The issuance of the formal decree of erection by the diocesan Bishop "transcends" said Pope Francis, "the solely diocesan sphere and makes it relevant to the wider horizon of the universal Church". The reason for this is found in the fact that every religious institute, notwithstanding that it has is origins within a particular Church, "as a gift to the Church, is not an isolated or marginal reality, but deeply part of her. It is at the very heart of the Church, a decisive element of her mission".[20] Accordingly, in their process of discernment leading to the ecclesial recognition of a new religious institute, diocesan Bishops are accompanied by the Apostolic See. In his Apostolic Exhortation *Vita Consecrata* Pope John Paul II had said the Apostolic See "has the responsibility of examining them in order to discern the authenticity of the purpose for their foundation". [VC 12] The end point of the process of accompaniment is a document from the Apostolic See whereby the diocesan Bishop receives permission to issue validly his formal decree. In accord with the new canon 579 unless the diocesan Bishop has received this permission in writing the canonical erection of a religious institute is invalid.

On 21 November 2020 Pope Francis issued *motu proprio* another Apostolic Letter *Ab Inito* whereby he amended two canons in the Code of Canons of the Eastern Churches relating to the same issue addressed in *Authenticum Charismatis*. The new laws came into force on 8 December 2020. In contrast with the Code of Canon Law, the Code of Canons of the Eastern Churches distinguishes between monasteries and religious institutes.

Canon 435 §1 CCEO regulates the establishment of monasteries by an Eparchial Bishop, and the amended law provides that the eparchial Bishop is competent to erect a monastery *sui iuris* within the territorial boundaries of the patriarchal Church having received in writing the permission of the Patriarch or in other instances the Apostolic See. Canon 506 §1 CCEO now provides that he eparchial Bishop can erect only congregations but he cannot do so without the permission in writing of the Apostolic See and in addition within the territorial boundaries of the patriarchal Church without consulting the Patriarch.

In this *Motu Proprio* Pope Francis says: "it is the responsibility of the Apostolic See both to accompany the Pastors in the process of discernment that leads to the ecclesial recognition of a new Institute or of a new Society of eparchial law, and to make a final judgment to test the authenticity of the inspiring purpose". [21]

20 POPE FRANCIS, *Letter to Consecrated Persons*, III, 5, 21 November 2014. http://www.vatican.va/content/francesco/en/apost_letters/documents/papa-francesco_lettera-ap_20141121_lettera-consacrati.html.

21 POPE FRANCIS, Apostolic Letter issued Motu Proprio *Ab Initio* 21 November 2020. http://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20201121_ab-initio.html.

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An Analysis of the *Vademecum* of the Congregation for the Doctrine of the Faith

Brendan Daly*

The Congregation of the Doctrine for the Faith has exclusive competence within the Catholic Church over all crimes against the faith, and the more-grave crimes (*delicta graviora*) against morality and the celebration of the sacraments. Many questions about procedures and jurisprudence have been received by the Congregation for the Doctrine of the Faith over the past two decades.

The bishops at the meeting of Heads of Bishops Conferences with Pope Francis in February 2019 requested a handbook to help them with procedures and jurisprudence. Responding to that request, the Congregation for the Doctrine of the Faith on 16 July 2020 published a *Vademecum*: *on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*.[1] The *Vademecum* only concerns crimes against the sixth commandment committed with minors although it provides standardised practice for dealing with other complaints of misconduct. Cardinal Ladaria, the Prefect of the Congregation, explained that it was not a normative legal text, but a manual to guide investigations[2] in a detailed step-by-step instruction.

Sexual Abuse of a Minor

Pope Francis in his *motu proprio Vos Estis Lux Mundi VELM* on 7 May 2019 had defined the sexual abuse of a minor in article 1 §1 i. ii. and iii. as:

> forcing someone, by violence or threat or through abuse of authority, to perform or submit to sexual acts;
>
> performing sexual acts with a minor or a vulnerable person;

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1 CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Vademecum*: *On Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics* Version 1.0' 16 July 2020. http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20200716_vademecum-casi-abuso_en.html. Hereinafter all quotes from the *Vademecum* are taken from this source.

2 https://www.vaticannews.va/en/vatican-city/news/2020-07/ladaria-vademecum-cdf-sexual-abuse-minors-clergy.html.

> the production, exhibition, possession or distribution, including by electronic means, of child pornography, as well as by the recruitment of or inducement of a minor or a vulnerable person to participate in pornographic exhibitions.[3]

The Congregation for the Doctrine of the Faith in the *Vademecum* has provided a more detailed description of what constitutes the crime of sexual abuse of a minor:

> The delict in question includes every external offense against the sixth commandment of the Decalogue committed by a cleric with a minor (cf. canon 1395 § 2 CIC; art. 6 § 1, 1° SST). [*Vademecum* 1]
>
> The typology of the delict is quite broad; it can include, for example, sexual relations (consensual or non-consensual), physical contact for sexual gratification, exhibitionism, masturbation, the production of pornography, inducement to prostitution, conversations and/or propositions of a sexual nature, which can also occur through various means of communication. [*Vademecum* 2]

This description reflects the jurisprudence of the Congregation. These crimes include all actions that have a clear sexual intent, including any sexual activity the minor consents to or not. The description is very significant, because some bishops and religious leaders from differing cultures around the world have too readily dismissed some complaints as merely boundary violations. The imputability of the accused cleric is increased if they hold an office such as diocesan bishop or vicar general.[4]

Pornography involving Minors

The crimes concerning pornography with minors have been grouped together in the *Vademecum*. The crimes concerning the acquisition, possession and distribution of pornography were introduced by *Sacramentorum Sanctitatis Tutela* in 2010. The *Vademecum* synthesises the crimes concerning pornography:

> SST has also introduced (cf. art. 6 § 1, 2° SST) three new delicts involving minors, i.e., the acquisition, possession (even temporary) or distribution by a cleric of pornographic images of minors under the age of 14 (as of 1 January 2020, under the age of 18) for purposes of sexual gratification by whatever means or using whatever technology. From 1 June to 31 December 2019, the acquisition, possession, or distribution of pornographic material involving minors between 14 and 18 years of age by clerics or by members of Institutes of Consecrated Life or Societies of Apostolic Life are delicts for which other Dicasteries are competent

3 Pope FRANCIS, Apostolic Letter *Vos Estis Lux Mundi - You re the Light of the World* (VELM), issued motu proprio on 7 May 2019 and came into force on 1 June 2019; http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio-20190507_vos-estis-lux-mundi.html. Hereinafter all quotes from Vos *Estis Lux Mundi* are taken from this source.

