

The Extrajudicial Penal Process

Brendan Daly *

Introduction

Extrajudicial processes take place frequently because the Dicasteries of the Apostolic See recognise the shortage of qualified personnel in the local Churches and authorise extrajudicial or administrative processes on a regular basis. The Dicastery for the Doctrine of the Faith explains:

The extrajudicial penal 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).¹

Canon law has traditionally favoured a trial as the judicial process to be used for imposing penalties, rather than the extrajudicial process.² Canon 1342 also implies that a judicial procedure is the preferred procedure for imposing a penalty:

Canon 1342 §1. Whenever there are just reasons against the use of a judicial procedure, a penalty can be imposed or declared by means of an extrajudicial decree, observing canon 1720, especially in what concerns the right of defence and the moral certainty in the mind of the one issuing the decree, in accordance with the provision of can. 1608. Penal remedies and penances may in any case whatever be applied by a decree.

§2. Perpetual penalties cannot be imposed or declared by means of a decree; nor can penalties which the law or precept establishing them forbids to be applied by decree.

§3. What the law or decree says of a judge in regard to the imposition or

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¹ DICASTERY FOR THE DOCTRINE OF THE FAITH, *Vademecum* 91, 5 June 2022, https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html; hereinafter *Vademecum*; Translations of canons by Canon Law Society of America on the Vatican website.

² Canon 221 §1. The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law. §2. If they are summoned to a trial by a competent authority, the Christian faithful also have the right to be judged according to the prescripts of the law applied with equity. All translations from the Vatican website using the Canon Law Society of America translation.

declaration of a penalty in a trial is to be applied also to a Superior who imposes or declares a penalty by an extrajudicial decree, unless it is otherwise clear, or unless there is question of provisions which concern only procedural matters.

The canon acknowledges that just reasons exist for an Ordinary not to use a judicial procedure and instead to use an extrajudicial process. Some special laws promulgated since 2000 have provisions enabling the Dicastries of the Doctrine of the Faith, Clergy and Evangelisation to dismiss or approve guilty clerics receiving perpetual penalties including dismissal from the clerical state. Juan Arietta explains:

The judicial trial is the ordinary means for imposing penalties, since it is the one that best fulfils the requirements of justice. It is, however, possible – and sometimes necessary – to have recourse to the administrative procedures where there are “just reasons”, that is, when the just and efficient administration of justice recommends it.³

Article 19 of *Sacramentorum Sanctitatis Tutela* allows the Dicastery for the Doctrine of the Faith to authorise an extrajudicial process and to impose a perpetual penalty such as dismissal from the clerical state:

Article 19. §1 Whenever the Congregation for the Doctrine of the Faith has decided that an extrajudicial process should be initiated, can. 1720 *CIC* or can. 1486 *CCEO* is to be applied.

§2 With the prior mandate of the Congregation for the Doctrine of the Faith, perpetual expiatory penalties may be imposed.⁴

The stipulation requiring a penal trial in canon 1342 §2 is derogated for crimes reserved to the Dicastery for the Doctrine of the Faith. The decision must be made with moral certainty⁵ and the prior mandate of the Dicastery is required to impose a perpetual penalty.

Competence

When information (*notitia de delicto*) is received by an Ordinary, it must first of

³ Juan ARRIETA, *Code of Canon Law Annotated*. 1052.

⁴ CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Sacramentorum Sanctitatis Tutela*, 11 October 2021, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html; herein after *SST*.

⁵ Judith HAHN, “What does it mean to be “morally certain”? How secular standards of proof help to understand canonical decision making”, *The Canonist*. Vol 11. No. 2. 242 and JUDITH HAHN, ‘Moral Certitude: Merits and Demerits of the Standard of Proof Applied in Roman Catholic Jurisprudence’, 8(2019), *Oxford Journal of Law and Religion*, 324.

all be decided who is the Local Ordinary competent to deal with the information.⁶ Pope Francis legislated in *Vos estis Lux Mundi*:

Art. 3 – Reporting §1. Except for when a cleric learns of information during the exercise of ministry in the internal forum, whenever a cleric or a member of an Institute of Consecrated Life or of a Society of Apostolic Life learns, or has well-founded motives to believe, that one of the acts referred to in art. 1 has been committed, that person is obliged to report it promptly to the local Ordinary where the events are said to have occurred or to another Ordinary among those referred to in canons 134 CIC and 984 CCEO, except for what is established by §3 of the present article.⁷

The revised *Vos Estis Lux Mundi* makes it the norm that unless the Ordinaries agree otherwise, the Ordinary of the place where the facts are alleged to have occurred is to proceed with the investigation:

