

Rights' Protection and Proportionality of Punishment in the Relationships between Canonical and Secular Jurisdictions. The Bis in Idem's Prohibition in the Case Law of European Court of Human Rights and Italian Court of Cassation*

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ABSTRACT

The paper examines the possible applicability of the *ne bis in idem* principle between the Italian and canonical jurisdictions, with reference to cases of sexual abuse of minors committed by clerics. Starting from an analysis of Italian jurisprudence, specifically the Supreme Court's decision (Judgment No. 34576 of 2021), the study highlights the non-applicability of the prohibition of *bis in idem* between the two systems due to their distinct and sovereign nature. The paper also proposes, in a *de iure condendo* perspective, the adoption of bilateral instruments to promote collaboration between the State and the Church, respecting their mutual autonomy and the principle of proportionality of penalties.

Il contributo esamina la possibile applicabilità del principio del ne bis in idem tra la giurisdizione italiana e quella canonica, con riferimento ai casi di abuso sessuale su minori commessi da chierici. Muovendo dall'analisi della giurisprudenza italiana, e in particolare della sentenza della Corte di cassazione n. 34576 del 2021, lo studio evidenzia l'inapplicabilità del divieto di bis in idem tra i due ordinamenti, in ragione della loro distinta natura e sovranità. Il contributo propone altresì, in una prospettiva de iure condendo, l'adozione di strumenti bilaterali volti a favorire la collaborazione tra Stato e Chiesa, nel rispetto della reciproca autonomia e del principio di proporzionalità delle sanzioni.

Summary: 1. Foreword. – 2. The possible configurability of *ne bis in idem* between Italian and canonical jurisdiction. The Italian legitimacy jurisprudence's position – 3. The canonical legislation on child abuse. – 4. Concluding remarks. Art. 23, cpv. of the Lateran Treaty and *de iure condendo* perspectives.

1. Foreword

Relations between religious and state criminal jurisdictions provide a privileged perspective for the investigation concerning the protection of personal rights in the application of the principle of proportionality of punishment.

The issue that has arisen with respect to preventing and combating crimes of sexual abuse of minors has questioned Italian jurisprudence, on the basis of the ECHR jurisprudence, on the compatibility with *ne bis in idem* principle of those hypotheses in which state criminal courts impose a criminal sanction against a person who has already been judged in the canonical court with the imposition of the penalties set forth in cann. 1331 ff. of the *Codex iuris canonici*.

The *ne bis in idem* principle states that a defendant who has already been acquitted or convicted by a judgment that has become irrevocable cannot be subjected to criminal proceedings again for the same deed. It is contemplated as a procedural guarantee of the person in several jurisdictions of both *civil law* and *common law*¹.

Regarding Council of Europe member states, the prohibition of *bis in idem* is enshrined, as known, in Article 4 of Protocol No. 7 to the European Convention on Human Rights². The provision states that

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¹ Cf., *inter alios*, C.F. STUCKENBERG, *Double Jeopardy and Ne Bis in Idem in Common Law and Civil Law Jurisdictions*, in D. K. BROWN – J. IONTCHEVA TURNER – B. WEISSER (eds), *The Oxford Handbook of Criminal Process*, Oxford, 2019, 457-475.

² Article 4 (7) of the ECHR, under the heading of the *Right not to be tried or punished twice*, reads as follows: «1. No one shall be prosecuted or sentenced criminally by the jurisdiction of the same state for an offense for which he or she has already been acquitted or convicted following a final judgment in accordance with the law and criminal procedure of that state. 2. The

“No one may be prosecuted or criminally convicted by the jurisdiction of the same state for an offense for which he or she has already been acquitted or convicted following a final judgment in accordance with criminal law and procedure of the state”³.

The most problematic issues before the European Court of Human Rights (ECHR) in the application of this principle have mainly concerned the compatibility of the provision of two penalty track, criminal and administrative, for the commission of the same fact with the prohibition of *bis in idem*⁴.

In November 15, 2016 ruling, *A and B v. Norway*, on the subject of tax violations, ECHR clarified, on this point, that the provision in tax matters of a double track, criminal and administrative, cannot be open to review and is not itself contrary to the prohibition of double jeopardy in the presence of a “close substantive and temporal connection” between the two proceedings⁵, such as to express an integrated approach of reaction to the offence structured in parallel stages of legal response by different authorities and for different purposes and compatible with the need to safeguard the interests of the individual protected by the principle of *ne bis in idem*, on the one hand, and the special interest of the community in being able to adopt a calibrated regulatory approach in the area in question, on the other. In the case examined, the Court, far from finding that a violation of the prohibition of *bis in idem* had taken place, therefore, took note of the complementary nature of administrative and criminal sanctions, in that the

provisions of the preceding paragraph shall not prevent the reopening of the trial, in accordance with the criminal law and procedure of the State concerned, if supervening facts or new revelations or a fundamental flaw in the antecedent procedure are capable of invalidating the intervening judgment. 3. No derogation from this Article shall be permitted under Article 15 of the Convention». See https://www.echr.coe.int/documents/convention_ita.pdf.

