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ISSUES OF COOPERATION BETWEEN THE STATE AND THE CHURCH IN THE FIELD OF PROCEDURAL LAW IN THE LIGHT OF ARTICLE 1 AND 5 OF THE CONCORDAT BETWEEN THE HOLY SEE AND THE REPUBLIC OF POLAND

PROBLEMATYKA WSPÓŁDZIAŁANIA MIĘDZY PAŃSTWEM I KOŚCIOŁEM W ZAKRESIE PRAWA PROCESOWEGO W ŚWIETLE ART. 1 I 5 KONKORDATU MIĘDZY STOLICĄ APOSTOLSKĄ I RZECZĄPOSPOLITĄ POLSKĄ

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Abstract

The principle of cooperation between the Church and the State is unequivocally expressed in Article 1 of the 1993 Concordat between the Republic of Poland and the Holy See. At the same time, cooperation, which may occur in different fields, must respect the principle of autonomy and independence of each party to an international agreement on its own.

By virtue of Article 5 of the Concordat, the Catholic Church gained from the State the assurance of the free exercise of its jurisdiction, including the autonomy of the church judiciary, especially in matters of marriage (cf. Article 10(3-4) of the Concordat). This follows from the overriding principle of respect for religious freedom, enshrined in the 1997 Constitution of the Republic of Poland.

One area of cooperation between the Church and the State may be procedural law taking into consideration the legal norms of two distinct legal domains – the state and the church legal order. Therefore, this issue at hand should be analysed in the light of the norms of Polish law, especially the Concordat between Poland and the Holy See, as well as canonical norms as the internal law of the Catholic Church.

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I present the issue of cooperation between the State and the Church in the field of procedural law, narrowing my scope to procedural marriage law and the procedural criminal law, which is applied by the church judiciary but cannot be applied in complete isolation from state legislation.

Based on specific state and church regulations concerning the Roman Catholic Church, case law and judicial practice, I show the obligations and rights as stemming from legal norms, and the doubts and difficulties following from the different premises of the two legal orders.

Keywords: cooperation, Polish concordat, procedural law, criminal law, marriage law

Abstrakt

Zasada współdziałania Kościoła i Państwa została w jednoznaczny sposób wysłowiona w art. 1 Konkordatu między Rzecząpospolitą Polską a Stolicą Apostolską z 1993 r. Jednocześnie współdziałanie, które może obejmować swym zakresem różne dziedziny, musi odbywać się w poszanowaniu zasady autonomii i niezależności każdej ze stron umowy międzynarodowej we własnym zakresie.

Kościół katolicki w art. 5 Konkordatu uzyskał od Państwa zapewnienie swobodnego wykonywania swojej jurysdykcji, włącznie z autonomią kościelnego sądownictwa, zwłaszcza w sprawach małżeńskich (por. art. 10 ust. 3-4 Konkordatu). Wynika to z nadrzędnej zasady poszanowania wolności religijnej, zapisanej w Konstytucji RP z 1997 r.

Jednym z obszarów współdziałania Kościoła i Państwa może być prawo procesowe. Złożona problematyka musi uwzględniać normy dwóch odrębnych porządków prawnych – państwowego i kościelnego. Problematykę tę należy zatem rozważać zarówno mając na uwadze normy prawa polskiego, a szczególnie Konkordat między Rzecząpospolitą Polską a Stolicą Apostolską, jak również normy kanoniczne, jako prawo wewnętrzne Kościoła katolickiego.

Autor artykułu ukazuje problematykę współdziałania Państwa i Kościoła w zakresie prawa procesowego, ograniczając się do procesowego prawa małżeńskiego i procesowego prawa karnego, które stosowane jest w sądownictwie kościelnym, a które nie może być aplikowane w całkowitym oderwaniu od ustawodawstwa państwowego.

Na bazie poszczególnych przepisów polskich i kościelnych dotyczących Kościoła rzymskokatolickiego, a także orzecznictwa i stosowanej praktyki, ukazane zostały obowiązki i prawa, jakie wynikają z norm prawnych, ale także wątpliwości i trudności wynikające z odmiennych założeń dwóch porządków prawnych.

Słowa kluczowe: współdziałanie, konkordat polski, prawo procesowe, prawo karne, prawo małżeńskie

Introduction

The issue of the cooperation between the Church and the Polish State in terms of procedural law involves two separate legal domains – state and church orders. This issue should therefore be considered both with respect to the norms of Polish law, particularly the Concordat between the Republic of Poland and the Holy See,[1] as well as canonical norms, which constitute the internal law of the Catholic Church.

Issues related to procedural cooperation are complex, and this is due to the separateness of the legal systems and the objects that sanction the exercise of judicial authority in the two. Practice shows, however, that in some measure state law affects canon law and *vice versa*.

In our reflections we shall present only some aspects of the cooperation between the Polish State and the Church in the area of procedural law, especially those related to marriage law and criminal law. The subject addressed here is characterised by many different aspects, which, for one, emphasize the distinctness of the entities in question, but also (despite some limitations) make it possible to build a consistent picture of their interaction.

1. The Principle of Cooperation between the State and the Catholic Church in State Legislation

It follows from the constitutional principle of the independence and autonomy of the State and the Church, and the cooperation between them for the "individual and the common good",[2] it follows that the State and the Church do not face each other as competing institutions, but "under different titles, are devoted to the personal and social vocation of the same men."[3]

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[1] Concordat between the Holy See and the Republic of Poland, signed in Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318 [hereinafter: Concordat], Article 1.

[2] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 [hereinafter: Constitution], Article 25(3).

[3] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), pp. 1025-115;

As Józef Krukowski aptly notes, "The role of both the Church and the State, even though they are dissimilar communities, is to help people achieve the common good, that is, build legal and social orders in which the rights and freedoms of every person are guaranteed and exercised" [Krukowski 1999, 72].[4]

Thus, both the State and the Church should take care that their mutual cooperation goes well. An eminent canonist of the Middle Ages, when the principle of church–state cooperation was not explicitly proclaimed but appreciated as the basis for the development of both realities, expressed it in the following adage: *cum regnum et sacerdotium inter se conveniunt, bene regitur mundus, floret et fructificat Ecclesia* (when secular and ecclesiastical powers agree with each other, the world is well governed, the Church flourishes and bears fruit).[5]

Mutual relations between the said entities are regulated by bilateral agreements. One of them is the Concordat, which regulates relations between the State and the Church, respecting the distinctness of the parties, for it is not an interstate agreement, but between a state and the Holy See, which acts as the supreme authority and representative of the Catholic Church, having personality under international law. Thus, the Church and the State coexist within one society, live in one territory, and to a large extent the same people are members of both communities [ibid., 70].

It is Poland's legal and cultural circumstances that for the reason given above the optimal form of the relations between the two domains is cooperation.[6] The same people, as both citizens and believers, are subjects of rights and obligations under state law and canon law and are involved in the life of both communities [Kroczek 2017b, 54].

Already in Article 1, the Concordat currently in force provides that "the State and the Catholic Church are, each in its own domain, independent and autonomous, and that they are fully committed to respecting this

English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [hereinafter: GS], no. 76.

[4] Unless otherwise indicated, translations of quotations are mine.

[5] Ep. 328 (PL 162, 246 B).

[6] In fact, in the Polish legal order, the cooperation of the Church and the State take place on many fronts. See Poniatowski 2015, 307-22; Zarzycki 2007, 23-60.

principle in their mutual relations and in co-operating for the promotion of the benefit of humanity and the good of the community."

Thus, the cooperation principle is a general commitment to undertake and implement activities for the sake of human well-being and the common good. One of the basic elements of human well-being and people's fundamental rights is the constitutional right to "a fair and public hearing" (Article 45(1) of the Constitution) [Sobczyk 2015, 191].

Under canon law, too, one of the basic rights of the faithful is the right to "vindicate and defend the rights they possess" and the right to "be judged according to the prescripts of the law applied with equity" (Canon 221 § 1-2).[7] They can benefit from that by pursuing the judicial and administrative route, although it must be conceded that, as envisioned by the ecclesiastical legislator, conducting processes in the Church is the exception, not the rule.[8] However, the Church legitimately needs a system in which it will be possible to restore the disturbed order.[9]

The operation of the judiciary is essentially pastoral, which stems from the nature of the Church. The Church's judicial apparatus is grounded in respect for the dignity and rights of every person. A just sentence, the right to which is always enjoyed by the faithful, should be handed down in compliance with the law but subject to canonical equity [Miziński 2009, 76].