Article 2, §3. Except as provided in article 3 §3, the Ordinary who has received the report transmits it without delay to the Ordinary of the place where the events allegedly took place, as well as to the Ordinary proper to the person reported. Unless otherwise agreed between the two Ordinaries, it is the task of the Ordinary of the place where the facts would have taken place to proceed according to the norm of law according to what is provided for the specific case.⁸

The Ordinary would usually be the diocesan bishop but it could be the apostolic or diocesan administrator. Normally there must be a preliminary investigation when information about an alleged delict is received. There must be decrees opening and closing the preliminary investigation, as well as a decree appointing the notary and the delegate to carry out the investigation. The Ordinary must take account of the fact that the appointed delegate cannot act as a judge in an ensuing trial nor can be a delegate or an assessor for an ensuing extrajudicial process according to canon 1717 §3 CIC and 1468 §3 CCEO. The Dicastery for the Doctrine of the Faith advises:

In appointing the person who carries out the investigation, and taking into account the cooperation that can be offered by lay persons in accordance with canons 228 CIC and 408 CCEO (cf. art. 13 VELM), the Ordinary or Hierarch should keep in mind that, according to canons 1717 §3 CIC and 1468 §3 CCEO, if a penal judicial process is then initiated, that same person cannot act as a judge in the matter. Sound practice suggests that the same criterion be used in appointing the delegate

⁶ Canon 1717 §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.

⁷ POPE FRANCIS, motu proprio, *Vos Estis Lux Mundi*, 25 March 2023, https://www.vatican.va/content/francesco/en/motu_proprio/documents/20230325-motu-proprio-vos-estis-lux-mundi-aggiornato.html; hereinafter *VELM*.

⁸ https://www.vatican.va/content/francesco/it/motu_proprio/documents/20230325-motu-proprio-vos-estis-lux-mundi-aggiornato.html.

and the assessors in the case of an extrajudicial process.⁹

Unless a preliminary investigation is entirely superfluous because the accused has been arrested and charged by the police, the local Ordinary must ensure there is a preliminary investigation carried out either by himself or another Ordinary, or someone he delegates to carry out this task. Most Ordinaries will delegate someone to carry out this task because there are usually many conflicts of interests with accused priests¹⁰ and alleged victims.¹¹

During the preliminary investigation, the alleged victim will usually be interviewed. It is extremely important that there be a good, comprehensive interview of the alleged victim. Frequently, alleged victims will only be interviewed once. Therefore, it is crucial that as much relevant information as is possible is obtained in any interview with the alleged victim. The accused is usually interviewed as part of the preliminary investigation. The accused must be informed of the right to remain silent¹² and if a cleric he has a right to present a petition to be dispensed from all the obligations associated with the clerical state:

157. From the time of the *notitia de delicto*, the accused has the right to present a petition to be dispensed from all the obligations connected with the clerical state, including celibacy, and, concurrently, from any religious vows. The Ordinary or Hierarch must clearly inform him of this right. Should the cleric decide to make use of this possibility, he must write a suitable petition, addressed to the Holy Father, introducing himself and briefly indicating the reasons for which he is seeking the dispensation. The petition must be clearly dated and signed by the petitioner. It is to be transmitted to the DDF, together with the *votum* of the Ordinary or Hierarch. In turn, the DDF will forward it and – if the Holy Father accepts the petition – will transmit the rescript of dispensation to the Ordinary or

⁹ *Vademecum* 39.

¹⁰ Canon 384. With special solicitude, a diocesan bishop is to attend to presbyters and listen to them as assistants and counsellors. He is to protect their rights and take care that they correctly fulfill the obligations proper to their state and that the means and institutions which they need to foster spiritual and intellectual life are available to them. He also is to take care that provision is made for their decent support and social assistance, according to the norm of law.

¹¹ Canon 1717 §1. Whenever an ordinary has knowledge, which at least seems true, of a delict, he is carefully to inquire personally or through another suitable person about the facts, circumstances, and imputability, unless such an inquiry seems entirely superfluous.

§2. Care must be taken so that the good name of anyone is not endangered from this investigation.

Canon 383 §1. In exercising the function of a pastor, a diocesan bishop is to show himself concerned for all the Christian faithful entrusted to his care, of whatever age, condition, or nationality they are, whether living in the territory or staying there temporarily; he is also to extend an apostolic spirit to those who are not able to make sufficient use of ordinary pastoral care because of the condition of their life and to those who no longer practice their religion.

¹² Canon 1728 §2. The accused is not bound to confess the delict nor can an oath be administered to the accused.

Hierarch, asking him to provide for legitimate notification to the petitioner.