Cf. B. NASCIBENE, *Ne bis in idem, diritto internazionale e diritto europeo*, in *Diritto Penale Contemporaneo*, March 20, 2018, 1-13, available at: <https://archiviopdc.dirittopenaleuomo.org/upload/1791-nascimbene2018a.pdf>; N. MADIA, *Ne bis in idem europeo e giustizia penale. Analisi sui riflessi sostanziali in materia di convergenze normative e cumuli punitivi nel contesto di uno sguardo d'insieme*, Milano, 2020, 21-120.

³ The principle has also been reaffirmed in the EU context by Article 50 of the Charter of Fundamental Rights of the European Union. See Article 50 of the *Charter of Fundamental Rights of the European Union*: «Right not to be tried or punished twice for the same offense. No one shall be prosecuted or convicted for an offence for which he or she has already been acquitted or sentenced in the Union following a final criminal judgment in accordance with the law.». See C. AMALFITANO, R. D'AMBROSIO, *Art. 50. Diritto di non essere giudicato o punito per due volte per lo stesso reato*, in Vv.AA., *Carta dei diritti fondamentali dell'Unione europea*, Milano, 2017, 1015-1042. The principle is also provided in Article 14 (7) of the International Covenant on Civil and Political Rights and Article 20 of the Rome Statute of the International Criminal Court.

⁴ See, with specific regard to the Italian context, the judgment of the EDU Court, Grande Stevens and others vs. Italy - appeals 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 filed on 4.3.2014, available at: <https://hudoc.echr.coe.int/>. Having regard to the application of the principle in the Italian legal system, the Italian Constitutional Court, in its ruling of June 16, 2022, No. 149, declared the constitutional illegitimacy of Article 649 of the Code of Criminal Procedure insofar as it does not provide for the judge to pronounce a judgment of acquittal or not to proceed against a defendant for one of the offenses provided for in Article 171-ter of Law No. 633 of April 22, 1941 (Protection of copyright and other rights related to its exercise, Official Gazette No. 166 of 16-07-1941) who, in relation to the same fact, has already been subjected to proceedings, which have been finally concluded, for the administrative offence - of an essentially criminal nature - referred to in Article 174 bis of the same law. To this end, the Court points out the absence of functional complementarity between the criminal and administrative sanctions, as well as of a mechanism for linking the two proceedings such as to ensure their close substantive and temporal connection.

⁵ «In particular, the respondent State had to demonstrate convincingly that the dual proceedings in question were sufficiently closely connected in substance and in time. That implied not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected. Material factors for determining whether there was a sufficiently close connection in substance included (i) whether the different proceedings pursued complementary purposes and therefore addressed different aspects of the social misconduct involved, (ii) whether the duality of the proceedings concerned was a foreseeable consequence, both in law and in practice, (iii) whether the relevant sets of proceedings were conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate interaction between the various competent authorities to bring about that the establishment of facts in one set was also used in the other set and (iv) whether the sanction imposed in the proceedings which became final first was taken into account in those which became final last, so as to prevent the individual concerned bearing an excessive burden. The connection in time had to be sufficiently close to protect the individual from being subjected to uncertainty and delay and from proceedings becoming protracted over time. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings». Cf. <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22002-11287%22%5D%7D>.

administrative sanction served as a general deterrent and to compensate for the considerable work and costs incurred by the tax authorities in carrying out controls and audits, while the criminal conviction held, in addition to a deterrent function, a punitive purpose with respect to the antisocial omission itself.⁶

Emphasizing the requirement of complementarity and the different purposes that the two punishment tracks fulfill, a similar conclusion could be reached in the relations between state criminal jurisdiction, in view of the different purposes of canonical punishment compared to state punishment.

However, the ECHR has not yet ruled on such a case. Otherwise, the issue was addressed by the Italian Court of Cassation, most recently with the ruling of 18 May 2021, n. 34576, which constitutes the starting point of our investigation.

2. *The possible configurability of ne bis in idem between Italian and canonical jurisdiction. The Italian legitimacy jurisprudence's position*

Two pronouncements of the Italian Court of Cassation, criminal section, concerning the matter of sexual abuse of minors by clerics already convicted in the canonical judgment⁷ offer interesting insights into the issue of the relationship between canonical and state jurisdiction on the procedural level, also in relation to the principle prohibiting *bis in idem*, and allow for a broader reflection regarding Article 23 (2) of the Lateran Agreement.

In the canonical system, too, the principle can be deduced from canons 1440 and 1642 § 2 CIC concerning the division of jurisdiction among the various levels of judgment. The principle, moreover, has been expressly sanctioned in relation to cases of marriage nullity by Articles 9 § 2 and 289 §§ 2-3 of the instruction *Dignitas connubii*⁸, which preclude the court from dealing with the *eadem causa* in the same level of judgment⁹.

In the Italian legal system, the procedural declination of *ne bis in idem* is enshrined in Article 649 Code of Criminal Procedure, although more recently an attempt has been made to hermeneutically reconstruct the strength of the principle as a function of the relationship between domestic law and other jurisdictions (the so-called *international ne bis in idem*)¹⁰ as a principle placed to protect the right of the person.

⁶ *Ibidem*.

⁷ Cf. ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, March 13, 2018, no. 21997. See A. NEGRI, *Distinzione degli ordini e ne bis in idem tra giurisdizione canonica e statale. Riflessioni a partire dalla sentenza Corte di Cassazione No. 34576/2021*, in *Dir. Rel.*, 32, 2021, 826-842.

