

COMPETENCE OF MAJOR SUPERIORS IN THE PROTECTION OF MINORS

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The article concentrates on the Major Superiors and their responsibility in following the abuses committed by the clerics and or religious subjected to them. This author highlights the position of the Institutes of Consecrated Life regarding such cases of abuse of minors and vulnerable persons, the prudential intervention of the major superiors when there is news about an at least probable delict committed by a religious cleric or by a non-religious cleric and the specific procedures.

Introduction

I will focus attention on the Major Superiors and on some peculiarities that they have as Ordinaries in reference to their responsibilities and competences in the protection and prosecution of abuses committed by clerics and/or religious subject to them.

Obviously many of the things that I will expose can be, *mutatis mutandis*, applied also to non-cleric religious, for whom a more serious crime is not configured, and therefore the rules for reserved crimes are not followed, although it is necessary to proceed with the dismissal from the Institute, according to universal law and the norms of proper law, referring the matter to the Congregation for Institutes of Consecrated Life and Societies of Apostolic life or to the Congregation of the Oriental Churches, as far as religious belonging to the Eastern Churches are concerned, and not to the Congregation for the Doctrine of the Faith.

The detailed definition of the most serious crimes (*delicta graviora*), reserved to the Congregation for the Doctrine of the Faith, and the related special procedural norms, are contained in the apostolic letter of John Paul II, *Sacramentorum sanctitatis tutela* with which are

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promulgated the *Normae de gravioribusdelictis Congregationi pro Doctrina Fidei reservatis*, dated April 30, 2001.¹ The *Normae* was issued by the Congregation for the Doctrine of the Faith, with the Letter *Ad exequendam*, sent to the Bishops of the whole Catholic Church and to the other Ordinaries and Hierarchs concerned, about the most serious crimes reserved to the same Congregation for Doctrine of Faith, May 18, 2001.²

A letter from Card. J. Ratzinger, Prefect of the Congregation for the Doctrine of the Faith, addressed to Card. E. Martínez Somalo, Prefect of the Congregation for Institutes of consecrated life and Societies of apostolic life, dated November 18, 2003³, offers observations and clarifications of an interpretative nature regarding the implementation of *Sacramentorum sanctitatis tutela* in Institutes of consecrated life and in Societies of apostolic life.

On May 21, 2010, the Congregation for the Doctrine of the Faith introduced changes to the previous norms and made them known with a Letter to the Bishops of the Catholic Church and to the other interested Ordinaries and Hierarchs.⁴ Recently, with Rescript dated December 3, 2019, changes have been made to articles 6 §2, 1° and 13 of the M.P. *Sacramentorum sanctitatis tutela*.⁵

It should also be borne in mind that on January 30, 2009⁶ the Congregation for the Clergy received special faculties to deal with cases of dismissal from the clerical state *in poenam* of clerics who have attempted marriage even if only civilly and who even after being admonished do not repent and continue in irregular and scandalous life and clerics guilty of serious external sins against the 6th Commandment; to inflict a just punishment or penance on the particular gravity of the external violation of divine or canon law lest an objective scandal occur; and to declare the loss of clerical status, including celibacy, of clerics who have left the ministry for more than

¹ Ioannes Paulus PP. II, Littere apostolicae motu proprio datae *Sacramentorum sanctitatis tutela*, 30 aprilis 2001, in AAS 93 (2001) 737-739.

² Congregatio pro Dottrina Fidei, Epistola *Ad exequendam*, 18 maii 2001, in AAS 93 (2001) 785-788.

³ Prot. N. 28/97 - 17781.

⁴ Congregatio pro Dottrina Fidei, Rescriptum ex audientia *Summus Pontifex*, 21 maii 2010, in AAS 102 (2010) 419-434.

⁵ Cf. http://www.vatican.va/roman_curia/secretariat_state/2019/document_s/rc-seg-st-2019_1203_rescriptum_it.html.

⁶ Prot. n. 2009 - 0556.

five consecutive years and who persist in this voluntary and unlawful absence from the ministry.

These faculties were made public by letter of April 18, 2009 to the Ordinaries; with a further letter dated March 17, 2010⁷, the same Congregation for the Clergy transmitted the procedural guidelines for dealing with the cases in question.

Finally, on May 3, 2011, the Congregation for the Doctrine of the Faith sent a Circular Letter to assist Episcopal Conferences in preparing guidelines for the treatment of cases of sexual abuse against minors by clerics.⁸ The Letter presents general aspects, summarizes the canonical legislation on the matter and offers indications to the Ordinaries on how to proceed. The Letter is also addressed to the Major Superiors.⁹

1. Institutes of Consecrated Life in the Face of Sexual Abuse of Minors and Vulnerable People.

The sexual abuse of minors and vulnerable people, carried out by religious, clerics or lay brothers, in addition to being a serious injustice towards the victims, endangers the faith of the people of God as well as of all men of good will and undermines seriously the reliability of the Church and the Institutes. They are a strong reminder to make a healthy discernment about the training itineraries in the Institute, the procedures for examining and selecting candidates, admissions, the ability of the training communities to verify, support and accompany the evolution and maturation of members.

