IX. The Preliminary Investigation for Penal Cases: Some Thoughts on Process

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In cases where it appears that a canonical delict has been committed, the (diocesan or religious) Ordinary is to conduct a preliminary investigation (Canon 1717 and following). It might be helpful here to review some of the factors involved in such an investigation.

Any canonical penal trial must begin with a preliminary inquiry which has as its purpose to enquire about: (1) the facts, (2) the circumstances, and (3) the responsibility of the accused.

Before proceeding with this investigation, we must keep in mind that sometimes there are simultaneous proceedings in the secular courts (either criminal or civil). It might be appropriate to postpone any formal canonical action until the secular proceedings are completed, so as to avoid "discovery" issues, and to risk muddying the waters. **On the other hand, the bishop would need some type of "process" to justify removing a priest from active ministry and placing him on administrative leave.**

The purpose of the preliminary investigation phase is to gather evidence (testimony, documents, etc.) leading to an appropriate degree of certitude regarding the offense. Its purpose is not to prove guilt or impose a penalty; this is the role of the subsequent penal trial or procedure. In other words, is there sufficient smoke (fumus juris) to consider that there is a fire?

The information the Ordinary receives must have a semblance of truth (Canon 1717, §1); it can be supported by other data on file in the chancery (i.e., past events).

By decree (see Canon 1719), the Ordinary names a priest delegate to conduct the inquiry. It is preferable that the ordinary remain one step removed from the actual process to allow for latitude later on if something has to be corrected or adjusted.

As to the responsibility of the accused, it would be important, from the very beginning of the inquiry, to determine (if possible) if there was indeed an intention to do something wrong, a mens rea on the part of the accused. This is an essential element of a canonical delict, for, without it, there is no delict in the formal sense of the term. Although the law presumes imputability, any presumption can be overturned by proof to the contrary.

The delegate cannot later serve as a judge in the process (Canon 1717, §3). Therefore, it would be important to keep this in mind when appointing the delegate.

Experience show that the diocesan attorney should **not** be the person to conduct this preliminary inquiry. The procedures and methods are quite different when it comes to civil or criminal law issues, and, once again, the waters can easily become muddied. Likewise, the diocesan attorney's priority would be to protect the diocese, not the accused, and this could lead to a conflict of interest.
The Ordinary (or the delegate) will determine how to proceed (through personal interviews, telephone conversations, etc.). Regardless of approach, it is essential to observe Canon 220 on the right to privacy and reputation.

Before the Ordinary decides anything on the matter, and after receiving the statements of those being interviewed and gathering the preliminary facts, he should hear the accused and the promotor of justice, and also, if he deems it prudent, two judges or others who are expert in the law. This is not a formal interrogation (which will follow later), but, rather, a consultation. Appropriate arrangements should be made for the accused to have suitable canonical and civil law advice.

If this is the first time that the Ordinary (or delegate) is intervening with the priest in the situation, is it not fair to ask the accused priest, on the spot, to resign his parish or to take irrevocable steps that would damage his rights? This is particularly important if the accused does not yet have canonical or civil counsel.

We should always keep in mind the fact that the accused is in a most vulnerable position at this moment. Very often, the accusation has come out of "nowhere" and the accused is at a loss to explain what happened.

The statements of those interviewed should be taken under oath, recorded verbatim, and signed, so that they can become proofs to be used if a formal trial is to be held later. There should be a priest notary (who will carry out the regular functions ascribed to the notary). Witnesses can be heard anywhere, since this is not yet a judicial procedure. (We cannot impose an oath, however, on the accused - Canon 1728, §2.)

If it is a case subject to the Congregation for the Doctrine of the Faith, having gathered sufficient information, the Ordinary (or the delegate) can then refer the matter to the diocesan or consultative panel (by whatever mane it is known - Review Board, Advisory Committee, etc.) for a preliminary review of the situation. The board could consider the reputation of the person making the compliant; anonymous letters are not used, unless there are other indications; it could, however, if it saw fit, act on rumors.

Experience shows that it is important to share with the consultative panel copies of all the information received, and not simply rely on the delegate's version of the facts; there can unwittingly be bias against the accused.

After examining the complaint and other factors, the panel could determine that there is no credible bias to the information received, and recommend that the matter be dropped. Or, it could state that it considers a judicial review by undertaken. Especially, at this point in the inquiry, we should keep in mind that the panel's role is consultative and the Ordinary is not legally bound by its recommendation.
Of course, the diocesan attorneys might not agree with this, and say that the diocese is opening itself up to accusations of negligence if the bishop does not go along with the consultative panel's recommendation.

If the panel is meeting, it is desirable that the promotor of justice participate in the discussion. The promotor will then have a better sense of what to do should the Ordinary decide to proceed with a process.

If we are dealing with one of the reserved cases, the Ordinary, once the preliminary investigation has gathered appropriate information, transmits this information to the Holy See (usually the Congregation for the Doctrine of the Faith - CDF). Otherwise, he proceeds on his own. The ordinary shout would prepare a votum or recommendation to assist the CDF to determine the next steps to be taken.

If the statute of limitations (i.e., canonical prescription) determines that the right to process a case has expired, and if it is a CDF case, the Ordinary is to request a dispensation from the norms of Canons 1362-1363 if he wishes to proceed with the case.

Once the preliminary inquiry has begun, the Ordinary or the presiding judge can invoke the provisions of Canon 1722 (on "administrative leave") in regard to the accused. It would be fitting that the accused be given the right of defense and that the promotor of justice be heard (keeping in mind that the Code does not call for mandatory intervention of the accused in this initial stage of the process. It would certainly not be appropriate to impose such measures without hearing the accused).

If the ordinary decides to proceed to a canonical trial, and if it is not a CDF reserved matter, he issues a second decree, indicating that the matter is to be remanded to the instruction and penalty phase of the process (Canon 1719). This decision is based on a number of points:

- Whether it appears that a canonical crime (delict) has indeed been committed (keeping in mind that not all sinful conduct is a canonical crime or delict);
- Whether the period of prescription has elapsed or not (or if, in CDF cases, the dispensation granted);
- Whether the accused is imputable for the act by reason of malice or culpability;
- Whether it is expedient in the light of Canon 1341 to initiate the process for declaring or inflicting a penalty;
- Whether an extra-judicial decree can be issued, or whether the case is one which requires a formal trial.

The decree must state the conclusion arrived at whether he has moral certainty concerning the sufficiency of the proofs, and, on that basis, whether to undertake the instruction and penalty phase of the penal process (see Canon 1718, §1).
Before issuing the decree, the Ordinary can consult two judges or legal experts.

The promotor of justice would then be asked to prepare an introductory *libellus* ("bill of complaint"). It is important, when determining the grounds, to make certain that the appropriate questions are asked. Reference should be made in the *libellus* to the presumed existence of a canonical delict, to the required responsibility (imputability), and to the eventual penalty to be imposed.

The Ordinary might decide that, although the accused priest did commit the offenses, he is laboring under serious psychological problems which call for his being placed in treatment, or at least call for an intensive psychological evaluation.

Also, we must keep in mind that there is a major difference between 'stupid" behavior, or 'imprudent" conduct, and a formal canonical delict.