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ANALYSIS OF THE CANONICAL PENAL PROCESS IN LIGHT OF THE MINIMUM CONDITIONS OF THE ADVERSARIAL PRINCIPLE*

ANALIZA KANONICZNEGO PROCESU KARNEGO Z PERSPEKTYWY MINIMALNYCH WARUNKÓW ZASADY KONTRADYKTORYJNOŚCI

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Abstract

The article covers the issue of the scope of the adversarial principle in the canonical penal process. In this context, consideration is given to the minimum conditions for the adversarial nature of the proceedings in the canonical process under analysis with regard to its elements, i.e. action as a procedural impulse, the designation of the object of the trial, the parties to the dispute and the person competent to settle it, equality of the litigants, the minimum disposition of the parties, the procedural authority with the attributes of independence and impartiality. In conclusion, it should be stated that the judicial penal process generally meets the minimum conditions for the validity of the adversarial principle.

Keywords: canon law, adversarial principle, penal process

Abstrakt

Artykuł porusza problematykę zakresu obowiązywania zasady kontradyktoryjności w kanonicznym procesie karnym. W tym kontekście rozważania dotyczą minimalnych warunków kontradyktoryjności postępowania w analizowanym procesie kanonicznym w odniesieniu do jego elementów, tj. skarga jako impulsu procesowy, oznaczenie przedmiotu procesu, strony sporu i podmiot uprawniony do jego rozstrzygnięcia, równouprawnienie stron procesowych, minimum dyspozycyjności

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stron, organ procesowy wyposażony w atrybuty niezawisłości i bezstronności. W konkluzji należy stwierdzić, iż kanoniczny proces karno-sądowego spełnia zasadniczo minimalne warunki obowiązywania zasady kontradyktoryjności.

Słowa kluczowe: prawo kanoniczne, zasada kontradyktoryjności, proces karny

Introduction

An analysis of issues related to canon criminal law must start with a reflection on the very essence of understanding criminal law *sensu largo*. In this connection, a reference will be made to Pope Francis' address to the delegates of the International Association of Penal Law delivered on 23 October 2014, in which he underscored that criminal law should be understood as the "*ultima ratio* [...], as the last resort to punishment, limited to the most serious cases against the individual and collective interests most worthy of protection."[1] Francis notes that criminal justice, that is, the application of a penal sanction in response to a crime is essential but not exhausted by the sole act of punishing the perpetrator. This is because finding an offender guilty of the imputed act and causing him or her the inconvenience of the penalty is not doing justice in this sense [Grześkowiak 2006, 51].

Essentially, canonical penal process was normalized by the 1983 Code of Canon Law,[2] in Canons 1717-1719, which provide for preliminary investigation preceding the principal proceedings. Canons 1720-1728 regulate the main course of the process, providing for two modes of canonical penal process: the administrative penal mode, which seeks to impose or declare a canonical punishment extrajudicially, and the canonical trial. The adversarial principle is implemented mainly before a first instance tribunal, and therefore in our considerations here the issue of the administrative penal mode will be barely touched upon, with more emphasis on the judicial penal process. To the extent necessary, reference will also be made to action

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[1] Francis, *Address of Pope Francis to the Delegates of the International Association of Penal Law* (23.10.2014); English text available at: https://www.vatican.va/content/francesco/en/speeches/2014/october/documents/papa-francesco_20141023_associazione-internazionale-diritto-penale.html [accessed: 03.08.2019].

[2] *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 [henceforth: CIC/83].

to repair damages, regulated in Canons 1729-1731 CIC/83 and the regulation of the 1917 Code of Canon Law.[3]

The scope of the adversarial principle in the canonical penal process will be examined by referring to the minimum conditions for the adversarial character of the process such as: an action brought to initiate judicial proceedings, the identification of the object of the process, the litigants and the body competent to settle it, equality of the litigants, the minimum disposition of the parties, the presence of a procedural authority with the attributes of independence and impartiality. An analysis of the adversarial principle in the context of the canonical penal process and in light of the above-mentioned conditions will allow us to answer the question which of those elements are the most prominent and which are subject to limitations. In this connection, it might also be considered what are the sources and consequences of the adversarial formula so constructed.

In view of the fact that criminal law entails an inherently repressive procedure, the guarantees that specific provisions provide for the defendant gain prominence. The rights and obligations of the accused need to be looked at from the initial phase of the proceedings to legal instruments for conducting the "battle" during the judicial proceedings, and finally, possibilities to appeal against the settlement rendered. For it goes without saying that in any trial, especially a penal process, the right of defence plays a significant role.

Before embarking on any closer examination of the conditions for adversarial formula, we also need to address the manner in which penal process is regulated by the CIC/83 norms. On the face of it, one can notice that a regulation of the entire penal process in just fifteen canons would be impossible were it not for the fact that they are in fact the proper norms of canonical penal proceedings, not of the ordinary adversarial process. It follows that for unregulated issues, the disposition of Canon 1728 § 1 CIC/83 makes reference to prescripts related to trials in general and ordinary contentious process, with the application of special prescripts governing matters that concern the public good, unless the nature of things indicates otherwise. Therefore, when issues of the adversarial principle in the penal process are examined, our comments will refer first and foremost to the proper

[3] *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 1-593 [henceforth: CIC/17].

norms of canonical penal procedure, referring – only to the extent necessary – to the ordinary adversarial process. This way of presenting the subject matter at hand will better elucidate the essence and characteristics of this procedure.

1. Action as an Impetus for Proceedings

The initiation of a penal process under canon law is preceded by a preliminary investigation, which pursuant to Canon 1717 § 1 CIC/83 is initiated by an ordinary who has received information of a delict which seems probable. He can conduct the process single-handedly, or through an appropriate person, in order to carefully examine the facts and circumstances of the offence and the perpetrator's sanity, except when the process appears to be completely unnecessary.[4] The positive condition for the initiation of a preliminary investigation is information about a delict, which has at least a semblance of truth,[5] with the negative condition being the redundancy of proceedings. A similar regulation appears in CIC/17, where under Canon 1939 § 1 a detailed investigation was not necessary if the delict was notorious and absolutely certain [Pawluk 1978, 119].[6]

Essentially, under CIC/17, reporting a crime to a superior was also voluntary. However, cases were also cited where the duty was urgent because the faith or religion was under threat, or to avoid or eradicate other public

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[4] Incidentally, it has been considered in the literature on the subject how widely the term 'ordinary' should be interpreted as used in Canon 1717 § 1 CIC/83 in relation to local ordinaries; it has been argued that a preliminary investigation can be initiated only by those competent to do so, namely, ecclesiastical authorities who have proper episcopal, ordinary power, encompassing legislative, executive and judicial functions. Therefore, vicars general and bishops will not have this competence, while the judicial vicar [officialis] indeed has judicial authority, but his task is to conduct the penal process [Krukowski 2007, 402].