The Institute cannot ignore any eventual cases of sexual abuse of minors committed by some of its members. These are behaviours contrary to the Gospel, the values of consecrated life and its mission. They represent a betrayal of the trust that people place in those who by vocation have placed themselves at the service of the most little ones, minors or most vulnerable.

⁷ Congregazione per il Clero, Lettera circolare per l'applicazione delle tre "Facoltà speciali" concesse il 30 gennaio 2009 dal Sommo Pontefice, 17 marzo 2010, Prot. N. 2010 - 0823, in *Ius Ecclesiae* 23 (2011) 229-234.

⁸ Congregatio pro Doctrina Fidei, Lettera circolare *Tra le importanti responsabilità*, 3 mai 2011, in AAS 103 (2011) 406-412.

⁹ "The Guidelines prepared by the Episcopal Conference ought to provide guidance to Diocesan Bishops and Major Superiors in case they are informed of allegations of sexual abuse of minors by clerics present in the territory of their jurisdiction."

There is a moral duty that affects everyone: to report to those who are competent (Major Superior, Local Superior), knowledge or suspicion of cases of sexual abuse, putting aside any fear of public scandal that could occur to the Church and the Institute through the complaint.

In the fulfilment of this duty, it should be borne in mind that every action taken must have the superior good of the minor or vulnerable person as its first concern. Any initiative that is not aimed at seeking and establishing the truth would be unjust and immoral, while any attempt to protect those suspected or accused of sexual abuse from the obligation to answer for their conduct, is wrong and must be condemned.

Faced with cases of sexual abuse of minors, the Institute, through the competent authority, having carried out a careful discernment on individual cases, can ask the religious to accept the necessary help, so as not to prejudice other minors; authoritatively encourage the religious to accept a psychiatric and psychopathological or even medico-legal evaluation, if the accusations are confirmed; put the religious in a situation where he has no direct contact with minors, especially when the offender denies his responsibility despite the evidence of the facts or when, while acknowledging having sexually abused a minor, he does not accept the help offered or when there is the possibility, even remote, of recidivism; ensure that, in proven cases of paedophilia, the religious does not operate or have direct contact with minors; suspend the religious from the apostolate; not to confirm his eventual election as superior or councillor; resort to disciplinary sanctions contemplated by canonical legislation up to dismissal from the Institute and request for loss of clerical status, in the cases provided.

Each choice requires that the procedures established by current legislation are respected.

2. The Prudential Intervention of the Major Superior

CIC c. 1717 §1 and CCEO c. 1468 §1 establish that whenever the Ordinary/Hierarch has news, at least likely, of a delict, he must carefully investigate the facts, circumstances and imputability, unless this investigation seems absolutely superfluous. It must be specified who is meant by Ordinary.

In accordance with CIC c. 134 §1, and with CCEO c. 984 and its peculiarities, the Ordinaries are - in addition to the Roman Pontiff, patriarch, major archbishop, metropolitan, the diocesan Bishops, the

equivalent of the diocesan Bishops and their Vicars -, also "for their members, the Major Superiors of the clerical religious institutes of pontifical right and of the Societies of apostolic life of clerical pontifical right, who possess at least ordinary executive power." The definition of Major Superior is contained in CIC c. 620 and in CCEO c. 418 §1.

From the combined provision of the two Latin canons it follows that the Provincial Superior of a Religious Institute divided into provinces is, at the same time, Major and Ordinary Superior.¹⁰

The Provincial Superior is responsible for carrying out, personally or through a suitable person, the prior investigation referred to in CIC c. 1717 §1 (see also c. 695 §2).

The Supreme Moderator of the Institute cannot replace or take upon himself the task that belongs to the Provincial Superior, unless the Institute's proper law provides for this.

As is known in the CIC the Major Superior indicates both the Provincial Superior and the Superior General. With reference to the Superior General only, the CIC uses the expression Supreme Moderator.

The Major Superior will consider seriously and with a sense of responsibility the accusations and suspicions of sexual abuse, of which he has received news, against a member of the Institute.

For the purposes of the likelihood judgment of the reported fact, it will take into account the number of people who report the crime, their independence, their intellectual and moral qualities, their willingness to sign what is reported.

Any anonymous accusations should be subject to evaluation; they should not be uncritically discarded, but it would be appropriate for them to be subject to prudent and careful verification. The completely generic or blatantly unfounded and slanderous anonymous reports do not deserve any attention. The investigation will be particularly accurate when the findings are difficult or deficient.

The situation must be faced with honesty and responsibility, towards all the subjects involved (the victims of abuse, the alleged guilty religious, the religious community, the ecclesial community and civil society).

¹⁰ According to CCEO c. 481 §1 the "president of a monastic confederation, the superior of a monastery *sui iuris*, the superior general of an order or congregation, the provincial superior, their vicars..." are major superiors.

The Institute must take as its own the presumption of innocence of the accused, who cannot be considered guilty until a final sentence, that is, till the conclusion of the entire trial, the final judgment of the criminal responsibility and punishment of the subject to the foreseen penal sanction. This principle, accepted in all legal systems including that of the Church, is applicable to the religious institutions as well.