Following the preliminary investigation, the Ordinary must decide whether the alleged crime is reserved or not reserved to a Dicastery of the Apostolic See. If the alleged crime is reserved to a dicastery, the local Ordinary must send all the acts of the preliminary investigation to the competent Dicastery. If the alleged crime is reserved, the competent dicastery will give the case a protocol number and will instruct the local Ordinary about the conduct of an extrajudicial process or trial. E.g., an alleged crime involving the sexual abuse of a minor or the sacrament of Penance is reserved to the Dicastery for the Doctrine of the Faith. If the alleged crime does not involve a more grave crime but has been committed by a bishop, the competent Dicastery for New Zealand and other mission territories is the Dicastery for Evangelisation.

Prohibition to exercise Sacred Ministry (administrative leave) if the alleged crime is reserved to the Dicastery for the Doctrine of the Faith

The Code of Canon Law and *Sacramentorum Sanctitatis Tutela* art. 10 provide for the accused at any stage of the process to be prohibited from the exercise of sacred ministry in canon 1722:

Canon 1722 To prevent scandals, to protect the freedom of witnesses, and to guard the course of justice, the ordinary, after having heard the promoter of justice and cited the accused, at any stage of the process can exclude the accused from the sacred ministry or from some office and ecclesiastical function, can impose or forbid residence in some place or territory, or even can prohibit public participation in the Most Holy Eucharist. Once the cause ceases, all these measures must be revoked; they also end by the law itself when the penal process ceases.

The Dicastery for the Doctrine of the Faith explain this in their *Vademecum*:

58. To defend the good name of the persons involved and to protect the public good, as well as to avoid other factors (for example, the rise of scandal, the risk of concealment of future evidence, the presence of threats or other conduct meant to dissuade the alleged victim from exercising his or her rights, the protection of other possible victims), in accordance with art. 10 §2 SST, the Ordinary or Hierarch has the right, from the outset of the preliminary investigation, to impose the precautionary measures listed in canons 1722 CIC and 1473 CCEO.

These precautionary measures constitute a taxative list so only one of these reasons may be chosen for prohibiting an accused from the exercise of sacred ministry, which is often referred to as “administrative leave”.¹³ Depending on the circumstances, the accusation, and the accused, an Ordinary may impose other disciplinary measures

¹³ *Vademecum* 59

such as requiring residence in a particular place.¹⁴ Precautionary measures are not penalties, but are administrative acts for the purposes of defending the good name of the persons involved, protecting the public good, avoiding the rise of scandal, having anything that might dissuade the alleged victim from exercising his or her rights, the protection of other possible victims. This must be carefully explained to the accused.

Prohibition to Exercise Sacred Ministry (administrative leave) if the alleged delict is not Reserved to the Dicastery for the Doctrine of the Faith

For crimes not reserved to the Dicastery for the Doctrine of the Faith, the law does not allow an Ordinary during the preliminary investigation to use canon 1722 to prohibit an accused from exercising sacred ministry. The Ordinary can only use canon 1722 from the beginning of a judicial process which is either a trial or an extrajudicial process. However, the Dicastery for Legislative Texts addresses these issues and advises Ordinaries as follows:

In many cases, on the basis of the elements already acquired at this initial stage, it will be necessary for the Authority to adopt some disciplinary measures against the person indicated, to protect the community and the interests of the Church (cf. can. 392). These measures are formally different from the precautionary measures, which can be imposed only once the penal procedure has been initiated (can. 1722). However, these disciplinary measures must correspond to the nature and type of delict alleged against the subject and must in any case be adopted in ways that do not harm the presumption of innocence that the law establishes against him (Cf nn. 191,208).¹⁵

The Ordinary can impose similar measures to canon 1722 using his executive authority in canons 391-392. Then once a penal process starts, the Ordinary can use the provisions of canon 1722:

Once the preliminary investigation has been concluded, if elements have emerged that require the need to start the procedure in view of sanctions, the Authority can opt for one of the two ways permitted by law: either proceed judicially, through a canonical tribunal which will have to follow a regular trial penal law (cans. 1717-1731) and pronounce a penal sentence or proceed by administrative means. In this case it will be the Bishop or the Superior himself, with the help of Assessors, who will have to follow an administrative sanctioning procedure which will lead to a penal decree (cf. nn. 165.). In deciding to follow the judicial or administrative route, the Bishop must take into account the actual material and personal

¹⁴ *Vademecum 60*; cc. 391, 392, 1722.

¹⁵ DICASTERY FOR LEGISLATIVE TEXTS, *Penal Sanctions in the Church: User Guide for Book VI of the Code of Canon Law*, 3, 31 May 2023, <https://www.delegumtextibus.va/content/dam/testilegislativi/TESTI%20NORMATIVI/Testi%20Norm%20CIC/Libro%20VI/LibroVISussidio/Penal%20sanctions%20User%20guide.pdf>; hereinafter User Guide.

possibilities on which he can count, as well as the circumstances which allow canonical justice to independently achieve its goals.¹⁶

The Dicastery for Legislative Texts reminds bishops to be careful about their decisions to hold a judicial or administrative procedure so that canonical justice is achieved in the case.

