefecerit, quando, et quibus.
8. An ipse, deficiente voluntate sacros suscipiendi ordines, id Seminarii Superioribus, Ordinario, vel spiritus moderatori (qui tamen eius confessarius non fuerit) manifestaverit, et quatenus negative, cur suam contrariam voluntatem ei non significaverit: quinam iste fuerit.
9. Quando accesserit ad sacrum ordinem subdiaconatus, diaconatus et presbyteratus; qualem revera interius habuerit animum in actu sacrae ordinationis; et an communis iucunditatis tunc particeps fuerit.
10. An officium recusaverit divinum, et Missam celebraverit, vel etiam alio modo sacrum ministerium exercuerit.
11. Istum contentiones adfuerint, et quales in specie, inter ipsum et parentes, aliosque, qui eum impellere potuerint ad suscipiendos sacros ordines, et num notae in loco ubi idem degebat, et quinam sint qui eas confirmare valeant.
12. Num ipsi etiam nota fuerint ante sacrorum ordinum susceptionem onera eis inhaerentia, ac praecipue quae coelibatus lex exigat.
13. Quomodo sese gesserit post sacerdotium initum, et quae ministerii Officia peregerit, quoties, quomodo, quanto tempore, et quibus in locis.
14. Istum sacri ministerii exercitio rata habere sacrae ordinationis onera intenderit. An sibi praesto sint documenta exhibenda, uti litterae a parentibus vel ab aliis scriptae ante susceptos sacros ordines, ad confirmandam illatam coactionem.
15. Quosnam alios testes ipse praeter exhibitos in elencho inducat sive consanguineos, sive affines, sive familiares, vel extraneos, qui

de cunctis circumstantiis certiores facti, plene et sincere referre possint.

16. An unquam contra sacram ordinationem et huius adnexa onera reclamaverit; et unde factum sit ut causae introductionem aut continuationem ad haec usque tempora distulerit.

[Exinde contestationes peragenda, si opus erit, inter ea quae actor asseruit, atque illa quae ipse in supplici libello retulit].

Absolute examine, de mandato iudicis integra depositio clara voce legitur actori, et iudex eundem interrogat: An habeat aliquid addendum, supprimendum, corrigendum, variandum! Dein petitur ut praestetur iusiurandum de veritate dictorum et de secreto servando, iuxta formam (cf. infra n. XIX). Ac, praestito iureiurando, subscribunt actor, iudex, defensor vinculi et actuarius.

N., Actor.

N., Iudex instructor.

L. S N., Defensor sacrae ordinationis.

N., Actuarius.

[*Adnotatio.* - Quoties alicuius sacerdotis sacra peracta sit ordinatio post Instructionem, quae a Sacra Congregatione de Sacramentis edita fuit 27 Decembris 1930, idemque contendat se gravi coactum metu sacros suscepisse ordines, ea ordinato erunt obscienda, quae de pandita ab ipso voluntate iurata et scripta declaratione confirmavit. Ii pariter erunt interrogandi, qui examinibus adfuere, iudiciumque pro sacra actoris ordinatione emisissent].³⁸

The detailed questions of the examination of the cleric confirm that the primary focus is the freedom of the cleric to choose ordination and the cleric's understanding of and ability to fulfill the obligations undertaken in sacred ordination. They clearly generally suggest a similarity to marriage nullity grounds, but specifically what could they be in relation to a petition for the declaration of the nullity of sacred ordination?

The ground most easily applied to a sacred ordination nullity case is that of reverential fear, as is made clear from the questions about the

³⁸Formulary XVIII in the Appendix of Formularies (emphasis supplied by this author).

attitude and actions of the parents of the ordained prior to ordination, and therefore the proofs would be similar to those in a marriage nullity case adjudicated on that ground. However, there is also the possibility of non-reverential or actual fear, such as a situation where a young man might have entered the seminary and accepted ordination to avoid compulsory military service during a time of war when the risk of death or grievous injury was extremely high and seminarians and priests were exempt under civil law from being drafted into the military. Again, if such were alleged, the proofs would be very similar to those in a marriage case on the same grounds.