The Major Superior must ensure the accused a fraternal, respectful and understanding listening. Adequate moral, spiritual and psychological support will be offered to him through a competent person, who can also act as an intermediary between him, the investigator and the Superiors, in the various stages of the procedure. It should not be hidden from the accused that the procedures provided for by canon law have been initiated.

3. The Verification Intervention Through the Preliminary or Prior Investigation

The Major Superior, whenever he has had at least probable news of the delict of sexual abuse committed by a religious cleric with a minor, has the duty to verify the facts with a prior investigation. This investigation is required both by the Code, and by the special legislation on *delicta graviora*, and by CIC c. 695 §2, even if the latter does not use the term *praevia investigatio*.¹¹

The preliminary investigation should not be confused with the "instruction of the cause" envisaged in the process and not even with the preliminary phase specific to the special processes. The preliminary investigation is an administrative procedure, extrajudicial, independent of the same conclusions to which the investigation will reach (the criminal trial, or the imposition of administrative sanctions, or the filing of the case as may be required). This is a preliminary phase, aimed at verifying the *fumus delicti*. It is administrative in nature and has the purpose of avoiding unnecessary or prejudicial processes, not sufficiently founded. In the most absolute way, a process must not be carried out before the process. The preliminary investigation must be carried out according to CIC cc. 1717 and 695 §2.

¹¹ Cf. c. 1717 §1; Congregatio pro Dottrina Fidei, Epistola *Ad exsequendam*, in AAS 93 (2001) 787. The c. 695 §2 does not speak explicitly and directly of prior investigation as c. 1717 §1, but, by obliging the Major Superior to collect evidence relating to the facts and imputability, it coincides with what is established in c. 1717 §1.

The "news of the crime" mentioned in c. 1717 § 1 must be at least probable: it is when there are facts (proofs) that justify the suspicion of carrying out a concrete crime and punishable act. In addition, the news must indicate the suspect's person and the presumption of his imputability.

The news can have multiple sources:

- the general supervision that the Major Superior exercises over the observance of religious discipline,
- a formal complaint, oral or written, made to the Superior or to another ecclesiastical or civil authority, by a person informed of the facts,
- the complaint of the injured party,
- the fact that a number of people talk about the crime episode, even without having the precise data,
- the request made by the faithful to remove the religious from the place,
- news released by the public information media.

The Major Superior must pay attention to the content of the news and the probability of its truthfulness. The question to ask at the wake of the news of the abuse is whether, in concrete terms, it is at least likely.

CIC c. 1717 §1 stipulates that the Major Superior investigate carefully. Prudence requires that during the investigation "no good reputation should be endangered" (§2), therefore none of the parties involved, both of the accusation and of the suspect, even when the news of the crime has become public. The preliminary investigation will be as confidential as possible. The right to good fame involves, in a generic form, the protection of the person's dignity and reputation which are opposed to injury and defamation; in application of the criminal matter, it entails, for the accused, the right to know the accuser, the object of the accusation and the evidence, therefore the right of an adequate defence, of a possible sanction according to the law, of the possibility of recourse to the higher authority and compensation for damages in case of slander.

CIC c. 1717 §1 provides that the subject who carries out the investigation may be as much the same Major Superior as another person, be this man or woman. Having regard to §3 of the same canon, it may be appropriate for the Major Superior to entrust another person with the task of carrying out the prior investigation. This other person,

suitable by virtue of preparation, competence, discernment and confidentiality, has the same functions that CIC c. 1428 §3 attributes to the auditor in the process, but applied to the concrete circumstances that determine some limits.

With regard to the way to carry out the prior investigation, in the absence of specific rules, the provisions contained in the CIC cc. 1526-1586(cf. also CCEO cc. 1207-1266) can be applied with certain adjustments, concerning the means of proof in trials. Evidence of any kind may be adduced, provided it is lawful and so long as it seems useful for examining the case. These may be statements by the parties, documents, testimonies, expert reports, access to judicial documents, including civil documents.

At the discretion of the Major Superior or at the request of the investigator, the promoter of justice may support the latter, as one can also seek the advice of expert. Instead, the presence of the notary, who must sign all the documents in order for them to be valid and have public faith, is required (c. 695 §2). In investigations involving a cleric, the notary must be a priest. Subject of the prior investigation are "the evidence relating to the facts and imputability" (c. 695 §2). Mitigating or aggravating circumstances should not be omitted.

By "facts" must be understood what happened, consciously and voluntarily caused by man. It must be an external (objective) violation of criminal law.

The "evidence" are arguments put forward so that whoever conducts the investigation can rationally convince himself of the validity and truth of what is alleged. The burden of proof rests on the person who claims. If the plaintiff is unable to prove his claims, the investigator will acquit the cited party. The burden of proof will only burden the defendant if it affirms facts contrary to those of the accusing party. The admission of the evidence lies with the person conducting the investigation, guaranteeing the legitimate conduct of the investigation.