Nor can we neglect the overarching principle of church law, articulated by the legislator in the last canon of CIC/83, namely, the salvation of souls, which is to be the supreme law in the Church. Although the principle of *salus animarum suprema lex* has always been present in the consciousness of the Church, it was not expressly stated until CIC/83. Tadeusz Pieronek regrets that it is not found at the beginning of the codification, but only at the very end, where the procedure for the transfer of pastors is provided

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[7] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317; English text available at: https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html [hereinafter: CIC/83].

[8] Cf. Canon 1446 § 1: "All the Christian faithful, and especially bishops, are to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible."

[9] Zenon Grocholewski addresses this issue with much accuracy, considering the unique nature of the Church as expressed in biblical images, "People of God", "Body of Christ" and "Community of the Faithful", showing a way of resolving disputes in the Church that differs from the ways used in secular communities [Grocholewski 1985, 492-94].

for, but this cardinal principle of ecclesiastical law is there to safeguard all church regulations [Pieronek 1988, 251].

The different axioms of the church and state legal orders assures the Church autonomy in the exercise of its jurisdiction, as enshrined in Article 5 of the Concordat.[10] This is due to respect for the right to religious freedom. As regards the ecclesiastical and state judiciary, although it refers explicitly to the adjudication of canonical matrimonial cases, Article 10 of the Concordat guarantees the exclusive competence of the ecclesiastical authority (para. 3), and with regard to the civil consequences of state courts (para. 4).[11] At the same time, in its last paragraph, the article provides for possible cooperation in the area of mutual notification of judicial decisions. The relevant procedure should be decided by the Joint Commission of the Government of the Republic of Poland and the Polish Bishops' Conference (KEP) (cf. Article 27 of the Concordat).

However, as Wojciech Góralski contends, this provision does not have a normative nature, being only a declaration of the will of the contracting parties. A regulation of this kind would have to be implemented by way of a new bilateral agreement, or agreed upon between the Government and the Bishops' Conference, authorized by the Holy See [Góralski 2008, 145].

Another area of possible (and sometimes even necessary) cooperation for the church judiciary and the state administration of justice is criminal law. This necessity has become particularly pronounced in recent years, when cases of possible sexual misconduct of some clerics against minors were reported. These wrongs (delicts, torts) are not the only ones punishable by both ecclesiastical and state authorities. They are classified as mixed offences, so-called *delicta mixti fori*. In practice, this means that parallel proceedings can take place under canon and state law. This also results from the duty to report the possible commission of certain offences mandated

[10] Article 5: "Respecting the right to religious freedom, the State shall guarantee the Catholic Church, irrespective of the rite, the free and public exercise of its mission, as well as the exercise of its jurisdiction, management and administration of its own affairs, in accordance with Canon Law."

[11] Article 10(3): "It is within the exclusive competence of ecclesiastical authorities to issue a judgement as to the validity of canon law marriage, and in any other matrimonial matters governed by canon law"; para. 4: "Adjudication of matrimonial cases within the limits of Polish legislation falls within the exclusive competence of State civil courts."

by the Polish Penal Code, Article 240.[12] This entails diverse effects, which we will analyse in what follows. Once a case is heard by a secular court, the ecclesiastical judiciary also can and sometimes has to impose canonical penal sanctions [Olechna and Rybińska 2015, 252].

The competencies so defined enable cooperation under criminal procedural law of the two orders. However, they provoke doubts and questions about the duties and rights of one forum *vis-à-vis* the other. Some of the powers and obligations result directly from legal norms. Others are unspecified and follow from procedural practice.

This also follows indirectly from Article 1 of the Concordat, whereby the contracting parties pledged to respect the principle of independence and autonomy in their cooperation for the common good. Importantly, however, that they did not commit themselves to cooperation only. The core aspect of Church–State cooperation is not that the two domains serve and help each other. They have no direct mutual obligations. The rationale behind the cooperation between the religious community and the state community is the good of the human person pursued within the competence of both communities [Hemperek 1985, 79; Góralski and Pieńdyk 2000, 22].

So what should Church–State cooperation be under procedural law? To answer that, we need to look at its motives. The classical public law of the Church would distinguish negative motive, which justified elimination of moral evil, that is, sin (*ratio peccati*), and positive motive, which justified helping one another to achieve good (*ratio boni perficiendi*). Krukowski observes that on the traditional reading, negative motive was posited. In contrast, nowadays the positive aspect comes to the fore. However, cooperation towards elimination of the pathological phenomena occurring in people's lives, both at the individual and communal levels, should not be underestimated. This point will be seen well in the context of criminal processes [Krukowski 1992, 25].

To round up this part of our analysis, the following questions should be raised: To what extent is it possible for the State and the Church to cooperate in the field of procedural law? When is this an obligation and when merely an option? Is the Church under the obligation to make available

[12] Act of 6 June 1997 – The Penal Code, Journal of Laws No. 88, item 553 as amended [hereinafter: PC].

records of judicial proceedings? Does the Church have the right to obtain such documentation from state authorities? What is the impact of rulings made in one forum upon the other? We shall seek answers to such questions by analysing the theory and practice of the interaction of ecclesiastical and state authority in the light of marriage procedural law and criminal procedural law applied in the ecclesiastical judiciary.

2. Cooperation with Respect to Marriage Procedural Law

Marriage and family are values safeguarded by both the Church and the State. In the canonical order, indissolubility is an essential attribute of marriage (Canon 1056). In the order of state law, too, the union of a man and a woman enjoys a very high position in the hierarchy of values. By according to it a high status in the Basic Law, the Polish constitutional legislator grants it "protection and care" of the State (Article 18 of the Constitution).

The cooperation between the Polish State and the Catholic Church in matrimonial matters is explicitly provided for in the Concordat, in Article 10(1), whereby "from the moment of its conclusion, matrimony according to canon law has such effects as those of a marriage concluded under Polish law", subject to the conditions listed in points 1-3 of this paragraph. The conclusion and ratification of the Concordat resulted in corresponding provisions in the Family and Guardianship Code.[13]

Adjudication on marital cases, however, is governed by the principle of autonomy of the ecclesiastical judiciary and the state judiciary. Each remains competent for the effects of marriage, as defined in their respective legal orders (Article 10(3-4) of the Concordat).

This follows from the mutual recognition in Article 1 of the Concordat of the principle of independence and autonomy of the State and the Church,

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[13] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws of 2022, item 2140 [hereinafter: FGC], Article 1 § 2: "A marriage is also concluded when a man and a woman entering into marital union under canon law or the law of another religious organisation declare their mutual intention to enter into marriage under Polish law in the presence of a member of the clergy, and the head of the civil registry office then draws up a marriage certificate. If these conditions are met, the marriage is considered to have been concluded at the moment of making the declaration of intent in front of the cleric."

and therefore mutual respect for the two separate legal orders [Góralski and Adamczewski 1994, 65]. The guarantees of free exercise of jurisdiction and being governed by own laws, which the State, respecting religious freedom, ensures to the Church by virtue of Articles 25 and 53 of the Polish Constitution and Article 5 of the Concordat, also result in the autonomy of the religious judiciary [Rapacz 2007, 56].

Premises guiding proceedings before an ecclesiastical court and state courts are radically different as regards matrimonial cases. The marriage annulment process seeks the objective truth about the marriage in question, looking into the period leading to its conclusion. In divorce proceedings, a validly contracted marriage is dissolved as a result of the complete breakdown of conjugal life.[14]

Accordingly, the Supreme Court correctly assessed that the future of a secular marriage is always decided by state courts. At the same time, it was stated that the decision of an ecclesiastical court on the validity of a canonical marriage cannot have a preliminary impact on the ruling of a state court on the validity or cessation of a secular marriage.[15]

Another issue, directly pertinent to procedural interaction and highlighted in the judgement in question is the evidentiary power that decisions handed down by ecclesiastical courts can have in civil proceedings. However, it is doubtful whether they rank as official documents or private documents of a special kind [Stanisz 2015, 181].

This gives rise to questions of making available to marriage annulment case files, which can be done at the request of the parties or their counsels, also when requested by law enforcement agencies and state courts. On the other hand, we can also ask about the possibility of church courts requesting access to state trial files or permission to follow a requisition route.

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[14] Among the reasons for divorce, the state legislator lists: the fault of the party demanding divorce, the welfare of the minor child of both spouses, the principles of social intercourse and the permanent and complete breakdown of conjugal life. The latter is the *sine qua non* condition for granting a divorce decree (Article 56 FGC).

