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Confidentiality and the duty to report

JUAN IGNACIO ARRIETA

A Rescriptum *ex audientia*, granted by the Holy Father to the Substitute of the Secretariat of State on 6 December last and signed by the Cardinal Secretary of State, promulgating an Instruction *On the Confidentiality of Legal Proceedings*, was published today. This Instruction is intended to specify the degree of confidentiality with which news or reports of sexual abuse committed by clerics or consecrated persons against minors and other subjects determined herein must be handled, as well as any conduct by ecclesiastical authorities that might tend to silence or cover them up. As will be seen, the purpose of the new Instruction is to erase in these cases the subjection to what is called “papal secrecy”, instead bringing the “level” of confidentiality, duly required to protect the good reputation of the persons involved, back to the normal “official secrecy” established by can. 471, 2nd CIC (can. 244 §2, 2nd CCEO), which each Pastor or the holder of a public office is required to observe in different ways depending on whether they are subjects who have the right to know said information or whether, on the other hand, they do not have this right.

The document is intended to give certainty on how to behave in these situations which, in some cases, particularly for sacred ministers, may touch upon indispensable moral duties of secrecy. The Instruction also follows on from other measures recently adopted by the Holy See, especially following the meeting of the presidents of the Episcopal Conferences held at the end of February last year. The Apostolic Penitentiary also intervened in these matters with a Note of 29 June last *on the importance of the internal forum and the inviolability of the sacramental seal*, in the context of which the Instruction now promulgated should also be seen.

In fact, without directly mentioning the papal secret, the motu proprio *La tutela dei minori* (*The protection of minors*), of 30 March 2019, and Art. 3 of the contextual Vatican Law no. CCXCVII *on the protection of minors and vulnerable persons*, of 26 March 2019, imposed on the entire Holy See the obligation to report this type of crime committed by employees or if it in any case occurred in Vatican territory, with the sole exception – of course – provided by the sacramental seal that must always be respected the priest who confesses (art. 3 §§1, 3 Law no. CCXCII). Subsequently, on 7 May 2019, the motu proprio *Vos estis lux mundi*, which does not even mention papal secrecy or – to consider it evident – the sacramental seal, extended the obligation to report illegal conduct by clerics or consecrated persons, including sexual acts with adults carried out with abuse of authority and guilty silence on conduct of this kind in the course of ecclesiastical investigations initiated against those responsible for these crimes. *Vos estis lux mundi* imposed on clerics and consecrated persons throughout the Church the obligation to report any information on such conduct, specifying that under no circumstances would such reporting be considered a “violation of official secrecy” (art. 4 §1).

These pontifical measures went far beyond the exclusive competence granted to the Congregation for the Doctrine of the Faith in the motu proprio *Sacramentorum sanctitatis tutela*, of 30 April 2001 and subsequently amended, which limited the task of the Dicastery to abuses against minors and incapacitated persons committed exclusively by clerics. The obligation to denounce prescribed by these norms required, for reasons of normative consistency, a careful examination from the perspective of the pontifical secret, which the various documents had not mentioned. In fact, the aforementioned secret is nothing more than a special duty of confidentiality – more strictly protected by canonical law and assumed through a specific formula of oath – imposed on certain categories of persons (bishops, curia officials, etc.) in relation to certain matters which they must deal with by reason of their office. It was the case, however, that art. I, §4 of the Instruction *Secreta Continere*, of 1974, which until today has regulated the “pontifical secret”, mentions among the subjects subject to the said norm the denunciations, the trial and the decisions concerning serious crimes against morals: in practice, all the conduct which is the object of the recent measures.

Such would be the context and motivation of this brief Instruction which, since it could not have been otherwise, concerns only the legal obligations of a subject which, in certain aspects, may also involve (mainly in the cases of priests) indispensable moral duties of silence which no human legislator has the capacity to modify. It is also a text in which the five paragraphs that compose the text are closely linked to each other, complementing each other to indicate together the correct conduct to be followed.

The Instruction does not in any way counter the absolute duty to observe the sacramental seal, which is an obligation imposed on the priest by virtue of the position he occupies in the administration of the Sacrament of Confession, and from which not even the penitent himself could free him. Nor does the Instruction touch upon the duty of strict reservation acquired possibly outside of confession, within the whole forum called "extra-sacramental". Finally, the Instruction does not concern other possible moral duties of confidentiality on account of circumstances entrusted to the priest in the sense described in n. 2 of the cited Note of the Apostolic Penitentiary.