The "imputability" is the third fundamental subject of the prior investigation. Imputability is the prerequisite for responsibility. It consists in the ability to be able to respond to having committed a fact foreseen and proven by law. This ability is excluded in the minor, before the age of seven ("he is considered not responsible for his acts": CIC c. 97 §2; CCEO c. 909 §2) and in the minors of sixteen when it comes to imposing a penalty (cf. CIC c. 1323, 1°; CCEO c. 1413 §1). A behaviour can present an irrefutable or evident objective imputability, but the person to whom this behaviour is attributed, from a subjective

point of view, may be incapable of crime (cf. the legal incapacities provided for in CIC c. 1323; CCEO c. 1413 §1) or there may be, in its comparisons, circumstances mitigating imputability (cf. CIC cc. 1324 and 1345; CCEO c. 1415). It is required that the imputability be serious for wilful misconduct or fault (CIC c. 1321 §1; CCEO c. 1414 §1). Once the external violation is placed, imputability is presumed, that is, it is assumed that whoever acted did it in a human way, with freedom, awareness and responsibility, unless it appears otherwise. If you can prove the lack of serious imputability, there is no canonical crime and consequently the case must be closed.

The Major Superior must, therefore, have a secure and precise conviction (moral certainty) of the facts, the evidence adduced, the seriousness of the incident happened and the imputability of the alleged offender.

As in the criminal trial, the accusation and evidence must be made known to the religious, giving him the faculty to defend himself - in the trial the sentence is considered vitiated by an irremediable nullity "if one or the other party was denied the right to defence" (CIC c. 1620, 7°; CCEO c. 1303 §1, 7°) -, so in the preliminary investigation the right to defence is a natural right that can never be ignored.

Even a possible dismissal decree issued by administrative procedure (cc. 696-697) would be vitiated by nullity if the right to defence had been denied or coerced. It should also be borne in mind that, during the investigation, 'the right of the religious to communicate with the Supreme Moderator and to directly expose the arguments in his defence always remains firm' (c. 698).

It is up to the prudent judgment of the Major Superior, in agreement with the investigator, if one has been appointed, to decide on the conclusion of the preliminary investigation. The elements gathered must be considered sufficient and any reasonable doubt about the truth must be excluded. The way of the conclusion is established in c. 695 §2: "All the acts, signed by the Major Superior and the notary, are to be forwarded, together with the written and signed replies of the member, to the supreme moderator."

In the cc. 1717 and 695, with reference to all phases of the preliminary investigation and to the same conclusion, the Major Superior is never obliged to avail himself of the work of his council. The proper law of the institute can establish the norms regarding the intervention of the board. In any case, any leaks that may harm the good reputation of the cleric or accused religious must be avoided.

If the clues collected by the Major Superior are inconsistent and if the existence of the crime is highly unlikely, or when it is a known crime and no doubt, it is not necessary to proceed with the preliminary investigation. However, it should be borne in mind that, if it is foreseen that the canonical penal process will be started, it would still be necessary to collect the necessary elements for this process.

It is not for the Major Superior to decide whether to resort to the judicial process, or to proceed by extrajudicial decree. This is the responsibility of the next phase. Any dismissal orders from the Institute are also the responsibility of the Supreme Moderator with the intervention of the Holy See.

We understand, at this point, the importance and relevance of the preliminary investigation: the measures of the second phase will be based on the documents transmitted by the Major Superior.

Among the measures that can be taken by the Major Superior is the immediate expulsion of the religious cleric from the religious house, in the event of a serious scandal or a very serious imminent damage to the Institute. CIC c. 703, which regulates this matter, will be examined later (cf. also CCEO cc. 498 and 551).

With the transmission of the documents to the Supreme Moderator, the preliminary investigation closes and a new phase begins with the Supreme Moderator and the Congregation for the Doctrine of the Faith as interlocutors.

Canon law prescribes to keep the documents pertaining to any preliminary investigation in the secret archive of the curia (cf. CIC c. 1719; CCEO c. 1470).

The archiving of the acts takes place when the competent Major Superior decides not to appeal to the supreme Moderator of the Institute.

According to the procedural law, the documents of the preliminary investigation are to be sent to the promoter of justice (CIC c. 1721 §1; CCEO c. 1472 §1), except those that are not deemed necessary. The archiving time cannot be less than the deadline set for the prescription of the criminal action.

Account should be taken of the provisions of c. 489 §2 regarding the obligatory destruction of certain documents.

4. Procedure according to the Norms of the Congregation for the Doctrine of the Faith

The *Normae de delictis reservatis* regulate the procedure that must be followed once the preliminary investigation regarding the crime against the sixth commandment of the Decalogue committed by a religious cleric with a minor under 18 years of age is concluded.

According to the art. 16 of the *Normae*:

Whenever the Ordinary or the Hierarch receives a report of a more grave delict, which has at least the semblance of truth, once the preliminary investigation has been completed, he is to communicate the matter to the Congregation for the Doctrine of the Faith, which, unless it calls the case to itself due to particular circumstances, will direct the Ordinary or Hierarch how to proceed further, with due regard, however, for the right to appeal, if the case warrants, against a sentence of the first instance, only to the Supreme Tribunal of this same Congregation.

The Ordinary - from now on means the Supreme Moderator of the Institute of consecrated life of clerical pontifical right or of the Society of apostolic life of clerical pontifical right, to whom are transmitted the acts of the preliminary investigation carried out by Provincial Superior (c. 695 §2) - is required to report to the Congregation for the Doctrine of the Faith the conclusions of the investigation, if this has confirmed the existence of serious elements against the religious cleric who has been investigated. The supreme moderator, therefore, does not proceed with the dismissal of the religious cleric (c. 695 §1), but informs the Congregation for the Doctrine of the Faith that will decide the procedure to be followed and the measures to be adopted.