[5] Some authors point out that for a trial to be initiated "there must be a high probability that an ecclesiastical delict has been committed" [Green 2000, 1807].

[6] Canon 1939 § 1 CIC/17: "Si delictum nec notorium sit nec omnino certum, sed innotuerit sive ex rumore et publica fama, sive ex denuntiatione, sive ex querela damni, sive ex inquisitione generali ab Ordinario facta, sive alia quavis ratione, antequam quis citetur ad respondendum de delicto, inquisitio specialis est praemittenda ut constet an et quo fundamento innitatur imputatio."

evil.[7] On the other hand, in cases of solicitation[8] or enrolment of a cleric in an association whose purpose was to oppose the Church or legitimate secular authority,[9] notification was mandatory [Pawluk 1978, 115]. The current code offers no norms requiring the faithful to report a delict, although their moral obligation to do so is emphasised in the case when grave and pressing reasons arise from natural and ecclesiastical law or from a threat to the faith or the good of the Church, or when they make it possible to avert a possible evil [Loza 2011, 1289]. Failure to denounce does not entail negative legal consequences for a member of the faithful. Importantly, though, the denunciation must be legal, submitted by a private or public person with a view to punishing the perpetrator of the act. In contrast, an evangelical denunciation (Matthew 18:15-19),[10] whose purpose is to improve the alleged offender, does not constitute grounds for a preliminary investigation. In this sense, the person reporting treats the offender as a brother, entrusting him or her to the ordinary's care as their spiritual father. In other words, it can be assumed that only a legal denunciation provides the grounds for initiating proceedings, made by a private or public person, and the goal is to punish the perpetrator for an act that meets the criteria of an offence [Krukowski 2011, *passim*].[11]

Referring to secular law, Andrzej Miziński noted that a *notitia criminis* immediately gives rise to the necessity of instituting a penal process, whereas the situation is radically different in the canonical penal process. Considering a possible investigation and the responsibility for an offence, by taking

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7 Canon 1935 § 2 CIC/17: "Imo obligatio denuntiationis urget quotiescunque ad id quis adigitur sive lege vel peculiari legitimo praecepto, sive ex ipsa naturali lege ob fidei vel religionis periculum vel aliud imminens publicum malum."

8 Canon 2368 § 2 CIC/17: "Fidelis vero, qui scienter omiserit eum, a quo sollicitatus fuerit, intra mensem denuntiare contra praescriptum can. 904, incurrit in excommunicationem latae sententiae nemini reservatam, non absolvendus nisi postquam obligationi satisfecerit aut se satisfacturum serio promiserit."

9 Canon 2336 § 2 CIC/17: "Insuper clerici et religiosi nomen dantes sectae massonicae aliisque similibus associationibus denuntiari debent Sacrae Congregationi S. Officii."

10 Holy Bible, New International Version (Biblica, 2011). Available at: www.biblegateway.com.

11 It should be noted that the CIC/83 does not identify sources of information so obtained; thus, in respect of CIC/17 we can say they are: information gathered by the ordinary concerning the maintenance of discipline in the Church, a denunciation, made properly by an official or a private person, an action for damages resulting from an offence, rumours and public information [Grochowina 2013, 80].

part in these proceedings as an authority with *de facto* unlimited power – geared in the first instance to applying pastoral measures – an ordinary may decide to initiate penal proceedings when these measures prove insufficient or ineffective [Miziński 2001a, 122].[12] The proceedings conducted as part of a preliminary investigation launched by a report filed with the ordinary are conducted to avoid unnecessary and detrimental trials, as well as those without sufficient factual and legal grounding. These proceedings are not tantamount to bringing an action or filing a penal complaint [Loza 2011, 1289].[13]

Pursuant to Canon 1718 § 1 CIC/83, only when a preliminary investigation and evidence taking are complete should the ordinary decide whether proceedings are to be instituted for the purpose of imposing or declaring punishment, taking into account Canon 1341 and deciding whether to follow a judicial process or to make use of an extrajudicial decree. Canon 1718 § 1 makes it explicit that this prescript is not an independent basis for the initiation of canonical penal proceedings, for only when the norms contained in Canon 1341 are factored in, it is possible to initiate canonical penal proceedings. From the canon in question, however, two trial modes follow explicitly: judicial or administrative if a positive decision is made on the need for further canonical penal proceedings.

The basic mode of proceeding in canonical penal cases is to conduct judicial penal proceedings, so the ordinary, when deciding on this way of conducting the trial, in accordance with the disposition of Canon 1721 § 1 hands over the preliminary investigation file to the promoter of justice. It should be underscored that only the promoter of justice is actively

[12] As a marginal note to secular law, it should be noted that Miziński is right only with regard to countries applying the legalism principle; in those where the opportunism principle applies, for example, in countries applying the Angolan system and in Belgium, Cyprus, France, Luxembourg and others, the procedural authority may not initiate proceedings on the grounds that the public interest in a particular matters makes proceedings pointless [Waltoś and Hofmański 2016, 294-96].