4 Canon 1326 §1 1°.

> (cf. arts. 1 and 7 VELM). From 1 January 2020, the CDF is competent for these delicts if committed by clerics. [*Vademecum* 6]

The *Vademecum* clarifies when the changes in age of minors and the competency of congregations came into effect:

> It should be noted that these three delicts can be addressed canonically only after the date that SST took effect, namely, 21 May 2010. The production of pornography involving minors, on the other hand, falls under the typology of delict listed in nos. 1-4 of the *Vademecum*, and therefore is also to be dealt with if it occurred prior to that date. [*Vademecum* 7]

From 1 January 2020, the Congregation for the Doctrine of the Faith is competent for all pornographic delicts committed by clerics. The praxis of the Congregation was always to consider the production of pornography as a crime against the person. The Congregation was always competent to deal with that crime from 2001.

Religious Leaders failing to act

The media have reported many instances from all over the world of bishops and religious leaders failing to investigate or adequately deal with complaints of sexual abuse. Pope Francis responded in his *motu proprio You are the Light of the World*. The definition of sexual abuse of a minor in *Vos Estis Lux Mundi* included as stated in article 1 §1 b):

> conduct carried out by the subjects referred to in article 6, consisting of actions or omissions intended to interfere with or avoid civil investigations or canonical investigations, whether administrative or penal, against a cleric or a religious regarding the delicts referred to in letter a) of this [article 1 §1 a].

Article 6 of *Vos Estis Lux Mundi* identified those who could be responsible for such conduct:

a) Cardinals, Patriarchs, Bishops and Legates of the Roman Pontiff;
b) clerics who are, or who have been, the pastoral heads of a particular Church or of an entity assimilated to it, Latin or Oriental, including the Personal Ordinariates, for the acts committed *durante munere*;
c) clerics who are or who have been in the past leaders of a Personal Prelature, for the acts committed *durante munere*;
d) those who are, or who have been, supreme moderators of Institutes of Consecrated Life or of Societies of Apostolic Life of Pontifical right, as well as of monasteries *sui iuris*, with respect to the acts committed *durante munere*.

These provisions are a dramatic change in approach by the Church. It is now a crime for bishops and religious leaders to fail to observe civil law on reporting crimes and failing to cooperate with or obstructing civil investigations.[5] Effectively the Church is canonising aspects of civil law regarding what constitutes sexual abuse and grooming, as well as civil procedural laws on reporting.[6] This has significance in many countries because of civil laws regarding grooming, obtaining the phone numbers of children, photographing children without parental consent, etc.

Historic failures of diocesan bishops and other religious leaders not dealing properly with complaints are now also encompassed by this legislation in *Vos Estis Lux Mundi*. The law explicitly refers to those "who have been in the past leaders", referring to moderators of institutes of consecrated life societies of apostolic life and monasteries, who may have been responsible for acts or omissions while they were in office. They can now be held accountable for their failures to act properly.

Bishops have a duty to act on complaints in accordance with the provisions of canon 392:

> §1 Since the Bishop must defend the unity of the universal Church, he is bound to foster the discipline which is common to the whole Church, and so press for the observance of all ecclesiastical laws.
> §2 He is to ensure that abuses do not creep into ecclesiastical discipline.

Vos Estis Lux Mundi clarified canon law such as canon 1389 which had already categorised acts or failures to act crimes when they constituted an abuse of an office or position:

> §1 A person who abuses ecclesiastical power or an office, is to be punished according to the gravity of the act or the omission, not excluding by deprivation of the office, unless a penalty for that abuse is already established by law or precept.
> §2 A person who, through culpable negligence, unlawfully and with harm to another, performs or omits an act of ecclesiastical power or ministry or office, is to be punished with a just penalty.[7]

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5 CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Vademecum, 16 July 2020,* " Whenever civil judicial authorities issue a legitimate executive order requiring the surrender of documents regarding cases, or order the judicial seizure of such documents, the Ordinary or Hierarch must cooperate with the civil authorities. n.50"

6 Canon 22. Civil laws to which the law of the Church yields are to be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless canon law provides otherwise.

7 In the 1917 Code of Canon Law, canon 2404: "Abuse of ecclesiastical power, in the prudent judgment of the Legitimate Superior, shall be punished according to the gravity of the fault, with due regard for the prescriptions of those canons that establish certain penalties for various abuses".

The provisions of *Vos Estis Lux Mundi* removed any doubt about the application of this canon concerning sexual abuse cases. Failures to act constitute an abuse of office.

When religious superiors fail to act in a case of sexual abuse, the diocesan bishop must insist that the religious superior act in accordance with canon 678:

> §1 In matters concerning the care of souls, the public exercise of divine worship, and other works of the apostolate, religious are subject to the authority of the Bishops, whom they are bound to treat with sincere submission and reverence.
> §2 In the exercise of an external apostolate towards persons outside the institute, religious are also subject to their own Superiors and must remain faithful to the discipline of the institute. If the need arises, Bishops themselves are not to fail to insist on this regulation.

The bishop has a clear obligation to act concerning sexual abuse in Catholic Schools for canon 805 states:

In his own diocese, the local Ordinary has the right to appoint or to approve teachers of religion and, if religious or moral considerations require it, the right to remove them or to demand that they be removed.