The supreme moderator, in accordance with the Institute's own law, with or without the vote of his council, must transmit to the Congregation for the Doctrine of the Faith not only the acts and decrees of the investigation, but also an evaluation of the case, with possible orientations (for example expressing one's conviction on the non-necessity of the criminal action, if the three purposes indicated by the c. 1341, in his opinion, have already been achieved).

It is in fact important to report to the Congregation for the Doctrine of the Faith the more or less collaborative attitude of the subject, the eventual possible existence of investigations and criminal measures taken by the civil authorities, the seriousness of the episodes and what has been done to prevent them from happening again, the attitude of

the minor's family, etc. The Supreme Moderator, in his own *votum*, can also suggest which procedure to follow. In other words, if an extrajudicial decree or recourse to the criminal trial is agreed (in this case if, then, it deems it possible to carry out the trial in the Institute or in the diocesan or inter-diocesan see, for example at the diocesan or inter-diocesan ecclesiastical court for cases of nullity of marriage) or if you deem it appropriate to completely refer the case to the Congregation for the Doctrine of the Faith. In this case, the latter will indicate to the Supreme Moderator how to proceed.

According to the *Normae de delictis reservatis*, the Congregation for the Doctrine of the Faith, having received the documents sent by the Supreme Moderator with his opinion, can order various measures:

- to call the cause to itself, given the particular circumstances (cf. art. 16);
- order the Supreme Moderator, suggesting appropriate rules, to proceed to further investigations through its own tribunal;
- request that the process to impose the sentence be started, indicating the competent tribunal to know the first instance case;
- to decide to proceed by administrative means (cf. art. 21 §2, 1°).

The Congregation for the Doctrine of the Faith indicates criminal procedure for the most serious and complex cases (cf. art. 21 §1). It cannot be denied that the criminal trial is the most suitable venue for decreeing extremely serious measures, such as the dismissal of the religious cleric from the Institute and the dismissal from the clerical state. It should be borne in mind that the contentious cases on the bond of the sacred ordination and on the charges attached to it are reserved to a tribunal composed of three judges, therefore to a collegiate Tribunal (CIC c. 1425, 1°; CCEO c. 1084 §1, 1°-2°).

The *Normae de delictis reservatis* establish that the second instance judgment, in the event that an appeal has been lodged against the first instance sentence, is reserved to the Supreme tribunal of the Congregation for the Doctrine of the Faith, which it will judge with its own tribunal. Other courts of the Church are therefore excluded (Supreme Tribunal of the Apostolic Signatura, Tribunal of the Roman Rota, Apostolic Penitentiary) (cf. art. 20).

The Congregation for the Doctrine of the Faith can also command the Supreme Moderator to carry out further investigations "through its own tribunal." It is one of the "religious tribunals", having its own

system (CIC c. 1427; CCEO, c. 1069). The religious subjects with judicial power are the Ordinaries of the clerical religious Institutes of pontifical right and of clerical Societies of apostolic life of pontifical right.¹² A religious Institute of clerical pontifical right or a Society of apostolic life of clerical pontifical right should not renounce setting up its own tribunal. It is a way of exercising the right autonomy of life, especially of government, recognized by the Church to the Institutes, so that they can make use of their own discipline in the Church and preserve their own charisma intact (c. 586 §1).

According to the provisions of c. 1427 §1, the judge of first instance for disputes between religious or houses of the same clerical Institute of pontifical right is the Provincial Superior or the local Abbot, if it is a monastery *sui iuris*, unless otherwise provided for in the Constitutions. If the Constitutions have no other provision, the provisions of the general canonical law just mentioned above shall be applied. The Congregation for the Doctrine of the Faith can indicate which court is competent to hear the case in the first instance, that is, whether it is the tribunal of the Institute to which the cleric religious to be brought to trial, belongs. It can be formed by members of the Institute or by external people, provided they meet the requirements established by the universal law of the Church.

In serious and ascertained cases, the Congregation for the Doctrine of the Faith can allow the Supreme Moderator to proceed administratively, in accordance with c. 699 §1 (cf. art.21 §2, 1 °). The decision, by the Supreme Moderator, must be taken with the council, as a collegial act in accordance with c. 119. If the Supreme Moderator with his council deems it convenient to dismiss the offender from the clerical state, he must ask the Congregation for the Doctrine of the Faith to impose the penalty by decree. The Congregation for the Doctrine of the Faith can also bring the most serious cases for dismissal *ex officio* directly to the Holy Father (cf. art. 21 § 2, 2 °).