[13] There is no consensus in the canonist literature as to whether the preliminary investigation is an integral part of a judicial penal process or whether it has an administrative nature with all the consequences that go with it [Miziński 2001b, 60]. An intermediate concept was proposed by Michał Grochowina, indicating that the preliminary investigation is an integral part of the penal process, although it is an administrative act *per se* if considered in isolation [Grochowina 2013, 97].

entitled to file a *libellus*, exercising a public function in the Church similar to the role of a prosecutor in civil legislation. The promoter is competent to file an accusation and provide evidence that has been collected in the preliminary investigation and new evidence, too. In this perspective, it should be considered essential for the promoter of justice to familiarize himself with the preliminary investigation records in order to learn about the case and subsequently bring charges against the alleged offender [Loza, 1293]. This solution was derived from the norms of CIC/17, where pursuant to Canon 1934 none but the promoter of justice was authorized to file an accusation. It was also emphasised that the accused is not entitled to recourse against the decree of the ordinary as to the handover of the file to the promoter of justice because its nature is not judicial [Pawluk 1978, 119].[14]

Once the ordinary presents the file, the promoter of justice is obliged to prepare a petition of accusation in accordance with Canons 1502 and 1504 CIC/83. At the same time, pursuant to Canon 1502 CIC/83, the promoter of justice, as a party to a canonical judicial penal trial is obliged to present a petition to the "lawfully competent judge," in which the matter in dispute is set out and the services of a judge are requested. The elements of the petition of accusation include: designation of the judge to whom the case is brought, the punishment to be applied and the person of the alleged perpetrator; indication of the legal basis for the claim and the facts and means of evidence supporting the accuser's claims; preparation of a letter bearing the promoter's signature, which specifies the day, month and year, the residence of the promoter to which correspondence is to be sent; designation of the place of permanent or at least temporary residence of the accused [Krukowski 2007, 409].[15]

In summary, it can be said that the petition of accusation (*libellus*) consists of a material element, which is the imposition or declaration of punishment, and a causal element, which is the title of the criminal action, i.e. the presumption of the commission of the alleged delict and the imputability

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[14] Canon 1934 CIC/17: "Actio seu accusatio criminalis uni promotori iustitiae, ceteris omnibus exclusis reservatur."

[15] A petition of accusation drafted under CIC/17 should include facts surrounding the offence, the type of delict and the canons violated by it, circumstances aggravating or mitigating the imputability of the offence, evidence that proves the criminal activity of the accused, a punishment for the offence in question as provided by criminal law [Pawluk 1978, 142].

of the act. The action so drafted is submitted by the promoter of justice and once accepted, the penal process is formally initiated [Loza 2011, 1293].[16] The procedure aimed at initiating proceedings in the second mode of the penal process, administrative penal proceedings, is different.

Without getting into details of the administrative mode of canonical penal process, we need to be reminded that when the 1983 Code of Canon Law was drafted, it was proposed that no ecclesiastical penalties should be imposed in the administrative mode. What is more, a regulation was proposed according to which the sentencing would occur in judicial proceedings, so as to guarantee justice in criminal cases. However, the consultors reasoned that reality required that punishments be served expeditiously and without excessive impediments, so the new code did not relinquish the administrative route, although precedence was established for judicial proceedings [Syryjczyk 1991, 148-49]. If the preference for the judicial route in the canonical penal process should be appreciated, it cannot be accepted that the mere consideration of speed and reduced formalism of the administrative procedure can be sufficient grounds for its functioning. In this connection, the need for human rights protection in canonical processes is particularly noteworthy. Pope John Paul II's allocution to the Tribunal of the Roman Rota of 29 January 2005 seems to have special relevance. It contains significant words in the context of matrimonial processes, but they are also pertinent to other processes: "It is true that the entitlement to timely justice is also part of the concrete service to the truth and constitutes a personal right. Yet false speed to the detriment of the truth is even more seriously unjust."[17]

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[16] The authorized person to initiate administrative penal proceedings is the ordinary who has decided to conduct a preliminary investigation. He is competent to issue a decree to conduct the trial by extrajudicial means, while the moment when the accused is notified of the accusation and evidence commences – from a purely formal point of view – the administrative penal process [Miziński 2003, 139].

[17] John Paul II, *Ad Tribunal Rotae Romanae iudiciali ineunte anno* (29.01.2005), AAS 97 (2005), p. 164-66; this English translation comes from: https://www.ewtn.com/catholicism/library/to-members-of-the-tribunal-of-the-roman-rota-8573 [accessed: 20.05.2023]. Analyzing the norms that make it possible to protect human rights in canonical processes, Ryszard Sztychmiler noted that the largest number of norms governing human rights protection are found in the rules governing the contentious process, primarily the matrimonial process. These are followed, he contends, by regulations of the penal process. These rights, however, are exercised in the least degree in administrative proceedings [Sztychmiler 2003, 36].

2. Designation of the Object of the Process

Although the source of the action and the object of the penal process is a delict, not every delict can be the object of the penal process and the basis for punishing the perpetrator judicially, or approving the penalty he has incurred. This is possible only if the offence has the relevant attributes specified by law. Since it is necessary to lay out the very concept of offence and its constituent elements [Pawluk 1978, 78].

In contradistinction to CIC/17, the current code does not provide a legal definition of delict. In the doctrine of canon law, however, this concept has come to include three elements: the objective element, i.e. an external transgression of a penal statute or a prescript; the subjective element, i.e. moral imputability in the form of a grave sin; and legal imputability in the form of either wilful misconduct (*dolus*) or unintentional misconduct (*culpa*); the legal element, i.e. an act prohibited under the pain of a penal sanction (at least unspecified) taking into account the provisions of Canons 1399 and 1401, 2° CIC/83 [Syryjczyk 2008, 100].[18] However, a note should be taken of the legislative technique in both codes, as in the CIC/83 we are dealing with a subjective view of criminal law, while in CIC/17 the treatment was objective. This means that in the previous code, offence and its punishment corresponded to the requirements of the classical school, while in the current one emphasis is on the perpetrator, in the first place, and then on his or her act [Syryjczyk 1985, 95].[19]

At the preliminary stage, the object is an offence or, more precisely, an act has come to attention and has at least the semblance of the constitutive elements of a crime. It is vital that the following questions be answered in the preliminary investigation: Was the offence actually committed? At what time and what circumstances surrounded the commission

[18] For more on the various elements of offence, see: Syryjczyk 1985, 85-96. Canon 2195 § 1 CIC/17: "Nomine delicti, iure ecclesiastico, intelligitur externa et moraliter imputabilis legis violatio cui addita sit sanctio canonica saltem indeterminata." Under CIC/17, two elements of offence were distinguished: the objective element, that is, an external violation of a penal law, and the subjective element, that is, a morally imputable violation of a penal law [Pawluk 1978, 78-86].

