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THE NEW *DELICTA GRAVIORA* LAWS

Davide Cito[†]

INTRODUCTION

The new *delicta graviora* laws were published in the *Acta Apostolicae Sedis*, updating the April 2001 *motu proprio* Apostolic Letter *Sacramentorum sanctitatis tutela*. Pope Benedict XVI approved the new laws on May 21, 2010.¹ At the time of their publication, the content of the new laws had previously appeared on the Holy See's website on July 15, 2010, because of the announcement of their imminent release.² The purpose of this paper is to discuss the procedural and substantive changes made to the *motu proprio* by the new *delicta graviora* laws.³ Part one summarizes the circumstances surrounding the publication of the new *delicta graviora* laws. Part two discusses the substantive law changes to the *delicta graviora*. Part three analyzes the procedural law changes to the *delicta graviora*, including an overview of the constitution and competence of the Church tribunals that apply these new laws. The paper concludes by reiterating the reasons for the substantive and procedural changes to the *delicta graviora* and how these changes will allow the Church to better serve her followers in justice.

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1. See Pope Benedict XVI, *Congregatio pro Doctrina Fidei*, in 102 *Acta Apostolicae Sedis* [hereinafter AAS] No. 7, 419-432 (2010) (consists of four elements: the *Rescriptum ex Audientia* that published the laws themselves pg.419; The *Substantive and Procedural Laws* pgs. 419-430; the *Letter to the Bishops* signed by the Prefect and Secretary of the Congregation for the Doctrine of the Faith pg.431; and finally, the *Essay* about the primary changes made to the m.p. *Sacramentorum sanctitatis tutela* pgs.432-434).

2. See Congregation for the Doctrine of the Faith, *Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations* (2010), http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html,

[T]he CDF has undertaken a revision of some of the articles of *Motu Proprio Sacramentorum Sanctitatis tutela*, in order to update the said *Motu Proprio* of 2001 in the light of special faculties granted to the CDF by Popes John Paul II and Benedict XVI. The proposed modifications under discussion will not change the above-mentioned procedures.

3. Congregation for the Doctrine of the Faith, *Substantive Norms*, available at http://www.vatican.va/resources/resources_norme_en.html (last visited Sept. 27, 2011) (*Motu proprio* is Latin for "Substantive Norms" and *delicta gravora* means "grave delicts.") [hereinafter *Motu proprio*].

I. BACKGROUND OF THE DELICTA GRAVIORA

Before focusing on the changes made to the substantive and procedural laws of the first version of the *motu proprio*,⁴ I wish to highlight how the circumstances surrounding their publication constitute a turning point in the Holy See's procedures. We are confronted with a ministry that has characterized itself as reserved, even regarding promulgated laws throughout the centuries, because of the sensitivity of the areas of its competence. To this effect, the 1962 document *Crimen sollicitationis* immediately preceded the publication of *Sacramentorum sanctitatis tutela*. The *Crimen sollicitationis* was subtitled "This text is to be diligently stored in the secret archives of the Curia for internal use only."⁵ Moreover, the procedure for the publication of the *motu proprio* coupled with an *Epistula* "sent from the Congregation for the Doctrine of the Faith to Bishops of the entire Catholic Church and other ordinaries and Hierarchs having an interest," in which the content of the new procedural and substantive laws was summarized, and their subsequent non-publication raised quite a few questions.⁶ The *motu proprio* and its subsequent revisions were then published in W.H. Woestman and other works.⁷ To better understand how the opinions surrounding the *delicta graviora* laws have changed in just a few years, it is helpful to look at an interview with the former Secretary of the Congregation for the Doctrine for the Faith, Monsignor Bertone concerning the laws themselves:

4. See Velasio De Paolis, *Norme "de gravioribus delictis" riservati alla Congregazione per la Dottrina della Fede* [Provisions "of gravioribus delictis" reserved to the Congregation for the Doctrine of the Faith] 91 *Periodica* fasc. 2, 239-271 (2002). See also José Bernal, *Procesos penales canónicos por los delitos más graves. El m.p. Sacramentorum sanctitatis tutela* [Criminal proceedings canonical by the most serious crimes. The mp Sacramentorum sanctitatis protection], in *Cuestiones vivas de Derecho matrimonial, procesal y penal canónico. Instituciones canónicas en el marco de la libertad religiosa: Actas de las XXV Jornadas de la Asociación Española de Canonistas, 2005* [Live issues marriage, law criminal procedure and canonical. Canonical Institutions under religious freedom: XXV Conference of the Spanish Association of canonists, 2005] 163-200 (R. Rodríguez Chacón & L. Ruano Espina eds., Universidad Pontificia de Salamanca, 2006) (Spain). See also Kurt Martens, *Les délits les plus graves réservés à la Congrégation pour la Doctrine de la Foi* [The most serious offenses reserved to the Congregation for the Doctrine of Faith], 56 *Revue de Droit Canonique* [R.D.Can.] 201-221 (2006) (Fr.) (Comments following the changes made to the *motu proprio* in 2002 and 2003).

5. Pope John XXII, *Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation*, Office of the Sacred Congregation, (March 16, 1962), available at http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (last visited Aug. 27, 2011).

6. See Pope John Paul II, *Litterae Apostolicae Motu Proprio Datae*, in 93 AAS, 738-739 (2001).

7. See William H. Woestman, *Ecclesiastical Sanctions and the Penal Process: A Commentary on the Code of Canon Law* (St. Paul Univ.) (2000). See also Bruno Fabio Pigin, *Diritto Penale Canonico* [Criminal Law Canon], 602-618 (Venezia: Marcianum, 2008) (It.).

Question: “Why were the new *delicta graviora* laws made public in such a reserved manner, without a press conference and without publication in the *Osservatore Romano*?” *Answer:* “I understand that reporters and the media prefer numerous press conferences, but the topic is a very delicate one. To avoid media sensationalism, we prefer disseminating them in an official way without too much emphasis.” *Question:* “To tell you the truth, the actual text of the new procedural and substantive laws was never officially published . . .” *Answer:* “That is true. They are sent to the Bishops and religious Superiors that deal with these problems upon express request. The substantive laws are condensed into a letter from the Congregation to the Bishops and also published in the *Acta Apostolicae Sedis*. The procedural laws then take their general course. The procedure for publication is delineated in Code of Canons.” The same thing occurred with the modifications approved in 2002 and 2003; they were published on the Internet but not officially.⁸

Today, the Holy See’s position regarding publishing modifications has noticeably changed, as evidenced by the fact that the news of the changes made to the laws were filtered through the press to prepare the public opinion for their reception. Additionally, the Holy See created a *focus* link on their official website months ago, dedicated to the topic of child abuse and the Church’s response to it. This has facilitated the access to documents that contain the Church’s response, along with other related materials. The materials have also been translated into many languages in an effort to reach the vast majority of the public and offer them detailed insight and information on this problem.⁹

A. *Translation of the Delicta Graviora*

The changes to the *motu proprio* have not just been made public in the Latin language (the *Acta Apostolicae Sedis* is officially written in Latin), but in order to make them comprehensible and accessible to the general public, they are published on the website in seven languages.¹⁰ They are also accompanied by four documents: “Letter to the Bishops of the Catholic Church and the other Ordinaries and officials about the changes introduced in the apostolic letter of his own accord given the *Sacramentorum sanctitatis*

8. *Interview with Monsignor Bertone*, 30 GIORNI, (February 2002) (It.).

9. *See Abuse of Minors. The Church’s Response*, THE HOLY SEE available at http://www.vatican.va/resources/index_en.htm (last visited September 16, 2011).

10. *See generally Motu Proprio*, *supra* note 3.

tutela,”¹¹ translated into five languages, dated May 21 2010, signed by both the Prefect and Secretary of the Congregation for the Doctrine of the Faith. This letter is also accompanied by an essay in six languages that explains the changes introduced in the new text of the laws. The remaining two documents are a “Historic Introduction by the Congregation for the Doctrine of the Faith,”¹² that illustrates the evolution of the laws from their inception in the 1917 Code of Canons, and a letter from P. Federico Lombardi, Director of the Vatican press agency, entitled “The meaning of the publication of the new laws of the *delicta graviora*,”¹³ is available in five languages.