As previously mentioned, the Instruction begins by excluding from the category of “pontifical secret” – with an implicit modification, therefore, of art. I §4 of the Instruction *Secreta Continere* – both the subjects described in art. 1 of the motu proprio *Vos estis lux mundi* (abuse of authority in forcing sexual acts, sexual abuse of minors or vulnerable persons, concealment of these conducts in ecclesiastical inquiries), and those contained in art. 6 of the motu proprio *Sacramentorum sanctitatis tutela*, as currently in force, which concerns crimes of paedophilia involving children under 18 years of age or with incapacitated subjects, as well as crimes of child pornography involving young people under 18 years of age (in accordance with the correction of art. 6 §1, 2nd now effected by another *Rescriptum ex audientia* to which I will later refer). All such conduct, therefore, is no longer the subject of pontifical secrecy, even if it is committed, as indicated in no. 2 of the Instruction, in conjunction with other crimes that are also the subject of pontifical secrecy (e.g. other crimes against morals or against the Sacraments within the competence of the Congregation for the Doctrine of the Faith and mentioned in the Instruction *Secreta Continere*).

However, and this is an important detail, the fact that knowledge of these criminal actions is no longer bound by the “pontifical secret” does not mean that it provides the freedom to make it public by those in possession of it,

which in addition to being immoral, would undermine the right to the good reputation of persons protected by can. 220 CIC. In this regard, no. 3 of the Instruction refers to those who are in any way required to officially handle such situations in the normal secrecy or official confidentiality indicated in canons 471, 2° CIC and 244 §2, 2 CCEO, as in the case of art. 2 §2 of the motu proprio *Vos estis lux mundi*. This means that persons informed of the situation or in any way involved in the inquiries or investigation of the case are required to "guarantee security, integrity and confidentiality", and not to share information of any kind with third parties unrelated to the case. Among those involved in the trial, once formally initiated, there is obviously the accused, so the new measure also promotes the adequate right of defence.

In the following two numbers of the Instruction, however, we find two other important clarifications to the duty of confidentiality. One is contained in no. 5, which, also following what is indicated by Art. 4 §3 of the motu proprio *Vos estis lux mundi*, prohibits the imposition of any kind of "bond of silence with regard to the facts of the case" on the subject who has filed the report or the complaint to the authority, or on those who allege to have been harmed, or on the witnesses who intervene in the case. The only exception to this prohibition concerns the accused himself who, in this type of measure, is regularly subjected from the beginning to various kinds of prohibitions and precautionary measures, depending on what the concrete circumstances are. Professional secrecy, therefore, concerns all those who, by reason of their role, must intervene in the handling of the case.

The other important perimeter of official secrecy, which is now further reaffirmed, always in line with the norm of art. 19 of the motu proprio *Vos estis lux mundi*, is the reminder of the due observance of the state laws established in the matter. Therefore, no. 4 of the Instruction reaffirms that the professional secrecy which must be observed in these cases may in no situation be an obstacle to "the fulfilment of the obligations laid down in all places by the laws of the State, including any reporting obligations [of possible news of a crime], and the execution of the enforcement requests of the civil courts" which, naturally, could oblige the delivery, for example, of documentary material of the external forum.

This, in essence, is the content of the new Instruction which, in line with the rules given in recent months on the subject, slightly corrects the Instruction *Secreta continere*, bringing greater coherence to the disciplinary system as a whole, and always on the sidelines of the moral duties of secrecy and confidentiality that a positive law is not able to dissolve.

At the same time as the Instruction *On the confidentiality of legal proceedings* was promulgated, a different document on a similar subject was published today. It is another *Rescriptum ex audientia*, this time unusually granted to two cardinals – the Secretary of State and the Prefect of the Congregation for the Doctrine of the Faith – to be inscribed in the periodic update of the norms of the motu proprio *Sacramentorum sanctitatis tutela*, concerning the treatment of the most serious crimes that fall within the competence of the Congregation for the Doctrine of the Faith, as the juridical experience of the proper conduct of trials requires. The changes introduced on this occasion, which replace previous texts of the cited motu proprio, are fundamentally two.

The first modification concerns the suppression of the preceptive requirement according to which, until now, the role of lawyer and prosecutor had to be fulfilled by a priest, both when the case was being studied by the diocesan courts, and when it was examined by the Congregation for the Doctrine of the Faith. From now on this role can also be held by a lay faithful who possesses the requisites established for this purpose by the legal provisions of the Church.

The other amendment that the aforementioned Rescript makes to the motu proprio *Sacramentorum sanctitatis tutela*, as already noted, relates to the increase to 18 – rather than 14, as it has been so far – of the age of subjects depicted in images as a requisite for defining the crime of child pornography. This decision too, despite the difficulties it may generate in determining the age, represents a consistent consequence of the general raising to 18 years of the age limit for constituting the crime of paedophilia established on the occasion of the amendments made to the original text of the motu proprio of May 2010.

Contribution of Professor Giuseppe Dalla Torre, former president of the Vatican City State Tribunal on the publication of the Rescript of the Holy Father Francis *On the confidentiality of legal proceedings*

An act that facilitates collaboration with the civil authorities

GIUSEPPE DALLA TORRE

The provision with which Pope Francis abolishes the pontifical secret for cases of sexual abuse lends itself to a dual reading.

