Biuletyn Stowarzyszenia Kanonistów Polskich XXXIII (2023), nr 36 bis, s. 197-214

# DISSIMULATION OR NEGLIGENCE: ON THE FAILURE OF THE ECCLESIASTICAL AUTHORITY TO REACT TO LAW VIOLATIONS

# DYSYMULACJA CZY ZANIEDBANIE – O ZANIECHANIU REAKCJI WŁADZY KOŚCIELNEJ NA NARUSZENIA PRAWA

Mateusz Przytulski OP, MA

The Cardinal Stefan Wyszyński University in Warsaw, Poland
e-mail: m.przytulski@dominikanie.pl; https://orcid.org/0000-0002-2764-862X

**Abstract**

This paper aims to present the difference between dissimulation and negligence in the context of the failure of an ecclesiastical superior to react to a violation of the law. The institution of dissimulation is presented on the basis of available research. In order to show the essence of this canonical institution as clearly as possible, reference is made to the general theory of the legal act. It is pointed out that dissimulation does not involve the essence of the dissimulated act, but its accidental element, i.e., the circumstances. By presenting the general assumptions of dissimulation, the author shows how to distinguish dissimulation from negligence. This can enable determination whether an ecclesiastical superior is legally and morally accountable for failing to act against a violation of the law.

**Keywords:** dissimulation, dispensation, toleration, ecclesiastical superior, ecclesiastical law theory, general norms

**Abstrakt**

Autor niniejszego opracowania podjął się przedstawienia różnicy pomiędzy dysymulacją a zaniedbaniem w kontekście zaniechania reakcji przełożonego kościelnego na złamanie prawa. Na podstawie dostępnych opracowań przedstawił instytucję dysymulacji. Aby jak najwyraźniej ukazać istotę działania tej instytucji kanonicznej odniósł się do generalnej teorii aktu prawnego. Wskazał, że dysymulacja nie jest związana z istotową częścią aktu, który podlega dysymulacji, lecz opiera się na przypadłościowej części tego aktu, czyli na okolicznościach. Przedstawiając

ISSN 1731-1438; e-ISSN 2719-7255
https://doi.org/10.32077/bskp.7954

generalne założenia dysymulacji wykazał, w jaki sposób odróżnić ją od zaniedbania. To może pozwolić na określenie, czy przełożony kościelny ponosi odpowiedzialność prawną i moralną za zaniechanie działania przeciw złamaniu prawa.

**Słowa kluczowe:** dysymulacja, dyspensa, tolerancja, przełożony kościelny, teoria prawa kościelnego, normy ogólne

## Introduction

One of the tasks of an ecclesiastical superior is to ensure that the laws are obeyed. This is his duty, the performance of which may be evaluated. We were reminded about that by Pope Francis, who in his Apostolic Letter *Come una madre amorevole*[1] addressed the issue of superiors failing to react to cases of sexual abuse. In the life of the Church and its activities in the areas of teaching, sanctification and governance, violations of the law do occur. As history shows, not all of them are addressed by church superiors. Some of these situations may become grounds for holding supervisors accountable for negligence. But what if a church superior willingly neglected this duty and considered that in a given situation it would be better not to react? This might be because he expected that his reaction could bring greater evil than the violation itself, so he resolved to ignore the infringement. Such conduct is not unfamiliar to the canonical tradition, as the institution of dissimulation has been known for centuries. This analysis aims to provide a general description of this institution and compare it with negligence. In this regard, the paper may contribute to the evaluation of the criteria that are used to determine the legal and moral responsibility of church superiors for failing to respond to violations of the law.

## 1. Dissimulation

### 1.1. The concept of dissimulation

Dissimulation refers to deliberate failure to notice (ignoring) a law violation for serious or important reasons [Pree 2019, 93-94]. Olivero, as well as Aymans and Mörsdorf, defined it as "turning a blind eye" deliberately

[1] Franciscus PP., Litterae apostolicae motu proprio datae *Come una madre amorevole* (04.06.2016), AAS 108 (2016), p. 715-17; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20160604_come-una-madre-amorevole.html [henceforth: CMA].