Moral considerations would include sexual abuse or misconduct. If the religious superior still fails to act, the diocesan bishop must inform the Holy See in accord with the provisions of canon 679:

For the gravest of reasons, a diocesan Bishop can forbid a member of a religious institute to remain in his diocese, provided the person's major Superior has been informed and has failed to act; the matter must, however, immediately be reported to the Holy See.

A bishop or a religious superior failing to act properly on a complaint of sexual abuse is committing a canonical crime or delict. The *Vademecum* reminds bishops that they can be removed for negligence, failing to act, or failing to deal properly with a complaint:

According to canon 1717 CIC and canon 1468 CCEO, responsibility for the preliminary investigation belongs to the Ordinary or Hierarch who received the *notitia de delicto*, or to a suitable person selected by him. The eventual omission of this duty could constitute a delict subject to a canonical procedure in conformity with the Code of Canon Law and the Motu Proprio *Come una madre amorevole,* as well as art. 1 § 1, b VELM. [*Vademecum* 21]

The motu proprio "As a Loving Mother"[8] contained the procedures to remove a bishop for negligence, and *Vos Estis Lux Mundi* in 2019 informed bishops they could be removed for failing to deal with complaints of sexual abuse.

Canon law also provides in canon 128 for a person who has been harmed by a failure to act to be recompensed for the harm[9] they incurred as a result:

Whoever unlawfully causes harm to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage done.

Myriam Wijlens points out that "canon 128 is not only directed to individuals who might cause damage, but includes damage caused by ecclesiastical officials."[10] Therefore, a bishop or religious superior who fails to act can be held accountable for their failure(s) to act especially when these actions lead to other persons being harmed or abused.

Law not Retroactive

The Congregation for the Doctrine of the Faith pointed out in its *Vademecum* that canon law is not retroactive. Investigations of alleged offences must be careful to establish when the action took place to establish if a delict or crime was committed:

SST has also introduced (cf. art. 6 § 1, 2° SST) three new delicts involving minors, i.e., the acquisition, possession (even temporary) or distribution by a cleric of pornographic images of minors under the age of 14 (as of 1 January 2020, under the age of 18) for purposes of sexual gratification by whatever means or using whatever technology. From 1 June to 31 December 2019, the acquisition, possession, or distribution of pornographic material involving minors between 14 and 18 years of age by clerics or by members of Institutes of Consecrated Life or Societies of Apostolic Life are delicts for which other Dicasteries are competent (cf. arts. 1 and 7 VELM). From 1 January 2020, the CDF is competent for these delicts if committed by clerics. [*Vademecum* 6]

It should be noted that these three delicts can be addressed canonically only after the date that SST took effect, namely, 21 May 2010. The production of pornography involving minors, on the other hand, falls under the typology of delict listed in nos. 1-4 of the present *Vademecum*, and therefore is also to be dealt with if it occurred prior to that date. [*Vademecum* 7]

8 POPE FRANCIS, motu proprio, "As a Loving Mother", 4 June 2016, http://w2.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html.

9 Cf. MARGARET SHARBEL POLL, *A Reparation of Harm: A canonical Analysis of Canon 128 with reference to its common law parallels,* Ottawa, Saint Paul University, 2002.

10 MYRIAM WIJLENS, *New Commentary on the Code of Canon Law,* Washington DC, Canon Law Society of America, 2000, *183.*

Myriam Wijlens of the Pontifical Commission for the Protection of Minors explains the importance of being aware "we have to remember that in penal matters, the investigation always has to take into consideration the law that was in place at the time the crime was committed. It is never retroactive."[11]

Derogation

The Congregation for the Doctrine of the Faith has the faculty to derogate from prescription for *graviora delicta* (more-grave crimes) when dealing with particularly bad offenders. A dispensation relaxes the law, while derogation means that the law does not apply in this particular case. The norms of the motu proprio *Sacramentorum Sanctitatis Tutela* (SST) in article 7 state:

> §1 A criminal action for delicts reserved to the Congregation for the Doctrine of the Faith is extinguished by prescription after twenty years, with due regard to the right of the Congregation for the Doctrine of the Faith to derogate from prescription in individual cases.
> §2 Prescription runs according to the norm of canon 1362 §2 of the Code of Canon Law, and canon 1152 §3 of the Code of Canons of the Eastern Churches. However, in the delict mentioned in art. 6 §1 n. 1, prescription begins to run from the day on which a minor completes his eighteenth year of age.[12]

It is important that a bishop or major religious superior refers all accusations of sexual abuse of minors to the Congregation for the Doctrine of the Faith because the Congregation has the power to derogate from prescription in individual cases. Also, with their experience of many cases from around the world, the Congregation may be able to suggest other lines of inquiry in a case that is not yet proven.

Reporting to Civil Authorities

Many bishops and major superiors in the past have tried to avoid reporting laws. Pope Francis in his motu proprio *Vos Estis Lux Mundi* required all bishops and major religious superiors to comply with reporting laws of civil authorities in their country. Article 19 Compliance with state laws states:

> These norms apply without prejudice to the rights and obligations established in each place by state laws, particularly those concerning any reporting obligations to the competent civil authorities.

11 https://www.vaticannews.va/en/vatican-city/news/2020-07/miriam-wijlens-protection-of-minors-interview-cdf-vademecum.html

12 CONGREGATION FOR THE DOCTRINE OF THE FAITH, motu proprio, *Sacramentorum Sanctitatis Tutela,* 21 May 2010. http://www.vatican.va/resources/resources_norme_en.html.

The Congregation for the Doctrine of the Faith went further in its *Vademecum*, encouraging reporting to civil authorities even when there is no legal obligation to do so:

> Even in cases where there is no explicit legal obligation to do so, the ecclesiastical authorities should make a report to the competent civil authorities if this is considered necessary to protect the person involved or other minors from the danger of further criminal acts. [*Vademecum* 17]

Myriam Wijlens explains "It says that, if at all possible, you should report this to civil authorities, even if it is not explicitly obligatory [per local civil laws]," she said. "But you have to take into consideration how to protect the persons that are involved, especially the minors that are involved."[13] Victims are always concerned to protect other potential victims and Church authorities must do everything possible to ensure their safety and the safety of other potential victims. Church authorities should, if possible, report crimes to civil authorities and go beyond what is the minimum cooperation required. A priority must be to protect victims and other potential victims ensuring their safety.