⁸ Cf. PONTIFICAL COUNCIL FOR LEGISLATIVE TEXTS, *Instruction to be observed in diocesan and interdiocesan tribunals in the handling of marriage nullity cases Dignitas connubii*, January 25, 2005, available at: www.vatican.va.

⁹ Cf. P. LO IACONO, *Conformità per equivalenza, divieto di ripresentare la "medesima causa" e salus animarum. Il difficile equilibrio tra giustizia e legalità*, in *Ius Ecclesiae*, 31, 2019, 543-566; ID., *Considerazioni canonistiche sul divieto di bis in idem (La conformità equivalente sopravvive alla riforma del processo di nullità matrimoniale)*, in *Dir. Rel.* 20, 2015, 61-84; M. FERRANTE, *Sulla configurabilità di un divieto di bis in idem tra il can. 1095, 2 e 3, e diritto di appello avverso il decreto collegiale con valore di sentenza definitiva pronunciato expeditissime*, in *Dir. Rel.*, 25, 2018, 337-352.

¹⁰ Cf., *ex multis*, C. VAN DER WINGAERT – G. STESENS, *The international non bis in idem principle: resolving some of unanswered questions*, in *International Comparative Law Quarterly*, 48, 1999, 779-804; N. GALANTINI, *Il principio del «Ne bis in idem» internazionale nel processo penale*, Milano, 1984; ID., *Il principio del ne bis in idem tra doppio processo e doppia sanzione*, in *Giur. it.*, 167, 2015, 216-223; A. PROCACCINO, *Il ne bis in idem dalla "certezza del diritto" alla certezza del "diritto soggettivo"*, in A. GAITO – D. CHINNICI (ed.), *Regole europee e processo penale*, Padova, 2015, 267-306; G.M. FLICK – V. NAPOLEONI, *A un anno di distanza dall'affaire Grande Stevens: dal bis in idem all' e pluribus unum?*, in *Rivista Associazione Italiana dei Costituzionalisti*, 6, 2015, available at www.rivistaaic.it; G. RANALDI – F. GAITO, *Introduzione allo studio dei rapporti tra ne bis in idem sostanziale e processuale*, in *Archivio penale*, 73, 2017, 103-127; B. NASCIBENE, *Ne bis in idem, diritto internazionale e diritto europeo*, in *Diritto Penale Contemporaneo*, 20 March 2018, 1-13 consultabile all'indirizzo: <https://archiviopdc.dirittopenalenome.org/upload/1791-nascibene2018a.pdf>; C. AMALFITANO, *Dal ne bis in idem internazionale al ne bis in idem europeo*, in *Riv. dir. internaz. priv. e process.*, 38, 2002, 923-960; N. MADIA, *Ne bis in idem europeo e giustizia penale. Analisi sui riflessi sostanziali in materia di convergenze normative e cumuli punitivi nel contesto di uno sguardo d'insieme*, Milano, 2020, 21-120.

On the application of *ne bis in idem* between canonical jurisdiction and Italian state jurisdiction, the Italian Criminal Court of Cassation has intervened on several occasions, most recently in its ruling No. 34575 of May 18, 2021¹¹ which excluded its possible operation.

As early as 2018¹², the same Court had ruled on the relationship between state criminal proceedings and canonical criminal proceedings, affirming the non-existence of procedural preclusion for the establishment of the subsequent trial before state courts against a cleric already convicted in the canonical system for child abuse with the infliction of the sanction of dismissal from the clerical state. In the 2018 ruling, however, the Supreme Court ruled out the application of the *bis in idem* prohibition invoked by the appellant on the grounds that the requirement of *idem factum*, i.e., the full overlapping of the fact judged in the canonical system with the fact subjected to the scrutiny of the state courts, was not deemed proven. The 2021 judgment, on the other hand, holds that the principle of *ne bis in idem*¹³ is not referable to the case before the court through a far more articulate argument that, moreover, takes into account - despite the confusion between the canonical and Vatican systems recorded in the appellant's defense - the peculiar nature of the canonical system as a confessional system, to be clearly distinguished from other state systems, including the system of the Vatican City State.

Based on the preliminary affirmation of the principle's non-applicability to the category of "generally recognized norms of international law" under Article 10 of Italian Constitution¹⁴, in the Court's opinion, the *bis in idem* prohibition cannot be invoked in the present case first of all because of the non-applicability to relations between state jurisdiction and canonical jurisdiction of Article 54 of the Convention Implementing the Schengen Agreement¹⁵, to which the Holy See has not acceded - as, moreover, has not acceded to the European Union - as well as of Art. 4 of Protocol 7 of the EDU Convention, a provision that «is certainly not applicable in cases of double proceedings against the same person for the same fact in two different states, as confirmed by the same case law of the EDU Court»¹⁶. In the same sense, in the absence of bilateral agreements capable of derogating from the principle of territoriality, there is also the reference to the combined provisions of Articles 6 and 11 of criminal code, according to which in the presence of crimes committed in the territory of the State the pre-existence of a judgment formed in the foreign system does not prevent the renewal of the trial also in the Italian

¹¹ Cf. ITALIAN REPUBLIC, COURT OF CASSATION, CRIMINAL SECTION III, sent., May 18, 2021, n. 34576, cit. Cf. N. GALANTINI, *Bis in idem per il cittadino già giudicato dalla giurisdizione ecclesiastica per un fatto contemplato dal codice canonico e sottoposto a giudizio in Italia per lo stesso fatto previsto dal codice penale*, in *Sistema Penale*, November 2 2021, available at the website: www.sistemapenale.it; A. NEGRI, *Distinzione*, cit., and also A. LICASTRO, *La repressione degli abusi sessuali dei chierici e il principio del ne bis in idem nei rapporti tra giurisdizione canonica e giurisdizione penale statale*, in *La legislazione penale* February 9, 2022, available at: www.lalegislazionepenale.eu.