– on the part of a competent authority – to some evil that either cannot be prevented or, if prevented, may give rise to more serious evil [Olivero 1953, 65-66; Aymans and Mörsdorf 1991, 273; Pree 2000, 413]. Lefebvre pointed out that this concealment could be due to any of the following: 1) the superior's inability to intervene, 2) his willing to avoid scandal, 3) uncertainty of the future, or 4) the lack of public awareness, 5) the desire to maintain the *status quo* at all costs, or 6) the inability to oppose the offender because he could not accept sanctions. It can also result 7) from a reluctance to grant a dispensation or an act of tolerance [Lefebvre 1947, 607]. Di Pauli further pointed out 8) the futility of applying the law [Di Pauli 1912, 397]. This was endorsed by Pree, who maintained that ecclesiastical authority was well aware that a response was impossible of harmful [Pree 2019, 93-94]. In dissimulation, the Church turns a blind eye, as it were, in order not to see what is going on because it is unable to change the situation [Aymans and Mörsdorf 1991, 273]. Olivero offered an important hypothesis by highlighting that dissimulation is not just feigned ignorance, but a deviation from the norm that mandates sanction. Thus, it is forgiving by pretending [Olivero 1953, 78].

The practice of dissimulation has been known in the Church for centuries. It was particularly relevant in the era of the Holy Inquisition, when in certain moments it was the only option to stay protected from inquisitorial persecution [Prosperi 2009]. As Di Pauli reminded, dissimulation is in constant use in the Church. Its significance is very accurately captured by Pope Gregory XVI's instruction of 22 May 1841, addressed to the bishops of Austria regarding mixed marriages. It includes the following statement: *Sedes Apostolica solet mala illa patienter dissimulare, quae vel impediri omnino nequeunt, vel si impediantur, funestioribus etiam incommodis facilem aditum patefacere possunt* (The Holy See has the habit of patiently dissimulating/overlooking those misfortunes that either cannot be prevented at all, or if prevented, can easily lead to even more pernicious inconveniences) [Di Pauli 1912, 150-51]. Therefore, the use of dissimulation springs from an undeniable necessity, because it hinges on the factual situation.

To offer a complete definition of the concept of dissimulation, it is also necessary to indicate the various names of this institution featured in canonical sources. Di Pauli mentioned, for example: *dissimulare poteris* (c. 2; c. 3; c. 5 Comp. I, 4, 6; c. 4 Comp. III, 4, 10). He also indicated: *sub silentio et dissimulatione poteris preterire* (c. 1 Comp. I, 4, 14), *conniventibus occulis*

*tollerare* (c. 2. Comp. II, 1, 9), *sub dissimulatione transire* (c. 15. X, 3, 39), *sub dissimulatione poteris sustinere* (c. 3. X. 4, 15). There are others mentioned: *silere poteris, prudenter dissimules, ecclesiastica prudentia dissimulare* [ibid., 254]. As Di Pauli pointed out, dissimulation is a fact, which is not determined by the terminology used, but by the general implication of the decree in question [ibid., note 1].

### 1.2. The subject and object of dissimulation

Considering the concept of dissimulation presented above, the following elements of this canonical institution can be identified: 1) the subject, which is church authority [Aymans and Mörsdorf 1991, 273]; under the current codification[2] it is provided for in Canon 129 § 1; 2) the object – a legal situation contrary to the canonical legal order. It is therefore reprehensible and legally relevant behaviour [Caprara and Sammassimo 2019, 290].