B. *Abuse of Minors and the Delicta Graviora*

What propelled this complete change in communication between the Holy See and the public is the terrible abuse of minors that has been perpetrated by some Clerics and in the words of P. Lombardi:

[T]he vast public sentiment in recent years, this type of crime has attracted a great deal of attention and created an intense debate on the laws and procedures applied by the Church to punish these crimes. It is right for there to be transparency about the laws that are in place to combat these crimes, and it is appropriate that those laws be presented in their entirety to enable anyone who needs information on the topic to have full access to them.¹⁴

Although the abuse of minors by a Cleric is a particularly odious and very serious crime, it is certainly not the only crime contained in the *delicta graviora*. However, recent events have made this particular type of crime the driving force of reform, and in a sense, the central point in the Holy See’s current penal legal system. The new procedural laws and all the progressive changes are modeled after the *motu proprio* to ensure the quick and efficient prosecution and punishment of these crimes. They have also been crafted to create a different relationship between the Church and the political sphere in

11. Congregation for the Doctrine of the Faith, *The Norms of the Motu Proprio*, “*Sacramentorum sanctitatis tutela*,” *Historic Introduction* (2001), available at http://www.vatican.va/resources/resources_introd-storica_en.html (last visited Sept. 27, 2011).

12. *Id.*

13. Letter from P. Federico Lombardi, Director of the Vatican Press Agency, *The significance of the Publication of the new “Norms concerning the most serious crimes,”* available at www.vatican.va/resources/resources_lombardi-nota-norme_en.html (last visited Sept. 16, 2011).

14. *Id.*

this area, which is no longer based on rigid separation and almost nonexistent communication, but rather on a collaborative model. As well as a “Guide to the Congregation for the Doctrine of the Faith’s general procedures regarding accusations of sexual abuse,”¹⁵ there are numerous other resources available on the topic. The Guide opens up its preliminary procedures section with “[w]e must always follow applicable criminal laws, as far as reporting these crimes to the appropriate civil authorities.”¹⁶ An interview with Monsignor Charles Scicluna, Promoter of Justice for the Congregation for the Doctrine of the Faith, stresses that “the laws on sexual abuse have never been meant to prohibit the reporting of these crimes to the civil authorities.”¹⁷ Additionally, as far as the concern that “Clerical Superiors are frequently accused of not reporting instances of pedophilia to the civil authorities that have been brought to their attention.”¹⁸ He responds:

In some countries with an Anglo-Saxon justice system, as well as in France, if the Bishops find out about crimes committed by their priests outside the realm of the sacramental seal of confession, they must report them to the appropriate civil authorities. It is an onerous duty, a Bishop reporting his Priest is comparable to a parent reporting his child. Although it is a particularly difficult duty, our instructions are always to respect the law.¹⁹

When asked again about “cases in which Bishops are not legally required to report them,” his answer is along the same lines:

In these cases, we do not force the Bishops to report their Priests, but we encourage them to reach out to the victims and to ask them to report the Priests who committed these crimes against them. We also instruct the Bishops to give the victims all the consolation, spiritual help, and any other type of help that they can. In a recent case regarding a Priest convicted by an Italian court, it was the Congregation that suggested to the victim, who

15. *Guide to Understanding Basic CDF Procedures concerning Sexual Abuse Allegations*, THE HOLY SEE available at http://www.vatican.va/resources/resources_guide-CDF-procedures_en.html (last visited Sept. 27, 2011).

16. *Id.*

17. Interview with Monsignor Charles Scicluna, Promoter of Justice for the Congregation for the Doctrine of the Faith on *The Strictness of the Church in Cases of Paedophilia* (2010) available at http://www.vatican.va/resources/resources_mons-sciicluna-2010_en.html (last visited Sept. 27, 2011).

18. *Id.*

19. *Id.*

was involved in a Canonic trial, to report the crime to the secular authorities in order to prevent more abuse.²⁰

Thereafter, the President of the Italian Episcopal Conference, Cardinal Angelo Bagnasco addressed the same issues in an interview with the National Italian newspaper, *Il sole24ore*, on April 11, 2010, stating that:

Pope Benedict XVI, to whom he renewed his affection, closeness of the episcopacy, and of the entire Italian Catholic Church for the gratuitous and shameful accusations that were made towards him, has taken a severe and critical approach, calling for the Church to examine itself, an examination that will lead to its purification from its members and those individuals who have painfully obfuscated its image and credibility. But this vigorous “purification” of the Church- that obviously includes loyal cooperation with the judicial system- cannot erase the suffering and disenchantment of victims, children and young adults whose trust was betrayed. Towards every person who has been violated, towards their families, I feel shame and remorse, especially in those cases where victims were not heard by the people who should have immediately intervened on their behalf. The confirmed cases of underestimating incidents, internal disorganization, and even cover-ups, will be rigorously prosecuted both within the Church and under Civil laws, and similarly to what has happened in certain cases, will also necessarily include the dismissal and removal of the people involved.²¹

C. *Role of Pope Benedict XVI*

Without the decisive action of Pope Benedict XVI, the changes in laws mentioned would not have happened.²² When he was still Prefect of the Congregation for the Doctrine of the Faith, he asked Pope John Paul II for special powers that would allow him to make the laws enacted in 2001 more efficient in prosecuting violations thereof, particularly, Clerical abuse of minors.²³

20. *Id.*

21. Gianni Riotta, *Chiesa, lavoro, politica, pedofilia Bagnasco parla a cuore aperto* (Apr. 11, 2010), <http://www.ilsole24ore.com/art/SoleOnLine4/Italia/2010/04/intervista-bagnasco-riotta.shtml> (last visited Sept. 27, 2011).

22. *Cf.* Interview with Cardinal Bagnasco, and J.I. Arrieta, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*, *La civiltà Cattolica*, Dec. 4, 2010, at 430; *see also*, J.I. Arrieta, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*, *La civiltà Cattolica*, Dec. 4, 2010, at 430.

23. *Cf.* Davide Cito, *La proibità morale nel sacerdozio ministeriale*, *Fidelium Iura*, at 119 (2003):

Following the Murphy Report, published in Ireland in fall 2009,²⁴ a painful pattern of abuse over time drastically opened the eyes of the Church to the magnitude of the widespread problem that knows no geographical barriers. The Holy Father chose direct spiritual, pastoral, and judicial action to help the Church develop new sensibility to the problem of sexual abuse of minors, while offering specific guidance for Pastors. In this regard, it is useful to mention that the Pope stressed that these are crimes against the person and the defense of the victims always prevails over protecting the Church's name or any other matters.²⁵ Pope Benedict XVI says:

[I]t seems that we must create a time for penance, a time for humility, to renew and relearn absolute sincerity. As far as the victims are concerned, there are three things I think are important. The first concern is for the victims - how we can heal them, what we can do to help these people overcome this trauma, find life again, come back and find renewed faith in Christ again. Care and commitment to the victims are our first priority, coupled with material help, psychologists, and spiritual help. The second concern is for the guilty parties involved: just punishment, precluding them from any kind of contact with young people, because we know that this is a disease and that free will has no bearing on this disease. Consequently, we must protect these people from themselves and keep them far away from young adults and children. The third concern is prevention, during the education and in choosing candidates for the Priesthood, to be as careful as humanly possible to prevent future case.²⁶

Although the central intervention of the Holy Father on this issue can be reviewed in the March 19, 2010 *Pastoral Letter* to Irish Catholics, in the past few months the Pope has always voiced his position on these crimes during every Pastoral occasion, particularly on Pastoral visits. Chronologically, we can recall some of Pope Benedict XVI's most influential statements on the

The changes made to the motu proprio *Sacramentorum sanctitatis tutela* in 2002 and 2003 brought up many doubts and even seemed to harm the rights of the accused. After nearly ten years, I must admit that they were necessary changes to protect the weaker party in this crime, the victims of the abuses, particularly in cases where the Church has difficulties in carrying out a trial because of the lack of qualified personnel.