The emphasis on the law of celibacy suggests that a particular petitioner might be able to assert the inability to observe celibacy as a ground for nullity whether it is due to a psychic cause or simple weakness or susceptibility in that regard. If a psychic cause is suggested, then proofs would be similar to those normally found in marriage nullity processes of that kind: medical reports, hospital records, reports from psychiatrists and/or psychologists and expert testimony. Even if a psychic cause is not alleged, an expert report would be useful, as well as proofs of a pattern of the inability to observe celibacy from before and after ordination.

Also, in regard to the obligation of celibacy and any of the other obligations of sacred orders, a petitioner might be able to argue that he suffered from a grave lack of discretion of judgment such that he was incapable of freely choosing sacred orders. For instance, it might be alleged that the cleric was not sufficiently informed of the rights and obligations of the clerical state or that, if so informed, the information was merely *pro forma* or consisted of having him sign a written acknowledgment of being so informed. Or it might be alleged that, even if the cleric were properly informed, that he was unable to completely understand and, more importantly, appreciate the obligations he was assuming by accepting sacred ordination, and this might be more credibly alleged in the case of a man who entered the seminary at a very early age. If such were the allegations, then the proofs would include the testimony of the seminary administration and professors and formation officials, spiritual advisors (excluding confessors) and other seminarians, as well as the psychological evaluations, if any, done prior to ordination and expert examinations and reports done in connection with the nullity process.

Since simulation of any sacrament is possible, if it is alleged that the cleric received sacred orders with the positive act of the will to exclude, either absolutely or at least hypothetically, the sacred order itself or at least one or more of the obligations which are attached to sacred

orders, such as celibacy, then it might be possible to prove the ordination null on the ground of total and/or partial simulation.

Other grounds which go to freedom, such as error, fraud, forged dimissorial letters, etc. might be applicable to nullity of sacred ordination cases, and the jurisprudence developed in marriage nullity cases decided on those grounds will no doubt be useful in adjudicating a nullity of sacred ordination case which alleges such grounds.

2.4. Administrative Process or Judicial Process

CCEO c. 1386 §1 goes on to confer on whatever dicastery is competent in a particular case the option of processing the case either in an administrative process before the dicastery itself (sometimes and formerly called the *via disciplinaris* or informal process) or in a judicial process before a tribunal appointed by the dicastery for the purpose of adjudicating the case. This is an important threshold decision by the dicastery because there are significant differences between an administrative process and a judicial process, not only procedurally, but also substantively.

It appears that the competent dicastery has considerable discretion in making this initial decision; however that discretion is not totally unfettered because fundamental fairness and natural justice must always be observed. The canon itself articulates no criteria to guide the competent dicastery, but certain general principles may be ascertained by looking to the facts an eparchial Bishop must take into consideration in deciding whether to proceed by way of an extra-judicial decree or a judicial process in the imposition of penalties³⁹ and in the actual praxis of the dicasteries of the Roman Curia in the processing of other kinds of cases.⁴⁰ The general principles that seem to emerge are that the administrative process is appropriate when the facts and proofs of the case are clear and the rights of the cleric and the public good can be adequately protected by it, as would be expected when the cleric himself files the petition or at least is not opposed to it; and the judicial process is appropriate when the facts and/or the proofs are in dispute and/or the rights of the cleric and the public good are not adequately protected by the administrative process and/or the cleric is opposed to the petition or is unable or incapable of

³⁹See, CCEO c. 1469 §1.

⁴⁰Such as the Congregation for the Doctrine of the Faith in the processing of *graviora delicta* cases and the Congregation for the Clergy in the processing of "Special Faculties" cases.

defending against the petition for some reason. It seems that the judicial process is to be employed in doubtful cases.