It should be noted, however, that for dissimulation to occur, certain conditions must be met. On the part of the subject – the ecclesiastical authority, it will be a knowledge of the legal situation that is at odds with to the canonical legal order, and a sufficient examination of the matter to be able to assess the consequences of a possible response. There are no requirements for the subject of dissimulation. It is immaterial what matter it pertains to, or what personal or territorial scope it has, but the only relevant issue is the circumstances. If they indicate that responding to a violation will do more harm than ignoring it, then dissimulation is justified [Aymans and Mörsdorf 1991, 273]. Once the adverse circumstances cease, dissimulation loses its legitimacy.

### 1.3. Dissimulation in light of the general theory of the legal act

As noted by Olivero and Pree, dissimulation does not mean that an infringement of law is acceptable but boils down only to the negative fact of not imposing sanctions [Olivero 1953, 70; Pree 2019, 94]. Therefore, we cannot say that dissimulation contributes to the law positively [Olivero 1953, 79]. So, dissimulation as a legal device will not be found in positive

[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]; legal state as of 18 May 2022.

law. By applying it, the ecclesiastical authority does not create a new legal situation. Dzierżon was right in underscoring that dissimulation is a legal fiction [Dzierżon 2020, 69]. Nonetheless, it is very apparent that this institution is closely linked to legal acts. Thus, it can be described as a kind of legal situation.

Thus, taking into account the general theory of the legal act, we should see what elements underpin the institution in question. From the perspective of the subject of dissimulation (church authority), no act has been placed, for authority is silent, turning a blind eye to evil [Aymans and Mörsdorf 1991, 273]. Things look different for the object of dissimulation. The theory of the legal act indicates that a specific legal act consists of essential elements (e.g., its validity) and accidental elements (e.g., things like legitimacy or the circumstances). Thus, a violation of the law can be viewed as a fact of law (better: a counter-legal fact), which in its essence contravenes the canonical order. In this framework, it is clear that dissimulation does not involve the essence of the counter-legal fact, but is, as it were, "suspended" in its circumstances. Dissimulation is just a legal fiction [Dzierżon 2020, 69]. The essence of the counter-legal fact is still contrary to the canonical legal order, and the ecclesiastical authority makes its non-action conditional on the circumstances. Stripping the counter-legal fact of these elements will make dissimulation lose its legitimacy and a different response from the ecclesiastical authority will be needed. The reaction would have to be resolute enough to touch the essence of the counter-legal fact. It would have to be an act involving the ontic core of this fact – either dismissing it or incorporating it into the legal order of the Church.

### 1.4. Dissimulation as an interim activity

Since dissimulation does not mean that an infringement is endorsed, it is merely an interim measure applied in anticipation of the cessation of either the infringement itself or the circumstances preventing the ecclesiastical authority from acting. Therefore, dissimulation is always temporary, never definitive, because it lasts only as long as adverse circumstances persist and cannot be remedied [Aymans and Mörsdorf 1991, 273]. In this vein, Pree stressed that the temporary nature of dissimulation is related to the duration of the tenuous state of affairs [Pree 2000, 413]. Olivero, on the other hand, argued that the temporary aspect originates in the fact that dissimulation does not give rise to any new situation for the trespasser.

He may not even have a notion that his superior is aware of his actions. Thus, a legally regulated and obligating situation does not arise [Olivero 1953, 81]. Regarding temporality, Di Pauli rightly noticed that there is *dissimulatio perpetua*, intended to forget [Di Pauli 1912, 257]. In this case, the dissimulation would be temporary to the extent that it would cease by being forgotten.

Dzierżon argued that in dissimulation, what is considered legitimate and valid in fact is not [Dzierżon 2020, 69]. This recognition is only extrinsic, as internally it cannot affect the illicit nature of a specific situation or conduct. Pree pointed out that dissimulation is a canonical institution of a strictly negative character [Pree 2019, 94]. It follows that dissimulation does not involve the essential elements of the infringement, but springs from its specific circumstances. Dissimulation does not make a law violation legal, but for legitimate reasons makes the ecclesiastical authority pretend not to know about it (ignorance). This institution permits violations only in a negative way – the church superior does not act *ex officio* in the external forum against the violator, and sometimes does not even address his request [Michiels 1949, 680]. From the offender's perspective, dissimulation does not imply approval, but serves to avoid problems [Aymans and Mörsdorf 1991, 273].