24. See generally Commission of Investigation into the handling by Church and State authorities of allegations and suspicions of child abuse against clerics of the Catholic Archdiocese of Dublin, Murphy Report (July 2009) (Ir.), available at <http://www.justice.ie/en/JELR/Pages/PB09000504> (last visited Sept. 27, 2011).

25. Pope Benedict XVI, *Letter to the Catholics of Ireland* (March 19, 2010), available at http://www.vatican.va/holy_father/benedict_xvi/letters/2010/index_en.htm (last visited September 16, 2011).

26. *Id.* at 2.

issue.²⁷ “The Church is doing, and will continue to do everything within its power to investigate these accusations, to ensure the guilty parties are brought to justice for these abuses, and to put effective measures into place to protect young people in the future.”²⁸

This problem has always existed, but today, we see it on a terrifying rampant scale: the greatest threat to the Church are not external enemies, but it comes from the sin within the Church and the Church has the profound need to relearn penance, to accept purification, to learn forgiveness on the one hand, but on the other realize the need for justice. Forgiveness cannot be a substitute to justice.²⁹

Pope Benedict further stated:

Another topic that has received much attention in the past months which seriously undermines the moral credibility of those responsible in the Church is the shameful abuse of children and young adults by Priests and other members of the Clergy. I have spoken about the deep wounds that this behavior has caused many times, primarily to the victims, but also to the fiduciary relationship that should exist between Priests and parishioners, Priests and their Bishops, and likewise between the authority of the Church and the people. I know that you have taken many serious steps to combat and remedy this situation, to ensure that the children are protected in an effective way from any harm, and to confront any future allegations of abuse in a transparent and appropriate manner if they arise. You have publicly voiced your profuse sadness for everything that has happened and for the often inadequate ways this topic was dealt with in the past. Your growing understanding of the extent of the abuse of children in society, of its devastating effects, and the necessity to give extensive support to the victims, should serve as an incentive to share the lesson you have learned with the public. What better method could there be of atonement for those sins than humbling oneself and with a compassionate spirit get closer to the children who have suffered because of the abuse? Our duty to take care of the youth requires nothing less than that. While we reflect on human fragility, something that these tragic events reveal in such a harsh way, we

27. *Id.* at 1 & 2.

28. Pope Benedict XVI, *Visit to Malta of the Special Envoy of Pope Benedict XVI his Eminence Cardinal Ennio Antonelli* (June 28, 2009), available at http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_20090628_malta-2_en.html (last visited Sept. 27, 2011).

29. Benedict XVI, *Apostolic Journey of Pope Benedict XVI To Portugal on the Occasion of the Tenth Anniversary of the Beatification of Jacinta and Francisco, Young Shepherds of Fatima* (May 11, 2010), available at http://www.vatican.va/holy_father/benedict_xvi/homilies/2010/documents/hf_ben-xvi_hom_20100513_fatima_en.html (last visited Sept. 27, 211).

are also reminded that in order to be efficient Christian guides, we have to live in the utmost integrity, humility, and sanctity.³⁰

But it is precisely the *Pastoral Letter* to Irish Catholics that has in many ways been a turning point both in an intraecclesiastical sense, by recalling the duties of all faithful, particularly Pastors, in preventing and punishing this crime, and as far as relations between civil and ecclesiastical authorities, in confronting this painful problem. Certainly the Pope, just as John Paul II had done years ago, takes the fact that the actions of the Pastors had been influenced by factors that impeded or at least made it difficult to both perceive the phenomenon and confront it with the right methods into account,³¹ although “there is no doubt that you and some of your predecessors have failed, sometimes gravely failed, to apply the Canonic laws that had already been codified long before regarding child abuse. Serious mistakes were made in responding to these accusations.”³²

30. Benedict XVI, *Apostolic Journey to the United Kingdom, Meeting with the Bishops of England, Scotland and Wales: Address of His Holiness Benedict XVI*, (Sept. 19, 2010), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_benxvi_spe_20100919_vescovi-inghilterra_en.html (last visited Sept. 27, 2011).

31. See John Paul II, *Address to the Cardinals of the U.S.* (Apr. 23, 2002),

It is true that a generalized lack of knowledge on the nature of the problem and sometimes even consultations with medical experts have brought Bishops to make decisions that were later discovered to be wrong. Now you are working to establish more reliable criteria, in order to ensure that similar mistakes do not happen again.

Benedict XVI, *Pastoral Letter to the Catholics in Ireland*, (Mar. 19, 2010) (“I understand how difficult it was to understand the complexity and extension of the problem and to obtain reliable information and make the right decisions in light of the conflicting advice from experts”). John Paul II, *Christmas Speech to Roman Curia* (Dec. 20, 2010),

In the seventies, pedophilia was theorized as something acceptable for mankind and child. However, this was part of a deep perversion of the concept of *ethos*. They went so far-even within Catholic theology- to say that it was neither categorically wrong, nor right. There is only better than or worse than, nothing in and of itself was right or wrong. Everything depended on the circumstances and the purpose intended. According to them, depending on the circumstances, anything could be wrong or right. Morality was substituted for a calculation of consequences and by doing so, had ceased to exist.

The effects of such theories today are evident in the encyclical by John Paul II, *Veritatis Splendor* (Aug. 6, 1993) (emphasizing with prophetic force and in the great tradition of Christian *ethos*, the essential and permanent pillars of morality. Today, this text must be the focal point in the path towards forming our consciences. It is our responsibility to make these criteria heard and comprehensible to mankind to pave the clear path to true humanity, amidst the current concern for mankind).

32. Benedict XVI, *Pastoral Letter of the Holy Father, Pope Benedict XVI, to the Catholics of Ireland*, para. 11 (Mar. 19, 2010) available at http://www.vatican.va/holy_father/benedict_xvi/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland_en.html (last visited Sept. 27, 2011).

The Pope's letter addresses present and future remedies, indicating the precise courses of action to be taken, that have also been stressed on other occasions: "I appreciate all the efforts that you have made to remedy past mistakes and to ensure that they will not be repeated. In addition to putting the Canonic laws into action in facing the instances of child abuse, you continue to cooperate with the civil authorities within their jurisdiction."³³ There are two directions to go from here: the rigorous application of the existing canonic laws and the cooperation with civil authorities.

It is precisely those two areas that have been modified by the *motu proprio Sacramentorum sanctitatis tutela*, "in order to improve their concrete implementation,"³⁴ and that, in my opinion, justifies this long preface before examining the concrete changes made to them.

II. THE SUBSTANTIVE LAWS

Even from just a year from its entry into force, the *motu proprio Sacramentorum sanctitatis tutela* already had proposed modifications that were deemed necessary for its efficient application. The first of these changes was dated November 7, 2002. It concerned the choice to derogate the statute of limitations upon the Bishop's request, of the *delicta graviora*, fixed at ten years, calculated from the victim's eighteenth birthday if it is abuse of minors. Other changes followed and they were all confirmed May 6, 2005 by Benedict XVI. One of the objectives of publishing the new laws is to insert certain changes into the formal text of the laws, so as to not ask the Holy Father to confirm the power to derogate each individual time. Both the substantive and procedural laws contain all of the previous changes. In addition to the changes made to the laws, there are other specifications that will be succinctly presented. The *motu proprio* is now composed of 31 articles, compared to the 26 of the first edition.³⁵

Following the order of the articles, the first major change was the modification that now better circumscribes the "material" jurisdiction of the Congregation for the Doctrine of the Faith. The interpretation of Article 52 of the Apostolic Constitution *Pastor bonus*³⁶ in conjunction with the

33. *Id.*

34. William Cardinal Levanda, *Letter to the Bishops of the Catholic Church*, (May 21, 2010), http://www.vatican.va/resources/resources_lettera-modifiche_en.html (last visited Sept. 27, 2011).