[15] Judgement of the Supreme Court of 17 November 2000, file ref. no. V CKN 1364/00, OSN/IC 2001, no. 9, item 126.

2.1. Requests Made by State Courts

In considering the first issue – making available church records when so requested by the parties or their counsels for the purposes of submitting them in the divorce process or state family courts – it should be noted that practice shows (as confirmed by court officials) these situations are not common. The CIC/83 rules of trial secrecy do not allow the release of case files to the parties or state courts, which is a reason for refusing to grant a request so directed [Brzemia-Bonarek 2007, 47]. The only procedural documents that litigants can receive are the statement of claim and the judgement. Note that when responding to such requests, the church legislature grants consent that the case file(s) be consulted in the court's chancery. In no other way can the parties consult such documents. A copy of the file can only be handed over to the requesting counsels, but only for the purposes of pending canonical proceedings (Canon 1598 § 1).

In the vast majority of cases, people apply to an ecclesiastical court after they have already obtained a civil divorce. One of the attachments is the operative part of the Regional Court's judgement. Sometimes a statement of reasons is appended to the ruling, which may prove to be useful evidence in canonical proceedings.

Marriage, which belongs in the sphere of public law, has to enjoy special protection, also in relation to the protection of procedural records, which often reveal information and data of a confidential or intimate nature, or involving the religious sphere, which – also as desired by the state legislator – enjoys freedom. For this reason, the church legislator equips the ecclesiastical judge with the option to decide not to disclose the file to anyone if it is likely to cause a serious threat (Canon 1598 § 1 *in fine*).

A more common case is when access to parts of the file is requested by the civil divisions of district or regional courts. This is less often the case in criminal divisions. Typically, the court requests access to an expert opinion. It may happen that the request is for information about the status of the canonical process, which is pending in parallel with the divorce proceedings. There is also the well-known case of one Polish church court, which received a telephone request from the judge presiding over inheritance proceedings involving the parties to an annulment case for information from the file that was allegedly useful in the civil suit he was dealing with. Upon hearing a reply from which it was concluded that

the file did not contain any relevant information, the request was abandoned. The legal basis for such requests on the part of common courts is Article 248 of the Code of Civil Procedure, in which the state legislator provided for a statutory obligation to grant a court's request to present and submit all kinds of documents relating to the facts essential to the resolution of the case. Anyone who is in possession of such a document is under this obligation, unless the document contains classified information.[16] There is an assumption in the doctrine of civil law that this obligation includes the requirement to file it with the court. It lies with the court, not the document holder, to assess whether the requested document constitutes evidence of a fact relevant to the outcome of the case [Marszałkowska-Krześ and Gil 2023].

The refusal to comply with the order to submit a document is subject to the court's assessment under Article 233 § 2 CCP. However, it must be conceded that submissions directed to a church court are generally requests and can be refused, which does not incur consequences. It is usually sufficient to furnish arguments citing the constitutional and concordat guarantee of the autonomy and independence of the Church from the State, as well as the principle of religious freedom enshrined in the Polish Constitution and the secrecy of the canonical marriage process.

However, there have been situations that required an intervention from the church party at the Concordat Commission level. Objections have been raised concerning requests for access to the files of marriage annulment cases or their excerpts containing witness testimony or expert opinions for use in civil proceedings. The church party considered such conduct

[16] Act of 17 November 1964 – The Code of Civil Procedure, Journal of Laws No. 43, item 296 [hereinafter: CCP], Article 248: "§ 1. Everyone shall present, if directed by the court, at a specified time and place, a document in his possession and constituting evidence of a fact relevant to the case resolution, unless it contains classified information. § 2. The above obligation may be waived by anyone who could, as a witness with respect to the facts mentioned in the document, refuse to testify, or who holds the document on behalf of a third party who could, for the same reasons, object to the submission of the document. However, even then, the submission of a document may not be refused if its holder or a third party is obligated to do so with respect to at least one of the parties, or if the document was issued in the interest of the party who requests the taking of evidence. Nor may a party refuse to submit a document if the harm to which it would be exposed to by doing so would be losing the case."

as an interference of state courts in the exercise of the Church's jurisdictional authority.[17]

Judges of church courts are bound by the provisions of canon law. Under Canon 1455 § 1, they are "always bound to observe secrecy of office in a penal trial, as well as in a contentious trial if the revelation of some procedural act could bring disadvantage to the parties". The obligation of official secrecy is categorical, and failure to observe it can even result in privation from office (Canon 1457) [Del Amo 2023, 900].

Thus, the CCP provision cannot be interpreted and applied in violation of the autonomy of the ecclesiastical judiciary, a position accepted by the secular judiciary, too.[18]

2.2. Cooperation with Investigative Authorities and Criminal Courts

We shall limit our analysis of the cooperation between church courts dealing with matrimonial cases and the authorities conducting state criminal proceedings and common courts only to a reflection on cases in which information about a *de sexto* crime against a minor is revealed in a marriage annulment suit. We shall devote more attention to issues not directly related to annulment lawsuits in a latter part.

By virtue of the amendments to the 2017 Penal Code, there is an obligation to report certain offences to the law enforcement authorities, including sexual crimes committed against a person under the age of 15 or taking advantage of the victim's helplessness or insanity.[19]

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[17] Ministry of Foreign Affairs, Department of Western and Northern Europe, Briefing note on the meeting of the Government and Church Concordat Commissions, Warsaw, 18 November 2009, as cited in: Stanisz 2015, 182.

[18] Such theses were presented in an opinion issued by the Judiciary Department of Courts, Organization and Analysis, drawn on 11 December 2014 (DSO-I-070-149/14), as cited in: Stanisz 2015, 182.

[19] Article 240 § 1 PC: "Anyone who has reliable information concerning a punishable preparation, attempt, or the commission of a prohibited act specified in Articles 118, 118a, 120-124, 127, 128, 130, 134, 140, 148, 156, 163, 166, 189, 197 § 3 or 4, 198, 200, 252, or a crime of a terrorist nature, fails to immediately notify an authority established for the prosecution of crimes, is liable to imprisonment for up to 3 years. § 2. Anyone having sufficient knowledge to assume that the agency mentioned in § 1 knows of the prohibited act being planned, attempted or committed but fails to report it, does not commit the offence specified in § 1; anyone who prevents the commission of a prepared or attempted

When discussing the necessity of fulfilling the obligation imposed by the state, binding also on the person who in the canonical process became aware of the possible commission of the offence mentioned in Article 240 PC, we should take note of two specific issues: when this awareness arose and its reliability.

Regarding the first aspect, there are four possibilities: an awareness develops during an interview that can be regarded as a pre-trial examination; information comes from the plaintiff's complaint; information crops up when testimony is heard; and some information is revealed during an expert's examination. In the first case, one must attempt to authenticate the information so obtained. Also, when it is evident from the content of the complaint that a reportable offence has been committed, before reporting it, the author of the claim should be summoned for an interview, which is in fact a pre-trial examination, in order to substantiate the information provided by the complaint, and informed of the obligation to report it to state law enforcement authorities. One also needs to make sure that the case has not been reported yet. If it transpires that the mandatory reporting has not taken place yet, it is worth trying to persuade the complainant to satisfy this obligation, bearing in mind, however, that if he himself is

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prohibited act does not commit the offence specified in § 1.; § 2a. A victim of an act mentioned in § 1 who has refrained from reporting the act is not liable to punishment. § 3. Anyone who has failed to report for fear of criminal liability threatening himself or his next of kin is not liable to punishment." In regard to crimes against sexual freedom and morals, this includes rape (jointly with another person or against a minor under 15 years of age, or against an ascendant, descendant, adoptee, adopter, brother or sister), including crimes committed with grave cruelty (Article 197 § 3-4 PC); sexual exploitation of helplessness, insanity (Article 198 PC); sexual exploitation of a minor (paedophilia and paedopornography) (Article 200 PC). Also, a clergyman with credible information about the possibility of such a crime, which is not covered by the secrecy of confession, is obliged to notify law enforcement authorities. If the perpetrator is a cleric, a member of an institute of consecrated life or an association of apostolic life, or the moderator of an international association of the faithful approved or erected by the Holy See, in keeping with Article 3 of Pope Francis' motu proprio *Vos estis lux mundi* – which after being in force *ad experimentum* for three years has just been promulgated anew and is effective as of 30 April 2023 – there is an obligation to notify the competent ecclesiastical superior as well. See Franciscus PP., Litterae apostolicae motu proprio datae *Vos estis lux mundi* (07.05.2019), AAS 111 (2019), p. 823-32; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/20230325-motu-proprio-vos-estis-lux-mundi-aggiornato.html [hereinafter: VELM].

the victim of a criminal act and fails to report, he is not liable to punishment (Article 240 § 2a PC). However, this attempt may prove unsuccessful [Wieczorek 2021, 221-22]. Then the obligation rests with the court clerk who registers the complaint. It should be remembered that the situation occurs even before the dispute is established, hence the importance of the initial verification of information of an offence [Brzemia-Bonarek 2021, 247].