[19] For more on the basic schools in criminal law, such as the classical and positive schools, see: Wróbel and Zoll 2010, 50-56.

thereof? Does the suspected perpetrator is the author of the offence? What is the imputability of the perpetrator? [Miziński 2001b, 61-62].

The object of the canonical judicial penal process are, under Canon 1400, 2° CIC/83, offences involving the imposition or declaration of a penalty. In contrast, pursuant to Canon 1425 § 1, 2°, the following are reserved to a "collegiate tribunal of three judges": penal cases entailing the penalty of dismissal from the clerical state or the imposition or declaration of excommunication.

From the perspective of the adversarial principle in question, it is also important to inform the parties of the penal process pending against them. Satisfying the duty to inform is necessary so that a party undertaking its defence can be aware of the nature of the potential liability and user the real option to counter the prosecutor's arguments. Therefore, from this point of view, of essence are the procedural activities of the preliminary investigation authority.

Under CIC/17, it was impossible to question a suspect as a witness in his case, because according to Canon 1946 § 2, 2°-3°, examination of the suspect could not take place until the investigation was closed. The rationale for this rested on the assumption that questioning at an earlier stage could prompt the suspect to cover his tracks. In addition, the prevailing view was that assurance of the right to a defence makes sense when all the evidence has been collected, so when the investigation is over. At the same time, it was argued that early questioning could have an adverse impact on the suspect's state of mind if the suspicion turns out to be unfounded after the investigation. Thus, it was assumed that the detailed investigation must be secret and not only with respect to the criminal act itself, but also with regard to the suspect [Pawluk 1978, 131].[20] The defendant would learn that there was a trial against him pending and an indictment had been filed only when he or she was served a summons. Until then, he could not take part in any of the activities of the pre-trial proceedings, as he was not even

[20] Canon 1946 § 2, 2°-3° CIC/17: "Ordinarius vel de eius speciali mandato officialis suo decreto iubeat ut: 2° Si indicia criminis habeantur, sed nondum sufficientia ad accusatoriam actionem instituendam, acta in eodem archivo serventur et invigiletur interim moribus imputati, qui pro prudenti Ordinarii iudicio erit opportune super re audiendus, et, si casus ferat, monendus ad normam can. 2307; 3° Si denique certa vel saltem probabilia et sufficientia ad accusationem instituendam argumenta praesto sint, citetur reus ad comparendum et procedatur ad ulteriora ad normam canonum qui sequuntur."

aware of the actions conducted against him. A copy of the indictment was not always attached to the summons, which stated the reason for the summons in general terms, since prudence exercised in individual cases made it possible to disapply this procedural step.

A similar solution is used in the current code, using the arguments that were applied in relation to the regulations of CIC/17. Nevertheless, the literature of the subject underscores that the questioning of a suspect in a preliminary investigation would be possible in order to clarify a specific case or eliminate suspicion, which can be done without jeopardizing the good of the investigation itself [Miziński 2001a, 150]. This means, therefore, that it is only during judicial proceedings that the accused learns about the nature of the penal proceedings against him or her and what evidence has been gathered for this purpose, and only by way of exception the possibility of questioning them at the stage of preliminary proceedings has been allowed.

3. Parties to the Contentious Trial and the Subject Competent to Settle It

Canonical judicial penal procedure strictly defines the institutions and regulations concerning the division of tasks in this process, as a result of which the phases of this procedure are split into a preliminary investigation, a case instruction phase, and a decision phase. This very structure of the judicial penal process provides the best guarantee of reaching the objective truth in the trial [Miziński 2002, 142]. It lies with the ordinary to initiate the preliminary investigation with a decree giving directions to the investigating judge if he will not conduct it personally. The role of the investigating judge is to collect evidence in the case, which will form the basis for a later trial along both penal and administrative judicial routes. These proceedings also involve a notary public, whose task is to draft the records for the evidence collected and secured [Miziński 2001a, 123-24].[21] Importantly, the injured party does not take part in the proceed-

[21] It should be noted in this context that Dariusz Borek is right in arguing that in administrative penal proceedings there occurs a merger of procedural functions in the ordinary, since on the one hand he is both the accuser and the authority who conducts the evidentiary proceedings, and thus has an accusing function; on the other hand, he is the judge who decides the case, and thus performs the adjudicating function

ings. However, as provided by Canon 1729 § 1 CIC/83, it should be noted that an injured party in the penal trial "can bring a contentious action to repair damages incurred personally from the delict" according to the norms governing the participation of a third party in the case. On this account, the authority conducting the preliminary investigation has to act in these proceedings as a procedural authority and counter-party to the accused. Also, we must not ignore the fact that due to the nature of these proceedings, the conducting authority here acts more as a law enforcement agency than an authority appointed to resolve the case.

Importantly, in light of CIC/17, it was emphasized that although the preliminary investigation can be conducted by the ordinary, it followed from Canon 1940 that the recommendation that the conduct of the pre-trial proceedings be entrusted to another person to better elucidate the case, exclude arguments suggestive of possible bias, and to protect the ordinary against possible reluctance of the suspect [Pawluk 1978, 120].[22] An analogous option is afforded by the current Canon 1717 § 1 CIC/83, but there seems to be no preference as to the choice of the authority running the preliminary investigation, as was the case in CIC/17. It also seems that the arguments in favour of such a solution also remain valid under the current legislation.

The preliminary investigation is conducted by the investigating judge. As a rule, the suspect does not participate in it; if, in exceptional cases, he or she is questioned, they do not have the status of a party to these proceedings. The injured party, standing in opposition to the suspect, does not appear, either; the only actor on stage here is the investigating judge.[23] In his

[Borek 2007, 283]. In other words, in administrative penal proceedings, the *nemo iudex sine actore* principle does not obtain, since in this process the *acusator et iudex* are one and the same entity – the ordinary – who exercises administrative, hence executive, power. In consequence, it is impossible to fully apply the distinction between the legal position of the parties and the adjudicating authority [Miziński 2002, 142].