The Congregation also commanded Ordinaries and Hierarchs in the *Vademecum* to comply with subpoena issued by civil authorities:

> Whenever civil judicial authorities issue a legitimate executive order requiring the surrender of documents regarding cases, or order the judicial seizure of such documents, the Ordinary or Hierarch must cooperate with the civil authorities. If the legitimacy of such a request or seizure is in doubt, the Ordinary or Hierarch can consult legal experts about available means of recourse. In any case, it is advisable to inform the Papal Representative immediately. [*Vademecum* 50]

Anonymous complaints

Bishops, major religious superiors and other Church leaders sometimes receive anonymous reports of abuse. The *Vademecum* addresses the handling of these reports prudently:

> At times, a *notitia de delicto* can derive from an anonymous source, namely, from unidentified or unidentifiable persons. The anonymity of the source should not automatically lead to considering the report as false. Nonetheless, for easily understandable reasons, great caution should be exercised in considering this type of *notitia*, and anonymous reports certainly should not be encouraged. [*Vademecum* 11]

13 https://www.vaticannews.va/en/vatican-city/news/2020-07/miriam-wijlens-protection-of-minors-interview-cdf-vademecum.html

> Likewise, when a *notitia de delicto* comes from sources whose credibility might appear at first doubtful, it is not advisable to dismiss the matter *a priori*. [*Vademecum* 12]

> At times, a *notitia de delicto* lacks specific details (names, dates, times…). Even if vague and unclear, it should be appropriately assessed and, if reasonably possible, given all due attention. [*Vademecum* 13]

There must be a preliminary investigation for every complaint received[14], unless a civil trial has already established the truth of the allegation. A situation like this makes a preliminary investigation superfluous. When an Ordinary decides that a preliminary investigation is superfluous because it is already proven or is impossible, he must provide a report to the Congregation for the Doctrine of the Faith showing how he reached the decision.[15]

Knowledge of an offence may come on Face Book or other social media. Photos, texts, messages and audio recordings are sometimes supplied to bishops and other religious leaders. They can prove sexual abuse with a high degree of certainty, leaving no doubt that sexual abuse happened and who the clerical perpetrator was. Anonymous complaints are often harder to investigate and the motives of the person making the allegation may be questionable. The *Vademecum* advises that although anonymous complaints do not have full credibility, they must be at least initially examined and investigated.

Myriam Wijlens gave one example of an anonymous complaint where the child says they were abused by "Father" without knowing his name. "I've seen people coming with their First Communion pictures saying, 'This is the priest, but I don't know his name." [16]

Another example of an anonymous complaint would be a person, without identifying themselves, mailing the bishop photos of a priest at a beach leading different children towards the sand dunes. The *Vademecum* offers guidance on how cases like this should be investigated, rather than just dismissing them outright. Bishops and Religious Superiors have the grave obligation to take any reports of abuse of minors very seriously.

Canon 1717 concerning a preliminary investigation requires the Ordinary to investigate when the complaint has a semblance of truth about it:

14 CONGREGATION FOR THE CLERGY, Prot. No. 37937/05 CA, June 23, 2007, quoted in Francis G. MORRISEY OMI, "Violations of Canon 277 (with an Adult) Appropriate and Just Responses" *The Canonist* Vol. 1 No. 2 (2010) 62.

15 *Vademecum*, 12, 13,16,18,19, 37.

16 https://www.vaticannews.va/en/vatican-city/news/2020-07/miriam-wijlens-protection-of-minors-interview-cdf-vademecum.html.

§1 Whenever the Ordinary receives information, which has at least the semblance of truth, about an offence, he is to enquire carefully, either personally or through some suitable person, about the facts and circumstances, and about the imputability of the offence, unless this enquiry would appear to be entirely superfluous.

§2 Care is to be taken that this investigation does not call into question anyone's good name.

§3 The one who performs this investigation has the same powers and obligations as an auditor in a process. If, later, a judicial process is initiated, this person cannot take part in it as a judge.

The Ordinary who is competent to investigate the complaint is the Ordinary of the accused or the Ordinary of the place where the alleged offence occurred.[17]

A semblance of truth is more than hearsay, but it is less than the balance of probabilities used in many investigations. The Ordinary needs strong evidence to decide not to hold a preliminary investigation; for example, it was impossible for the cleric to commit the offence, because he was living in another country at the time of the alleged offence. The *Vademecum* advises:

> Given the sensitive nature of the matter (for example, the fact that sins against the sixth commandment of the Decalogue rarely occur in the presence of witnesses), a determination that the *notitia* lacks the semblance of truth (which can lead to omitting the preliminary investigation) will be made only in the case of the manifest impossibility of proceeding according to the norms of canon law. For example, if it turns out that at the time of the delict of which he is accused, the person was not yet a cleric; if it comes to light that the presumed victim was not a minor (on this point, cf. no. 3); if it is a well-known fact that the person accused could not have been present at the place of the delict when the alleged actions took place. [*Vademecum* 18]

The Abused person must be welcomed, listened to and supported

Myriam Wijlens noted that the 1983 Code of Canon Law understood violations against the Sixth Commandment by a cleric as "a violation of the commitment that the priest had made to a celibate life".[18] Now the *Vademecum* is first of all focussed on welcoming, listening to and accompanying the abused person:

> The ecclesiastical authorities must ensure that the alleged victim and his or her family are treated with dignity and respect, and must offer them welcome, attentive hearing and support, also through specific services, as well as spiritual, medical and psychological help, as required by the specific case (cf. art. 5 *VELM*). The same can be done with regard to the accused. One should, however, avoid giving the impression of wishing to anticipate the results of the process. [*Vademecum* 55]

17 *VELM* article 2, §3; *Vademecum* 22, 31.