### 1.5. Effects of dissimulation

In light of the above, we can distinguish between the direct and indirect effects of dissimulation. The direct effect is that evil is not escalated, which is also a direct effect of dissimulation. Auguścik, on the other hand, pointed out that the purpose of dissimulation is the spiritual well-being of the person [Auguścik 2014, 23]. This can be perceived as an indirect, but also ultimate, purpose of this canonical institution. If dissimulation were not aimed at non-escalation of evil, it would not be justifiable. In such a case one could speak of guilt, *culpa* or *dolus* [Di Pauli 1912, 397]. Among the indirect effects, two can be distinguished: the failure of church authority to act, which is viewed as a means of achieving a direct effect, and the lack of penal sanction against the offender.

### 1.6. Types of dissimulation

For completeness of our analysis here, it is worth indicating several distinctions within dissimulation, as this will help to demonstrate the multifarious nature of this institution. To this end, we shall draw on Di Pauli and Olivero.

The first to be mentioned are *dissimulationes legis* and *dissimulationes facti*. This distinction is not redundant but has far-reaching significance. This is because one would often be more comfortable hiding the existence of the law – that is, disregarding it while examining specific cases. On the other hand, it would be more appropriate to dissimulate a fact or relationship that, under the *rigor iuris*, should not occur [Di Pauli 1912, 254-55; Olivero 1953, 94-97].

The moment when dissimulation occurs is also important. A distinction can be made between *dissimulatio ante factum* and *dissimulatio post factum*. On this classification, dissimulation is characterised by the moment of occurrence in relation to an act or state of affairs. As noted by Di Pauli, *dissimulationes ante factum* occur primarily in dissimulations of law, as long as the facts affected by the dissimulated law are such that allow it. However, such dissimulations also occur independently of the dissimulation of the law. *Dissimulatio post factum* is the most common type of dissimulation, which Di Pauli defines as ordinary. This is also because sooner or later *dissimulatio ante factum* turns into *dissimulatio post factum* [Di Pauli 1912, 255-56; Olivero 1953, 97-99].

Another distinction concerns the forum affected by dissimulation – *dissimulatio pro foro externo* and *dissimulatio pro foro interno*. From Di Pauli's considerations it follows that dissimulation in the internal forum takes place very frequently, especially with regard to the sacrament of penance [Caprara and Sammassimo 2019, 294]. This may be because dissimulation of this type does not tend to cause scandal or harm the public interest of the Church. It is also important to make a reservation that not every dissimulation involving the internal forum can be justifiable in the external forum [Di Pauli 1912, 256; Olivero 1953, 91-93]. Olivero further pointed out that for dissimulation in the sacramental forum to be justifiable, it is necessary that the subject the dissimulation show good faith [Olivero 1953, 67].

In regard to the scope of dissimulation, one distinguishes between *dissimulatio absoluta* and *dissimulatio relativa*. Di Pauli demonstrated

the difference using the example of a judge's reference to an invalid marriage. *Dissimulatio relativa*, in his opinion, occurs when a judge who is aware that the marriage in question is invalid, does not act *ex officio* and shuts his eyes to that. *Dissimulatio absoluta* occurs if a marriage has been denounced to him, thus obliging him to take action, but he continues to pretend he knew nothing [Di Pauli 1912, 256-57]. It is worth noting that Olivero's publication omitted this difference.