The first is, obviously, within the Church: the provision in question modifies the canonical legal system, the original and therefore independent and autonomous system, thus aligning it with regard to the issue of abuse with the levels of transparency and guarantees now assured by the most evolved legal orders. In substance, the reasons that in the past had led the ecclesiastical legislator to introduce, among the matters subject to pontifical secrecy, the gravest offences reserved to the Congregation for the Doctrine of the Faith, have given way to matters that are now perceived as more elevated and worthy of special protection. First and foremost the primacy of the human person offended in his or her dignity, even more so for reasons of weakness due to age or natural incapacity. And then this full visibility of the passages in the canonical procedures intended to punish the criminal act, which contributes over time to the pursuit of justice and the protection of those involved, including those who can be unjustly affected by accusations that turn out to be unfounded.

But this latter provision of Pope Francis on the confidentiality of canonical proceedings on the issue of abuse also comes to have a particular relevance external to the canonical order. This is not a monad that, in history, exists in isolation with respect to the other orders and other legal experiences; and on the other hand the faithful are at the same time citizens and, as such, subject to the laws of their respective states, as well as to ecclesiastical provisions. And the sad phenomenon of sexual abuse, as is well known, constitutes a criminal offence in canon law, as well as in secular law.

The fall of papal secrecy has general effects on the entire course of the prosecution, at canonical level, of dishonest conduct: from the prodromal phase of the denunciation, to the phase of the preliminary investigations and of the preliminary investigation, to the phase of the proper debate, up to the decision. It concerns both the procedures that take place at the local level, and those that take place in Rome, at the Congregation for the Doctrine of the Faith. The official secrecy provided for by canon 471 § 2 of the Code of Canon Law (canon 244 § 2, 2nd of the Code for the Eastern Churches), to be respected in every phase and directed to protect the good reputation, image and private sphere of all the persons involved, remains understandable, so that the relative information must be treated in such a way as to guarantee the security, integrity and necessary confidentiality. But on this point the measure is clear: “Professional secrecy shall not prevent the fulfilment of the obligations laid down in any place by the laws of the State, including any reporting obligations, and the execution of the enforcement requests of the civil courts”.

This means that, should the State law provide for the obligation to report on the part of those who are informed of the facts, the removal of papal secrecy and the clarification of the limits of official secrecy allow the fulfilment of the provisions of the law, thus promoting full cooperation with the civil authorities and avoiding unlawful incursions of civil authority in the canonical sphere. The same is true of executive measures of the state judicial authority, the non-compliance with which would subject – among other things – the competent ecclesiastical authority to serious sanctions for violation of criminal law.

It should be noted that the Instruction now published is careful to specify that no bond of silence regarding the facts of the case may be imposed, by any authority, on those who report abuses, those who allege to have been harmed, or witnesses. This thereby closes the circle of guarantees that the papal provision is intended to ensure.

It has been said that the Instruction is an internal act of the Church, but with repercussions outside the canonical order. It is obvious, however, to specify that, as far as the exercise of secular justice in the matter in question is concerned, it will be necessary to adhere the internal legislation of each State. For example, in the case of

systems that provide for the prosecution of crimes of abuse only on complaint by one party, the fall of papal secrecy and, in the sense mentioned, of official secrecy, can only operate once the injured party has activated criminal proceedings with the due request to the judicial authority to proceed against the perpetrator of the crime. Furthermore: in the States with a concordatory regime, the new pontifical provisions will be implemented in harmony with the specific norms eventually in force for the protection of the sacred ministry.

Finally, there remains a fundamental difference depending on whether the requests of the civil authorities are addressed to the local ecclesiastical authorities (Bishops, Major Superiors in the case of religious), or to the Holy See and, more precisely, to the Congregation for the Doctrine of the Faith. In the latter case, in fact, they must take place through those forms of judicial cooperation between different jurisdictional authorities, for the performance of activities relating to a process (such as the assumption of information or documents, etc.), known as letters rogatory. In the first case, instead, such requests will take place according to the internal provisions of the individual state systems.

Certainly, in both cases, the proceeding civil authority will have to formulate the requests with detailed, precise and not generic indications, but this is a problem entirely internal to the state systems, which falls outside the sphere of competence of the canonical system.

In conclusion it may be said that the changes to the pontifical secret now effected by Pope Francis are part of the long process aimed at the repression of an abominable phenomenon, of which the *motu proprio Vos estis lux mundi* of 7 May last constitutes a fundamental milestone; on the other hand, they contribute to favouring the passage of the canonical order from an attitude of distrust and defence with regard to the state systems, to an attitude of trust and healthy collaboration. And this is in line with what was indicated by Vatican Council II in par. 76 of the pastoral constitution *Gaudium et spes*.