18 https://www.vaticannews.va/en/vatican-city/news/2020-07/miriam-wijlens-protection-of-minors-interview-cdf-vademecum.html.

A person making an allegation of abuse will often have a support person such as their counsellor or a family person with them. Myriam Wijlens points out "the victim and the family are to be treated with respect …The one who does the investigation must offer them welcome and attentive hearing, and must offer medical, psychological, and spiritual support".[19] The *Vademecum* envisages that the alleged victim will be accompanied and supported through the process. Supported by ecclesiastical authorities means to be assisted, to be guided and to be given moral support. The person carrying out the investigation cannot both impartially investigate the allegation and fully support the victim. The tribunal has advocates for petitioners and respondents to guide them and assist them by explaining the law and procedures in a declaration of nullity process. The accused in a preliminary investigation or penal process is offered legal advice and support. The person making an allegation also needs competent, canonical legal advice and support. This indicates that a "Victim Assistance Coordinator", an advocate familiar with the Church processes, should support the alleged victim and their family if they desire this. This is something that requires improvement in many current processes.

Prohibition to Exercise Sacred Ministry

In secular society we are used to people, in the medical profession or the police for example, being placed on administrative leave while their actions are being investigated. Administrative leave is not a penalty and it does not presume their guilt. The accused is on full pay and the administrative leave measure is to facilitate the justice process.

A parallel in the Church is to at least temporarily "prohibit the accused from the exercise of the sacred ministry" or to withdraw his faculties to function publicly. This is not a penalty in the Church but at any stage of the process including the preliminary investigation of a complaint is provided for by canon 1722:

> At any stage of the process, in order to prevent scandal, protect the freedom of the witnesses and safeguard the course of justice, the Ordinary can, after consulting the promotor of justice and summoning the accused person to appear, prohibit the accused from the exercise of the sacred ministry or of some ecclesiastical office and position, or impose or forbid residence in a certain place or territory, or even prohibit public participation in the blessed Eucharist. If, however, the reason

19 https://www.vaticannews.va/en/vatican-city/news/2020-07/miriam-wijlens-protection-of-minors-interview-cdf-vademecum.html.

ceases, all these restrictions are to be revoked; they cease by virtue of the law itself as soon as the penal process ceases.

The accused cleric can be prohibited from exercising sacred ministry from the moment the accusation is first received by the Ordinary or the Hierarch. The *Vademecum* reinforces the use of the phrase "prohibit the accused from the exercise of the sacred ministry" and notes that:

> The older terminology of *suspensio a divinis* is still frequently being used to refer to the prohibition of the exercise of ministry imposed on a cleric as a precautionary measure. It is best to avoid this term, and that of *suspensio ad cautelam*, since in the current legislation suspension is a penalty, and cannot yet be imposed at this stage. The provision would more properly be called, for example, *prohibition* from the exercise of the ministry. [*Vademecum* 62]

The *Vademecum* emphasises that a cleric must not be transferred somewhere else:

> A decision to be avoided is that of simply transferring the accused cleric from his office, region or religious house, with the idea that distancing him from the place of the alleged crime or alleged victims constitutes a sufficient solution of the case. [*Vademecum* 63]

Unfortunately, transferrals to other parishes and appointments has often happened in the past and caused harm and great scandal through further victims being abused.

Seal of Confession

Investigations of crimes involving the sacrament of Penance are guided by *SST* 24. The Seal of Confession is briefly addressed in the *Vademecum*:

> It must be pointed out that a report of a *delictum gravies* received in confession is placed under the strictest bond of the sacramental seal (cf. canon 983 § 1 CIC; canon 733 § 1 CCEO; art. 4 § 1, 5° SST). A confessor who learns of a *delictum gravies* [more grave delict] during the celebration of the sacrament should seek to convince the penitent to make that information known by other means, in order to enable the appropriate authorities to take action. [*Vademecum* 14]

It would have been better if the Congregation distinguished between an abuser, an adult abused as a child or a recent child victim disclosing sexual abuse in the sacrament of Penance. The circumstances of an innocent child seeking help on the occasion of going to confession is very different to an abuser confessing his abuse.[20] The priest should

[20] Australian court finds Archbishop Wilson guilty of concealing abuse, May 22, 2018: "The second victim said he had told Wilson of the abuse in the confessional in 1976, but that Wilson had dismissed the boy with a penance, saying that he was lying. Wilson said he would never tell someone in the confessional that they were untruthful, and that he did not remember having seen the boy at all in 1976. Fletcher was convicted of nine counts of sexual abuse and was jailed in 2006. He died of a stroke within the year. Wilson said he had no previous suspicions about the integrity of Fletcher's character." https://www.catholicnewsagency.com/news/australian-court-finds-archbishop-wilson-guilty-of-concealing-abuse-66003. The convictions were overturned on appeal.

persuade the child victim to talk to him outside the confessional/room after the confession. The priest could then accompany the child to speak to its parents and/or could help the child to inform civil authorities.

The Steps of the Preliminary Investigation

The preliminary investigation is outlined in canons 1717 ff. CIC or canons 1468 ff. CCEO.

> It must always be kept in mind that the preliminary investigation is not a trial, nor does it seek to attain moral certitude as to whether the alleged events occurred. It serves: a/ to gather data useful for a more detailed examination of the *notitia de delicto*; and b/ to determine the plausibility of the report, that is, to determine that which is called *fumus delicti*, namely the sufficient basis both in law and in fact so as to consider the accusation as having the semblance of truth. [*Vademecum* 33]

The allegation may be indisputable or notorious because of information available to the public, or it may be impossible to have taken place for some reason. Then the preliminary investigation would be superfluous.[21]

According to the *Vademecum*:

> The preliminary investigation should gather detailed information about the *notitia de delicto* with regard to facts, circumstances and imputability. It is not necessary at this phase to assemble complete elements of proof (e.g., testimonies, expert opinions), since this would be the task of an eventual subsequent penal procedure. The important thing is to reconstruct, to the extent possible, the facts on which the accusation is based, the number and time of the criminal acts, the circumstances in which they took place and general details about the alleged victims, together with a preliminary evaluation of the eventual physical, psychological and moral harm inflicted. [*Vademecum* 34]

The Ordinary or Hierarch decrees the opening of the preliminary investigation and names the person conducting the investigation (*Vademecum* 40; CIC 1719, CCEO 1470) and appoints a priest notary (CIC canon 483 §2; CCEO 253 §2).