The next distinction involves temporal issues. In this division, Di Pauli points to *dissimulatio perpetua* and *dissimulatio temporaria*. This distinction can also betray the purpose of a specific dissimulation. *Dissimulatio perpetua* is aimed at forgetting. When *dissimulatio temporaria* occurs, the subject takes time until the circumstances change or, for example, the authorities complete necessary proceedings that otherwise would allow an equitable and valid response. Sometimes such a dissimulation in a specific case appears as the only viable solution [Di Pauli 1912, 257; Olivero 1953, 107-108].

Under another distinction, dissimulation can involve a matter that contradicts the law or is beside the law. Di Pauli referred to these two types as *dissmulatio contra legem* and *dissimulatio praeter legem*, respectively. He pointed out that dissimulation refers principally to *contra legem* situations, but cases of dissimulation *praeter legem* can also occur. This happens when *res dissimulata* is not at odds with the law, because it has not yet been regulated by the law – especially in disciplinary matters, but also in pastoral work [Di Pauli 1912, 257; Olivero 1953, 99-100].

The next distinction is made between *dissimulatio rei invalidae* and *dissimulatio rei illicitae*. Here, a given fact is considered in terms of how greatly its invalidity or illiceity nature affects the legitimacy or duration of the dissimulation [Di Pauli 1912, 257-58; Olivero 1953, 104-105]. This distinction does not undermine the outlined concept of viewing dissimulation in light of the general theory of the legal act; instead, it clearly explicitly that dissimulation cannot change the nature of the dissimulated fact – what is invalid or illicit will remain so.

*Dissimulatio totalis* versus *dissimulatio partialis* is yet another distinction. Here, the object of dissimulation is either a whole act – both its validity and liceity (*dissimulatio totalis*) – or its part, either validity or liceity (*dissimulatio partialis*) [Di Pauli 1912, 258; Olivero 1953, 105-106].

The distinction between *dissimulatio singularis* and *dissimulatio cumulativa* is intended to indicate whether the dissimulation involves a single case or several of them [Di Pauli 1912, 258; Olivero 1953, 107].

Further, dissimulation can be tacit or express – *dissimulatio tacita* or *dissimulatio expressa*. The latter occurs, according to Di Pauli, when a dissimulatory decree is issued using the *dissimulare poteris* formula. It can also occur when dissimulation concerning a specific case is obvious, as not all cases of dissimulation are *expressis verbis*. Most often, however, dissimulation is tacit [Di Pauli 1912, 258; Olivero 1953, 108].

In relation to openness, one can distinguish between *dissimulatio occulta* and *dissimulatio notoria*: the former occurs when either the fact of dissimulation or the dissimulated thing is unknown. The latter concerns dissimulations that are notorious [Di Pauli 1912, 258; Olivero 1953, 108-109].

The opposition *dissimulatio rei* vs. *dissimulation personae* shows what is dissimulated: an individual or the action he takes. Di Pauli says that *dissimulatio personae* can take place, for example, in pastoral care. A pastor can dissimulate cohabitating persons, but by saying sermons on Christian morality he can allude to the conduct of the dissimulated persons [Di Pauli 1912, 258-59]. On this reading, it is possible to dissimulate not only a single person, but an entire group [Olivero 1953, 27].

Last but not least, there is a distinction between *dissimulatio materialis* and *dissimulatio formalis*. What matters here is which element of the act is dissimulated: either its content or the form, respectively. Formal dissimulation can occur when, for example, a dispensation has been given with respect to the material part, but not the formal part [Di Pauli 1912, 259]. This difference was ommitted by Olivero.