Cases resolved before April 30, 2001 by judiciary or extra-judiciary way, must not be reopened unless new elements intervene. For the cases prior to April 30, 2001 in which no action has been taken yet, the Congregation for the Doctrine of the Faith is to be heard in any case, which has the right to derogate case by case from the terms of the

¹² Cf. V. De Paolis, *Norme De gravioribus delictis riservati alla Congregazione per la Dottrina della Fede*, in *Periodica* 91 (2002) 297; G. Núñez, *La competencia penal de la Congregación para la Doctrina de la Fe. Comentario al m.p.Sacramentorum Sanctitatis Tutela*, in *Ius Canonicum* 43 (2003) 367.

prescription, at the reasonable request of the Supreme Moderator. The criminal action relating to reserved crimes is extinguished by prescription in twenty years, starting from the day in which the victim has turned eighteen (see art. 7 §§1-2).

The *delicta graviora* listed in the M.P. *Sacramentorum sanctitatis tutela* are of the exclusive competence of the Congregation for the Doctrine of the Faith. Cases not explicitly covered by the aforementioned M.P., such as, for example, the sexual abuse of minors committed by non-clerical religious, are the exclusive competence of the Congregation for Institutes of consecrated life and Societies of apostolic life or of the Congregation of the Oriental Churches, as far as religious belonging to the Eastern Churches are concerned. A special Commission has been set up at the Congregation for Institutes of consecrated life and Societies of apostolic life to deal with reports and complaints against non-clerical religious.

5. The First Instance Trial.

The Congregation for the Doctrine of the Faith indicates the competent tribunal to know the first instance case. It can be the Institute's tribunal, the diocesan tribunal, the regional tribunal for matrimonial nullity cases or another ecclesiastical tribunal. Normally all members of the tribunal, even the patrons (defence lawyers) of the cleric religious under trial, must be priests: Congregation for the Doctrine of the Faith can, however, exempt in individual cases from the requirement of the priesthood and that of the degree (but not from the license) in canon law (cf.art. 15).

If no appeal is lodged against the sentence, it becomes executive. The second instance judgment is reserved to the Supreme Tribunal of the Congregation for the Doctrine of the Faith (cf. art. 20).

Given the delicacy of the elements involved and the possible repetition of behaviours by the religious cleric after some time, it is appropriate to keep some documentation of the case in the secret archive of the curia. In the dioceses, only the diocesan Bishop must have the key (cf. CIC c. 490 §1; CCEO c. 261 §1), so also for the religious Institutes only the Major Superiors should have it.

The rules that regulate such conservation - motivated by the need to protect the good reputation of the offender (or presumed such), to have available data for issues that could reoccur later and to keep elements for future historical research - are contained in CIC c. 489 §2 and CCEO c. 259 §2.

To the purely canonical requirements the need of having available the relationship with the civil order is added: all documents relating to the proceedings before the state judiciary must be kept until the terms of the canonical and civil prescriptions expire.

6. Administrative Solution of the Case.

The Congregation for the Doctrine of the Faith can decide that it proceeds administratively (cf. art. 21 §2, 1°). The procedure is that foreseen in c. 699 §1: Supreme Moderator with his council, consisting of at least four members, for validity, proceeds collectively with an accurate assessment of the evidence, arguments and defence and, if this is the result of a secret vote, will issue the decree of dismissal, expressing at least briefly the reasons, in law and in fact. Voting is carried out in accordance with CIC c. 119.

According to this canon, there is the possibility that the Supreme Moderator does not decree the dismissal with his council. The Congregation for the Doctrine of the Faith respects the provision of non-resignation established in c. 695 §1: "A member must be dismissed for offences mentioned in cc. 1397, 1398 and 1395, unless, for the offences mentioned in c. 1395 §2, the Superior judges that dismissal is not absolutely necessary and that sufficient provision can be made in some other way for the amendment of the member, the restoration of justice and the reparation of scandal."

The c. 695 §1 establishes that the Superior must dismiss a religious for the offences mentioned in cc. 1397-1398 (murder, kidnapping, mutilation, abortion) and 1395 (sixth commandment and vow of chastity). Assuming the specific offence, the canon determines ordinarily the procedure for obligatory dismissal.

But precisely in reference to the offences configured in c. 1395 §2 (among these is the offence against the sixth precept of the Decalogue committed with a minor under the age of 18), c. 695 §1 provides the reservation that the Superior does not proceed with dismissal as it is not considered completely necessary and provided that the three conditions established in the same canon are fulfilled. The expulsion from the Institute foreseen in c. 695 §1 is not, therefore, automatic, for the mere fact that the offence has been committed, but is decreed by the Superior, according to law.

The nature of the reservation or exception provided for in the canon consists in the fact that the Superior may not proceed with the expulsion, provided that the three established conditions are fulfilled.

However, it should be noted that, even if the conditions are fulfilled, the Superior can still proceed with the expulsion, since the general principle is that of expulsion mandatory.

The Major Superior can judge that expulsion is not entirely necessary because: 1° the correction of the religious can be provided in another way (there must be a morally certain perspective of repentance by the guilty of sexual abuse of a minor); 2° justice can be reinstated (compensation can be charged to the Institute for damages caused to third parties. But if the offspring was born from sexual abuse, it is right that the religious is going to carry out his duty as a father, not only from an economic point of view); 3° the scandal can be repaired (the simple removal of the guilty person from the community is not enough. The Superior must resort to other penal or penitential remedies. It is important what the community can propose).

The procedure does not apply to c. 695 §2, but c. 699 §1.