The person conducting the investigation must be careful to respect the right to privacy of the alleged victim and their desires. Also, the good name of the accused must be

[21] *Vademecum* 12, 13, 16, 18, 19, 37.

protected (CIC 220; CCEO 23; *Vademecum* 44). The Ordinary or Hierarch will usually prohibit the accused from the exercise of sacred ministry.

The Ordinary or Hierarch is to inform the civil authorities of the receipt of the allegation according to the following principles:

> Two principles apply: a/ respect for the laws of the state (cf. art. 19 VELM); and b/ respect for the desire of the alleged victim, provided that this is not contrary to civil legislation. Alleged victims should be encouraged - as will be stated below (no. 56) - to exercise their duties and rights vis-à-vis the state authorities, taking care to document that this encouragement took place and to avoid any form of dissuasion with regard to the alleged victim. [*Vademecum* 48]

If the law requires the Ordinary or Hierarch to report, they must do so [*Vademecum* 49] and when civil authorities issue subpoenas the Ordinary or Hierarch must obey them [*Vademecum* 50].

Although there may be no witnesses, the credibility of the persons involved, the consistency of the facts and the accounts of what happened, other accusations against the accused, previous patterns of offending, documents etc. all help to establish the truth of the accusations.

There is the maxim "the accused is innocent until proven guilty" in "The Declaration of Rights" from the time of the French Revolution.[22] On the other hand, according to canon 1321, if it is proven the accused committed the action, the presumption of the law is that the accused is culpable for the offence.

If a cleric admits his guilt or he has been found guilty in a civil court, then the preliminary investigation is not necessary [*Vademecum* 37].

A cleric may admit his guilt and his unsuitability to be a minister and can therefore apply to be dispensed from the obligations of celibacy at any stage of the process. He can never again present himself as a minister of the Church.

The Ordinary according to canon 1717 can appoint a "suitable person"[23] (often called a "delegate") "to enquire carefully, about the facts and circumstances, and about the imputability of the offence". This person may receive advice from a body such a Complaints Advisory Committee (CAC).Then this person who carried out the investigation must hand over to the Ordinary or Hierarch all the acts of the investigation and his/her evaluation of them. [*Vademecum* 67] The delegate or investigator can fill out the form at the end of the *Vademecum* as the investigation proceeds. This will keep the investigation focussed.

22 Canons 220; 1321 par. 3; 1728 par. 2; cf. KENNETH PENNINGTON, "Innocent until Proven Guilty: The Origins of a Legal Maxim", *The Jurist, 63* (2003), 106-124.

23 Canon 1428 §3; *VELM 5; Vademecum* 38.

The Ordinary or Hierarch must then decree the conclusion of the preliminary investigation. [*Vademecum* 68; CIC canon 1719 and CCEO 1470] The Ordinary must then decide whether the allegation has a sufficient basis in law and in fact to have a semblance of truth.

The Ordinary or Hierarch must:

> in accordance with art. 16 *SST*, once the preliminary investigation has concluded, whatever its outcome, the Ordinary or Hierarch is obliged to send, without delay, an authentic copy of the relative acts to the CDF. Together with the copy of the acts and the duly completed form found at the end of this handbook, he is to provide his own evaluation of the results of the investigation (*votum*) and to offer any suggestions he may have on how to proceed (if, for example, he considers it appropriate to initiate a penal procedure and of what kind; if he considers sufficient the penalty imposed by the civil authorities; if the application of administrative measures by the Ordinary or Hierarch is preferable; if the prescription of the delict should be declared or its derogation granted. [*Vademecum* 69]

The Congregation for the Doctrine of the Faith will give the case a protocol number and will acknowledge receipt of the file to the Ordinary or the Hierarch and then in accord with the *Vademecum*:

> After attentively examining the acts, the CDF can then choose to act in a variety of ways: it can archive the case; request a more thorough preliminary investigation; impose non-penal disciplinary measures, ordinarily by a penal precept; impose penal remedies or penances, or warnings or rebukes; initiate a penal process; or identify other means of pastoral response. The decision, once made, is then communicated to the Ordinary with suitable instructions for its execution. [*Vademecum* 76]

Penal Processes

There are three possible penal processes. "By law, three penal procedures are possible: a judicial penal process; an extrajudicial penal process; or the procedure introduced by article 21 §2, 2° *SST*." [*Vademecum 85*] "The procedure provided for in article 21 §2, 2° *SST* 7 is reserved for the most grave cases, concludes with a direct decision of the Supreme Pontiff and requires that, even though the commission of the delict is manifestly evident, the accused be guaranteed the right of self-defence". [*Vademecum* 86] However, it is not possible to have any penal process for a deceased cleric. [*Vademecum* 160]

Extrajudicial Penal Process

The extrajudicial penal process is more expeditious than the judicial process and is suitable when the facts are clear especially if the cleric has pleaded guilty. The Ordinary can ask the Congregation for the Doctrine of the Faith for an administrative process because of the shortage of qualified personnel, the geography of the diocese, or the timeliness of the decision because of scandal or media coverage.