### 1.7. Dissimulation vs. toleration and dispensation

#### 1.7.1. Dissimulation vs. toleration

The canonical legal order also envisages the institution of toleration. It is very similar to dissimulation, but there is one crucial point of difference: the fact that the ecclesiastical authority does not conceal the existence of a tolerated fact [ibid., 404]. The definition makes it clear that toleration is a willingness to allow something that is declared explicitly. It occurs after all arguments for and against have been weighed. Paździor noted that

the canonical studies on the attitude of toleration mention "a disposition of an indulgent and benevolent nature, from which stems a reasoned judgement that prescribes, for just reasons, to patiently endure certain states that are inconvenient and even contrary to our views" [Październik 2001, 650]. Tolerance can also involve an explicit permission (positive act) issued by a competent church authority, which harbours some reservations about a particular act [Aymans-Mörsdorf 1991, 273]. Capello pointed out that toleration involves a negative admission of evil [Capello 1923, 345, note 269]. Dissimulation, in contrast, does not carry a positive moment of concession. Dissimulation does not entail approval of a law infringement but is merely limited to the negative fact of not imposing sanctions [Olivero 1953, 70; Pree 2019, 94]. In the case of toleration, the applicable norm is not abrogated. While studying the general structure of toleration, Olivero noticed that warrants conduct that is different from what the universal rule describes. However, the rule stays and is not abrogated, and addressees are presented with the alternative between a conduct that is consistent with it or with *lex tolerans* [Olivero 1953, 201]. Aymans and Mörsdorf, on the other hand, argued that toleration and dissimulation practically overlap in implying in a given case the non-application of a principle of ecclesiastical law. The logical consequence is that violations of the law go unpunished, especially that no discomfort is to be felt – if the Church, at least implicitly, admits that it is not willing to generate or take any sanctions [Aymans and Mörsdorf 1991, 273].

The distinction between *tolerantia tacita* and *dissimulatio tacita* is an interesting issue. On the face of it, they are no different because they are not revealed. That a specific fact will be tacitly tolerated or dissimulated is not determined by the ecclesiastical superior. Decisive here is the nature of the fact tolerated or dissimulated [Di Pauli 1912, 405]. It should be noted, though, that while dissimulation can also apply to acts *contra fidem et mores*, tolerance cannot [ibid.] If these could be tolerated, it would mean that the ecclesiastical authority approves such conduct. So it is preferable to "turn a blind eye" to some situations, hence the institution of dissimulation.

### 1.7.2. Dissimulation vs. dispensation

Dispensation is a legal remedy provided by positive law. In current legislation, the basic provisions for this canonical institution are found

in Canons 85-93 CIC/83. The ecclesiastical legislator provides it is "a relaxation of a merely ecclesiastical law in a particular case" (Canon 85). Dispensations are granted by "those who possess executive power within the limits of their competence, as well as by those who have the power to dispense explicitly or implicitly either by the law itself or by legitimate delegation" (Canon 85). The Canon indicates that the object of dispensation is a purely ecclesiastical law (*lex mere ecclesiasticae*). It follows that the formulation presumes the impossibility of granting a dispensation from divine law and limits its scope only to laws issued by the ecclesiastical authority. However, we ought to bear in mind that the ecclesiastical authority, by virtue of the power granted to it by Christ himself, has the jurisdiction to promulgate and concretise divine law and to dispense from it [Sobański 2001, 76-77]. By virtue of this power the Church grants dispensations from laws that are binding by the power of divine law. These include, for example, a dispensation from a contracted but unconsummated marriage, a Pauline privilege based dispensation from a marriage, or a dispensation from vows [Gałkowski 2013, 68-73]. For dispensation does not entail an abrogation of the law, but a recognition that for a given situation it would be proper and legal to disapply it. As Gałkowski points out, the purpose of the dispensation is the well-being of an individual who is in a difficult situation, and this calls for special solutions [ibid, 73].

As a canonical institution, dispensation gives rise to a novel legal situation [Fornés 1998, 143; Baura de la Peña 1999, 385]. It is, so to speak, *lex specialis vis-à-vis lex generalis*, which the ecclesiastical authority considers inapplicable to the circumstances. This is what sets dissimulation apart. Dispensation is a legal act, action [Dzierżon 2020, 69-70]. It is an act of grace that puts a particular action – despite its inconsistency with the general norm – in its proper place within the legal order without violating it. Dispensation leads to the realization of good, while dissimulation results in the non-escalation of wrongdoing. Dissimulation does not entail approval of a law infringement but is merely limited to the negative fact of not imposing sanctions [Pree 2019, 94].