[22] Canon 1946 § 2, 2º-3º CIC/17: "Haec inquisitio, quamvis ab ipso loci Ordinario peragi possit, ex generali tamen regula committenda est alicui ex iudicibus synodalibus, nisi eidem Ordinario ex peculiari ratione alii committenda videatur."

[23] Incidentally, it should be said that the judicial investigation has been done away with in countries such as Germany (1974), Italy (1988), Switzerland (2007), Austria (2008). The elimination of the investigating judge was also contemplated in Croatia and France. The criticism of the classical model featuring the investigative judge in whom both investigative and jurisdictional functions are fused was addressed by introducing into pre-trial proceedings a judge for preliminary proceedings [Andrzejewski 2012, 120-39].

analysis of the implications of this situation, Miziński notes that the judicial penal process necessarily entails the existence of parties, the petitioner and the respondent, since the penal process inherently leads to the restoration of justice once violated and the repairing of the scandal caused by the offence. At the same time, Miziński underscores that due to the unique nature of the judicial penal process, at the preliminary investigation phase we are not yet dealing with either judicial proceedings or parties to the case in the strict sense of the term, and the concept emerges only when a dispute arises before an ecclesiastical judge [Miziński 2010, 126-27].

Regarding, in turn, the accused as the defendant, it is noted in scholarship that his role is not as important in the constitution of procedural relations as the promoter of justice, even though the consequences of these relations affect him directly. The defendant in a penal trial is constituted by the judge's acceptance of the indictment and his notifying the party of this decision – it is when the accused-judge relationship also arises.

In the process in question, the function of the public prosecutor, that is, the party initiating the case called theaccuser (*accusator*), is always performed by the promoter of justice. The opposing party is the accused (*accusatus*), that is, the person at whom, as a result of the preliminary investigation, the suspicion of an offence is directed. In the judicial penal process, when more physical persons are indicted, they all become defendants in the case. Thus, the process involves litigants with opposing interests "who seek to obtain the benefit of the judgement through evidentiary actions and the judge's decision" [Andrzejewski 2003, 127-31].

As for the judge's role, it is to recognize and resolve the said conflict of interest between the parties and issue a decision in the form of a judgement or a court decree [ibid., 134]. At the same time, the rule is that cases are heard by a single judge, which complies with Canon 1424 CIC/83. However, criminal cases relating to offences that result in dismissal from clerical state and the imposition or declaration of excommunication are considered under Canon 1425 § 1, 2º CIC/83 by a collegial tribunal of three judges. It is pertinent to note that, for example, under CIC/17, criminal cases for offences punishable by deposition, deprivation of dignity or clerical garb were reserved to a tribunal consisting of five members. It seems that today this provision is unnecessary, and it is better to enable a bishop to establish a tribunal of three or five judges for cases characterised by more complexity or gravity [Del Amo 2011, 1068].

The judicial penal process involves parties at dispute and the entity competent to settle it, as there is no doubt the functions of the prosecuting authority and the party opposed to the accused are separated, with the defendant appearing in the case. This means that the prosecuting function here is performed by the promoter of justice, the adjudicating role is performed by the judge, and defence is guaranteed by Canon 1723 CIC/83, whereby the judge should encourage the defendant to appoint an advocate within the time limit prescribed by the former. In the event that the defendant fails to appoint a defence counsel, the judge may, before the joinder of the issue, appoint a lawyer for him until the defendant himself appoints one.

4. Equal Rights of the Parties

The prescript of Canon 1723 § 1-2 CIC/83 no doubt reinforces the guarantees of the rights of the accused in the canonical judicial penal process, as it virtually prescribes that the accused be urged to appoint an advocate within the time specified by the judge. However, should the accused fail to exercise this right, the judge should appoint an advocate before the issue is joined, who will perform his tasks until the defendant appoints a lawyer. On the face of it, it seems that the obligation to appoint a defence counsel, mandatory in the judicial penal process, is the reinforcement of the procedural guarantees of the accused. The canon at hand replicates Canon 1655 § 1 CIC/17, which ordered that the accused be informed of the possibility of appointing a lawyer for himself [Pawluk 1978, 146].[24]

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[24] Canon 1655 § 1 CIC/17: "In iudicio criminali reus aut a se electum aut a iudice datum semper habere debet advocatum." When considering the right to defence in the administrative penal process, as per Canon 1720, 1° CIC/83, the accused must be given the opportunity to defend himself, unless he refused to appear after being duly summoned. The cited canon unequivocally guarantees the defendant's right to defend himself in this kind of process, but is it the right of the accused to defend his interests in person (the right of defence in the material sense) or can he use the services of counsel of his choice or one appointed *ex officio* (the right of defence in the formal sense)? In its judgement of 7 February 2004, file ref. no. SK 39/02, Lex no. 84271, the Constitutional Court highlighted this: "The constitutional right to defence should be interpreted broadly, as it is not only a fundamental principle of the penal trial, but also a fundamental standard of the democratic rule of law. This right is reserved to everyone from the moment penal proceedings are initiated against him (in practice, the moment when the charges are presented) until the final judgement is handed down; the right is also available during executive proceedings. The right of defence in a penal trial has both material and formal dimensions. Material defence is the defendant's ability to defend his

Therefore, we need to reflect on the consequences of not having a lawyer in a judicial penal process. This issue is debatable in the doctrine of canonical criminal law. Although it is highlighted that the presence of an advocate in the penal trial leads, in a way, to putting the defendant's level of preparation on a par with the promoter of justice's expertise, various consequences are shown regarding the absence of such an advocate. Authors such as Giuseppe Di Mattia and Raffaele Coppola opt for irremediable nullity of a judgement as provided for in Canon 1620, 7°, whereas Józef Krukowski and Andrzej G. Miziński are opposed to that. Those in favour of the irremediable nullity of a judgement emphasise that the absence of an advocate during the trial is tantamount to renouncing the right of defence, while the opponents cite Canons 10 and 124 to argue that one needs a nullifying or invalidating law to declare the nullity of an act [Miziński 2011, 308-11].