Penal Processes

By law, three penal procedures are possible according to the DDF *Vademecum* 85: “By law, three penal procedures are possible: a judicial penal process; an extrajudicial penal process; or the procedure introduced by article 26 SST.”¹⁷ The procedure in article 26 is explained in the 2021 norms:

It is the right of the Congregation for the Doctrine of the Faith, in whatever stage and grade of the unfolding of the proceedings, to present directly the most grave cases mentioned above in articles 2-6 to the decision of the Supreme Pontiff with regard to dismissal or deposition from the clerical state, together with dispensation from the law of celibacy, when it is manifestly evident that the delict has been committed, after having given the guilty party the possibility of defending himself.¹⁸

Decision whether to initiate a Penal Process

After the preliminary investigation, the Ordinary must decide whether there is to be a penal process or not:

When it seems that sufficient evidence has been collected, the ordinary is to decide:

1° whether a process to inflict or declare a penalty can be initiated;

2° whether, attentive to can. 1341, this is expedient;

3° whether a judicial process must be used or, unless the law forbids it, whether the matter must proceed by way of extrajudicial decree.¹⁹

In 2021 Pope Francis changed canon 1341²⁰ so that there is an obligation on the Ordinary to initiate a judicial or administrative penal process if other remedies are perceived to be insufficient for “justice be sufficiently restored, the offender reformed,

¹⁶ User Guide 3.

¹⁷ *Vademecum* 91.

¹⁸ SST 26.

¹⁹ Canon 1718 §1.

²⁰ The 1983 Code had previously stated in Canon 1341: “Only after he has ascertained that scandal cannot sufficiently be repaired, that justice cannot sufficiently be restored and that the accused cannot sufficiently be reformed by fraternal correction, rebuke and other ways of pastoral care is the Ordinary then to provide for a judicial or administrative procedure to impose or to declare penalties.”

and the scandal repaired”:

Canon 1341. The Ordinary must start a judicial or an administrative procedure for the imposition or the declaration of penalties when he perceives that neither by the methods of pastoral care, especially fraternal correction, nor by a warning or correction, can justice be sufficiently restored, the offender reformed, and the scandal repaired.²¹

Now a discretionary penalty must be imposed if the offender abused a position of authority or an office.²² Juan Arrieta explains the significant change in canon 1341:

The text of this canon substantially modifies the corresponding canon promulgated in 1983. Whereas at that time provision was made for following the punitive route only when it was perceived by the authority that other remedies dictated by pastoral concern were not sufficient, the text now imposes on the Ordinary the duty to initiate disciplinary sanctions if from the information received in the preliminary investigation (cf. c.1717) he considers that the other remedies are not enough to achieve the purposes of the penalty. The entire discipline now contained in book VI is governed by this same criterion and by that set out in c.1311, §2.²³

This means “penalties are always to be applied with canonical equity and having in mind the restoration of justice, the reform of the offender, and the repair of scandal.”²⁴

Extrajudicial Process

If there is to be an extrajudicial process, the Ordinary must decide whether to personally preside over the process or to name a delegate with expertise in canon law. The Ordinary may delegate the entire process to a delegate or reserve the final decision to himself. The Ordinary must also appoint two assessors to assist him or the delegate in the evaluative stage of the process.²⁵ The Ordinary in choosing them, should consider the criteria set forth in canons 1424 and 1448 §1 CIC.²⁶ All these officials must be appointed by a decree of the Ordinary, and they are to take an oath to faithfully fulfil the task they have been appointed to.²⁷

²¹ Canons. 1311§2 and 1342.

²² Canon. 1326 §1. A judge must [*debet*] inflict a more serious punishment than that prescribed in the law or precept when:

§2° a person who is established in some position of dignity, or who, in order to commit a crime, has abused a position of authority or an office;

§3. In the same cases, if the penalty constituted is discretionary, it becomes obligatory.

²³ Juan ARRIETA, *Code of Canon Law Annotated, 4th ed.*, (Montreal: Wilson & Lafleur 2022) 1051.

²⁴ Canon 1311.

²⁵ *Vademecum* 95.

²⁶ *Vademecum* 93.

²⁷ *Vademecum* 96.

The accused must be summoned by a decree from the Ordinary or the delegate, clearly indicating why he is being summoned, the accusation, and the proofs gathered up to this point. The accused must be reminded that he is not obliged to admit the offence and does not have to take an oath, although he may decide to do either or both of these things.²⁸ The *Norms* promulgated in 2021 (cf. art. 20 §7 SST), require for the case of an extrajudicial process in matters reserved to the DDF that the accused, in accordance with the prescriptions of canons 1723 and 1481 §§ 1-2 CIC, be assisted by an advocate and/or procurator, either of his own choice or, otherwise, appointed *ex officio*.