Interstingly, some claim that dissimulation involves a tacit dispensation (*dispensa tacita*). Lefebvre cited, for example, Fellinus Sandaeus, who claimed that the pope's silent dissimulation contains a dispensation [Lefebvre 1947, 621]. This opinion may result from the impression that if church authority – and in this case the supreme authority – turns a blind eye

to violations of the law, it apparently accepts them. In his critique of such positions, Michiels stressed that the nature of the two institutions is quite different [Michiels 1949, 680]. It is also worth quoting Di Pauli, who pointed out that it is difficult to distinguish tacit dispensation from tacit dissimulation other than by referring to the will of the superior [Di Pauli 1912, 411]. Paździor thus rightly noted that the difference between dissimulation and tacit dispensation lies in the situation of the superior; by dissimulating his hands are tied by the ramifications that could arise in the event of strong opposition. The case is different when a tacit dispensation is granted. Furthermore, in the case of dissimulation the ecclesiastical authority is completely passive, and shows a positive act of will with its tacit dispensation [Paździor 2000, 520]. It should also be remembered that dissimulation, on many accounts, makes up for the shortcomings that dispensation cannot satisfy owing to material or formal requirements [Michiels 1949, 680-81]. As Pree and Baura de la Peña showed, this can often apply to cases in which a dispensation would not be possible because divine law was violated [Pree 2019, 94; Baura de la Peña 1999, 385]. However, it seems appropriate at this point to recall that there are dispensations from divine law, so the impossibility to apply a dispensation can be better accounted for by the category of canonical equity.

To round up our discussion of the differences between dispensation and dissimulation, we can refer to the general theory of the legal act already outlined. The ecclesiastical authority, by applying a dispensation to a counter-legal fact, directly affects its essence and makes it compatible with the Church's legal order. This brings the whole act into compliance with it. It can be clearly seen that a new legal situation is created [Fornés 1998, 143; Baura de la Peña 1999, 385]. The counter-legal fact becomes a fact of law, because the dispensation transforms its ontic core. The case is very different with dissimulation because, as already shown, it is based only on its circumstances.

### 1.8. Cessation of dissimulation

Dissimulation may not cease as a result of a positive act of ecclesiastical power in line with the formula "from now on I don't dissimulate, but I also don't act." This would still be dissimulation. Dissimulation would cease if it were transformed into a different institution, such as tolerance or dispensation. In such cases, however, there would occur a positive act directed

at the counter-legal fact, and this, being completely alien to dissimulation, would replace it in whole or in part. Dissimulation may also cease when the ecclesiastical authority no longer realizes that there is a specific counter-legal fact that dissimulates [Di Pauli 1912, 257].

The ecclesiastical authority is obliged to stop dissimulation when the circumstances that prevented action cease. According to the theory of legal act presented here, the anchor for dissimulation would disappear. If the authority continued to ignore the law violation, it would no longer be dissimulation, but negligence [ibid., 397].

## 2. Negligence

Canon 1378 § 2 of the 1983 Code provides for a criminal sanction for culpable negligence (*culpabili neglegentia*): "A person who, through culpable negligence, unlawfully and with harm to another or scandal, performs or omits an act of ecclesiastical power or office or function, is to be punished according to the provision of can. 1336 §§ 2-4, without prejudice to the obligation of repairing the harm" (Canon 1378 § 2). In light of this canon, culpable negligence means a lack of diligence in the performance of an act of governance, ecclesiastical office or task, as a result of which personal harm or indignation is caused [Kaleta 2022, 255]. As Kaleta noted, this negligence stems from taking or failing to take action. The result of this negligence is supposed to be someone's harm or indignation [ibid., 256]. Further, he pointed out that this negligence consists in the exercise of ecclesiastical power, office or task that requires taking a specified measure [ibid., 256]. In light of this canon, we can notice that negligence from which no harm or indignation would issue is not subject to penalty.