2.5. The Process before a Tribunal

Section 2 of *CCEO* c. 1386 provides that, if the competent dicastery entrusts the adjudication of the case to a tribunal, the process will be governed by the canons on trials in general (*CCEO* Title XXIV, cc. 1055 to 1184 inclusive) and the ordinary contentious trial (*CCEO* Title XXV, Chapter I, cc. 1185 to 1342 inclusive), unless there is a good reason not to in light of the nature of nullity of sacred ordination cases.⁴¹ While it is difficult to hypothesize an example of a compelling reason to vary from the procedures on trials in general and ordinary contentious trials, some indication of the unique issues in sacred ordination nullity cases which might justify such variances in procedure are included in the very detailed norms issued in regard to these cases by the Apostolic (Holy) See⁴² after the Pio-Benedictine Code came into force and which were completely compatible with subsequently promulgated prior Oriental legislation *in vigore* until the coming into force of the *CCEO*.⁴³ These norms remain useful since the process envisioned in the *CCEO* is clearly based on the prior Oriental legislation which was itself substantially equivalent to that of the Pio-Benedictine Code.⁴⁴ The process specified in the norms is detailed and remains a solid guide to the manner in which the tribunal should proceed in such cases, *mutatis mutandis*.⁴⁵

The tribunal to whom the adjudication of a declaration of nullity of sacred ordination case may be entrusted by the competent dicastery is not specified anywhere in *CCEO* c. 1386. This implies that the competent dicastery has a choice of which tribunal to use and discretion in making the choice. Allowing for any special norms which may be in force in a particular dicastery or comparative *praxes Curiae Romanae*, some guidance might be found in the more detailed

⁴¹The text of the canon is: (*CCEO* c. 1386 §2). If the dicastery hands the case over to a tribunal, the canons on trials in general and on the ordinary contentious trial are to be observed unless the nature of the matter precludes this; the canons on the summary contentious trial cannot, however, be used.

⁴²See, the *Instruction* of the Sacred Congregation for the Sacraments of 9 June 1931, AAS 23 (1931) 457-473 and especially the Appendix to the *Instruction* found at AAS 23 (1931) 473-492, which contains detailed formularies for each stage of the trial, interrogatories for parties and witnesses, etc.

⁴³M.p. *Sollicitudinem Nostram*, cc. 501 to 506 inclusive.

⁴⁴1917 *CIC* cc. 1993 to 1998 inclusive.

⁴⁵*Instruction* of the SC Sac., AAS 23 (1931) 457-473, especially Capita VI through XV at pp. 463 to 471.

provisions of the prior Oriental legislation.⁴⁶ Those provisions indicate that, as applied to the current competences of the dicasteries involved, cases within the competence of the Tribunal of the Roman Rota (cases attacking the validity of the ordination itself) would be adjudicated by the Roman Rota itself or entrusted to the tribunal of the eparchy of incardination of the cleric at the time of the ordination *sub iudice*, and cases within the competence of the Congregation for the Doctrine of the Faith (cases alleging a *delictum gravius* or grave delict or defect in the ordination ritual itself) would be entrusted to a tribunal of the Congregation itself or to the tribunal of the eparchy in which the ordination took place.⁴⁷

Although *CCEO* c. 1386 §2 does not specifically mention the participation of the Promotor of Justice in a process to declare the nullity of sacred ordination, nevertheless this section does specifically incorporate by reference the canons on trials in general. This reference clearly includes *CCEO* cc. 1094 and 1095 which require the participation of the Promotor of Justice in cases which involve the public good and in which the nature of the matter requires the participation of the Promotor of Justice. The participation of the Defender of the Bond of Sacred Ordination is expressly required by the provisions of *CCEO* c. 1096. Therefore, the failure to cite the Promotor of Justice and/or the Defender of the Bond (of Sacred Ordination) and their resulting failure to participate invalidates the acts of the case.⁴⁸ This section of the canon expressly forbids the use of the summary contentious process (*CCEO* Title XXV, Chapter II, cc. 1343 to 1356 inclusive) in the adjudication of the nullity of sacred ordination cases.