35. Pope Benedict XVI, *Motu Proprio data, Quaerit semper* (Aug. 30, 2011), available at http://www.vatican.va/holy_father/benedict_xvi/motu_proprio/index_en.html (last visited Sept. 27, 2011).

36. See John Paul II, *Apostolic Constitution, Art. 52* (June 28, 1988),

Apostolic Letter m.p. *Sacramentorum sanctitatis tutela* stated: “After we had approved the *Agendi ratio*, it was necessary to specifically define both ‘the more grave crimes against morals or crimes committed during the celebration of the sacraments’ for which the competence of the Congregation for the Doctrine of the Faith remains exclusive, and that also have the special procedural norms to declare and impose Canonic sanctions.”³⁷ This leads one to believe that the competence for crimes against the Faith was entirely with the *Nova agendi ratio*. Not only does Article 1, Section 1 of the *motu proprio* add the expression “*delicta contra fidem*,”³⁸ or crime against the Faith, but it adds Article 2 in which these crimes against the Faith are indicated with their individual reference to each of the Code of Canons for Eastern and Latin Churches and the Latin Code.³⁹ In these cases, the Congregation acts as a second degree appeals Court, leaving the jurisdiction of the Ordinary local tribunal in place for sentencing and the entire trial (at the trial court level) in both the judicial and administrative systems. The specification of the jurisdiction for crimes against the Faith, as indicated by Article 1, does not compromise the efficiency of the *Agendi ratio in examine doctrinarum*, because the *Agendi* is meant to be a specific tool to intervene on more broad doctrinal conflicts which require a more qualified and scientific response.

The Congregation for the Doctrine of the Faith is also entrusted with penal jurisdiction for *delicta graviora*, against Cardinals, Patriarchs, representatives of the Holy See, and Bishops, the Holy Father, and upon his previous mandate, and also other physical persons listed in Can. 1405 section 3 CIC and 1061 CCEO.⁴⁰ There has been a progressive widening of the

The Congregation examines offences against the faith and more serious ones both in behaviour or in the celebration of the sacraments which have been reported to it and, if need be, proceeds to the declaration or imposition of canonical sanctions in accordance with the norms of common or proper law.

available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-index_en.html (last visited Sept. 27, 2011).

37. See John Paul II, *Apostolic Constitution, Art. 52* (June 28, 1988), available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_19880628_pastor-bonus-roman-curia_en.html (last visited Sept. 27, 2011). In conjunction with, *Sacramentorum sanctitatis tutela* (2001) http://www.vatican.va/resources/resources_introd-storica_en.html (last visited Sept. 27, 2011).

38. The specification of crimes *contra fidem*, or against the faith was missing in the 2001 draft.

39. See CODE OF CANON LAW cans. 909, 1365, 1367, 1378 §2 n.1, 1379 (1983).

40. CODE OF CANON LAW, *supra* note 39, can. 3. See also CODE OF CANONS OF THE EASTERN CHURCHES, can. 1061 (1990).

Congregation for the Doctrine of the Faith's jurisdiction, even if it is limited to the most serious of crimes of the Roman Rota Tribunal.

A. *Offenses against the Eucharist*

Crimes against the Eucharist remain unchanged, even though they have been reorganized by separating the attempted liturgical action of the Eucharistic sacrifice from its simulation. The first crime presupposes that the offender is not a Priest, and in the latter offense, that he is. Additionally, the consecration for sacrilegious purposes is punished if it implicates either of the two Eucharistic species (bread or wine), both when it occurs within the Eucharistic celebration and outside of it, clarifying the previous language that may have caused confusion.

Article 3 regulates the most serious of crimes since the Eucharist encompasses all of the good in the Church.⁴¹ The penal protection is that of preserving the legitimate Eucharistic celebration and ensuring the actual presence of Jesus Christ that is an irrepressible requirement in order for the Church to conserve its identity.

Five crimes are described in Article 3.⁴² First, there is the crime of removal or conservation of consecrated species for sacrilegious purposes, regulated in Can. 1367 CIC and 1442 CCEO,⁴³ integrated by the authentic response of the Pontifical Council for the Legislative Texts in June 1999. While in the case of removal or conservation, the element that constitutes the crime is the sacrilegious purpose (for example use in a satanic ritual), for cases of desecration, defined as “any voluntary action that is gravely derogatory.”⁴⁴ The crime is punished with the sanction of excommunication *latae sententiae* reserved to the Holy See and if the crime is perpetrated by a Cleric, the optional penalty in the most serious cases of dismissal from the Clerical state. If the faithful is of an oriental denomination, the penalty is major excommunication, because the CCEO does not allow for *latae sententiae* sanctions, but it retains the institution of reserved sins according to Can. 728 and 729 CCEO and if the offender is a Cleric, the sanction is possible dismissal.⁴⁵

41. *Motu Proprio*, *supra* note 3, at art. 3.

42. *Id.* at arts. §1 and §2.

43. CODE OF CANON LAW, *supra* note 39, can. 1367. *See also* Code of CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1442.

44. Pontifical Council, *Il disprezzo delle sacre specie [The Contempt of The Sacred Species]* (1999), in L'OSSERVATORIO ROMANO (1999), available at <http://www.internetsv.info/ResponsoE.html>.

45. *See* CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 728, 729.

The second crime, regulated by Article 2⁴⁶ is the attempted Eucharistic celebration by someone who is not an ordained Priest (Can. 1378 §2, 1^o CIC).⁴⁷ This crime is contained in the Latin Code of Canons, but because it is part of the *delicta graviora*, it is also imputable to members of the Oriental Church. The crime consists of an attempt, because someone who is not ordained cannot validly consecrate the Eucharist. The punishment is the penalty of an interdicted person, *latae sententiae*. If the offender is a Deacon, the consequence is suspension; and for members of the Oriental Church, it must be a sanction that is proportional to *ferendae sententiae*.

The third crime of Article 3⁴⁸ includes among the *delicta graviora* the simulation of Eucharistic celebration described in Can. 1379 CIC and 1443 CCEO that had been combined with the attempted Eucharistic celebration.⁴⁹ As previously mentioned, the separation of these crimes is important because the attempted celebration is committed by someone who is not an ordained Priest, while the simulation can only be committed by a Priest that is capable of celebrating a valid Eucharist and voluntarily chooses not to do so, knowing that he is leading his followers to believe that they are celebrating the Eucharist. Both Can. 1379 CIC and Can. 1443 CCEO contain a general statute of limitations regarding the simulation of sacraments. According to Article 4, n.3 of the *motu proprio*, only the simulation of the sacraments of Eucharist and Confession are categorized as *graviora delicta*⁵⁰. Meanwhile, other instances of simulation, for instance, the administration of a sacrament remain a common disciplinary crime, which of course does not make them any less criminal. The sanction required for a similar offense, remains the same in both the Latin and Eastern Oriental Canons, a perpetual penalty that must be proportional to the individual offense, and does not exclude major excommunication.

The fourth and clear-cut crime is explained in the *communicatio in sacris* and expressly prohibited by Can. 1365 CIC and 1440 CCEO. In fact, although the Code of Canons categorically prohibits any illegitimate *communicatio in sacris*, leaving its legal classification to the universal or particular laws, both Can. 908 CIC and Can. 702 CCEO prohibit the

46. *Motu Proprio*, *supra* note 3, at art. 2.

47. See CODE OF CANON LAW, *supra* note 39, can. 1378 §2, 1^o. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1443.

48. *Motu Proprio*, *supra* note 3, art. 3.

49. See CODE OF CANON LAW, *supra* note 39, can. 1379. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1443.

50. *Motu Proprio*, *supra* note 3, at art. 4, n. 3.

Eucharistic celebration with ministers that are not Catholic.⁵¹ In this case however, the area of the crime is narrowed down because the text does not generically refer to non-Catholic ministers or ministers, who are not in full communion with the Holy See, but specifies only ministers of the Ecclesiastic community who do not possess the Apostolic succession or that do not recognize the sacramental dignity of the Priesthood. Although still prohibited, the Eucharistic celebration with ministers of Orthodox churches does not fall within the realm of the *graviora delicta*. The sanction applied to such an offense according to both the Latin and Eastern Code of Canons is a perpetual, proportional penalty.