¹² Cf. ITALIAN REPUBLIC, COURT OF CASSATION, CRIMINAL SECTION, May 18, 2018, n. 21997, cit. In argomento cf. A. NOCERA, *Il divieto di bis in idem non opera nei rapporti tra processo canonico e giudizio penale*, in *Il penalista*, 19 giugno 2018, consultabile all'indirizzo: www.ilpenalista.it; P. LO IACONO, *Chierici pedofili*, cit., 481-512; L. BARONTINI, *Rigudicabile in Italia il chierico rimesso allo stato laicale? Il ne bis in idem tra dimensione internazionale e doppio binario sanzionatorio*, in *Diritto Penale e Processo*, 26, 2020, 99-106.

¹³ In the wake of the 2018 ruling, the Criminal Court of Cassation, also in its 2021 judgment, therefore, sets the external limits of operativeness and relevance of the *ne bis in idem* principle, reiterating its conventional nature and expressly excluding its applicability in the case of canonical sanctions against clerics, since the Holy See is not a party to the Edu Convention nor to the Convention Implementing the Schengen Agreement.

¹⁴ «In fact, it has already been affirmed, on several occasions, by this Court, how the principle of *ne bis in idem* does not have the nature, precisely, of a general principle of international law capable of prevailing over the principle of territoriality of Articles 6 and 11 of the Criminal Code (among others, Sez. III, no. 21997 of 13/03/2018, I., Rv. 273158; Sect. 6, No. 54467 of 11/15/2016, Resneli, Rv. 268931, Sect. 1, No. 29664 of 12/06/2014, Spalevic, Rv. 260537; Sect. 2, No. 40553 of 21/05/2013, Tropeano, Rv.256469), as the same can be applied only in the presence of conventions, ratified and made enforceable, between states, binding only the contracting countries within the limits of the agreement reached»: ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, May 18, 2021, No. 34576, cit., 475.

¹⁵ Article 54 of the Schengen Convention states, «A person who has been finally judged in one Contracting Party may not be subjected to criminal proceedings for the same acts in another Contracting Party provided that, if convicted, the sentence has been served or is actually being served at present or, according to the law of the convicting Contracting State, may no longer be served». The Schengen Convention can be found at: <https://eur-lex.europa.eu/>.

¹⁶ In this sense ITALIAN REPUBLIC: SUPREME COURT, CRIMINAL SECTION III, Judgment, May 18, 2021, No. 34576, cited above, 477.

system¹⁷. Nevertheless, as similarly noted by the Supreme Court, a further obstacle to the recognition of the principle of *ne bis in idem* is the provision in Article 649 of the Code of Criminal Procedure, which places this prohibition exclusively on the domestic procedural level.

Greater glimmers would instead seem to solicit, at least with regard to the moment of execution of the sanction, the application of Article 669 of the Code of Criminal Procedure, for which, in the abstract, it does not seem to be possible to exclude the possibility of a computation of the prison sentence inflicted and already served in the foreign system the purposes of the execution of the sentence imposed by the Italian jurisdictional authorities¹⁸. Even this perspective, however, does not seem able to justify the applicability of the *bis in idem* prohibition with respect to the issue submitted to the Criminal Court of Cassation's consideration in 2021, which on the contrary—as it appropriately reiterates—rather than a foreign system concerns a confessional system such as the canonical system, to be distinguished from the Vatican system¹⁹, itself assimilable to other state systems although canon law constitutes its primary source and its primary interpretative criterion²⁰.

Another argument used in the appeal defined by the judgment *de qua* to justify the operation of the principle of international *ne bis in idem* in the relations between the canonical and Italian legal systems is represented by the reference to Article 23, paragraphs 1²¹ and 2²² of the Lateran Treaty, from whose

¹⁷ Case law on this point is almost constant. See ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, Judgment, July 24, 2019, No. 33564, in which it was reiterated that a trial held in a non-EU state does not preclude the renewal of the trial for the same facts in Italy because *ne bis in idem* is not a general principle of international law, applicable as such in the domestic system. The ruling can be found at: http://images.processopenaleegustizia.it/f/sentenze/documento_eDOFN_ppg.pdf. An openness to the recognition of the principle of *ne bis in idem* even in the absence of specific conventions was instead recently professed by the Court of the Republic of San Marino, a non-EU country, April 5, 2020 at the online address: https://www.sistemapenale.it/pdf_contenuti/1589382138_giudice-rimedi-straordinari-san-marino-ne-bis-in-idem-internazionale.pdf, with a note by N. GALANTINI, *Il giudice per i rimedi straordinari di San Marino riconosce e applica il principio del ne bis in idem internazionale*, in *Sistema penale*, May 16, 2020, available at: www.sistemapenale.it

¹⁸ These glimmers, regarding the concrete application of Article 669 c.p.p., seem to exist also in relation to the Vatican system, in the hypothesis that the Vatican jurisdictional authorities convict with a prison sentence a person subsequently sentenced with the same prison sentence in the Italian system. Moreover, Article 138 c.p. itself provides that in the event of a renewal of judgment in Italy, the sentence served abroad is always counted for the purposes of its deduction from the sentence, of the same species, imposed in Italy. And Article 137 of the Criminal Code also applies the same criterion of deduction to pre-trial detention.