It seems, however, that there are more arguments in favour of the first position, which treats the absence of an advocate as equal to denying the accused the right of defence, thus leading to the irremediable nullity of a judgement, in line with Canon 1620, 7°. Denying the right of defence to one of the parties represents, as it were, a general clause with grave sanctions set forth in the aforementioned canon. The status we attribute to this right of defence follows from natural law, which cannot be neglected by the code legislator.[25] Apparently, only a trial in which the parties are on an equal footing defending their positions and challenging the opposing ones enables these parties to finally accept the settlement. We must not forget that this is because any trial should have an educational impact

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interests in person (e.g., the option to refuse to give explanations, the right to consult case files and submit a motion for evidence). Formal defence results from the right to use the assistance of a defence lawyer of choice or appointed *ex officio*." There is a view in the literature that in the administrative penal process the advocate's intervention is inadmissible, and the accused must defend himself, which does not preclude personal consultation with advocates or experts [Krukowski 2007, 408]. It is underscored elsewhere that since the CIC/83 has no provisions regulating the participation of an advocate or defence counsel in this type of procedure, the accused must defend his rights himself. Notwithstanding that, also in the administrative process, the accused must be fully guaranteed the right of defence, while the ordinary, before issuing a final decree, must have moral certitude about the perpetrator's guilt given the evidence gathered [Miziński 2003, 157-58].

[25] On the criminal procedure if the *Normae de gravioribus delictis* obtain with regard to the principle of inquisitiveness, right of defence, the openness principle, cooperation with civil authorities and compensation for damages, see Núñez 2013, 573-620.

on the subject of these proceedings – the defendant himself. This would be hardly achievable if the arguments of only the professionally prepared party were presented to the adjudicating authority. Ensuring equal opportunities to one party by appointing an advocate demonstrates that only the adversarial nature of the positions propped by solid preparation makes it possible to achieve a fair judgement.

A right vested in the accused, under Canon 1728 § 2, is the option of not confessing the delict, and as a result he is under no obligation to tell the truth regarding his responsibility for the delict. It follows that he cannot be compelled to take an oath, so as not to put him in a position where he would have to commit perjury. This is different from the ordinary adversarial process, where the parties are obliged to both answer the judge's questions and divulge the whole truth. Thus, failure to respond enables the judge to ponder what conclusion to draw regarding the proving of the facts [Miziński 2002, 153-54].[26]

Some counterbalancing and more equity is afforded by Canon 1725 CIC/83, according to which the accused has the right, exercised either in person or through a lawyer or attorney, to have the last word during the case, whether in writing or orally. Concerning the last word, it should be noted that the judicial penal process differs from the ordinary adversarial process, for it follows from Canon 1603 § 3 that both the promoter of justice and the defender of the bond have the right to respond again to the parties' response. Therefore, the right of the last word is not reserved to either the petitioner or the defendant. Nonetheless, the right of the last word for the accused was also exercised under CIC/17, where it provided that the promoter of justice should speak first, and the accused and his lawyer should speak and make a reply at the end [Pawluk 1978, 168].

By virtue of Canon 1726 CIC/83, "at any grade of stage of the penal trial," the defendant's reputation is protected if it has been clearly established that he or she did not commit the delict. This principle embodies proper rendition of justice and canonical equity. By and large, an acquittal should be handed down after all the evidence in the case has been taken.

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[26] It was also impossible, by virtue Canon 1744 CIC/17, to have the accused take an oath to speak the truth, since the canon provides as follows: "Iusiurandum de veritate dicenda in causis criminalibus nequit iudex accusato deferre; in contentiosis, quoties bonum publicum in causa est, debet illud a partibus exigere; in aliis, potest pro sua prudentia."

But in a situation where it transpires already in the course of the trial that the defendant was wrongfully indicted, such proceedings should be aborted immediately and a verdict of acquittal issued. Otherwise, an unwarranted prolongation of procedural formalism would occur [Miziński 2007, 157].

Canon 1727 § 1 gives the defendant the right to bring an appeal when the acquittal was rendered simply because the penalty was facultative, or the judge used his discretionary authority. In doing so, it should be remembered that the filing of an appeal, in accordance with Canon 1638, results in a stay of execution, meaning that it is an absolutely suspensive measure. Interestingly, it must not escape our notice that in canonical judicial proceedings the character of the appeal provisions is special, since the accused can bring an appeal if he feels aggrieved by the very existence or content of the verdict. He can also appeal against a sentence that did not impose a penalty [Loza 2011, 1296].

However, it is unfavourable for the defendant preventive measures are taken against him by the ordinary. Under Canon 1723, the ordinary may remove the defendant from sacred ministry or ecclesiastical office and service, and order or forbid him to stay in a certain place or territory, and even forbid public participation in the Holy Eucharist. The application of these measures is aimed at avoiding scandal, protecting the freedom of witnesses and to guarantee administration of justice. Admittedly, the ordinary can do that only after he has heard the promoter of justice and summoned the defendant. It is argued in scholarship that no recourse is available to the accused against such a decree, since the decree is not issued extrajudicially but *in quodlibet processus stadio* in order to ensure that justice is done. Moreover, in this meaning, a recourse might thwart the trial by restricting the witness's freedom to come forward and testify. In this connection, Canon 1958 CIC/17 is worthy of note, as it provided explicitly that *non datur iuris remedium* against this kind of decrees and therefore under Canon 6 § 2 of the 1983 Code one should apply the *iuris veteris* interpretation [ibid., 1294].[27] Nevertheless, in keeping with

[27] It should also be emphasised that the proposed reform of criminal law, on the one hand, limits the freedom of action granted to church authorities; on the other hand, it promotes the use of executive power by expanding the possibility of using the administrative appeal procedure and promotes the use of criminal sanctions. The innovations of the proposed reform include expiatory penalties. See Sánchez-Girón 2014, 567-602.

Canon 1348, even *vis-à-vis* a person released from prosecution or against whom no punishment has been administered, the ordinary can, through appropriate admonitions or other "means of pastoral solicitude," or even by punitive measures if appropriate, "provide for the welfare of the person and for the public good."

5. Disposition of the Parties

Similarly to the ordinary contentious process, the judicial penal process is also predicated on the principle *nemo iudex sine actore*. This is borne out by the content of Canon 1721 § 1 CIC/83, according to which after the ordinary decrees that a judicial penal process must be initiated, he hands over the acts of the investigation to the promoter of justice, who is to the *libellus* of accusation to the judge.