The procedure established in c. 699 §1 requires that the decision be taken by a collegial act with a secret vote, in accordance with c. 119. The tests, arguments and defences are the object of evaluation and voting. In collegial intervention, the council and the supreme moderator form a college, that is, a group of equals, in which the Superior is a *primus inter pares* (first among equals). The decision is collegial and is that of the majority; the Supreme Moderator is responsible for deciding parity with his vote (c. 119, 2°).

The Supreme Moderator is responsible for issuing the decree of dismissal. The validity of the decree depends on the following elements, requested simultaneously:

- by the fact that the Supreme Moderator acts together with his own council;
- the fact that the board is composed of at least four members, since its action must be collegial;
- the fact that the decision is taken collectively and by secret vote;
- by the fact that the decree of dismissal is motivated *in iure et in facto*, at least summarily;
- by the fact that the decree mentions the right of the dismissed religious to have recourse to the competent authority within ten days of receiving the notification;

- by the fact that the decree of dismissal from the Institute was confirmed by the Congregation for the Doctrine of the Faith or by the diocesan Bishop, depending on the nature of the Institute, and does not produce effects before such confirmation.

The penalty of dismissal from the clerical state is decided and imposed simultaneously with the confirmation of the decree of dismissal from the Institute.

The decree of dismissal must be notified to the interested party after the confirmation of the Congregation for the Doctrine of the Faith. As with all *delicta graviora*, the appeal against the decree issued will be forwarded to the Congregation for the Doctrine of the Faith within the peremptory time limit of sixty days from notification and will be decided exclusively by the Ordinary Congregation of the members of the Congregation for the Doctrine of the Faith (Feria IV). Recourse to the Apostolic Signatura is not admitted (cf. art. 27). The appeal has a suspensive effect (c. 700).

The dismissal decree raises two other problems: the first concerns the possible financial help of the Institute to the dismissed religious, the second the compensation for the damage to the victims of sexual abuse.

As regards the first question, c. 702, after affirming that those who leave or have been legitimately discharged from the Institute have no right to claim anything for any activity they provide, assert that the Institute must "show equity and evangelical charity towards the member who is separated from it." Helping "with equity" implies taking into account the circumstances of each case and therefore age, health, skills, educational qualifications acquired, professionalism, etc. Helping "with charity" means that you cannot give up on helping beyond the limits of justice.

The second issue concerns compensation for damage to victims of sexual abuse. Abuse of children can cause profound and lasting disturbances on their psyche. Child abuse is known to have turned into a source of enrichment in some countries. Acts or declarations that may mean the Institute's assumption of responsibility for offences committed personally by members of the Institute itself, must be avoided. In any modern and civil penal system, criminal liability is personal for one's own fault.

7. The Dismissal from the Institute for a Religious Who is not a Cleric

If the accusation of abuse of a minor is addressed to a non-clerical religious, substantially the procedure does not change. The crime, in fact, still falls within the violation of c. 1395 §2 which refers to c. 695 §1 which, as already seen, establishes that the dismissal procedure must be obligatorily started.

The fact that the religious involved is not also a cleric allows the Major Superior not to have to notify the Congregation for the Doctrine of the Faith knowledge of the alleged offence but does not exempt him from having to start the preliminary investigation to collect the elements useful for making a judgment about.

Even in these circumstances, the Major Superior, having assessed the evidence and issued the judgment, has the right not to proceed with the request for dismissal if he believes that the offender can be corrected in any other way and the reintegration of justice and the reparation of the scandal are equally protected. Given the delicacy of the matter, it is highly advisable that the Major Superior use this faculty not to proceed exceptionally.

In case of doubt, consultation with the Institute's higher authority is always possible.

Another observation can be made regarding the condition of complicity in which a religious can be involved when a crime of abuse is committed (cf. c. 1329).

The Major Superior, carrying out the preliminary investigation, must try to establish what are the circumstances that entail the possibility of attributing complicity in the criminal action to the religious and subsequently what the degrees of competition that also entail criminal imputability.

The elements to be evaluated are two: the subjective and the objective material. The subjective element wants to determine the existence, in the accomplice, of the deliberate will to carry out the crime by accepting or sharing the criminal will of those who physically commit the crime.

The objective material element must instead establish the degree of participation in the external action necessary to produce the criminal event, that is, how much the cooperation of the accomplice effectively

influenced so that the crime could be committed or how much it has been the efficient cause for it.

Complicity occurs when both subjective and objective elements work together, that is when the will of the participants and their actions allow the crime to take place.

8. The Immediate Expulsion from the Religious House

The c. 703 provides for an exceptional remedy in particular situations, that is, in the case of a serious external scandal or extremely serious imminent damage that threatens the Institute, precisely because of the presence of the religious. The remedy consists in the immediate expulsion from the religious house by the Major Superior without his council having to intervene or, if there is danger in the delay, by the local Superior with the consent of his or her local council, in order to eliminate the scandal or prevent damage.

Since this is an extremely summary procedure, the two cases of urgency must occur as established by the canon: it must be a "serious external scandal" (cf. cc. 695 §1 and 696 §1) and a "very serious imminent damage to the Institute"; for example, when the danger of infamy could fall on the community or on the entire Institute.