The fifth and final crime against the Eucharist was a legislative innovation in 2001 because it framed a crime that was not explicitly contained in either the CIC or the CCEO, even if such behavior was still categorically reprimanded. Canon 927 CIC categorically prohibited the consecration of one species without the other (bread or wine), or of both outside of the Eucharistic celebration even if not for sacrilegious purposes (the sacrilegious purpose heightens its unlawfulness).⁵² However, there was still no penal classification for it and in many cases it could have fit into Can. 1367 on the desecration of the consecrated Eucharistic species. Considering the fact that the Canonic Penal law is subject to strict interpretation,⁵³ we can infer that it was necessary for the legislature to specifically delineate the elements of the crime for all of the cases in which the criminal behavior did not formally consist of desecration of the Eucharistic species as delineated in Can. 1367 CIC and 1442 CCEO. The current text extends the crime to include all instances of consecration for sacrilegious purposes without expressly citing Can. 927 CIC. The crime includes both the consecration for sacrilegious purposes of one Eucharistic species without the other, or of both, during the Eucharistic celebration or outside of it. As far as the penalty imposed, it can span up to dismissal or deposition.

B. *Offenses against the Sanctity of Penance*

Article 4 of the *motu proprio* is dedicated to the *delicta graviora* of crimes committed against the sanctity of Penance.⁵⁴ The category of *delicta graviora* contains a large number of crimes surrounding the Sacrament of

51. See CODE OF CANON LAW, *supra* note 39, can. 908. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 702.

52. See CODE OF CANON LAW, *supra* note 39, can. 927.

53. *Id.*, can. 18. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1500.

54. *Motu proprio*, *supra* note 3 at art. 4

Penance, indicating the great care the Church takes in protecting the celebration of this Sacrament by also punishing frequent abuses during its celebration or during Confession. In fact, in the 2001 version of the *motu proprio*, abuse against the Sacrament of Penance were comprised of only three crimes- the absolution of an accomplice in sin against the sixth precept of the Decalogue, while not in danger of death,⁵⁵ the solicitation to sin against the sixth precept of the Decalogue, during or under the pretext of confession in order to absolve the confessor of the sin committed (Can. 1387 CIC and 1458 CCEO),⁵⁶ and the direct violation of the sacramental seal.⁵⁷ In 2003, the crime of indirectly violating the sacramental seal was added because of the frequent difficulties in discerning the cases of direct and indirect violations. In the modifications made, three more crimes have been added, so that all of the crimes committed against the sanctity of the sacrament of Penance will be considered *delicta graviora*.

The first of these crimes is the attempted sacramental absolution by unlawfully listening to a confession, included in the *motu proprio* and described in art. 4 §1 n. 2.⁵⁸ The aforementioned crime recalls Can. 965 CIC and 722 §1 CCEO.⁵⁹ Anyone who has not received the sacred order is “incompetent” and cannot impart a valid absolution because of the prohibition to do so imposed by divine law; he who has not received the power, is “unable” to do so under ecclesiastic law. However, in either situation the absolution is invalid and like the attempted Eucharistic celebration, this criminal act is appropriately categorized as an “attempt,” because the individual can only attempt the action without the possibility of obtaining the results of absolution. The individual that cannot validly impart sacramental absolution is not only prohibited from attempting to absolve, but also may not listen to a confession for any reason whatsoever even should the reason seem justifiable and even if he has no intention to impart an invalid absolution. Because the Canon recalled in art. 4 §1, n. 2 of the *motu proprio* is only contained in the Latin Code, its inclusion in the m.p. *Sacramentorum sanctitatis tutela*, extends the offense to Eastern Rite followers of the Church,

55. See CODE OF CANON LAW, *supra* note 39, can. 1378 §1. See also Code of Canons of the Eastern Churches, *supra* note 40, can. 1457.

56. See CODE OF CANON LAW, *supra* note 39, can. 1457. See also Code of Canons of the Eastern Churches, *supra* note 40, can. 1458.

57. See CODE OF CANON LAW, *supra* note 39, can. 1388 §1.

58. *Motu proprio*, *supra* note 3 at art. 4, § 1, n. 2.

59. See CODE OF CANON LAW, *supra* note 39, CAN. 965 §1 (“The valid absolution of sins requires that the minister have, in addition to the power of orders, the faculty of exercising it for the faithful to whom he imparts absolution.”). See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 772 (“the ministry of the sacrament of penance belongs to the priests.”).

to whom a proportional *ferendae sententiae* penalty should be applied, and when taking can. 1378 §3 CIC into consideration could reach even major excommunication. Article 4, §1, n. 3⁶⁰ also includes the simulation of the sacramental absolution within the *delicta graviora*.⁶¹ Similarly to the Eucharist, it is a crime committed by a Priest with the valid power and ability to impart absolution, who instead voluntarily chooses to merely simulate the administration of the sacrament.

The third crime added concerning the sacrament of Penance contained in the *delicta graviora* is delineated in art. 4, §2. It is configured in a decree from the Congregation for the Doctrine of the Faith dated September 23, 1988 that recalls the previous 1973 decree, prohibiting both the recording and the dissemination through any form of media any content of a confession.⁶² The crime may be perpetrated in three ways: recording a confession, divulging anything in a recorded confession, or both, recording and divulging a confession. In the first two cases, they are treated as two distinct crimes that can be committed by different people, while in the last case, they are aggregated into one crime. When a confession is recorded, it has to actually be recorded, not merely overheard. If there is no recording involved, then overhearing a confession would fall within the realm of Can. 983 §2 CIC and there would be no point in punishing someone who listens to a confession and uses a recording device, while not punishing someone who is still violating the sacramental seal, even without the use of an external recording device, because the offender is still driven by the same illicit intentions.⁶³ As far as divulging the content of the confession, the dissemination of information has to be done through some form of media outlet, either written publications, broadcasted television, radio, computer technology, internet outlets, otherwise, it would fall within a different offense, Can. 1388 §2⁶⁴ punishes the violation of the secrecy of confession. During the commission of this crime, the position of the “necessary accomplices,” or those without whom the commission of the crime would have been impossible;⁶⁵ for example, editors or curators of a television or

60. *Motu proprio*, *supra* note 3 at art. 4 § 1, n. 3.

61. See CODE OF CANON LAW, *supra* note 39, can. 1379. See also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1443.

62. See Congregation for the Doctrine of the Faith, *Urbis Et Orbis* [The City and County] at para. 3 (1988), in 80 AAS No. 1, 1367 (1988).

63. See CODE OF CANON LAW, *supra* note 39, can. 983 §2.

64. *Id.* can. 1388 §2.

65. *Id.* can. 1329 §2:

radio show, even if their motive is purely economic is explained. Compared to the 1988 decree, the canonic penalty has changed from what was previously known as the excommunication *latae sententiae* to what is now a *ferendae sententiae* penalty, which is both perpetual and preceptive. The penalty could include even dismissal from the Clerical state, if the offender is a Cleric. Personally, I would have maintained the previous penalty of *latae sententiae* excommunication, with the addition of a perpetual, preceptive, and expiatory sanction⁶⁶ in an effort to further discourage a crime that desecrates the sincerity of the sacrament between the penitent with God who is “full of mercy and forgiveness.”⁶⁷

C. *The Proposed Ordination of Women*

The newly modified Article 5 of the *motu proprio* creates a new crime not present in the 2001 edition, the attempted ordination of a woman. The newly modified article applies the excommunication *latae sententiae* reserved to the Holy See, and the expiatory penalty of removal from the Priesthood, if the offender is a cleric. The Congregation for the Doctrine of the Faith promulgated the decree December 19, 2007.⁶⁸ The attempted ordination of a woman is a peculiar type of crime both because of its dynamic and the different potential categories of offenders. Firstly, Article 5, n.1 recalls Can. 1378 CIC on attempted Eucharistic celebration, which is an independent crime, but is also closely linked to attempted ordination, particularly to the Priesthood.⁶⁹ It then goes on to examine the perpetrators of the crime, both those who attempt to confer the ordination and the women who receive or attempt to receive it. Generally, the crime is based on a prior agreement between coconspirators. According to Can. 1329 §1 particularly in more recent developments, the doctrinal positions taken are in contrast with the Magisterium of the Church on the subject, even though

Accomplices who are not named in law or precept incur a *latae sententiae* penalty attached to a delict if without their assistance the delict would not have committed, and the penalty is of such a nature that it can affect them; otherwise, they can be punished by *ferendae sententiae* penalties.