As the literature points out, the procedural impulse, that is, a procedural act necessary to develop the judicial penal process, is entrusted to the judge, who is not only authorized but also obliged to conduct the proceedings on his own initiative. He therefore has the competence to act *ex officio*, and thus to determine the course of the trial, without having to wait for the initiative of the parties in this regard. Surely, in a contentious trial concerning a private interest, the procedural impulse comes from the parties, while already in a contentious trial involving the public good, the disposition is distributed between the judge and the parties [Greszata-Telusiewicz 2013, 109]. The previous solution was already implemented in the CIC/17, where under Canon 1619 § 2 the judge was obliged *ex officio* to supplement the evidence both incriminating and exculpating the accused [Pawluk 1978, 149]. Confirmation of judicial penal proceedings conducted *ex officio* is found in Canon 1452 § 1 CIC/83, according to which, after a case has been legitimately introduced, the judge can and should proceed *ex officio* in penal cases that regard the public good of the Church or the salvation of souls.

In the penal process, the aggrieved party, under Canon 1729 § 1, enjoys the right to bring a contentious action to repair damages suffered as a result of the delict. This option, however, is vested in the party at the initial stage of the penal process; it is not permissible after the taking of evidence is complete, as explicitly provided in Canon 1596 § 2.

Nor should we ignore Canon 1724, which vests in the promoter of justice the power to renounce the trial at any grade thereof. However, it is noted that this can happen only "at the command of or with the consent of the ordinary whose deliberation initiated the process." The mere exercise of this power by the promoter of justice is not sufficient, since, in principle, the renunciation must be accepted by the defendant, except when he himself has been declared absent from court. At the same time, it is noted that in the penal process, the promoter of justice cannot perform any jurisdictional acts, so he does not have the *potestas*, but only legitimately performs the *munus*, and his actions depend on the ordinary, who plays a decisive role in these proceedings [Miziński 2010, 130].[28] The disposition of the promoter of justice, by virtue of Canon 1727 § 2, is no doubt reflected in his ability to appeal the judgement whenever the scandal has not been repaired or justice has not been restored sufficiently.

In sum, it can be concluded that in the penal process the ordinary is the *dominus litis* of these proceedings. He is the one who, having obtained at least probable information about the crime, decides whether to conduct the preliminary investigation personally or with the help of another suitable person. He is the one who chooses either administrative or judicial penal process within the limits of the applicable law. In this context, we need to look at the general clause *iustae causae* in Canon 1342 § 1, upon which administrative penal proceedings are conditional, which gives the ordinary a great deal of freedom in choosing the path the canonical process will follow. Throughout the penal process, the ordinary can apply preventive measures *vis*-à-*vis* the accused, and it is also up to him to allow the promoter of justice to renounce the trial, even though, formally, he is not a judge in the proceedings.

6. Independence and Impartiality of Judges

Choosing the path followed in the penal process, either judicial or administrative penal trial also determines the position of the person conducting these proceedings and immanently affects his independence

[28] When opting for the administrative penal process, the first thing to consider is that the ordinary is the person who initiates the preliminary investigation and can conduct it, has the competence to pursue either the administrative or judicial penal path, present charges to the accused and direct these proceedings.

and impartiality. When we examine the guarantees of judicial independence, we will omit the theoretical and legal guarantees since they are not subject to major modification in the canonical penal process; besides, they are broadly discussed in the literature.[29] Our attention will focus on procedural guarantees that are regulated differently in the judicial penal process.

The legislator's concern for judicial independence, which is guaranteed when the case is heard, is undoubtedly visible in reserving the hardest criminal cases to the collegial tribunal, particularly cases referred to in Canon 1425 § 1, 2° and § 2 CIC/83. Surely, the appointment of a collegial tribunal is justified by the gravity of the case and has a positive effect on the level of procedural guarantees. However, the scope of collegiality in the current 1983 Code relative to the CIC/17 with regard to criminal cases has been curtailed – the current legislation does not envisage a mandatory composition of five judges, while the number of delicts reserved to collegial tribunals has been significantly reduced. Nevertheless, at all times tribunal collegiality in the gravest criminal cases has been preserved and promotes the maintenance of the impartiality and independence of the body adjudicating the case.

As regards the superiority of the judge over the litigants, there can be no doubt that in proceedings where the judge's role is not limited to that of a passive arbitrator resolving the dispute, but includes the possibility of taking evidence *ex officio*, the position of the judge is largely reinforced at the expense of the litigants. Indeed, looking at the entire penal process and the preliminary investigation, we can say that the position of the judge in this process is very strong.

If we reflect on the guarantees at the sentencing stage, we need to address the possibility of appealing the judgement vested in the accused, who has this option by virtue of Canon 1717 § 1 CIC/83. This possibility uniquely pertains to the judicial penal process, where the accused can appeal not only against an unfavourable verdict, but also when it does not impose or impose any penalty. It should be remembered that even in such a situation, the ordinary is entitled to impose administrative measures on the accused.

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[29] See Andrzejewski 2021, 18-26.

When the many advantages of the judicial penal process over the administrative penal proceedings are examined, it is pointed out in the literature that it ensures in the administration of justice the commitment and impartiality of the Church, leaving no room for arbitrariness and improvisation even in the most serious and scandalous delicts [Miziński 2001a, 151].[30] To be sure, the validity of these arguments can hardly be questioned.

Summary

In light of the arguments presented above, the advantages of the canonical penal process are obvious. This mode of proceeding certainly enables evidence to be taken in the instruction of the case. It also makes it possible to obtain a greater degree of moral certitude about the delict that occurred, to adequately assess the circumstances of the crime and the imputability of its perpetrator, to determine both the degree of the perpetrator's obstinacy and the *damnum sociale* caused by the delict, and to impose an appropriate penalty in accordance with the pastoral spirit [Miziński 2002, 142-43]. *A contrario*, it would be advisable to consider the said advantages relative to administrative penal proceedings and conclude that with regard to this process one cannot speak of defence of the accused in the formal sense; there is no evidence taking adequate to the judicial process, the degree of moral certitude is definitely lower, it is more difficult to properly assess the circumstances of the delict and the imputability of its perpetrator; also, it is difficult to determine the obstinacy of the perpetrator, and greater caution can be exercised regarding the impartiality of the authority administering the penalty.