Information obtained when the testimony of the parties or witnesses under oath is heard has greater probability and trustworthiness, even though the judge is not free from the obligations mentioned above regarding the information conveyed by the petition.

Disclosure of information about sexual harassment in a broad sense that emerges during consultation with an expert, also when he is a physician, is not exempt from the obligation to report the offence, as the provision of Article 240 § 1 PC excludes the duty of secrecy under the Act on the Professions of Physician and Dentist.[20] Moreover, he discharges his duties as an expert appointed by an ecclesiastical judge (Canon 1575).

Information obtained from some officials suggests that only few annulment processes reveal information about sexual offences.

In situations where an offence of this kind has not been previously reported, the state prosecutor's office is always notified of its possible commission. The party to the case is informed of this. The practice of the surveyed courts is to attach with the notice a certified extract from the file containing the petition or excerpts from the testimony regarding the information gained. The state prosecutor's office does not question this method of notification and does not request access to all case files. Whilst a civil court requests such access, investigating authorities and criminal courts can order the release of relevant documents. However, this will happen much more often with canonical penal processes, so we shall address this issue in what follows.

2.3. Requests Made by Ecclesiastical Courts

As a rule, it is not common for ecclesiastical courts to request files from investigating authorities or common courts when dealing with matrimonial

[20] Act of 5 December 1996 on the Professions of Physician and Dentist, Journal of Laws of 2011, No. 277, item 1634 as amended, Article 40(2)(1).

cases. Typically, as mentioned above, the parties themselves furnish divorce decrees issued by regional courts. If these documents contain statements of reasons relating to the time preceding the marriage or present reasons for the inability to form a marital community, they can prove helpful in proving canonical consensual incapacity. Sometimes an important reason is an adjudication of guilt for the breakdown of the marriage.

The reason for requesting state assistance in conducting procedural activities in canonical proceedings is the legal interest that arises not only from Polish law, but also from canon law. A landmark ruling in the issue at hand was the 2015 judgement of the Supreme Administrative Court on the refusal to provide a party to an ecclesiastical process with information from the PESEL resource.[21]

This is because the petitioner is obliged to provide the defendant's home address so that the ecclesiastical court can lawfully inform the defendant of the pending lawsuit. In exceptional situations, despite the efforts made, the petitioner may not be able to determine the whereabouts of the defendant. In such a case, in order to demonstrate to the court that the complaining party has made reasonable efforts to establish the defendant's residence, it is necessary to request the data on the defendant's whereabouts from the municipal authorities.

In the case at hand, such a request should have been made to the Minister of the Interior, according to the legislation at the time. However, the Minister refused to provide the information, considering that the complainant had not demonstrated the legal interest required by the Act on Population Registration and Identity Cards (as of 2012).[22] He argued that such an interest does not result from a pending process in a metropolitan court, unlike proceedings in state courts. The ecclesiastical court is not a state institution but of the religious community. Such reasoning was supported by the Voivodeship Administrative Court in Warsaw, which argued that the metropolitan court neither exercises justice nor is it an organ of the judiciary, but adjudicates under canon law, hence no legal interest based on a universally applicable legal norm can be derived [Fray 2015].

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[21] Judgement of the Supreme Administrative Court of 8 May 2015, file ref. no. II OSK 2416/13, Lex no. 1798118.

[22] Act of 10 April 1974 on Population Registration and Identity Cards, Journal of Laws No. 14, item 85, Article 44h(2).

The Supreme Administrative Court took a different view, overturning the earlier ruling and thus the minister's decision. He reasoned that according to Article 10(2) of the Polish Constitution, the judicial power is vested in courts and tribunals. Thus, the ecclesiastical court is not part of the judiciary, but exercises judicial authority.[23]

The principal argument is derived from Article 25(4) of the Polish Constitution, which provides for the determination of relations between the State and the Catholic Church through an international agreement. On this basis, the provisions of the Concordat, upon its ratification "became part of the legal order of the Republic of Poland." The legal possibility of defending one's interest before the ecclesiastical authority in matters of canonical marriage, provided for in Article 10(3), is the basis for acknowledging legal interest. If the generally applicable law (the Concordat) offers means of defending oneself against the ecclesiastical authority in matrimonial cases, this satisfies the premise of a legal interest grounded in this law. The fact that the competence of the ecclesiastical authority is assumed for the subject matter does diminish the legal interest. Putting up defence before the Metropolitan Court […] and not before Polish judicial authorities has no legal effect on the derivation of a legal interest. The fact that the ruling of an ecclesiastical court on the validity or termination of a canonical marriage has no force for the validity of a secular marriage does not impede the derivation of a legal interest in providing PESEL data, since under the international agreement on the right of defence such a legal interest is pertinent."[24]

The cited decision of the Supreme Administrative Court has in some ways revolutionized the perception of the canonical annulment process. What canonists have long asserted has been articulated very clearly. A party has a legal interest also in the canonical process. The venue of the defence has no legal significance; whether it is a secular justice system or an ecclesiastical tribunal is immaterial. The latter's competence for asserting one's rights results from a ratified international agreement [Niemczycki 2020, 147-57].[25]

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[23] Judgement of the Supreme Administrative Court of 8 May 2015, file ref. no. II OSK 2416/13, Lex no. 1798118.

[24] Ibid.

[25] The subject of "legal interest" has been addressed quite extensively in the legal literature; see Duda 2008.

The path of requisition is known in both the state and the canonical legal order. The use of legal aid, as shown above, is impossible if a state court were to request an ecclesiastical court. Could such assistance, then, be requested by a state court, for the purpose of hearing a party or witness[26] or accessing, for example, medical records held by a state court?[27]

The admissibility of such aid can be substantiated under Canons 1530, 1452 and 1608, which obligate the judge to seek the truth about the marriage on trial and to demonstrate a legally-based activity in the taking of evidence [Świto 2012, 154]. The possibility of such requisition is also supported by Article 44 § 3 of the Law on the System of Common Courts, which unequivocally obliges common courts to perform evidentiary procedures ordered by other adjudicatory bodies, the ecclesiastical court being one of those.[28] Under the current state and canonical regulation, such requisition, however extraordinary it may be, is permissible and does not violate either partner's legal order or the principle of autonomy and independence.

2.4. Mutual Notifications and Recognition of the Effects of Rulings

The aforementioned issue of mutual notification of decisions handed down by common courts and ecclesiastical courts in matrimonial cases has not been regulated yet, as permitted by paragraph 5 of Article 10 of the Concordat.

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[26] Such questioning would not have any evidentiary value within the meaning of canon 1547, since the testimony should be taken under the direction of the judge, but it could constitute evidence "of any kind", as referred to in Canon 1527 § 1.

[27] This issue was discussed in meetings of the Church Concordat Commission and the Government Concordat Commission in 2003-2005, and was even the subject of a parliamentary question [Brzemia-Bonarek 2007, 49].

[28] Act of 27 July 2011 on Common Courts Organisation, Journal of Laws No. 98, item 1070; English text available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2020)004-e. See Article 44 § 3: "The courts shall conduct proceedings to take evidence, within the scope provided for in the provisions on civil proceedings, at the request of authorities adjudicating in cases other than set forth in Article 44(1) and (2), if the request was made by the Minister of Justice." A request for judicial assistance directed to the district court in whose jurisdiction a given action would be taken should be conveyed via the Minister of Justice, who may decide on its execution. Medical records could be made available to the ecclesiastical court not on an *ad oculos* basis, but as an account of their contents provided by a common court [Świto 2012, 161-62].

Such a clarification would exemplify agreed-on cooperation of competent representatives of both parties, which can take the form of a legal contract. As Józef Krukowski notes, such interaction could cover not only notifications of rulings, but also the exchange of documents between civil and ecclesiastical courts. He believes provision of official information could be useful in litigation. At the same time, the norms referenced in this sensitive matter should respect each spouse's right to privacy. These principles would substantiate the respect for the autonomy and independence of the Church and the State, each in its own domain [Krukowski 2000, 315-16].