66. See CODE OF CANON LAW, *supra* note 39, can. 1364 (medical and expiatory sanctions are not to be applied in conjunction with another, as is written in ¶ 1364 where they coexist; therefore, medical and expiatory sanctions may be applied together for the same crime because they have different objectives).

67. CATECHISM OF THE CATHOLIC CHURCH ¶ 277 (2d ed. 1997).

68. Congregation for the Doctrine of the Faith, *General Decree regarding the delict of attempt sacred ordination of a woman* (Dec. 19, 2007) available at http://www.vatican.va/roman_curia/congregations/cfaith/doc_dis_index.htm (written in seven languages) (last visited September 16, 2011).

69. *Motu proprio*, *supra* note 3 at art. 5(1).

hypothetically it could also be committed by only one offender attempting to receive the sacred order by deceiving the minister who confers it.⁷⁰ For all coconspirators, the penalty remains the same, the *latae sententiae* excommunication, applied by the Holy See, for Latin rite followers. For Eastern followers, major excommunication is the applicable sanction and is also reserved to the Holy See. In the event that the attempt to confer the sacred order is committed by a cleric, in addition to being excommunicated, he may also be punished with dismissal or deposition. This specification made by article 5, n.3 of the *motu proprio*, shows that the individual who attempts to ordain may be a lay faithful man or woman, it would not change the substance of the crime, it would still remain an attempt and never a simulation, even if the offender was a validly ordained Bishop because even though the Bishop would be “capable” of conferring the order, a woman is incapable of validly receiving that sacred order, as established in Can. 1024 CIC and 754 CCEO.⁷¹ However, the addition of an expiatory penalty like dismissal or deposition shows the gravity of the behavior of a cleric who commits the crime. We could ask ourselves why the choice was made to punish his crime with excommunication, when the attempted Eucharistic celebration, or the abuse of a minor is punishable only with expiatory penalties, up to dismissal or deposition, which themselves depend on the gravity of the individual offense.

We have to keep two things in mind: the nature and goal of the penalty as well as its social significance. Censures or medical penalties are meant as remedial measures, their implementation depends on the repentance of the offender. They are always issued indefinitely until the offender ceases his contumacy or until his repentance.⁷² The penalty of excommunication is the most serious of the penalties and is linked to offenses having to do with the faith and ecclesiastic communion, and its effects are directly related to the areas which these crimes offend; that is why they have the effect of prohibiting receiving the sacraments and dismissal from an ecclesiastic position or assignment.⁷³ The publication of the Apostolic letter, *Ordinatio*

70. See CODE OF CANON LAW, *supra* note 39, can. 1329 §1. (“Those who conspire to commit the crime and are not mentioned explicitly by the law or precept, may be sanctioned with *ferendae sententiae* sanctions if they are applicable to the principal and must be subject to the same or lesser sanctions.”).

71. *Motu proprio*, *supra* note 3 at Art. 5(3). (“Only the baptized man has validly received the sacred ordination.”).

72. In contrast the views expressed in CODE OF CANON LAW *supra* note 39, can. 1347, *see* Id. can. 1358 §1.

73. See CODE OF CANON LAW, *supra* note 39, can. 1331 §1:

*sacerdotalis*⁷⁴ definitively conveyed the Magisterium's teaching, specifying that the Church lacks the power to bestow on women ordination to the priesthood, evidencing the close link this offense has with the Faith and the Ecclesiastic communion, as well as bringing attention that it has received in the last few years as a result of similar problems in non-Catholic faiths. The penalty of excommunication appears to be a penalty that is proportional to the characteristics of this crime, differing greatly from other more serious offenses, such as the abuse of a minor, for which the most serious penalty is the dismissal from the clerical state, regardless of whether the offender has repented. The goal of this type of sanction is to not allow the offender to exercise the ministry, thus protecting the community from recidivism. Censure or expiatory penalties, are not penalties comparable to one another as far as gravity, but only in their prevalent goals⁷⁵ and they can also be applied in conjunction with one another.

D. Abuse of Minors by a Cleric

Article 6 (previously article 4), specifically outlines the *delictum gravius contra mores*, or abuse of minors perpetrated by a Cleric (Can. 1395 §2 CIC).⁷⁶ It been modified twice and it has guided the adaptation of the m.p. *Sacramentorum sanctitatis tutela* to delineate punishment for the crime.

The first change was to equate the crime against a minor at n.1, initially limited to the effects of this crime, now equal to a crime against an incapacitated person. Prior to this change, recourse for a similar crime was found in Canon 1395 §2, that generally punished a crime committed with violence, regardless of the age of the victim, as is certainly the case with the abuse of an incapacitated person, but this would have extended the jurisdiction of the Congregation in this area of offenses. On the other hand,

An excommunicated person is forbidden: 1) to have any ministerial participation in celebrating the sacrifice of the Eucharist or any other ceremonies of worship whatsoever; 2) to celebrate the sacraments or sacramentals and to receive the sacraments; 3) to exercise any ecclesiastical offices, ministries, or functions whatsoever or to place acts of governance.

74. See Pope John Paul II, *Ordinatio sacerdotalis* [Apostolic Letter of the Priestly Ordination] (1994).

75. See CODE OF CANON LAW, *supra* note 39, can. 1341 ("An ordinary is to take care to initiate a judicial or administrative process to impose or declare penalties only after he has ascertained that fraternal correction or rebuke or other means of pastoral solicitude cannot sufficiently repair the scandal, restore justice, reform the offender.") (All of the canonic sanctions have this tripartite purpose, although in the case of censure, the primary purpose is the amendment of the offender. Meanwhile, the main purpose of the expiatory sanctions is to remedy the scandal and reestablish justice. This is cognizable from the differences in application, remission, and duration of expiatory sanctions and opposed to censure).

76. *Motu proprio*, *supra* note 3 at art. 6.

it was useful and practical to equate a crime that the Congregation encountered frequently to a similar category of crimes such as the abuse of minors.

Article 6, n.2, §1 created the criminal offense the acquisition, possession, or divulging for vile motives, of pornographic images depicting minors below the age of fourteen by a Cleric. The Congregation for the Doctrine of the Faith had already placed it into the offense *delictum cum minore*.⁷⁷ This does not only mean physical contact, or direct abuse, but also includes indirect abuse, such as showing pornography to, or exposing oneself to a minor. The crime also includes searching and downloading child pornography from the Internet, for example. This type of behavior constitutes a crime in some nations. While *browsing* can be involuntary, downloading rarely is. Downloading usually requires a choice or specific option, sometimes requires payment with a credit card, and the subsequent communication of personal data of the buyer that rarely remains anonymous and is frequently traceable. Some Priests have been convicted and incarcerated for possession of thousands of pornographic images of children and other minors. According CDF procedure, this behavior falls within the *delictum gravius*.⁷⁸ The classification made by article 6, n.2, appears necessary to dissipate any doubts or interpretive questions that could arise because the penal laws are subject to strict interpretation and are not subject to interpretation and would not be applied by analogy.⁷⁸ The three activities indicating this type of criminal behavior are also modeled on similar secular laws.