98. ... The Ordinary (or his delegate) must be informed of the appointment of the advocate and/or procurator by means of a suitable and authentic procuratorial mandate in accordance with canon 1484 §1²⁹ CIC, prior to the session in which the accusations and proofs are made known, in order to verify that the requirements of canon 1483 CIC have been met.³⁰

If the accused neglects to appoint an advocate, the Ordinary must appoint an advocate for him and inform him who it is. If the accused does not respond to the summons, he should be summoned again. His response is to be noted in the acts of the case, and the process continues to its conclusion.

The acts of the case are to be shown to the accused and his advocate. If the accusation involves the sacrament of Penance, the accused can only be told the name of the accuser if the alleged victim explicitly consents to her name being made known to the accused.³¹

The assessors are not required to be involved in collecting proofs such as interviewing the parties or witnesses, but of course they may. Proofs include:

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

²⁸ Canon 1728 §1. Without prejudice to the prescripts of the canons of this title and unless the nature of the matter precludes it, the canons on trials in general and on the ordinary contentious trial must be applied in a penal trial; the special norms for cases which pertain to the public good are also to be observed.

§2. The accused is not bound to confess the delict nor can an oath be administered to the accused.

²⁹ Canon 1448 §1. A judge is not to undertake the adjudication of a case in which the judge is involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line or by reason of trusteeship, guardianship, close acquaintance, great animosity, the making of a profit, or the avoidance of a loss. §2. In these circumstances the promoter of justice, the defender of the bond, the assessor, and the auditor must abstain from their office.

³⁰ *Vademecum* 98.

³¹ *SST* art 4 §2.

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.³²

Often the Ordinary or his delegate may decide further proofs may need to be collected. The proofs need to be shown to the advocate and the accused, and they can also be made available to the alleged victim and an advocate.

The accused and his advocate/procurator may present a written defence or be given a reasonable time limit to present a defence to the Ordinary or his delegate. The defence may include a request for further witnesses to be interviewed. The Ordinary or his delegate has the authority to decide to admit or not admit new evidence according to the criteria of universal law on contentious trials.

The Ordinary or his delegate must decide on the credibility of all those taking part in the process. Testimonials to the credibility of the accuser could be obtained and inconsistencies in the accuser's evidence could be pointed out. It is most important to ascertain whether the accused has any ulterior motive in accusing the cleric.

The accuser may have given evidence during the preliminary investigation and may decide not to be interviewed again. In this case the process continues. Similarly, the accused may simply say "prove the allegation" and refuse to be interviewed or to provide a statement.

The extrajudicial process concludes when the Ordinary or his delegate have decided that sufficient evidence has been collected and the right of defence has been provided for. The Ordinary or his delegate invites the two assessors to provide their evaluation of the proofs and arguments of the defence in accord with canon 1720 within a reasonable period of time. He can invite them to come to a joint session to facilitate discussion, debate, and analysis of the case. The written opinions of the assessors should be included in the acts of the case but the *Vademecum* 117-118 makes it clear that the *Vota* should not be shared with the accused or his advocate/procurator. There should be minutes of the meeting included in the acts.

Afterwards the Ordinary or his delegate decide whether the case is proven or not and writes a decree of adjudication. Although it looks like a sentence it is not one because this process is not a trial. The Ordinary or his delegate should cite the principal elements of the accusation, the development of the process, the reasons for the decision in law and in fact, as well as any mitigating or aggravating circumstances.³³ The Ordinary or his delegate (cf. canon 1720, 3° CIC) if the delict is proven with moral

³² *Vademecum* 96.

³³ Canon 1720 3°. if the delict is certainly established and a criminal action is not extinguished, he is to issue a decree according to the norm of cc. 1342-1350, setting forth the reasons in law and in fact at least briefly.

certainty, must issue a decree concluding the process, imposing and/or declaring the penalty, or imposing a penal remedy or penance that he considers most suitable for the reparation of scandal, the reestablishment of justice and the amendment of the guilty party.

The accused and the accuser must be notified about the outcome and the accused may appeal the decision. The accused must sign acknowledging he has received the decree. If he refuses to sign acknowledging receiving the decree, others present such as the notary must sign a written document testifying that the accused was given the decree. The accused must also be advised how to appeal, the time limits, and to whom the appeal is to be addressed.