International agreements of states such as Spain, Italy, Malta, Croatia, Lithuania, Slovakia, Portugal, contain solutions reaching much further, because they also provide for the recognition of the civil effects of ecclesiastical judgements in matrimonial cases, although this may happen automatically or in a controlled or dependent manner.[29]

Even though the issue of mutual notification of rulings remains unsettled today, the following questions should be asked here: Would it be practicable and beneficial to launch in Poland a system in which the State would recognise the civil effects of rulings of ecclesiastical courts?

It seems that one can agree with the view expressed by some canonists, who believe that there are no arguments to the contrary [Majer 2007, 414-22], particularly that what matters is working together for the sake of the same people who are contracting marriage in religious form with civil effects. Of course, the recognition would concern only the invalidity

[29] In Spain, the procedure for the recognition in the state forum of ecclesiastical judgements *pro nullitate matrimonii* and papal dispensations from a marriage contracted but not unconsummated has been regulated in relevant laws, regulations and decrees. Spanish courts distinguish between their "recognition" (*el reconoscimiento*) and execution (*la ejecución*). The first concerns the "reception" of church rulings in legal transactions in Spain. A ruling made by a Spanish court is executed by entering information of the dissolution of marriage in the civil status records [Białobrzeski 2017, 175]. In Italy, a deliberative proceeding can be held before the competent court of appeal, in which an enforceable ecclesiastical decision on the invalidity of a marriage concluded in concordat form is reviewed (as to the form and subject matter) to verify the ecclesiastical judge's competence, guarantees of the right to defence and the participation of the parties in the process. An decision of an ecclesiastical court that contradicts a state court judgement or when a matter with the same subject matter and parties is pending before an Italian court, as well as a judgement that would be at variance with the Italian legal order, cannot be recognized in the Italian legal order [Bednarski 2013, 43-63]. For solutions in the other countries mentioned, see Andrzejewski 2021, 147-66; Majer 2007, 414-31; Cadelo 2005, 99-188.

of marriage as such. Thus, as Adam Bartczak notes, the recognition could have only effects with respect to divorce. Matters such as property, maintenance and guardianship should remain within the competence of state courts. In addition to considering the differences arising from the two legal orders (impediments, defects of consent, forms of marriage), one would have to establish whether the grounds for divorce are also present in the case of an ecclesiastical recognition of a marriage as invalid. Apart from that, it would be worth determining the rationale for recognition itself. Would it depart from or coincide with the requirements for marriage (consensual declaration of the parties' will as to the possibility of a recognition, entry in civil status records) [Bartczak 2014, 28-38]?

A different opinion is presented by Wojciech Góralski, who contends that "the separation of two distinct legal orders seems optimal, since the substantial differences between them would render the mutual recognition of rulings in matrimonial cases impossible" [Góralski 1994, 141].

In the current state of the law, ecclesiastical rulings are effective only in the ecclesiastical order, while civil marriages resulting from concordat marriages can be contested by the parties in a civil court in order to obtain an annulment or a divorce according to Polish law [Krukowski 1999, 130-31].

In practice, this implies that ecclesiastical rulings passed by a court or an administrative authority (nullity decree, papal dispensation *super rato*, canonical separation, declaration of presumed death of a spouse) will be possible regardless of the "status" of the civil unions against for which they are issued. In the same way, a civil judgement of a civil court awarding a divorce, which invalidates a civil marriage concluded under Article 10(1) of the Concordat, has no effects whatsoever in the ecclesiastical legal order [Góralski and Pieńdyk 2000, 69].

3. Cooperation of the Church and the State Regarding Procedural Criminal Law[30]

With the increased incidence of canonical processes in the last decade or so, resulting mainly from administrative decisions and concerning

[30] In this part, some fragments are taken from the author's earlier study, submitted for publication in March 2022 and still pending. However, there is an audiovisual record of the presentation that became the basis for writing an article: Kaminski 2021.

some sexual offences of members of the clergy against minors, the question of cooperation between the church and state judiciary has become extremely relevant.

In the VELM, promulgated anew on 25 March 2023 – which is applied no longer *ad experimentum*, but indefinitely – Pope Francis reminds us that the ecclesiastical provisions on the canonical preliminary investigation, which it is mandatory for the Ordinary to conduct whenever he deems it reasonable – after the information of a canonical offence has been substantiated – without prejudice to the rights and duties established anywhere in state legislation, particularly regarding a possible obligation to notify the competent civil authorities (VELM 20).

3.1. Reporting Obligation

When information is gained about a possible offence that constitutes not only a canonical delict but also an act punishable under state law, there arises the duty to notify law enforcement authorities of the possible commission of an offence. In light of Polish legislation, this will apply in particular to the punishable failure to report certain crimes, including sexual offences against minors, as transpiring from Article 240 PC, examined above.

This incentive to cooperate with law enforcement agencies and the state justice system is endorsed by Pope Francis' instruction *On the Confidentiality of Legal Proceedings*,[31] which waives papal secrecy in certain cases. According to Francis' rescript, papal secrecy no longer applies to "accusations, trials and decisions" involving paedophile crimes (SR 1), as also reflected in the material norms *de delictis riservatis*.[32]

This also applies to cooperation with authorities conducting state criminal trials. The Pope also mandates that "office confidentiality shall not

[31] Cardinal Secretary of State, Rescritto del Santo Padre Francesco con cui si promulga l'Istruzione *Sulla riservatezza delle cause* (17.12.2019) [hereinafter: SR], https://www.vatican.va/roman_curia/secretariat_state/2019/documents/rc-seg-st-20191206_rescriptum_it.html [accessed: 20.04.2023]; Cardinal Secretary of State, Rescriptum ex audientia. Instructio *Secreta Continere. De secreto pontificio* (04.02.1974), AAS 64 (1974), no. 2, p. 89-92.

[32] Congregation for the Doctrine of the Faith, Norms Regarding Delicts Reserved to the Congregation for the Doctrine of the Faith (11.10.2021) [hereinafter: Norms]; English text available at: https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html [accessed: 21.04.2023], Article 28 § 1.

prevent the fulfilment of the obligations laid down in all places by civil laws, including any reporting obligations, and the execution of enforceable requests of civil judicial authorities" (SR 4).

At the same time, it should be noted that this does not mean lifting any secrecy. The instruction recalls that "the information is to be treated in such a way as to ensure its security, integrity and confidentiality in accordance with the prescriptions of canons 471, 2° CIC/83 and 244 § 2, 2° CCEO, for the sake of protecting the good name, image and privacy of all persons involved" (SR 3). Also, the *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics*, issued by the Congregation for the Doctrine of the Faith at the time, points out that "secret of office" applies from the moment the offence is reported to the ecclesiastical authority.[33] As regards the Polish legal reality, however, this should be done with respect for the constitutional principle of autonomy and independence of the State and the Church, and the properly applied concordat principle of the autonomy of the state and church judiciary.

The authors of the *Vademecum* further remind us that "even in cases where there is no explicit legal obligation to do so, the ecclesiastical authorities should make a report to the competent civil authorities if this is considered necessary to protect the person involved or other minors from the danger of further criminal acts" (Article 17).

3.1.1. Polish Legal Reality

Considering the context of the issue at hand – the Polish Concordat – it is necessary to look at a source of particular law represented by a document issued in 2014 and amended two times by the Polish Bishops' Conference, which despite its misleading name (*Wytyczne* 'guidelines') is no doubt an act of church law: *Wytyczne dotyczące wstępnego dochodzenia kanonicznego w przypadku oskarżeń duchownych o czyny przeciwko szóstemu przykazaniu Dekalogu z osobą niepełnoletnią poniżej osiemnastego roku życia* [Guidelines on preliminary canonical investigation concerning accusations

[33] Dicastery of the Doctrine of the Faith, *Vademecum on Certain Points of Procedure in Treating Cases of Sexual Abuse of Minors Committed by Clerics* (ver. 2.0, 05.06.2022) [hereinafter: *Vademecum*], https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html [accessed: 21.04.2023], Article 30.

of clerical persons of acts against the Sixth Commandment committed with a minor under the age of 18].[34]

Since its promulgation, the *Guidelines* have been amended twice, and these amendments addressed the issue of interaction with the State, which is of interest to us. The first was related to the 2017 amendment of Article 240 of the Penal Code, mentioned several times,[35] while the second was introduced in 2019 to take account of the duties related to the registration of reports mandated by Pope Francis in the first version of the VELM.