¹⁹ Of this, the Court of Criminal Cassation in the 2021 pronouncement gave an account by recalling that «a similar concurrence of jurisdictions with regard to the same fact having criminal relevance subsists in the same relations between canonical authority and jurisdictional authority of the Vatican City State precisely with reference to Crimes in Sexual And Child Pornography Matters»: ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, sent., May 18, 2021, no. 34576, cit., 480. Moreover, it should not be overlooked that Article 22 of the Lateran Treaty provides a specific provision that settles any conflicts of jurisdiction in the case of crimes committed in the territory of the Vatican City State between Italian courts and Vatican courts. In fact, at the request of the Holy See, Italy will provide in its territory for the punishment of crimes committed in Vatican City, except when the perpetrator has taken refuge in Italian territory, in which case proceedings will certainly be brought against him in accordance with Italian laws.

²⁰ Cf. G. DALLA TORRE, *Lezioni di diritto vaticano*, Turin, 2020; J.I. ARRIETA, *Corso di diritto vaticano*, Rome, 2021. Law No. LXXI of October 1, 2008 on the Sources of Law of the Vatican City State states in Article 1 that «the Vatican legal system recognizes in the canonical order the first normative source and the first criterion of interpretive reference». The text of Law No. LXXI can be found in *AAS Supp.*79 (2008), 65-70.

²¹ Article 23(1) of the Lateran Treaty states that: «For the enforcement in the Kingdom (now Republic) of judgments issued by the courts of Vatican City, the norms of international law shall be applied» The appellant complains of a violation of Article 23(1) of the Lateran Treaty in order to have the extrajudicial decree issued by the delegate appointed by the diocesan bishop pursuant to can. 1720 CIC included in the phrase «judgments issued by the Vatican City courts». On this point, the Court correctly noted that: «the applicability of this provision to judgments» of the courts of Vatican City» only (i.e., Tribunal of First Instance, Court of Appeals and Court of Cassation) and not also of ecclesiastical authorities, as, in the present case [...] must be considered to be the delegate of the Bishop who pronounced the decree already mentioned» Thus, ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, sentence, May 18, 2021, no. 34576, cited above, 478.

²² Article 23 (cpv.) of the Lateran Treaty states, «on the other hand, judgments and measures issued by ecclesiastical authorities and officially communicated to the civil authorities, concerning ecclesiastical or religious persons and concerning spiritual or disciplinary matters, shall certainly have full legal effect in Italy, including for all civil effects». The Court, on this subject, pointed out that «the mere provision of 'recognition' in Art. 23, paragraph 2, does not appear to be able to amount to a prohibition of *bis in idem*, they simply entail, instead, that the decision in question, precisely because it is to be enforced also for civil effects (i.e. in a sphere other than the strictly ecclesiastical one and concerning, therefore, the *status* not of a cleric but

interpretation could be inferred the recognition of the civil effectiveness of canonical criminal jurisdiction within the Italian legal system and the applicability of the prohibition of dual jurisdiction. In the appeal, this reading was further comforted by the provision in point 2(c) of the Additional Protocol to the 1984 Concordat Revision Agreement, according to which the phrase «the civil effects of canonical proceedings are to be understood in harmony with the constitutionally guaranteed rights of Italian citizens» would have affirmed the principle of *ne bis in idem* with respect to canonical sentences of conviction, with the consequent preclusion for the state authority to exercise punitive power²³.

The Supreme Court, as already argued in the 2018 ruling, in addition to noting the evident confusion made by the appellant between the Vatican and canonical systems, pointed out that the conventional nature of the *bis in idem* prohibition does not allow proposed interpretation of Art. 23(2) of the Lateran Treaty; nor, likewise, can the interpretation of that provision in the sense of the immediate effectiveness of canonical penal measures, inferable, as on the contrary objected to by the appellant, from the Additional Protocol amending the Concordat, stipulated on February 18, 1984 (point 2, lett. c), for which «the civil effects of judgments and measures issued by ecclesiastical authorities [...] are to be understood in harmony with the rights constitutionally guaranteed to Italian citizens». Indeed, with this provision, in the Court's opinion and as argued in doctrine, only an indirect effectiveness of canonical measures is recognized, without any preclusion of the contextual or subsequent exercise of state punitive power²⁴.