Extrajudicial process for alleged Crimes reserved to the Doctrine of the Faith

When the Dicastery for the Doctrine of the Faith authorises or decides there is to be an extrajudicial process, the Ordinary and/or his delegate must carefully follow their instructions. The Ordinary decides whether to personally preside over the process or to name a delegate with expertise in canon law.

The Ordinary may delegate the entire process to a delegate or reserve the final decision to himself. The Ordinary must also appoint two assessors to assist him or the delegate in the evaluative stage of the process.³⁴ The Ordinary in choosing them, should consider the criteria set forth in canons 1424 and 1448 §1 CIC.³⁵ There is no need to appoint a promotor of justice because the promotor of justice at the DDF will participate in the process. All these officials must be appointed by a decree, and they are to take an oath to faithfully fulfil the task to whom they have been appointed.³⁶

There are some differences in procedure with extrajudicial processes according to the CCEO. Some priests are bi-ritual and function in Churches of different rites. If a priest who is bi-ritual is accused of a crime, it may be necessary to seek the guidance of the Dicastery for the Doctrine of the Faith.³⁷

The accused must be summoned by a decree, clearly indicating why he is being summoned, the accusation, and the proofs gathered up to this point. The accused must be reminded that he is not obliged to admit the offence and does not have to take an oath, although he may decide to do either or both of these things.³⁸ The accused must have an advocate and/or procurator. The *Norms* promulgated in 2021 (cf. art. 20 § 7 SST) require for the case of an extrajudicial process in matters reserved to the Dicastery for the Doctrine of the Faith that the accused be assisted by an advocate and/or

³⁴ *Vademecum* 93.

³⁵ *Vademecum* 93.

³⁶ *Vademecum* 96.

³⁷ *Vademecum* 94.

³⁸ Canon 1728 §2. The accused is not bound to confess the delict nor can an oath be administered to the accused.

procurator, either of his own choice or, otherwise, appointed *ex officio*.³⁹

98...The Ordinary (or his delegate) must be informed of the appointment of the advocate and/or procurator by means of a suitable and authentic procuratorial mandate in accordance with canon 1484 §1⁴⁰ CIC, prior to the session in which the accusations and proofs are made known, in order to verify that the requirements of canon 1483 CIC have been met.⁴¹

If the accused neglects to appoint an advocate, the Ordinary must appoint an advocate for the accused and inform him who it is. If the accused does not respond to the summons, he should be summoned again. His response is to be noted in the acts of the case, and the process continues to its conclusion.

The acts of the case are to be shown to the accused and his advocate. If the accusation involves the sacrament of Penance, the accused can only be told the name of the accuser if the alleged victim explicitly consents to her/his name being made known to the accused.⁴²

The assessors are not required to be involved in collecting proofs such as interviewing the parties or witnesses, but of course they may. Proofs include:

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.⁴³

Often the Ordinary or his delegate may decide further proofs need to be collected. The proofs need to be shown to the advocate and the accused, and they can also be

³⁹ In accordance with the prescriptions of canons 1723 and 1481 §§1-2 CIC.

⁴⁰ Canon 1448 §1. A judge is not to undertake the adjudication of a case in which the judge is involved by reason of consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line or by reason of trusteeship, guardianship, close acquaintance, great animosity, the making of a profit, or the avoidance of a loss.

⁴¹ Canon 1483. The procurator and advocate must have attained the age of majority and be of good reputation; moreover, the advocate must be a Catholic unless the diocesan bishop permits otherwise, a doctor in canon law or otherwise truly expert, and approved by the same bishop.

⁴² *SST* art 4 §2. In the cases concerning the delicts mentioned in §1, it is not permitted for anyone to indicate the name of the accuser or the penitent either to the accused or to his or her patron, unless the one making the accusation or the penitent has expressly consented; the question of the credibility of the accuser is to be considered attentively; and any danger of violating the sacramental seal is to be altogether avoided, taking care, however, that the right of defense of the accused remains intact.

⁴³ *Vademecum* 96.

made available to the alleged victim and an advocate.

The accused and his advocate/procurator may present a written defence or be given a reasonable time limit to present a defence to the Ordinary or his delegate. The defence may include a request for further witnesses to be interviewed. The Ordinary or his delegate has the authority whether to admit new evidence or not according to the criteria of universal law on contentious trials.

The Ordinary or his delegate must decide on the credibility of all those taking part in the process especially if the case involves the sacrament of penance. Testimonials to the credibility of the accuser could be obtained and consistencies in the accuser's evidence could be pointed out. It is most important to ascertain whether the accused has any ulterior motive in accusing the cleric.

The accuser may have given evidence during the preliminary investigation and may decide not to be interviewed again. In this case the process continues. Similarly, the accused may simply say "prove the allegation" and refuse to be interviewed or to provide a statement.