The 2017 amendment incorporated the state law norm into canon law. Thus, the duty to report sexual offences against minors to law enforcement authorities was reinforced,[36] becoming also a canon law duty, aside from the Polish law.

The ecclesiastical legislator, in ordering a church superior to report through an attorney to the competent authority appointed to prosecute crimes, has significantly expanded the catalogue of obligatory information to be stated in the written report. It includes information on the alleged perpetrator, a general description of the prohibited act, the name of the alleged victim, the data of the person from whom the information was obtained

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[34] Polish Bishops' Conference, *Wytyczne dotyczące wstępnego dochodzenia kanonicznego w przypadku oskarżeń duchownych o czyny przeciwko szóstemu przykazaniu Dekalogu z osobą niepełnoletnią poniżej osiemnastego roku życia* (07-08.04.2014), https://episkopat.pl/wp-content/uploads/2020/07/Wytyczne_nowelizacja_2019.pdf [accessed: 21.04.23] (hereinafter: *Guidelines*). The norms developed by the Polish Bishops' Conference were enacted in accordance with the recommendation expressed in the "circular" of the Congregation for the Doctrine of the Faith of 3 May 2011. The dicastery pointed out to the bishops the necessity of drafting appropriate norms, which should also take into account the law in force in a given country and receive the Holy See's *recognitio*. Congregazione per la Dottrina della Fede, *Lettera circolare per aiutare le Conferenze Episcopali nel preparare linee guida per il trattamento dei casi di abuso sessuale nei confronti di minori da parte di chierici* (03.05.2011), "Enchiridion Vaticanum" 27 (2011), 256-63; Congregazione per la Dottrina della Fede, *Lettera del Cardinale William Levada per la presentazione della circolare alle Conferenze Episcopali sulle linee guida per i casi di abuso sessuale nei confronti di minori da parte di chierici* (03.05.2011), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_levada-abuso-minori_it.html [accessed: 21.04.2021].

[35] Polish Bishops' Conference, *Uchwała nr 5/376 z dnia 6 czerwca 2017 r.*, https://episkopat.pl/wp-content/uploads/2017/07/KEP_wytyczne_z_aneksami.NOWELIZACJA.2017-1.pdf [accessed: 21.04.2023].

[36] In the introduction to Annex 2 the *Guidelines* use a canonically wrong term, "a minor under the age of eighteen."

(Article 1a(2) of the *Guidelines*). Under Polish law, in light of legal doctrine and case law, the reporting obligation provided for in Article 240 PC covers only the fact of reporting, which may even be anonymous [Dudka 2005, 55-62], and the reporting party's reference to evidence that substantiates his claim [Zalewski 2013].

Unfortunately, in contrast to the Polish legislature, the ecclesiastical legislator did not hedge the omission of this duty with a penal sanction. Another serious shortcoming, apparent from the *Guidelines*, is the imposition of the penal law obligation to report only on information obtained after the law came into force. Such a view of the Church legislature should be considered wrong, if only considering the grammatical interpretation inherent in the text of substantive criminal law. Indeed, the state legislature used the phrase "anyone who has reliable information" in Article 240 PC, indicating a state of affairs using a stative verb. Its wording, hence its interpretation, is therefore different from the phrases used in other normative acts: "whoever learns" (Article 304 of the Code of Criminal Procedure[37]) or "who has become aware" (Article 910 § 4 CCP) [Kroczek 2017a, 91-107].

As Piotr Kroczek notes, the very solution of incorporating a norm of Polish law into canon law should be praised highly. In this way, the duty to report has two normative sources, which increases the likelihood of its fulfilment; that is, the conduct expected by the Polish legislator as well as the ecclesiastical legislature, which follows suit [ibid., 96]. The content of a notice directed to state law enforcement authorities cannot be information obtained in the sacrament of confession. The *Guidelines* treat knowledge obtained through spiritual direction in a similar way (Article 17).

3.2. Granting State Authorities Access to Documents

Cooperation in the area of procedural law also includes the mutual handover of documents and records of canonical investigations as well as prosecutorial procedures and trials.

It is common practice for Polish prosecutor's offices conducting an investigation after a possible crime is reported by an ecclesiastical entity to request access to the preliminary investigation file. The summons cites a CCP legal basis. These are regulations according to which legal and natural

[37] Act of 6 June 1997 – The Code of Criminal Procedure, Journal of Laws No. 89, item 555 as amended [hereinafter: CCP].

persons are obliged to provide assistance at the request of the authorities conducting criminal proceedings, if without such assistance it is impossible or very difficult to conduct a "procedural act" (Article 15 § 3 CPC).[38]

It remains debatable whether the verifying procedure of the prosecutor's office, or the preparatory proceedings with a view to initiating possibly a criminal trial, are strictly procedural activities within the meaning of the CCP, because this is what they are after its formal initiation. However, commentators point out that the duty to assist the authorities conducting criminal proceedings is present at both the preparatory and trial stages. The procedural authority may request such assistance when it finds a procedural act impossible or extremely difficult to perform unaided. The purpose of such assistance is not to replace a procedural act with one performed in the course of rendering assistance, but only to help carry out the act. The request for assistance can take oral or written form [Kaczorkiewicz 2009, 8-9].

Although it is mandatory to provide assistance, in the summons from the prosecutor's office in the case of clerical sexual offences against minors, a request is submitted to send the file of the preliminary canonical investigation or part of it. However, the statutory obligation has its limits. They are determined by other provisions of the law, which the authority is not to violate [Jezusek 2016, 44-48]. At this point, we can reasonably ask whether this also applies to provisions of canon law? On the basis of the previous considerations, which show that the Concordat is part of the Polish legal system, a positive answer must be given. This is because the obligation to assist when requested by the authorities conducting criminal proceedings

[38] Article 15 § 3: "Legal persons or organizational units without legal personality and other than those specified in § 2, as well as natural persons shall be obliged to provide assistance at the request of the authorities conducting criminal proceedings to the extent and within the time limit set by them, if without such assistance it is impossible or significantly difficult to conduct a procedural act." Another provision cited by the state prosecutor's office is Article 307 § 1 CCP when it receives a notice of the possible commission of a crime and requests in writing the completion of the data contained in the notice of a crime within a specified period of time, or the verification of the facts in this regard.: "If necessary, it may be demanded that the data contained in the notice of the offence be completed within a specified time-limit, or a verification of the facts in the matter may be ordered. In that case, the order instituting the investigation or inquiry, or refusing the institution should be issued no later than 30 days after receiving the notification."

cannot lead to a violation of the rights of the summoned entity, in this case an ecclesiastical juridical person [Sakovich 2023].

From the perspective of secular law, the CCP provisions, which underlie the action of the authorities requesting access to records, are legitimate but the counter-argument that the ecclesiastical party may advance is based on respect for the constitutional and concordat autonomy and independence of the Church (and thus the autonomy of the canonical legal order) and the principle of protection of religious freedom enshrined in the Constitution.

In this connection, it is worth recalling the 2017 decision of the District Court for Łódź-Śródmieście, overruling the state prosecutor's order for the release of documents related to the proceedings conducted in the Archdiocese of Łódź, in the case of a cleric accused of paedophilia.[39]

Following the prosecutor's order, police officers entered the diocesan curia seizing photocopies of the canonical preliminary investigation. In this case, the chancellor of the curia filed a complaint through a professional attorney, complaining about the seizure of documents constituting the Church's internal records. The court overruled the contested order of the state prosecutor. By way of justification, the court pointed out that the release of the complete file of internal canonical proceedings is an excessive interference in the internal affairs of the Church. In the matter at hand, the church authorities realised their statutory duty by informing state agencies of the possible commission of an offence and declared their full cooperation with regard to the pending criminal proceedings. In this connection, Article 5 of the Concordat was invoked, which served to highlight the Catholic Church's ability to freely administer its affairs on the basis of canon law as a separate legal system that allows it to exercise judicial authority (Canon 391 § 1-2; Article 25(3) of the Constitution).