First, as regards the preliminary investigation preceding the canonical judicial proceedings, it is no surprise that it was based – given the detective

[30] As a side note to the issue of the independence and impartiality of the procedural authority in the administrative penal proceedings, it is underscored that with a trial so structured it is impossible to speak of full independence of the conducting authority. The lack of division of procedural functions among the various actors, no division of the procedural stages for resolving a case in this type of process, and the lack of obligation to maintain *ad validitatem* the rules of procedure all give rise to the impossibility of fully ascertaining the objective truth, and at the same time securing justice and the rights of the faithful, often leading to the procedural authority rendering decisions that are subject to a greater margin of error [Miziński 2002, 142-43].

nature of these proceedings – on the inquisitorial nature of the process. Nevertheless, at this stage any serious concessions in favour of the adversarial principle can hardly be found. It is worth noting that during the preliminary investigation no questioning of the accused occurs, because he is not even aware of the proceedings pending against him. In consequence, he is barred from filing any requests for certain investigative activities. The aggrieved party is no better off, who has no right to participate in the activities conducted at this stage. The preliminary investigation is completely inquisitorial, which undoubtedly negatively affects the defendant's right of defence, for it cannot be ruled out that the defendant's insufficient powers at the initial stage may be conducive to the insufficient collection of evidence by one of the parties. Even the judicial stage that follows cannot convalidate the absence of the accused from preliminary activities. In order to strengthen the procedural guarantees based on the adversarial principle in the context of a preliminary investigation, it would be advisable, *de lege ferenda*, for example, to allow mandatory interrogation of the suspect in the presence of defence counsel and allow him to request procedural actions at this stage of the proceedings.

Now, regarding the implementation of adversarial conditions in the judicial penal process, it should be noted that it is unquestionably based on the accusatorial procedure principle, since these proceedings begin only after the indictment has been filed by the promoter of justice, who prepares it and sustains it before the tribunal of first instance. This mode does not provide for the judge's operating *ex officio*, so the judge cannot refer the case to court on his own and single-handedly change the subject of the dispute. We can say with complete certainty that this condition of the adversarial principle is fulfilled by a canonical trial conducted in the judicial penal mode, even if we accept that the initiation of complaint proceedings depends largely on the will of the ordinary.

Referring to the designation of the matter in dispute, we should underscore that it is unique to the penal process, and it is a canonical delict. Given that no legal definition of offence exists, its characterization should incorporate three elements. In general, the accused learns of the proceedings against him or her only at the trial stage, after being summoned by the judge. Notably, the indictment is not always attached to the summons, and the accused may not be fully informed about the accusation. As we have already emphasised, in order to conduct an adversarial dispute,

it is necessary to fully define what the content of the contending positions should be. On this reading, the contentious character is not augmented by the preliminary investigation, in which, among other things, an initiating decree is issued without being communicated to the suspect and – if the penal process does not require that – is held in the secret archives of the curia. At this procedural stage, the suspect is not charged, either; the whole time, he or she is unaware of the proceedings pending against him. We should conclude, then, that with regard to the preliminary investigation, the condition of determining the matter in dispute is not fulfilled, as opposed to judicial proceedings.

As for the necessary presence of litigants and the person authorized to resolve the dispute – hence the separation of procedural functions – it can be claimed that this condition retains validity only for the judicial stage. This is because there are no opposing parties in the preliminary investigation, and the only subject at this stage is the investigating judge. Thus, there is no separation of the functions of the procedural authority; this must be detrimental not only to the comprehensive character of the material collected, but also to objectivity of its collection. In judicial proceedings, the case is entirely different. There are opposing parties in it, the promoter of justice strives to sustain the action he brings, the defendant and his advocate can engage in a procedural "battle" to defend their rights, while the judge is appointed to resolve the conflict. Therefore, it cannot be questioned that in judicial proceedings there are parties to the dispute and the body competent to settle it, who helps balance the powers of the opposing parties. It should not be forgotten at this point that only the multiplicity of subjects having different roles in the process can lead to a dispute. After all, keeping these functions separate is not only an important step in ensuring the objectivity of the evidence collected, but it also serves to respect the dignity of the positions emerging in the process, which may often be in stark opposition to each other.

Turning to the equality of litigants, it should first be noted that due to the nature of penal proceedings, the parties will never be perfectly equal. This is because during the preliminary investigation the suspect cannot defend his rights. The indictment and the acts of the case are known to the judges in advance, which also has a strong bearing on them, giving the prosecution an advantage. In this connection, one cannot overlook the fact that the judicial stage involves mainly a reconstruction

of the material collected with the participation of only one litigant. On the other hand, surely, the obligation to have defence counsel, whether appointed by the defendant or by the judge, is intended to counterbalance the promoter of justice and merits our approval. Just as the defendant's right not to confess to the crime, the opportunity for the accused to speak at the end are circumstances that strengthen the right of defence.

In regard of assuring a minimum disposition of litigants, it should be emphasized that the central figure in penal proceedings is unquestionably an ordinary. He is the one initiating proceedings and ordering their conduct; also, he chooses the procedural mode, and he has the competence to apply preventive measures during the proceedings, against which there is no appeal. Similarly, the ordinary has the final say regarding the possibility of renouncing the trial by the promoter of justice. Such an assessment remains stable even if the promoter of justice carries out a number of activities of the judicial proceedings, as the most important ones are still reserved to the ordinary. With regard to the accused, one speaks of the scope of impact on the course of the trial starting from the judicial stage. This is manifested, for example, through the grant of permission to renounce the trial or the possibility of filing an appeal.

The independence and impartiality of the process body is also of considerable importance for the judicial penal process. This condition, in particular, safeguards the duty of collegial adjudication of the most serious crimes, as well as the superior position of the judge *vis-à-vis* the litigants. With the other guarantees of judicial independence in the canonical penal trial, we can claim that this condition for the validity of the adversarial principle is also fulfilled.

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