In further support of the autonomy and competition of the canonical and state jurisdictions *in subiecta materia*, the Court also recalls what was expressly provided for in the *Guidelines for cases of sexual abuse of minors by clerics* issued by the Italian Episcopal Conference on May 22, 2012 and updated as of June 24, 2019, and in particular point 1 of paragraph 8 regarding relations with civil authority, where the “mutual autonomy of the ecclesiastical and civil systems” is reiterated²⁵. The same considerations made with regard to the relationship between canon law and Italian law, on the subject of *ne bis in idem*, can also be extended, as the Court of Criminal Cassation points out, to the relationship between the canonical and Vatican systems. On this point, in fact, the Court notes that “a similar concurrence of different jurisdictions with regard to the same fact having criminal relevance can be found in the same relations between canonical authority and the jurisdictional authority of the Vatican City State precisely with reference to crimes in sexual or child pornography matters.”²⁶.

3. The canonical legislation on child abuse

The common commitment of the state and the Catholic Church to the suppression of abuse perpetrated by clerics against minors postulates an examination of existing canonical provisions on the subject.

In particular, we are referring to the *Normae de delictis Congregationi pro Doctrina Fidei reservatis seu Normae de delictis contra fidem necnon de gravioribus delictis* of May 21, 2010, which attributed to the competence

of a citizen) may be fully effective also in Italy (in the species, for example, with regard to the legitimate subjection of the cleric to the obligation of residence imposed on the defendant in an institution falling within the Italian state), and therefore not preventing at all, all the more so because of the absence of a specific exception to the principle of territoriality, a trial for the same fact also in Italy».

²³ Cf. ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, Judgment, May 18, 2021, No. 34576, Cited Above, 478.

²⁴ On this subject M. TOSCANO, *L'art. 23 del Trattato Lateranense: l'efficacia civile dei provvedimenti a carico di ecclesiastici e religiosi*, in N. MARCHEI – D. MILANI – J. PASQUALI CERIOLI (ed.), *Davanti a Dio e davanti agli uomini. La responsabilità fra diritto della Chiesa e diritto dello Stato*, Bologna, 2014, 203-220; P. LO IACONO, *L'art. 23 cpr del Trattato del Laterano e la “legge sui culti ammessi”*. *Rapporti tra giurisdizioni in materia disciplinare*, in M. D'ARIENZO (ed.), *1929-2019. Novant'anni di rapporti tra Stato e confessioni religiose. Attualità e prospettive*, Cosenza, 2020, 178-216, especially 187.

²⁵ The Document can be found at: <https://www.chiesacattolica.it/wp-content/uploads/sites/31/2019/06/27/Linee-guida-per-la-tutela-dei-minori-e-delle-persone-vulnerabili.pdf>.

²⁶ Cf. ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, May 18, 2021, No. 34576, cited 478.

of the then Congregation, now the Dicastery for the Doctrine of the Faith²⁷ the punishment of the so-called *delicta graviora*²⁸. In fact, Art. 1 § 1 of the *Normae* provides that it is the Congregation that judges crimes against the faith and more serious crimes committed against morals or in the celebration of the sacraments (Art. 1), and among the more serious crimes against morals is also expressly included "the crime against the sixth commandment of the Decalogue committed by a cleric with a minor of eighteen years of age" (Art. 6 § 1, 1°).

The same source states that, unless the Dicastery for the Doctrine of the Faith avoids the case to itself due to special circumstances, the instruction of the criminal proceedings is entrusted to the diocesan Ordinary who will proceed, following the prior investigation provided for in the codal norms set forth in canons 1717-1719 CIC, to the issuance of a decree by extrajudicial means pursuant to can. 1720 CIC, or to the initiation of a judicial criminal trial. In the former case, the diocesan Ordinary will make known to the accused the charge and the evidence, giving him an opportunity to defend himself, unless the accused duly summoned has neglected to appear; he will carefully evaluate with two assessors all the evidence and arguments; he will issue, if he ascertains with certainty the crime and the criminal action is not extinguished, the decree in accordance with canons 1342-1350, setting out at least briefly the reasons in law and fact. In this hypothesis, too, therefore, there will be an exercise of jurisdictional power, since the criminal decree of conviction follows from the exercise of a power of jurisdiction provided for in the canonical system and which the ordinary may exercise personally or through others according to can. 1719 CIC.

A fortiori, the judgment that defines the canonical criminal trial constitutes the exercise of jurisdictional power, at the outcome of which, after ample discussion and with the guarantee that the accused will always have the right to write or speak last, either personally or through his lawyer or prosecutor, it will be possible to evaluate the delinquent or non-delinquent character of the conduct and to inflict the canonical sanctions deemed most appropriate.

Thus, there does not seem to be any doubt as to the actual criminal nature, even from a substantive point of view, of the canonical proceedings and of the related punitive measures, which, for such crimes, may consist of decidedly afflictive penalties²⁹.

These are, as is evident, penalties that are sometimes capable of significantly affecting the personal freedom of the convicted person, especially in the case of the imposition of the penalty of injunction or prohibition to reside in a certain place. Indeed, it cannot be doubted, in such cases, that the offender's personal freedom is actually compressed as a result of the canonical penal sanction, as noted, moreover, even by the Court of Criminal Cassation itself in the grounds of its judgment, which it is emphasized that the canonical sanction "can hardly be assimilated to the mere 'spiritual' matter."³⁰

4. Concluding remarks. Art. 23, *cpv.* of the Lateran Treaty and *de iure condendo* perspectives

The conclusions of non-applicability of the principle of *ne bis in idem* procedure reached by the Italian Court of Criminal Cassation certainly appear unexceptionable from the perspective of relationship between legal systems.