Also, the judge highlighted the separateness of canonical and prosecutorial proceedings and the necessity of taking evidence independently in the course of the latter. Given the willingness of the ecclesiastical party to cooperate, there were, in the court's opinion, other options to determine possible witnesses or seek information. The aspect of declared cooperation was completely disregarded in the prosecution in question. The justification

[39] Decision of the District Court for Łódź-Śródmieście of 21 December 2017, file ref. no. VI Kp 471/17 (in the Author's archive).

contains a very interesting element, which has relevance for the deliberations; namely, the court's reference to the broader context, which was the penetration of the domain of a foreign, sovereign state (since the original documents were, in accordance with canonical procedure, sent earlier by the diocesan curia to the Holy See), safeguarded by the Republic of Poland on its territory through a ratified international agreement.[40]

Since the Church is willing to cooperate with the Polish State in judging crimes that are delicts known in both legal orders – as encouraged by normative and non-normative documents of the Church – it is worth distinguishing between the different modes of proceeding for the release of the files of canonical preliminary investigation and the handover of files produced in the course of a canonical process that the Dicastery of the Doctrine of the Faith may order having evaluated the investigation records conveyed to the Holy See.

While the preliminary investigation records are the property of the office of the ordinary ordering the investigation, at the time they are being conveyed to the Holy See, they are in the possession of the Dicastery for the Doctrine of the Faith. Such a position is supported by the procedural guidelines provided to ordinaries by the Apostolic Nunciature in Poland on 9 December 2021, and the accompanying remarks of the Pontifical Council for Legal Texts, dated 12 May 2021, which respond to the questions asked by Polish bishops in respect of VELM.[41]

The Vatican authors of the guidelines formulate criteria for proper cooperation depending on the stage of the canonical process. If, at the diocesan stage or at the level of a religious order jurisdiction, "the secular judicial authority lawfully requests access to the documentation, a brief report presenting the *status quaestionis* may be sent to it and, in addition, consideration may be given, at the bishop's discretion, to providing the requested

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[40] Ibid.

[41] Initially, the documents bore the clause "For internal use," but now their content is cited by internet sources, including the Catholic News Agency. Pontifical Council for Legal Texts, *Osservazioni* (12.05.2021), attachment to protocol N. 17462/2021 [hereinafter: *Indications*]; "Nieprawdziwe tezy mediów o postępowaniu abp. Gądeckiego ws. procesu księdza pedofila [Untrue claims of the media about the conduct of Archbishop Gądecki regarding the trial of a paedophile priest]." https://www.ekai.pl/nieprawdziwe-tezy-mediow-o-postepowaniu-abp-gadeckiego-ws-procesu-ksiedza-pedofila [accessed: 22.04.2023].

documentation" (para. 3 of the *Indications*), excluding, of course, documents belonging to the internal forum (para. 4 of the *Indications*).[42]

"Once the preliminary investigation is complete and its results have been conveyed to the relevant dicasteries of the Holy See, the matter is transferred to Vatican's jurisdiction; therefore, both the documents issued by the relevant dicasteries of the Holy See and by authorities acting in Poland under its delegation (e.g., the delegate conducting the process or carrying out the procedures provided for in the motu proprio *Vos estis lux mundi*) remain at the disposal of the Holy See" (para. 5 of the *Indications*).

"If a copy of the documentation sent to the Holy See remains in the diocese, the correct way of possibly making it available to the secular justice system is via international legal assistance, carried out through diplomatic channels. The Holy See willingly offers its judicial cooperation to other states, observing the principles of international courtesy, reciprocity and on the basis of ratified treaties, provided that requests for such cooperation meet all the formal and substantive requirements established by international custom for this form of legal assistance" (para. 6 of the *Indications*).[43]

The framework of cooperation so defined between the Church judiciary and State authority, on the one hand, testifies to respect for the secular legal order and transparency of church procedures; on the other hand, it serves to preserve the autonomy of the Catholic Church and its independence

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[42] Matteo Visioli presents the view that the lifting of papal secrecy does not apply to records of the preliminary proceedings, since they are not explicitly mentioned in the above-cited papal instruction *On the Confidentiality of Legal Proceedings*. The document mentions notifications, processes and decisions, omitting preliminary investigations. Besides, this author doubts whether the decision lifting the confidentiality of cases concerning crimes and cases pending before the instruction became effective [Visioli 2020, 725-36]. This position was criticised by Jan Dohnalik, who pointed to an overly restrictive interpretation, which is at variance with the legislative intent of the author of the instruction [Dohnalik 2021, 273-74].

[43] In the spring of 2023, the Chodzież District Court, among others, enjoyed international legal assistance, receiving from the Holy See the files of the preliminary investigation, which the Poznań Archdiocesan Curia had previously conveyed to the Holy See in accordance with the relevant canonical procedure. "Nieprawdziwe tezy mediów o postępowaniu abp. Gądeckiego ws. procesu księdza pedofila [Untrue claims of the media about the conduct of Archbishop Gądecki regarding the trial of a paedophile priest]." https://www.ekai.pl/nieprawdziwe-tezy-mediow-o-postepowaniu-abp-gadeckiego-ws-procesu-ksiedza-pedofila [accessed: 22.04.2023].

from state authorities, plus official secrecy, which still obtains in canon law (Canons 471, 2º and 1455 § 1). Executive requests from state authorities must therefore be granted within the limits of applicable state law, but also in accordance with ecclesiastical law, which continues to apply papal secrecy to *delicta graviora*, which are not offences against the Sixth Commandment [Dohnalik 2021, 276].[44]

3.3. Cooperation of state judicial authorities with the Church

The Church, in exercising its judicial authority over perpetrators and victims of canonical offences, especially *delicta graviora contra sextum*, protects the public good by judging the criminal behaviours of its faithful and taking precautions to eliminate them. In this sense, the Church cooperates with state judicial authorities, which are to be understood broadly as, in keeping with the papal instruction *On the Confidentiality of Legal Proceedings*, state institutions applying criminal procedure, and therefore not only common courts, but also law enforcement authorities like the police and prosecutors. State institutions also take similar measures for citizens when there is a concurrence of canonical and state liability for an offence. The State, having the appropriate legal instruments, as well as access to an array of documents, is free

[44] The Church's cooperation in this regard concerns law enforcement agencies and the judiciary, as they are the ones who take actions of a broadly procedural nature. There is no duty of information and transfer of case files to other state institutions. The issue emerged in Poland in February 2021, when the Chairman of the State Commission for Paedophilia sent a letter to officials of ecclesiastical courts, demanding access to records of canonical proceedings and criminal-administrative trials against paedophile offenders. In response to this initiative, a working team was appointed by the Polish Bishops' Conference for contacts with the State Commission for Paedophilia. The goal of this body, headed by the KEP Delegate for the Protection of Children and Young People Abp Wojciech Polak, was to develop the scope and rules of cooperation with the Commission. Following this, in May 2021, Polak sent a letter to officials assuring that ecclesiastical courts would take action after clarifying legal doubts and specifying the rules of cooperation. The doubts concerned mainly the legal basis of the Commission's requests for access to case files. Another point of doubt was the protection of sensitive personal data contained in church documents. At the same time, the Delegate declared his willingness to cooperate and ability to provide the Commission with statistical data on the number of cases of sexual abuse of minors under 15 years of age reported to the Church in Poland. He further informed the Committee chairman about the implementation of the obligation to notify law enforcement authorities of these offences and cooperation with them. *List Delegata KEP ds. Ochrony Dzieci i Młodzieży do Oficjałów Sądów* (11.05.2021) (in the Author's archive).

to order their release. It has coercive apparatus, which facilitates the effective conduct of criminal proceedings. For the ecclesiastical judiciary, such solutions remain unavailable, understandably, and therefore, in order to fruitfully exercise judicial authority, the Church may request state authorities to provide access to certain documents or case files. Does the Church have the right to do so? Is the State obliged to cooperate with the Church in this regard?

The basis for requesting assistance from competent church authorities in the area mentioned above is Article 156 CCP. Para. 5 stipulates that in addition to parties, defence counsels, attorneys and statutory representatives, "with the permission of the state prosecutor, access to files in the pending preparatory proceedings and after its completion, may be made available to other persons by way of exception" (Article 156 § 5 and 5b CCP). Court case files enjoy a similar right (Article 156 § 1 CCP).

To exercise it, a legal interest must be demonstrated, which in the case of the Church is the notification of a possible crime, which, despite not making the Church a party to the proceedings, affects the cleric who is under the jurisdiction of the ordinary. In practice, such requests elicit various responses from state bodies: from giving access to all files, specific extracts, to refusal or failure to give an administrative reply.

The right justifying access to case files is justified by CCP commentators by the simultaneous conduct of disciplinary proceedings against the accused by competent persons – by the church judiciary in this case [Zgryzek 2014, 768ff.].