The extrajudicial process concludes when the Ordinary or his delegate has decided that sufficient evidence has been collected and the right of defence has been provided. The Ordinary or his delegate invites the two assessors to provide their evaluation of the proofs and arguments of the defence in accord with canon 1720 within a reasonable period of time. He can invite them to come to a joint session to facilitate discussion, debate, and analysis of the case. The written opinions of the assessors should be included in the acts of the case but the *Vademecum* 117-118 makes it clear that the *Vota* should not be shared with the accused or his advocate/procurator. There should be minutes of the meeting included in the acts.

After evaluation, the Ordinary or his delegate decides whether the case is proven or not and writes a decree of adjudication. Although it looks like a sentence it is not one because this process is not a trial. The Ordinary or his delegate should cite the principal elements of the accusation, the development of the process, the reasons for the decision in law and in fact, as well as any mitigating or aggravating circumstances. The *Vademecum* states concerning this decree:

119. Should the delict be established with certainty, the Ordinary or his delegate (cf. canon 1720, 3^o⁴⁴ CIC) must issue a decree concluding the process, imposing and/or declaring the penalty, or imposing a penal remedy or penance that he considers most suitable for the reparation of scandal, the reestablishment of justice and the amendment of the guilty party.

⁴⁴ Canon 1720. If the ordinary thinks that the matter must proceed by way of extrajudicial decree: carefully all the proofs and arguments with two assessors:

3^o if the delict is certainly established and a criminal action is not extinguished, he is to issue a decree according to the norm of cc. 1342-1350, setting forth the reasons in law and in fact at least briefly.

If the Ordinary or his delegate wishes to impose a perpetual expiatory penalty such as dismissal from the clerical state, he must send the entire authenticated acts including the defence arguments, the vota of the assessors and his draft decree to the Dicastery for the Doctrine of the Faith:

120. The Ordinary should always keep in mind that, if he intends to impose a perpetual expiatory penalty, according to article 19 §2⁴⁵ SST he must have a prior mandate from the DDF. Such a mandate is an exception, limited to these cases, from the prohibition of inflicting a perpetual penalty by decree, laid down in canon 1342 §2⁴⁶ CIC. An explicit reference to this mandate received from the DDF must be included in the decree if a perpetual penalty is imposed.

If the Dicastery for the Doctrine of the Faith gives the mandate, the Ordinary or his delegate must write the decree of adjudication, making explicit reference to the mandate. The accused and the accuser must be notified about the outcome. The accused must sign acknowledging he has received the decree. If he refuses to sign acknowledging receipt of the decree, others present such as the notary must sign a written document testifying that the accused was given the decree. The accused may appeal the decision. Therefore, the accused must also be advised how to appeal, the time limits, and to whom the appeal should be addressed.

Procedural Differences for an Extrajudicial penal process according to the CCEO

There are several key differences from CIC in the extrajudicial penal process as described in the CCEO.

a) Prescription

The prescription of canon 1486⁴⁷ CCEO must be strictly followed, under pain of invalidity of the penal decree.⁴⁸

b) Assessors

The CCEO does not mention assessors.

c) Promotor of Justice

The involvement of the promotor of justice is obligatory and the notification of the accusation and proofs must take place with the obligatory presence of the promoter of justice and the notary.

⁴⁵ SST art. 19 §2. With the prior mandate of the Congregation for the Doctrine of the Faith, perpetual expiatory penalties may be imposed.

⁴⁶ C. 1342 §2. Perpetual penalties cannot be imposed or declared by means of a decree; nor can penalties which the law or precept establishing them forbids to be applied by decree.

⁴⁷ C.1487 §1. Recourse against the decree by which a penalty is imposed can be made to the competent higher authority within ten available days (*tempus utile*) after it has been communicated. §2. This recourse suspends the force of the decree. §3. There is no further recourse against the decision of the higher authority.

⁴⁸ *Vademecum* 131.

d) Penalties

The Dicastery for Legislative Texts advises that particular attention should be given to the question whether, on the basis of the gravity of the delict, the penalties listed in canon 1426 §1 CCEO are indeed adequate for achieving the provisions of canon 1401 CCEO. Canons 1429 and 1430 CCEO should be observed in imposing any penalty.⁴⁹

e) Mandate for Perpetual Penalty

Hierarchs and their delegates must remember that, according to article 19 §2 SST, the prohibitions of canon 1402 §2 CCEO are not applicable. Perpetual expiatory penalty by decree can only be imposed with the prior mandate of the DDF as required by the same article 19 §2 SST. The concession of this prior mandate from the DDF must be explicitly mentioned in the decree.⁵⁰

f) Penal Decree

The decree must meet the criteria in numbers 119-126 of the Dicastery for Legislative Texts *User Guide*.⁵¹

g) Notification of the Decree

The accused is notified of the decree according to the terms of canon 1520⁵² CCEO and in proper form.⁵³

Possible decisions in a penal process

The Dicastery for the Doctrine of the Faith explains that three types of decisions are possible:

Vademecum 84. 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.