²⁷ Cf. FRANCIS, Apostolic Constitution *Praedicate Evangelium on the Roman Curia and its Service to the Church and the World*, March 19, 2022, available at: <https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2022/03/19/0189/00404.html>

²⁸ See *ex multis*, D. MILANI, *Delicta reservata seu delicta graviora: la disciplina dei crimini rimessi alla competenza della Congregazione per la Dottrina della Fede*, in *Stato, Chiesa e pluralismo confessionale*, Online Journal (www.statoe Chiesa.it), October 21, 2013, 1-25.

²⁹ Penalties may consist, according to the current can. 1336 CIC in the: injunction to dwell in a certain place or territory or to pay a fine or a sum of money for the purposes of the Church, according to the regulations defined by the Bishops' Conference; prohibition to dwell in a certain place or territory or to exercise, everywhere or in a certain place or territory or outside of them, all or some offices, positions, ministries or functions or only some tasks inherent in the offices or positions etc; deprivation of all or some offices, positions, ministries or functions or only some tasks inherent in the offices or positions; of the faculty of receiving confessions or the faculty of preaching; of the delegated power of government; of some rights or privileges or insignia or titles; 5° of all or part of ecclesiastical remuneration, according to the regulations established by the Episcopal Conference, except as provided in can. 1350, § 1; resignation from the clerical state.

³⁰ Cf. ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III, May 18, 2021, n. 34576, cit., 477.

The issues raised, however, offer insights beyond the mere technical-legal profile.

From a substantive point of view³¹, in fact, the dual subjection of the cleric or religious to both canonical and state jurisdiction, resulting from his dual ordinal membership, entails in fact the consequence that by virtue of his clerical *status* he suffers an overall more serious sanction than that imposed on another person not subject to the punitive power of the canonical system.

It should be reiterated that the difference in structure and purpose between the Church and State systems makes the duplicity of jurisdiction entirely legitimate, and this is to safeguard their mutual independence and sovereignty, as enshrined in Article 7 of the Italian Constitution. At the same time, however, one problematic issue cannot be overlooked regarding the need for the protection of personal rights especially with regard to the prohibition of unequal treatment.

For this reason, with a view to mutual cooperation between the two orders, the forms of cooperation already implemented, also referred to by the Court of Criminal Cassation in its judgment No. 34576 of 2021³², could nonetheless find their own specific regulatory provision through the use of bilateral negotiation. Cooperation should be implemented not only during the sanction phase but also earlier, such as during investigations or evidence gathering.

In particular, in the perspective of the enhancement of the substantial dimension of the principle of *ne bis in idem* also between canonical and state systems-which fits not only into a logic of relations between different jurisdictions, but is also an expression of a principle not only of reasonableness but also of proportionality of punishment for the protection of the could arrive at a kind of modulation, or rather, compensation of state punishment, taking into account the punishment already served in the canonical system, provided that the offender has given evidence, for example, of his repentance and has given rise to a concrete form of reparation, and, therefore, there is certainty that the canonical punishment has succeeded in fulfilling its purpose.

Such a form of linkage between the systems at the procedural level and the infliction of punishment seems, moreover, already to be envisaged, albeit in the absence of a specific bilateral negotiating statute, by the canonical system, which is more attentive to the substantive datum rather than to mere formal compliance with often ideological legal postulates, given its character of elasticity of norms.

In fact, following Pope Francis' Apostolic Constitution *Pascite gregem Dei*, in the new formulation of CIC can. 1344³³ provision was made for the possibility that the canonical judge may refrain from inflicting punishment, or may impose a milder punishment or make use of a penance, if the offender has been sufficiently punished by the civil authority or - and this is an important element – it is expected that he will be punished³⁴. Nonetheless, point 4 of paragraph 8 of the aforementioned *Guidelines for cases of sexual abuse of minors by clerics* stated that “in the event that for the offenses in question investigations are underway or criminal proceedings are opened according to state law, the Bishop's cooperation with the civil authorities will be important, within the scope of their respective competencies and in compliance with concordat and civil law. Once the canonical precautionary measures deemed necessary have been taken, the Bishop or the competent Superior may consider suspending canonical investigation activities in order to avoid unnecessary overlapping”. In addition, item 5 of the same paragraph 8 explicitly provides that “the Bishop or competent Superior may refer to final or non -definitive acts or conclusions of the state proceedings, without this preventing or exempting him from his own evaluation, in accordance with canon law”³⁵.

In other words, through “institutionalized” ways of collaboration between the canonical and state systems in the fight against sexual abuse of minors, while respecting the principle of the distinction of orders, the principle of proportionality of the overall sanctioning treatment could thus be concretely

³¹ A. PROCACCINO, *I bis in idem tra diritti individuali e discrezionalità dell'apparato. Il doppio processo come pena*, Padova, 2022.

³² Cf. ITALIAN REPUBLIC: COURT OF CASSATION, CRIMINAL SECTION III., May 18, 2021, n. 34576, cit., 479-481.

³³ Cf. J. I. ARRIETA, *Motivazioni e principali novità del nuovo sistema penale canonico*, in *Dir. Rel.*, 33, 2022, 186-204.