Were it necessary to access the files of a proceeding that is pending in accordance with civil law,[45] the church party may also pursue its right. The basis for this is found in Article 525 CCP, which provides that "the case file shall be made available to the participants in the proceedings and, with the permission of the presiding judge, to anyone who substantiates their need to view the files. The same applies to 1) making and receiving copies and extracts from case files, and 2) receiving audio or video/audio recordings of the case file."

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[45] 'Civil law' here is used in reference to proceedings that are held under the provisions of the Civil Code and the Code of Civil Procedure in force in the Polish state. This clarification seems necessary because originally, in the Middle Ages, the term 'civil law' (*civitas*) was used in reference to state law, regardless of its branch, to distinguish it from ecclesiastical law.

4. Jurisdiction of state courts in "religious matters"

After considering the question of cooperation of state courts with ecclesiastical courts in the field of matrimonial and criminal procedural law, the question can be raised: Are the state courts competent in any of the matters that fall to the autonomous judiciary of the Catholic Church?

For the issue thus signalled, according to Grzegorz Maroń, it is crucial to distinguish the courts' illicit "resolution" of doctrinal and internal church disputes as well as their judgemental "evaluation" of the religious doctrine position or the internal law of a religious organisation on specific questions from the permissible, declaratory "determination" of this position to the extent necessary for the adjudication of civil cases based on general provisions of the law [Maroń 2022, 136].

The necessity of such a settlement can be verified when there occurred an infringement of personal rights in the exercise of procedural rights before the ecclesiastical court, which is evaluated by a civil court. In this case, the objection that civil litigation is inadmissible has no grounding, since personal rights are protected also in the canonical process. If the information concerning personal rights, revealed in an ecclesiastical process, are not objectively justified by the purposes of the canonical process, and is either untrue or true but defamatory and irrelevant to the outcome of the case, we are dealing with an unlawful infringement of personal rights.[46] In a case like this, one can seek protection of their personal rights before a court via civil litigation, in particular their dignity and good name [Misztal-Konecka 2020, 424].

The civil court's evaluation in such a process does not concern the activity of a constituent body of a religious association, such as an ecclesiastical court, but the conduct of an individual appearing before such a body. The judicial decision in this case does not constitute an interference of state authorities in the internal affairs of a religious organisation; further, it does not interfere in the proceedings or control their decisions [Borecki 2018, 88-100].[47]

The action of the parties within the limits of their procedural rights can take place both before a civil (state) court and an ecclesiastical court. Both

[46] Judgement of the Supreme Court of 3 May 1968, file ref. no. II CR 163/68, "Biuletyn SN" 11-12 (1968), item 207; Judgement of the Court of Appeals in Katowice of 10 April 2015, file ref. no. I ACa 1106/14, Legalis no. 1285440.

[47] Decision of the Supreme Court of 12 May 2016, ref. IV CSK 529/15, OSNC 2017/3/35.

qualify as resulting from the subject's right to act within the competence limits imposed the legal order. Action before the ecclesiastical court is certainly within the legal order. The functioning of the ecclesiastical judiciary is approved by state legislation, which grants it autonomy. Ecclesiastical courts do not operate without the knowledge and consent of the state [Misztal-Konecka 2020]. Therefore, the performance of procedural acts before an ecclesiastical court cannot be treated as a circumstance excluding liability for violating personal rights.[48]

Civil cases arising out of or directly related to intra-church disputes can be heard by state courts when neutral principles of law underlie the decision, as long as it does not violate each other's autonomy and independence. When for a civil case, however, it becomes necessary to resolve a religious controversy falling within the scope of the Church's autonomy, the court should rely on the findings of the competent ecclesiastical authority in the matter [Maroon 2022, 136].

Guarantees of free exercise of jurisdiction and being governed by its own laws allow the Catholic Church to maintain the autonomy of its judicial system. It is impermissible for state courts to settle disputes arising from the application of Church internal law. The principle of the state's impartiality in matters of worldview, stipulated by Article 25(2) of the Polish Constitution, also implies the public authorities' lack of religious competence, which also results in the lack of competence to adjudicate religious matters [Walencik 2013, 16; Zieliński 2009, 141-67].

Conclusions

There is absolutely no doubt that our analysis of constitutional and concordat norms, state laws, and the relevant norms of canon law demonstrates

[48] So was ruled by the Bialystok Court of Appeals, obliging a man to make a written statement to the petitioner in which he would retract his false claims made in the marriage annulment case about her mental illness, incestuous relationships in her family, an extramarital relationship with her superior at work, psychiatric treatment and the unexplained death of a child with her involvement. In addition, the defendant was to pay a compensation of 3,000 zloty. The court rightly held that the violation of personal rights that occurred before the ecclesiastical court is only part of the facts, and does not prejudge the inability of the state court to hear the case – Judgement of the Court of Appeals in Białystok of 12 January 2017, ref. no. I Aca 676/16, Legalis no. 1576465.

the principle of respect for the autonomy and independence of the Catholic Church and the state, each in its own domain. From them follow the guarantees of the Church's free self-governance based on its internal law and jurisdiction. More broadly, this implies the autonomy of the religious judiciary and the state judiciary. The element that sets the two orders apart is also their object of judicial authority. In the Church, this would be spiritual things (*res spirituales*) and things related to them (*res spiritualibus adnexae*). The essence of the administration of justice, which is as a specific element of the state's *imperium*, is manifested through the issuance of binding decisions in settling disputes over the rights and obligations of individual entities, based on general and abstract norms.

In both systems, similar procedural steps and methods of proof are utilized: statements of the parties, admissions, public and private documents, witness testimony, expert opinions, site visits and inspections. However, despite the two judicial systems being largely similar in their functions, ecclesiastical courts lie outside the constitutional judicial system. Their operations is governed by the Church's internal law. However, this is not an argument for undermining the judicial nature of the activities of church institutions. The Church can exercise its jurisdiction based on the provisions of the Concordat, especially Articles 1 and 5, and with regard to matrimonial matters, also Article 10 (3-4).

Acting towards the common good, marriage and family, as well as counteracting pathologies, puts some of the issues within the purview of both the state and church legal orders (*res mixtae*). This creates the possibility, and even the necessity, of interaction in the field of procedural law especially with regard to matrimonial and criminal law. Legal norms create certain opportunities, but also limitations. Practice also reveals unregulated areas and motivates *de lege ferenda* postulates.

In the course of the work on the Concordat, the issue of mutual notifications between common and ecclesiastical courts of their rulings in matrimonial cases was set aside for separate regulation. To date, the issue has not been resolved by the Joint Commission of the Government of the Republic of Poland and the Polish Bishops' Conference.

Church courts also lack the ability to obtain medical records, which are often important evidence in ongoing proceedings. Medical facilities make it available only at the request of common courts. It seems that the requisition

path, known to both the state and church judiciary, could also be used along the church–court axis. While existing regulations permit it, its practical application is another area calling for regulation.

The Supreme Administrative Court reasoned that the concordat entitlement of ecclesiastical courts to conduct autonomous proceedings in marriage cases gives rise to the parties' right to obtain the necessary information from public administrative bodies. Can this only apply to an unknown postal address of the defendant? The legal interest arising from a church trial seems to validate other, further-reaching measures as well.

Increasingly, the Church is using procedural criminal law. In the case of delicts punishable by both the Church and the State, such as sexual offences against minors, it is not uncommon for proceedings to run concurrently in church and state institutions. Against this emerges the issue of document exchange and process records. The Pontifical Council for Legal Texts, in its comments accompanying the Vatican guidelines conveyed to the Polish Bishops' Conference, notes the need for the Joint Commission to undertake yet another task, which is to clarify issues of a moral nature and concerning the relationship between legal orders, as well as international law, especially to emphasize the special status of some documents (e.g., those of the internal scope) and the need to respect the international status of the Holy See in penal processes that have already been transferred to papal jurisdiction.

Cooperation implies mutual respect for the activities of the two systems for the benefit of the same people. The resulting mutual area of understanding should inspire actions that promote the resolution of issues that can improve the procedural activities of both partners, with their autonomy and independence maintained.

As a final note, it is worth quoting an excerpt from a Constitutional Court ruling that encourages cooperation: "It is aptly argued in the doctrine that since the regulation of the institutional position of churches and religious organisations, enshrined in Article 25 of the Constitution, has been given the shape of a systemic principle, the interpretation of all other constitutional provisions must be conducted in a way that is 'friendly' to these principles, hence ensuring their implementation in the best possible way."[49]

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[49] Judgement of the Constitutional Court of 2 December 2009, U 10/07, OTK-A 2009, no. 11, item 163.

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