The extrajudicial process

> sometimes called an *administrative process*, is a type of penal process that abbreviates the formalities called for in the judicial process, for the sake of expediting the course of justice without eliminating the procedural guarantees demanded by a fair trial (cf. canons 221 CIC and 24 CCEO). [*Vademecum* 91]

The Congregation for the Doctrine of the Faith following article 21 §2, 1° *SST*, derogating from canons 1720 *CIC* and 1486 *CCEO*, in individual cases, ex officio or at the request of the Ordinary or Hierarch can decide to proceed in this way. The Ordinary must decide whether he will preside over the process personally or appoint a delegate with the two assessors. The criteria for the assessors and any delegate are outlined in canon 1424 and 1448 §1. A priest notary must be appointed. The Ordinary or Hierarch does not have to appoint a promotor of justice. All officials must take an oath to fulfil their duties faithfully and to observe secrecy. The oaths must be recorded in the acts.

The accused should have an advocate or a procurator according to canons 1723 and 1481§§ 1-2. If the accused fails or refuses to appear when summoned, the process continues. [*Vademecum* 100]

The proofs contained in the case are

> all those materials collected during the preliminary investigation and any other materials acquired: first, the record of the accusations made by the alleged victims; then pertinent documents (e.g., medical records; correspondence, even by electronic means; photographs; proofs of purchase; bank records); statements made by eventual witnesses; and finally any expert opinions (medical, including psychiatric; psychological; graphological) that the person who conducted the investigation may have deemed appropriate to accept or have carried out. Any rules of confidentiality imposed by civil law should be observed. [*Vademecum* 106]

If the sacrament of Penance is involved, the accused cannot be told the name of the accuser without the accuser's consent:

Particular attention should be given to the fact that, if the case involves the sacrament of Penance, respect must be shown for article 24 *SST*, which states that the name of the alleged victim is not to be revealed to the accused unless the accuser has expressly consented otherwise. [*Vademecum* 102]

In a case involving the Sacrament of Penance:

> Whenever the concrete case requires it, the Ordinary or his delegate is to assess the credibility of those taking part in the process (canon 1572). According to article 24 § 2 SST, however, he is obliged to do so with regard to the credibility of the accuser should the sacrament of Penance be involved. [*Vademecum* 113]

The Vademecum affirms the right of defence of the accused:

> The argument for the defence can be presented in two ways: a/ it can be accepted in session with a specific statement signed by all present (in particular by: the Ordinary or his delegate; the accused and his advocate, if any; the notary); or b/ through the setting of a reasonable time limit within which the defence can be presented in writing to the Ordinary or his delegate. [*Vademecum* 109]
>
> It should be carefully noted that, according to canon 1728 § 2 CIC, the accused is not bound to confess (admit) the delict, nor can he be required to take an oath to tell the truth. [*Vademecum* 110]
>
> The argument for the defence can clearly make use of all legitimate means, as for example the request to hear its own witnesses or to present documents and expert opinions. [*Vademecum* 111]

At the conclusion of the process, the *Vademecum* states that the Ordinary or his delegate and two assessors decide if the accused is guilty with moral certainty and the penalty to be imposed. The *Vademecum* advises the Ordinary to ensure notes or minutes of the discussions of the Ordinary and the two assessors are to be kept:

> Similarly, if the evaluation of proofs and defence arguments takes place during a joint session, it is advisable that a series of notes on the interventions and the discussion be taken, also in the form of minutes signed by the participants. These written notes fall under the secret of office and are not to be made public. [*Vademecum* 118]

The standard of proof required to reach a decision is very important. If criminal cases go to a civil court, the civil court will decide then on the principle of "beyond reasonable doubt" not "on the balance of probabilities".

Church investigations are supposed to be conducted according to the standard of proof of moral certainty as stated in canon 1608:

§1 to give any judgement, the judge must have in his mind moral certainty about the matter to be decided in the judgement.
§2 The judge must derive this certainty from the acts and from the proofs.
§3 The judge must weigh the proofs in accordance with his conscience, with due regard for the provisions of law about the efficacy of certain proofs.
§4 A judge who cannot arrive at such certainty is to pronounce that the right of the plaintiff is not established and is to find for the respondent, except in a case which enjoys the favour of law, when he is to pronounce in its favour.

Moral certainty applies whether a case is decided as part of a trial or whether it is being handled administratively. Canon 135 §2 points out that "a law which is contrary to a higher law cannot be validly enacted by a lower legislator." So without an admission of guilt, recommendations of sexual abuse committees and decisions of any Ordinary using "the balance of probabilities" could be challenged on the standard of proof used. Canon 1608 §4 upholds the principle that someone is innocent until proven guilty.

Lawrence DiNardo explains:

> Moral certitude is a practical judgment on the part of the judge based on the available proofs, considered as a whole and not a collection of isolated factors. Moral certainty is not absolute certainty where there is no possibility of the opposite being true.[24]

Moral certainty is a much higher standard than the balance of probabilities, and really means that one is confident that in the future no evidence could be produced to contradict the judgment or decision that is made. Therefore, moral certainty is close to the standard of "beyond reasonable doubt".

Judicial Process

There is a preference for a penal trial in *Sacramentorum Sanctitatis Tutela* article 21. The *Vademecum* considers the law concerning a judicial process to be clearly laid out in both codes of canon law. There are the canons on trials CIC cc. 1400-1500, ordinary contentious trials cc. 1501-1570 and cc. 1717-1731 and *SST* articles 8-15, 18-19, 21-31 [*Vademecum* 87]

After an Ordinary decides an allegation has the semblance of truth about it, the Congregation for the Doctrine of the Faith must authorise a penal process for one to take place. Then the Ordinary receiving the authorisation must hand the letter of the Congregation to the Judicial Vicar to initiate the trial. The promotor of justice presents a libellus, based on the law and the known facts, to the judges appointed to the case by the Judicial Vicar according to canons 1502 and 1504. The praxis of the Congregation

[24] Lawrence DiNardo, "Canonical Penal Procedures," paper presented at the Canon Law for Media Seminar sponsored by the United States Conference of Catholic Bishops and the Canon Law Society of America on May 25, 2010 in Washington DC, 5.

seems to be that they will grant a dispensation for someone to be a judge if they are a priest without a doctorate in canon law or if they are a layperson with a doctorate.