³⁴ Cf. Can. 1344 CIC: «Even though the law uses prescriptive terms, the judge, according to conscience and at his prudent discretion, may: [...] 2° refrain from inflicting punishment, or inflict a milder punishment or make use of a penance, if the offender has amended himself and likewise the scandal and damage that may have been procured has been repaired, or if the same has been sufficiently punished by the civil authority or it is expected that he will be punished».

³⁵ About this topic see P. LO IACONO, *La Conferenza Episcopale Italiana ed il delictum gravius contra mores: salvaguardia dell'indipendenza della comunità ecclesiale e leale collaborazione con la comunità politica*, in *Dir. Rel.*, 17, 2014, 17-68.

guaranteed, while respecting the dignity of the person that must be recognized even to the offender of vile rights such as pedophilia.

On the other hand, even in the absence of new negotiations between Italy and the Holy See, the possible modulation of the state penal sanction could also arise from a more precise interpretation, perhaps discussed and approved in the Italy-S. See Joint Commission, of the already existing bilateral norms and specifically of the norms of concordat nature present in the Lateran Treaty³⁶, such as Art. 23 cpv. of the Lateran Treaty concerning the civil efficacy of spiritual and disciplinary measures, therefore also sanctions, against clergy and religious.

As is well known, Art. 2 lett. c) of the Additional Protocol to the Agreement making amendments to the Lateran Concordat contains a provision regarding the meaning to be attributed to Art. 23 cpv. of the Lateran Treaty by which the Holy See declares itself in agreement with the interpretation of the Italian State according to which "the civil effects of judgments and measures issued by ecclesiastical authorities, provided for by that provision, are to be understood in harmony with the rights constitutionally guaranteed to Italian citizens"³⁷. From this perspective, the formula used-although interpreted in a conforming manner by doctrine and jurisprudence in the sense of rendering inadmissible a direct and coercive efficacy of ecclesiastical jurisdiction in spiritual and disciplinary matters-appears, however, to be susceptible to highlighting further consequences arising from an exact "state" determination of the consequential effects of ecclesiastical measures in harmony with the «constitutionally guaranteed rights of Italian citizen»³⁸.

In the final analysis, a renewed hermeneutical deepening of Article 23 of the Lateran Treaty would be desirable, which would somehow make it possible to overcome the traditional exegetical approach on the level of mere *orderly colligatio*³⁹ – although correct on the formal level of respect for the principles of autonomy and sovereignty of the jurisdictions – in order to finalize it on the substantive guarantee of the fundamental rights of the person.

³⁶ On the norms of a concordatary nature of the Lateran Treaty, cf. V. DEL GIUDICE, *Manuale di diritto ecclesiastico*⁷, Milan, 1951, 73 who writes about a «mixture of provisions, so many times noted, whereby in the Treaty one finds norms which would be more suitable for a Concordat». Utilizzano la locuzione «infiltrazioni concordatarie» G. CATALANO, *Problematica giuridica dei Concordati*, Milan, 1963, 134 e S. BORDONALI, *Stato e Chiesa in Italia negli ultimi venticinque anni*, in *Dir. Eccl.* 100, 1989, 217-256, specialmente 255. See also on this point, G. PEYROT, *Note sulle proposte di revisione del Concordato del 1929*, in *Idir. Eccl.*, 88, 1977, 389-419, especially 390 where he specifies how some provisions of the treaty «reveal, beyond any possibility of doubt, the proper character of concordat norms» and F. FINOCCHIARO, *La mancata revisione dell'art. 11 del Trattato Lateranense*, in *Dir. Eccl.*, 124, 2003, 35-47, especially 40.

³⁷ The full provision of Art. 2, lett. (c) of the Additional Protocol to the Agreement of Modification of the Concordat of 1929, Feb. 18, 1984, reads, «The Holy See takes occasion from the modification of the Lateran Concordat to declare itself in agreement, without prejudice to the canonical order, with the interpretation which the Italian State gives to Article 23, second paragraph, of the Lateran Treaty, according to which the civil effects of judgments and measures issued by ecclesiastical authorities, provided for by that provision, are to be understood in harmony with the rights constitutionally guaranteed to Italian citizens».

³⁸ Cf. Art. 2(c) of the Additional Protocol to the Agreement between the Holy See and the Italian Republic Making Modifications to the Lateran Concordat. On this subject, cf. P. LO IACONO, *L'art. 23 cpv. of the Treaty*, cit., 192.

³⁹ After an initial orientation that interpreted art. 23, paragraph 2 of the Lateran Treaty in the sense of the immediate enforceability in the Italian legal system of canonical measures on clerics and religious, an interpretation based on the mere presuppositional value of the measures themselves for the purposes of the applicability of state regulations was affirmed. Cf. C. RUPERTO, *L'art. 23 cpv. del Trattato lateranense quale momento di «colligatio» fra ordine canonico e ordine civile*, in A. RAVÀ (ed.), *Nuove prospettive per la legislazione ecclesiastica*, Milan, 1981, 492-494. For a complete examination of the doctrinal and jurisprudential evolution regarding Article 23, see M. TOSCANO, *L'art. 23 del Trattato Lateranense: l'efficacia civile dei provvedimenti a carico di ecclesiastici e religiosi*, cit., 203-221; P. LO IACONO, *L'art. 23 cpv del Trattato*, cit., 179-198.