The expulsion order from the religious house does not amount to dismissal from the Institute, is not comparable to the transfer to another house, does not take the form of a penalty such as those provided for in c. 1337 and is not comparable to the provision with which the diocesan Bishop forbids a religious to reside in a diocese (cf. c. 679).

The remedy provided by c. 703 involves the removal from the religious house of a "member" of the Institute, without distinction of age or dignity, condition or previous merits. The measure is interlocutory, that is, aimed at remedying the scandal or the very serious imminent damage and therefore requires further continuation. Expulsion is always optional, as other remedies can be found. If the scandal or damage causes one or some of the crimes typified by the cc. 694 and 695 §1, the procedure set out in c. 695 §2 must be applied. Canon 703 establishes that, if necessary, the Major Superior is to take care that the process of dismissal is instructed according to the norm of law, or refer the matter to the Apostolic See.

9. Some Pastoral Attentions of the Major Superior

The preliminary investigation could reveal an evident non-imputability of the religious (cf. c. 1323, 6°) for psychological reasons. In this case, but also in less serious cases (and in parallel with any canonical procedure), it is necessary to propose to the religious a specialist psychological accompaniment.

It may be appropriate to ask the interested party for an authorization to ask the specialist for a certificate that highlights the possibilities and risks of taking on certain ministries. On the basis of the indications of the specialist and with the precautions that the case requires, the Major Superior will establish which tasks to be entrusted to the religious and with what protections.

With reference to the age of the offender, even for serious cases, it will be necessary to evaluate the opportunity to resort to dismissal from the Institute when it would be objectively difficult to reintegrate him into society.

It is advisable to find, in time, specialized centres or individual specialists to whom the religious, clerics or lay people could be sent for a psychological consultation and accompaniment. So it is a good thing to have a list of catholic consultants particularly equipped to be able to follow the minors and families, victims of abuse.

It is important also to have some protected centres available that can follow the religious, when this can be useful or necessary.

The opportunity to offer help to the minor and his or her family can be considered especially if he or she manifests an attitude of availability. This aid must never be of an economic nature, but could consist in allowing free access to specialized structures or people.

Finally, it is to be considered whether civil proceedings have already been initiated before the canonical investigation. From the moment in which the civil procedure is activated, consider carefully, perhaps resorting to experts on the matter, the opportunity to suspend the canonical one in order to avoid that a pronouncement or a sentence of the ecclesiastical tribunal could condition the civil one. In the event that the civil investigation is concluded with the indictment, and the suspension of the canonical procedure has been previously chosen, it will be possible to decideto conclude also the latter, taking into account the c. 1344, 2°, when there was a sentence of condemnation.

Pay attention to the rite of plea-bargaining, as it involves the admission of guilt.

Conclusion

It is an increasingly widespread belief that in the ecclesial sphere, and therefore also in Institutes of consecrated life, serious primary prevention must be implemented, capable of motivating people and contexts to be watchful, to listen and engage themselves for the emergence of the truth, **definitively abandoning the code of silence**, perverse styles of paternalism, concern to keep hidden facts that have come to light.

The role of the process should be re-evaluated as a modality that is more capable of opening up to dialogical dimensions. But one can understand the difficulty of this dialogue: it is hateful, sometimes rough material; we are not used to dealing with certain topics with human clarity and evangelical *parrhesia*. To this can be added also the insufficiency in the procedural dialogue: when the Congregation for the Doctrine of the Faith authorizes the Supreme Moderators to proceed judicially or administratively, especially in small Institutes, it is difficult to find people capable of intervening adequately in the various offices that the criminal process entails, sometimes in certain regions it is also difficult to find them in diocesan tribunals. The same difficulties are already registered in the pre-trial phase of the preliminary investigation.

Let me now close the discussion with the words of a Master, which, though written almost 20 years ago, are of formidable relevance, precisely because of the current context in which the contemporary Church attempts to produce legislative innovations in the penal sphere.

[...] In concrete life there have been conflicting responses: on the one hand, an almost complete neglect of the criminal law and the discipline that it intends to protect, and on the other a tendency aimed at exacerbating criminal law, especially as regards clerics and the clerical state; above all under the pressure of situations of urgency and gravity, shortcuts were sought for procedures in the imposition and declaration of canonical penalties. It has been argued that the ways provided for by the Code do not respond to pastoral needs and do not sufficiently protect the discipline and doctrine of the Church. In this regard, it is sufficient to recall the problem of paedophile clerics, the question of the defence and protection of the doctrine of faith and customs, the dismissal of

clerics from the clerical state. [...] Criminal law seems to be the part of canon law in which the balance between philosophy and theology of law on the one hand and positive human law must be continuously harmonized and balanced; natural and positive divine law and positive human law need new and continuous mediations of the competent ecclesiastical authority. This cannot be considered simply as an accountant who notes and takes note of the behaviour of the faithful, simply declaring to them the consequences of their actions.¹³

¹³ V. De Paolis, *L'attuazione della riforma del diritto penale canonico*, in J. Canosa (ed.), *I principi per la revisione del Codice di diritto canonico. La ricezione giuridica del Concilio Vaticano II*, Giuffrè Editore, Milano 2000, 671-672; 673-674; 708.