2.6. Effects of the Pendency of the Process

Section 3 of *CCEO* c. 1386 provides that the cleric is forbidden (*vetatur*) from exercising sacred orders once the process has been commenced by the transmittal of the petition to the competent dicastery.⁴⁹ The canon is very clear that the dicastery need not be in actual receipt of the petition for the prohibition to come into force, rather it happens *ipso iure* upon the transmittal of the petition, whether it is sent by the cleric himself or by the hierarch or major superior.

⁴⁶M.p. *Sollicitudinem Nostram*, cc. 501 to 506 inclusive.

⁴⁷M.p. *Sollicitudinem Nostram*, cc. 501 §2 and §3; accord 1917 *CIC* c. 1993 §2 and §3.

⁴⁸*CCEO* c. 1097.

⁴⁹The text of the canon (*CCEO* c. 1386 §3) is: Once the libellus has been sent, the cleric is forbidden to exercise sacred orders by the law itself.

Naturally, if he did not submit the petition himself, the cleric must have received notice of the transmittal of the petition for the prohibition to come into force. Because the canon merely prohibits the exercise of orders, any acts of orders exercised thereafter would be illicit but valid, except for acts requiring faculties if they had been revoked. Even for facultative acts, there would be the possibility of the applicability of the principle of *ecclesia supplet*⁵⁰ as well as the exception for the *ipso iure* faculties in *periculo mortis* situations.⁵¹

3. The Effects of the Sentence of Nullity becoming Executive

CCEO c. 1387 specifies that the cleric whose ordination is the subject of this process loses all of the rights and is free from all of the obligations of the clerical state only if and when an affirmative decision as to nullity, either by the competent dicastery or by a tribunal designated by the competent dicastery, is confirmed by a second sentence.⁵²

This brief canon is deceptively simple because of the unarticulated implications contained therein. The significance of this canon is that the process for the declaration of nullity of sacred ordination is not concluded with an affirmative decision in first instance before either the competent dicastery in an administrative process or before a tribunal of or appointed by the competent dicastery in a judicial process. In order to become effective, the affirmative sentence in first instance must be confirmed by a second instance sentence. This is very similar to the requirement of a second conforming sentence of nullity in marriage nullity cases as required by former CCEO cc. 1368 to 1370. Therefore, the praxis and jurisprudence that was developed when those provisions were in force can be a guide for the proper application of CCEO c. 1387 as to the process for the second conforming sentence, e.g., the duty of the first instance dicastery or tribunal to transmit the acts of the case *ex officio* to the second instance authority if there is no appeal or recourse, the right of appeal or recourse (which is not expressly mentioned in CCEO c. 1387), the time periods for transmission and filing of pleadings, etc.

⁵⁰When executive power of governance for the external and internal fora is supplied by the Church in cases of common error of fact or law as well as cases of positive and probable doubt of fact or law. See, CCEO c. 884.

⁵¹Duty to absolve a penitent in danger of death under CCEO c. 735 §2 and duty to anoint in cases of necessity under CCEO c. 739 §2.

⁵²The text of the canon (CCEO c. 1387) is: After a second sentence has confirmed the nullity of sacred ordination the cleric loses all rights proper to the clerical state and is free of all its obligations.

The proper authority for ratification, recourse or appeal will depend on the competent dicastery before whom the case was filed and the relevant common law and any special norms which may be in force. Generally, if the case is decided administratively by the dicastery, it seems clear that a party would have the right to appeal by way of hierarchical recourse. If, however, the case is decided judicially by a tribunal, the appeal would be to the tribunal already established by law as the Court of Second Instance for the First Instance Tribunal inasmuch as this is included in *CCEO* c. 1386 §2's reference to trials in general and the ordinary contentious process.⁵³ Naturally, attention must be paid to any special norms for such cases which may be in force from time to time for a particular dicastery. Both a second affirmative decision under a hierarchical recourse and a second conforming sentence by an appellate tribunal would satisfy the requirement of a second sentence for purposes of *CCEO* c. 1387.