E. *Statute of Limitations*

The final change made to the substantive laws of the *motu proprio*, was made to the statute of limitations for *delicta graviora*. For one thing, the power conceded to the Congregation in 2002 to derogate the statute of limitations was included, thus eliminating any reference to an express Bishop request for derogation. The Congregation itself can concede derogation to the statute of limitations administratively. The Statute of Limitations has also been extended from ten to twenty years starting from the eighteenth birthday of the victim, for crimes committed against a minor. Undoubtedly,

77. Congregation for the Doctrine of Faith, *e prassi presso la Congregazione per la Dottrina della Fede riguardo ai delicta graviora* [Procedures and Practices at the Congregation for the Doctrine of the Faith for Grave Offenses] art. 4(a) (2004).

78. CODE OF CANON LAW, *supra* note 39, cans. 18, 19. *See also* CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, cans. 1500, 1501.

the extension of the statute of limitations to twenty years (that has been interpreted as being retroactive, thus applicable to crimes committed before these modifications were made) was made to avoid an excessive use of the derogation to the statute of limitations. The current legislation, however, remains problematic and not easy to reconcile with the principle of *favor rei*. Additionally, in my opinion, an unlimited statute of limitations would be the most viable solution, rather than having a twenty-year statute that can be lengthened indefinitely by conceding a derogation on a case by case basis. The derogation can seem like an arbitrary exercise of judiciary power.

III. THE PROCEDURAL LAWS

Since the m.p. *Sacramentorum sanctitatis tutela* is primarily procedural, it was the procedural laws within the *motu proprio* that were modified to adapt them to the concrete cases and to allow for swift and efficient trials for abuse of minors. In this regard, as previously stated, the laws that were promulgated substantially mirror the changes created in 2002 and 2003 except for two new dispositions. The first innovation is geared to clarify the changes and the second is a more substantial change. The clarification comes in Article 17 of the new text and provides that if the case is deferred to the Congregation without conducting the investigation contained in Can. 1717 CIC and 1468 CCEO, the preliminary acts in the trial *may* and no longer *must* be conducted by the Congregation itself.⁷⁹

The most considerable addition appears to be the insertion of the wording in the current art. 19, “to impose from the outset of the preliminary investigation those (cautionary) measures which are” that are also contained in Can. 1722 CIC and 1473 CCEO.⁸⁰ This was the most controversial topic, since the doctrine had previously been against this possibility.⁸¹ The innovation does not appear ill-timed, especially because of the recent widespread public accusations. Although there is a presumption of innocence until one is proven guilty, not applying cautionary measures would make the exercise of the ministry difficult, but to me, it is not easy to harmonize it with Can. 1717 §2 CIC and 1468 §2 CCEO. Both Canons

79. See *Motu proprio*, *supra* note 3, at art. 17.

80. See *id.* at art. 19.

81. See F. Daneels, *L'investigazione previa nei casi di abuso sessuale di minori* [The Preliminary Investigation in Cases of Sexual Abuse of Minors], in *Iustitia in Caritate: Miscellanea di studi in onore di Velasio de Paolis* 503 (J. Conn & L. Sabbarese eds., 2005) (“The cautionary measures contained in Can. 1722, cannot be applied during the preliminary investigation or even at its completion, they can only be applied once the actual penal trial has begun.”) He is almost saying that not even the administrative procedure that is aimed at declaring the sanction would suffice for the application of a cautionary measure.

equally establish that: “Care must be taken so that the good name of anyone is not endangered from this investigation.”⁸² This is true particularly when information regarding a crime has not been made public yet, because the new article 19 does not limit the use of the cautionary measures to when the trial has begun.⁸³ Currently, except for the limits placed by the Canons, cautionary measures can now be applied even in the preliminary phases of an investigation.

To synthetically describe the current procedural laws with the numerous modifications made throughout the years, you could say that the laws are certainly sensitive to the problem of abuse. However, they are still problematic as far as harmonizing them with the penal system in the Latin and Eastern Code of Canons. These difficulties exist because in large part, they seem to keep the 2001 system unchanged. This lack of change can be inferred from then-Secretary of the Congregation of the Doctrine the Faith, Monsignor Bertone’s words at the beginning of this article, the introduction of derogations as gap fillers, and the lack of competent personnel with the resulting complexity of a possible judicial proceeding with all of its implications. These derogations touch upon all relevant aspects of the judicial process, except the right of the defendant to defend himself. This right may seem insufficiently protected by the current procedure because to the outsider it seems like a temporary system full of derogations, in which different laws that conflict with one another and with the codified penal system coexist.

Like the 2001 version, the procedural laws have been subdivided into two titles, dedicated to the “Constitution and competence of the Tribunal” and to the “Judicial Order”.⁸⁴ As far as the first section, the previous laws have remained unaltered, except for the section on the cautionary measures in Can. 1722 CIC and 1473 CCEO placed in article 19.⁸⁵ Two new articles were added (currently articles 15 and 18) that recall the faculties conceded February 7, 2003.⁸⁶ These articles have a dual purpose, on the one hand to allow the execution of the trials at the local level even with the lack of personnel holding a doctorate in Canon Law, and on the other hand, not to

82. See CODE OF CANON LAW, *supra* note 39, can. 1717 §2; see also CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1468 §2.

83. See *Motu proprio*, *supra* note 3, at art. 19.

84. See Congregation for the Doctrine of the Faith, *Sacramentorum Sanctitatis Tutela*, (2001), available at <http://www.bishop-accountability.org/resources/resource-files/churchdocs/SacramentorumAndNormaeEnglish.htm> (last visited Sept. 27, 2011).

85. See *Motu proprio*, *supra* note 3, at art. 19.

86. *Id.* at arts. 15 & 18.

block the progression of a trial for purely procedural reasons. The risk before this change was that the violation of procedural laws could lead to subsequent pleadings being nullities, which would in turn lead to an excessively long trial or worse, the dismissal of a case for reasons instead of substantive ones.

A. *Constitution and Competence*

The Tribunal within the Congregation for the Doctrine of the Faith has actual jurisdiction on all crimes listed in the Substantive laws and geographically for the Latin and the Eastern Catholic Churches. Judges in the Tribunals are the Fathers of the Congregation, specifically the Cardinals and Bishops that are members of the Congregation. The Prefect of the Congregation can also nominate judges whose prerequisites are codified in article 10.⁸⁷ The articles that follow, eleven through thirteen, are dedicated to the internal organization of the Tribunal, while article 14 is dedicated to the personnel of the lower Tribunals.⁸⁸

Article 15 allows the Congregation for the Doctrine of the Faith to exempt individuals in articles ten through fourteen of the *motu proprio* from the prerequisite of holding a Doctorate in Canon Law.⁸⁹ This exemption does not affect Can. 1421 CIC and 1087 CCEO. These articles establish that in order to be a practicing Judge, a person must hold a license in Canon Law as a bare minimum and if the candidate were a lay person, he may only be appointed to form a Judge panel. The exemption from the requirement of the Priesthood seems to mean that both men and women may be appointed as lay persons to the position.

Additionally, article 18 gives the Congregation the faculty to reform and cure the pleadings and court documents done in lower Courts that violate procedural laws, upon the Congregation's request, or in accordance with Can. 1717 §1 CIC and 1468 §1 CCEO.⁹⁰ In order to do so, the Ordinary or Hierarch has to conduct an investigation upon receiving plausible information of the commission of a crime.

87. *Id.* at art. 10. ("It is necessary to nominate judges who are priests and of a mature age, holding a doctorate in Canon Law, with good customs, particularly distinguished for their prudence and legal experience, even if they are contemporaneously judges or counselors in another Dicastery in the Roman Curia.")

88. *See id.* at arts. 11–14.

89. *See id.* at art. 15.

90. *See id.* at art. 18.

This *facultas sanandi* shows the *motu proprio* does not intend for the Congregation for the Doctrine of the Faith to substitute the lower courts in the initial investigation, and the avocation of the trial to the Congregation is allowed by article 16 only under particular circumstances. The lower courts are not expected to give up their right and duty by passing the case on to the Congregation. Article 18 is a practical tool to make up for possible shortcomings of the lower courts, but obviously, this is not an incentive to treat these cases superficially.

Before further delving into judicial organization, while I stress that the *motu proprio* does not intend to deviate from the common law, the *motu proprio* is composed of a few brief articles, and I will attempt to show the discrepancies between these and the codified laws.