⁴⁹ User Guide 135.

⁵⁰ User Guide 136.

⁵¹ User Guide 137.

⁵² CCEO c. 1520 §1. A decree has legal force when it is communicated to the one to whom it is destined, according to the laws and the most secure ways of the place. §2. If there is danger of a public or private harm so that the text of the decree cannot be given in writing, the ecclesiastical authority can issue it by reading it before an ecclesiastical notary or two witnesses to the person for whom it is destined and by having all present sign an instrument stating that this was done; the decree is then considered to have been communicated. §3. If a person for whom a decree is destined refuses to accept the communication or, summoned according to the law to a meeting in order to receive or hear the decree, refuses, without a just cause to be evaluated by the author of the decree, to come to the meeting or to sign the instrument mentioned in 2, the decree is considered to have been communicated.

⁵³ User Guide 138.

- *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.

It is possible to provide for the public good or for the welfare of the person accused through appropriate warnings, penal remedies, and other means of pastoral solicitude (cf. canon 1348 CIC).

The decision (issued by sentence or by decree) must refer to one of these three types, so that it is clear whether it is “*constat*”, “*constat de non*” or “*non constat*”.⁵⁴

When the penal procedure ends

If the Pope made the decision, there is no possibility of appeal against his decision.⁵⁵ Apart from that circumstance, there are different possibilities available for those who were parties in the process.

If it was a penal judicial process, a legal challenge is possible, namely, a complaint of nullity, *restitutio in integrum*,⁵⁶ or appeal.⁵⁷ Article 16 §3 SST, states the only tribunal for appeals is the Supreme Tribunal of the Dicastery for the Doctrine of the Faith. For appeals, the prescriptions of law must be followed, noting carefully that article 16 §2 SST modified the time limits for the presentation of an appeal, imposing a peremptory time limit of sixty useful days, to be calculated according to what is laid down in canons 202 §1 CIC and 1545 §1 CCEO.⁵⁸ If it was an extrajudicial penal process, recourse can be made against the concluding decree within the terms provided by canons 1734ff. CIC and 1487 CCEO (cf. Section VIII).⁵⁹

When an appeal or recourse is made according to canons 1353 CIC and 1319 and 1487 §2 CCEO, appeals and recourses have a suspensive effect on the penalty.⁶⁰ However, this also means that any precautionary measures remain in force with the

⁵⁴ *Vademecum* 84.

⁵⁵ *Vademecum* 143. If it was the procedure mentioned in article 26 SST, inasmuch as it concerns an act of the Roman Pontiff, no appeal or recourse is admitted (cf. canons 333 § 3 CIC and 45 § 3 CCEO).

⁵⁶ Restitution to the original position e.g., as if there was no contract.

⁵⁷ *Vademecum* 144.

⁵⁸ *Vademecum* 146.

⁵⁹ *Vademecum* 147.

⁶⁰ *Vademecum* 148.

same caveats and procedures mentioned in nn. 58-65.⁶¹

In taking recourse against a penal decree, the accused and/or his advocate/procurator according to canon 1734 CIC, must first seek its emendation or revocation from the author (the Ordinary or his delegate) within the peremptory time limit of ten canonical days from the legitimate notification of the decree.⁶² The author of the decree, according to canon 1735, within thirty days after receiving the petition, can respond by emending his own decree or by rejecting the petition. He can also not respond and his response is presumed to be negative after 30 days.⁶³

If the author rejects the petition to amend the decree or does not reply for 30 days, then the accused can apply to the *Congresso* of the DDF directly or through the author of the decree (cf. canon 1737 §1 CIC) or through a procurator, within the peremptory time limit of fifteen useful days provided for by canon 1737 §2 CIC.⁶⁴ If the accused presents the hierarchical recourse to the author of the decree, he must immediately transmit it to the DDF (cf. canon 1737 §1 CIC). Thereafter, the author of the decree awaits possible instructions or requests from the Dicastery for the Doctrine of the Faith. The Dicastery will inform him about the result of the examination of the recourse.

Conclusion

Canon law recognises that a penal trial is the best process for achieving justice for alleged victims and the accused. However, the realities of delays, shortages of qualified personnel, and the number of cases means that out of necessity many cases are dealt with by an extrajudicial process. The Ordinary and/or his delegate and assessors must be careful to uphold the rights of both the accused and the alleged victim.

⁶¹ *Vademecum* 149.

⁶² *Vademecum* 151.

⁶³ *Vademecum* 152.

⁶⁴ *Vademecum* 153.

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