Finally, the canon expressly provides that the issuance of a second conforming sentence of nullity carries with it *ipso iure* the loss of all rights and freedom from all obligations of the clerical state. Naturally, as in normal praxis, the issuance of a decree of nullity by the competent dicastery is the proper method of concluding the process, followed by communication of the decree to the cleric and notification to the entities where a record of the ordination had been made.

4. Excursus on the Issue of Sacraments administered by Clerics Whose Ordinations are annulled.

As noted at the outset, the declaration of nullity of sacred ordination is inexorably connected to the problem of the validity of sacraments administered by a cleric whose ordination has been adjudged to be null.

There is at least some precedent for the resolution of the issue in the treatment of the afore-mentioned "secret ordinations" in Communist Czechoslovakia. In the cases of those secret ordinations which were doubtful as to validity, the Holy See decided that the Baptisms administered by such doubtfully ordained priests were not problematic since any person may validly baptize as long as the form and matter of the sacrament are present. The issue of marriages performed by such priests was resolved by the *en masse* radical sanation of all such

⁵³The former legislation on this point (M.p. *Sollicitudinem Nostram*, c. 503) made explicit reference to the canons on contentious trials in general and on matrimonial processes.

marriages by the Holy See itself. The remedy for sacraments requiring episcopal character for validity, i.e., ordinations to the diaconate and priesthood and episcopal consecration, was the reordination *sub conditione* of those clerics by Bishops who were most certainly validly consecrated themselves; and this same solution could in theory be applied, to the cases of ordinations performed by a Bishop whose episcopal consecration is doubtful with unconditional reordination employed for clerics ordained by a Bishop whose episcopal consecration is itself declared to be invalid. However, it seems that no provision was made in the resolution of the Czechoslovakian secret ordinations as to the Eucharists (Masses or Divine Liturgies) celebrated by these priests, or as to absolutions which were given by or the anointings of the sick and Chrismations (Confirmations) performed by them. The Holy See's position that doubts as to the validity of secret ordinations are to be resolved by reordination *sub conditione* is a prospective solution only and does not address the validity of the Eucharists and other sacraments, especially confessions, administered by those clerics prior to reordination or to those sacraments administered by the secretly ordained priests and bishops who have declined reordination *sub conditione*. The principle of *ecclesia supplet* seems inapplicable because it supplies only the missing executive power of governance and not the power of orders.⁵⁴ As to those issues, the Holy See admits they remain to be resolved.⁵⁵ The possible solutions to these questions are not obvious and will require clarification by the competent authority.

Conclusion

A consideration of the three canons of the CCEO which comprise the process of the declaration of nullity of sacred ordination indicates that this process is one which has been provided for those kinds of situations in which any other process is inadequate. While the process for the declaration of the nullity of marriage is a common one and therefore there is ample and well-developed jurisprudence for marriage cases, there is very little jurisprudence extant specifically in regard to nullity of sacred ordination cases. If, as this author expects, this process comes to be employed more frequently, canonists, dicastery officials and jurists functioning in this area will, of necessity, be called upon to develop and articulate jurisprudence relevant to the specific grounds which may be formulated in these cases. The Supreme Legislator has provided the process and it is up to those entrusted with

⁵⁴See, CCEO c. 994, accord CIC c. 144 §1.

⁵⁵CDF, Dichiarazione sulla «chiesa clandestina» nella Repubblica Ceca, N. 4 C.

its implementation to do so faithfully in accordance with the mind of the Legislator and with the ever-present aid of the Holy Spirit.