First, the important modification to the previous article 17 (now article 21) established in accord with the 1962 *Instructio*,⁹¹ was the obligatory nature of the judicial trial.⁹² This is what Can. 1342 §2 CIC and 1402 §2 CCEO now establish. They require the use of a trial if perpetual penalties may be imposed, such as dismissal from the clerical state or deposition. Currently, because of an exemption given in 2003, included as paragraph 2 of article 21, besides a trial, an administrative procedure can be initiated within the Congregation and in local courts. The procedure is regulated by Can. 1720 CIC and 1486 CCEO, and is sometimes referred to as “reinforced” because the councilors deliberate with their votes,⁹³ and it can result in the direct referral to the Holy Father for the dismissal from the clerical state in the most serious of cases. In both the judicial and administrative processes, all penalties can be inflicted except the perpetual penalties that can only be imposed by the Congregation (if the trial takes place under their jurisdiction) or on its mandate (in case the trial takes place in local courts).

B. *Judicial Order*

This all seems like a practical confirmation of the reversal of the principle contained in the Code, of preferring the judicial as opposed to the administrative process; although article 21 recalls verbatim what is said in the 2001 version of article 17, suppressing the *nonnisi* disposition that

91. See *Instruction of the Supreme Sacred Congregation of the Holy Office: Instruction on the Manner of Proceeding in Causes involving the Crime of Solicitation* (1962), available at http://www.vatican.va/resources/resources_crimen-sollicitationis-1962_en.html (last visited Sept. 27, 2011).

92. See *Motu proprio*, *supra* note 3, at art.21 (previously 17).

93. See CODE OF CANON LAW, *supra* note 39, can. 1720 §2; CODE OF CANONS OF THE EASTERN CHURCHES, *supra* note 40, can. 1486.

indicated the obligation to utilize the judicial process. Though §2, n.1 allows the Church to proceed administratively both on the impulse of the local Ordinary, without the attachment of a reason to justify this decision (such as just cause contained in can. 1342 §1 CIC or in severe cases such as the *facultas dispensandi* conceded in 2003), even if the decision to file will certainly be made according to justifiable and acceptable criteria.⁹⁴ Conversely, n.2 in the same paragraph provides the possibility of bringing the case directly to the Holy Father only when the crime has a two-fold requirement: it has to be severe and its commission must seem founded after giving the accused the opportunity to defend himself.⁹⁵ Even if the choice adopted by the legislature has shown great efficiency in prosecuting the most serious of crimes over the years, we should not forget that the preference of the judicial process regulated by the codes and not denied by the m.p. *Sacramentorum sanctitatis tutela* does not favor only the accused, but also the individuals that are called to judge him, so that their decision will be a carefully pondered one and they can reach moral certainty. It also ensures that the judicial process aims to serve everyone. In this sense, the hope is that the judicial process will not be supplanted by the administrative process, especially when the administrative process does not offer the same guarantees of moral certainty, but the administrative process can also be justified and desirable.⁹⁶

Another modification introduced in 2003 and stressed in the current version by article 27 concerns the scope of the right of the accused to defend himself.⁹⁷ It establishes that the only way to appeal administrative documents from the Congregation is directly to the Congregation itself within sixty days, excluding the appeals process in article 123 of the *Pastor bonus* constitution and it also specified the appeal to the Apostolic Signatura. Of course, different people are called to review and decide the appeal than those who approved the appealed decrees, but this exception to the common

94. See *Motu proprio*, *supra* note 3, at art.21(1) (previously art. 17).

95. See *id.* at art.21(2) (previously art. 17).

96. See P. Ciprotti, *Diritto Penale Canonico*, 11 Enciclopedia giuridica Treccani 13 (1990) identified the reasons that might make one decide against a trial and the subsequent administrative procedure:

1) [T]hat the offender does not contest the commission of the crime and admits he is guilty of it; in this case, the need for certainty is satisfied outside of the courtroom and a trial would be superfluous because a just sentence will still be imposed; 2) that the information of the crime has not been divulged or is not easily spread, and an ordinary penal trial would be unadvisable, because of the risk of societal damage that would negate the reparation to the social damage that the sanction seeks to achieve, thereby also causing a useless injury to the offender.

97. See *Motu proprio*, *supra* note 3, at art. 27.

laws in force for all the Dicastries of the Roman Curia would appear not entirely justified.

Staying on the same topic of the accused's right to defend himself, article 24 stresses the prohibition to communicate to the accused and to his patron the name of his accuser, when the crime surrounds the sacrament of Penance.⁹⁸ Compared to the *Crimen sollicitationis* laws, that do not allow exceptions, article 24 allows the communication of this information with the consent of the accused. As indicated in the third paragraph of the article, the principal concern is that of avoiding whatever type of violation of the sacramental seal and it applies only to crimes against the sacrament of Penance. However, the position of the accused is undoubtedly weakened by this prohibition and thus paragraph 2 of the same article recommends that the Tribunal carefully evaluate the credibility of the accuser.

Lastly, considering that these laws are the ones in force within the ecclesiastic community, exclusively concerning the dispositions for the Canon procedure relative to the prosecution and punishment of the *delicta graviora*, the absence of any reference to civil authorities is not surprising, because in any case, a Catholic's duties towards their nations as citizens are not diminished by being Catholic.

CONCLUSION

In conclusion, the new laws on the most serious crimes cannot be adequately explained if we do not take into account the incidence of the crime of abuse of minors in the life of the Church in the past few years and the tenaciously proposed efforts by the Holy Father to promote even on a judicial level, tools that enable the Church to protect the victims of these abuses by impeding the repetition of these criminal acts. All this must be done while taking the current situation the entire Church is in into account. There is no doubt that the current legislation can help combat criticism, especially if it is compared to the previous legislation, and not just from a technical standpoint,⁹⁹ and among the possible critical future changes is the harmonizing of these laws with the general canon law contained in

98. See *id.* at art. 24.

99. See J. Llobell *Contemperamento tra gli interessi lesi e i diritti degli imputati: il diritto all'equo processo*, in D. Cito *Processo penale e tutela dei diritti nell'ordinamento canonico* 63-143 (2004). The considerations made by J. Llobell are still very current because they highlight how these seemingly technical and pragmatic issues can mean a compression of the rights of the faithful that is not always justifiable.

both the Latin and Oriental Codes of Canons. I think this contribution¹⁰⁰ seems to foreshadow a revision of the penal laws contained in the VI Book of the 1983 Code, to conform it to the circumstances that have been maturing over the course of the past few years, so as to have an adequate tool to confront the grave discipline problems there have been.

Still, the hope is that this penal and judicial emergency that is coming to light in the lives of God's people, will serve to promote the crucial importance of not just having adequate laws, but where possible, to also have faithful that are ready to collaborate with the onerous duty of Pastors to protect the common good of the ecclesiastic community.¹⁰¹

100. See Pontifical Council, *L'influsso del Cardinale Ratzinger nella revisione del sistema penale canonico*[The Influence of Cardinal Ratzinger in the revision of the canonical penal system] (2010), in 161 *La Civiltà Cattolica* 430 (2010), available at http://translate.google.com/translate?hl=en&sl=it&u=http://www.vatican.va/resources/resources_arrieta20101204_it.html&ei=JSx5TrPNFMi1twf5huEL&sa=X&oi=translate&ct=result&resnum=1&ved=0CCkQ7gEwAA&prev=/search%3Fq%3DL%25E2%2580%2599influsso%2Bdel%2BCardinale%2BRatzinger%2Bnella%2Brevisione%2Bdel%2Bsystema%2Bpenale%2Bcanonico%26hl%3Den%26prmd%3Dimvns.

101. See CODE OF CANON LAW, *supra* note 39, can. 392 (among the functions that configure the Episcopal ministry, can. 392 CIC underlines the duty of diocesan Bishops to promote the Church's universal discipline, while being vigilant against abuses especially concerning the ministry of the Word, celebration of sacraments, the cult of God and the Saints, and the administration of goods).