The presiding judge cites the defendant who is invited to appoint an advocate. If he does not appoint an advocate, one is to be appointed for him.

The judges decree the Joinder of Issues defining the object of the trial (canon 1513). Then the evidence is collected and published (canon 1598). The acts of the case can then be inspected by the promotor of justice, the defendant and his advocate/procurator. Further evidence may be requested and then the case is concluded (canon 1599).

The promotor of justice and the advocate for the defendant submit their briefs. Then the judges each write a votum and they then meet and on the basis of moral certainty (canon 1608) reach a verdict in the case by majority vote. The sentence is published and can be appealed by the defendant or the promotor of justice at the Congregation for the Doctrine of the Faith.

The *Vademecum* explains:

> The judicial penal process does not require a double conforming sentence. A decision at second instance becomes *res iudicata* (cf. art. 28 *SST*). Such a definitive sentence can be challenged only by a *restitutio in integrum*, provided elements are produced that make its injustice clear (cf. canons 1645 *CIC*, 1326 *CCEO*), or by a complaint of nullity (cf. canons 1619ff. CIC, 1302ff. *CCEO*). The Tribunal established for this kind of process is always collegiate and is composed of a minimum of three judges. [*Vademecum* 88]

Possible Decisions in a Penal Process

Article 84 of the *Vademecum* explains that:

> The decision that concludes the penal process, whether judicial or extrajudicial, can be of three types:
> - *conviction ("constat")*, if with moral certainty the guilt of the accused is established with regard to the delict ascribed to him. In this case, the decision must indicate specifically the type of canonical sanction imposed or declared.
> - *acquittal ("constat de non")*, if with moral certainty the innocence of the accused is established, inasmuch as no offence was committed, the accused did not commit the offence, the offence is not deemed a delict by the law or was committed by a person who is not imputable.
> - *dismissal ("non constat")*, whenever it has not been possible to attain moral certainty with regard to the guilt of the accused, due to lack of evidence or to insufficient or conflicting evidence that the offence was in fact committed,

> that the accused committed the offence, or that the delict was committed by a person who is not imputable.

The public good or for the welfare of the person accused may be provided through appropriate warnings, penal remedies and other means of pastoral solicitude (cf. canon 1348 CIC).

The decision at the end of the penal process (issued by sentence or by decree) must refer to one of these three types, so that it is clear whether there is a conviction *"constat"*, an acquittal *"constat de non"* or dismissal *"non constat"* because it was not proven the offence was committed by the accused or that the accused was not imputable.

After the Penal Procedure

There is no appeal against a decision of the Roman Pontiff. (cf. canons 333 §3 *CIC* and 45 §3 *CCEO*).

The two codes provide different processes for appeals against penal decrees in judicial or administrative processes. "The CCEO provides a simpler procedure than that of the CIC. In fact, canon 1487 §1 CCEO provides only that recourse be sent to the CDF within ten useful days from the decree's notification". [*Vademecum* 155]

There are strict time limits in the CIC 1983 to appeal a judicial decision or to have recourse against an administrative decision by an Ordinary or his delegate.

> If it was a penal judicial process, the possibility of a legal challenge exists, namely, a complaint of nullity, *restitutio in integrum*, or appeal. [*Vademecum* 144]
>
> If it was an extrajudicial penal process, recourse can be made against the decree that concluded it, within the terms provided by law, namely, by canons 1734 ff. *CIC* and 1487 *CCEO* (cf. Section VIII). [*Vademecum* 147]
>
> According to canons 1353 *CIC* and 1319 and 1487 §2 *CCEO*, appeals and recourses have a suspensive effect on the penalty. [*Vademecum* 148]
>
> Since the penalty is suspended and things return to a phase analogous to that prior to the process, precautionary measures remain in force with the same caveats and procedures mentioned in nos. 58-65. [*Vademecum* 149]

The *Vademecum* in article 152 advises the Ordinary to consult immediately the Congregation for the Doctrine of the Faith when he receives an appeal or a recourse against a penal decree.

Training

The Congregation emphasises the importance of training in canon law:

> This *Vademecum* does not claim to replace the training of practitioners of canon law, especially with regard to penal and procedural matters. Only a profound knowledge of the law and its aims can render due service to truth and justice, which are especially to be sought in matters of *graviora delicta* by reason of the deep wounds they inflict upon ecclesial communion.

There are problems in many dioceses and countries because investigators appointed by Ordinaries to investigate allegations have little or no knowledge of canon law. It is obvious that if investigators do not understand the crimes they are investigating, such as absolution of an accomplice or solicitation, how can they ask the right questions? If investigators do not understand the procedures that must take place at the end of their investigation, they may not understand their role.

Their investigation only needs to establish a "semblance of truth" about the allegation. A "semblance of truth" might be established by few photos and the file may be fewer than ten pages. The investigator is not a judge in a canonical process. If the rights of the accused are violated, even if he is guilty, it may be more difficult to convict him. Sometimes investigators compile files of 300-400 pages. Frequently interviews during a preliminary investigation do not begin and end with an oath to tell the truth. Often, interviews are not signed by the person being interviewed. This means that if a canonical process follows, the person must be interviewed again to at least meet these basic requirements for canonical evidence.

CONCLUSION

This *Vademecum* has great value as a practical tool to guide the investigation when an allegation of a crime of sexual abuse is reported. It is not a legislative document, but shares the collective wisdom and experience of the Congregation in dealing with these cases.

It is clear how to conduct investigations beginning with the reception of the complaint through to the decision at the end of the process. Answers are provided to the most common issues bishops and religious superiors face. The procedures are described in a very organised way. Transparency and honesty are promoted. Coupled with a better discernment of vocations to priesthood and religious life, improved formation and ongoing formation, effective safeguarding and preventative measures, the *Vademecum* does a great deal to help bishops, hierarchs and other Church leaders deal with the sexual abuse crisis.

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