Regarding the obligation to react to violations of the law, the Church legislator provided regulation contained in Canon 1341 CIC/83, whereby the ordinary is obliged to initiate judicial or administrative proceedings to impose or declare a penalty, when he considers that the means of pastoral care – especially a fraternal correction, a warning or admonition – are not sufficient to restore justice, reform the offender, and repair the scandal (Canon 1341). Krukowski noted that the ordinary's obligation to decide on penal process arises only after measures of pastoral care have been exhausted [Krukowski 2022, 139]. In light of the canon in question, it is clear that the ordinary is obliged to respond to violations of the law. What

type of corrective or expiatory device he will use is of secondary importance in this case.

In addition to the CIC/83, various regulations on the response of superiors to abuse are found in other documents. Such an important source is, for example, the motu proprio *Vos estis lux mundi* of Pope Francis of 7 May 2019.[3] With regard to an ecclesiastical superior, it criminalizes failure to react to sexual abuse of minors or helpless persons. The Pope indicated that it is criminal to obstruct to impede or obstruct proceedings (secular and ecclesiastical) against a cleric or religious who commits this offence [Majer 2020, 145]. Another document envisaging the liability of church superiors for negligence with regard to the exercise of their office, and especially with regard to crimes of sexual abuse against minors and "vulnerable adults," is the CMA. It enabled a punitive removal of church hierarchs and higher religious superiors from office for negligence in this regard. In discussing it, Majer pointed out that a diocesan bishop can be removed from office if "he has through negligence committed or through omission facilitated acts that have caused grave harm to others, either to physical persons or to the community as a whole" (Article 1 § 1 CMA) [ibid. 146]. He specified that these include physical, spiritual or material harm [ibid.]. In the latter part of his text, he presents criteria for the removal of a bishop from office, such as the lack of diligence in the exercise of office, even in very serious degree, and even without serious moral fault (Article 1 § 2 of the CMA) [ibid.]. Regarding crimes involving minors or vulnerable adults, a grave lack of diligence is enough (Article 1 § 3 CMA) [ibid.]. As Majer rightly noted, the removal from office in question is not a punitive "deprivation" of office. The CMA is not a penal law, so removal from office would be done administratively. Moreover, it would not be necessary to prove the bishop's "guilt," as it is enough to state that his negligence caused harm [ibid.]. It would therefore be obligatory to indicate a causal link between negligence and damage [ibid.].

[3] 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 [henceforth: VELM].

### 3. Dissimulation vs. neglect: A comparison

Although dissimulation and negligence occur when the ecclesiastical authority omits to respond, they can be easily distinguished. First, dissimulation as a canonical institution demonstrates the flexibility of the law and not its violation. This is reflected in the search for justice and mercy, whose common denominator is canonical equity. In this sense, canonical equity expresses a higher form of justice. As Gerosa noted, it is related to *caritas* and to divine *misericordia* [Gerosa 2003, 154]. Auguścik underscored that such an understanding of these fundamental determinants eliminates legal arbitrariness, and influencing the creation of law, the framework for its concretisation is determined [Auguścik 2014, 19]. Second, in dissimulation, a specific situation is seen in its entirety, and the best solution is sought. Although using dissimulation is a negative act (or rather non-action), one cannot speak of negligence. This is because the ecclesiastical authority has analysed the matter and decided that "it is better not to see it." Moreover, it was even ready to react, but for various reasons it is not good under the circumstances.

In negligence, not only a lack of reaction or an inadequate response occur, but also a misjudgement of the matter. Negligence can arise when the ecclesiastical authority defines a wrong hierarchy of goods and recognises, for example, that it is better to be silent about a fact before it becomes public. However, when the response of the authority in a particular case could put an end to the harm that a particular person may be experiencing, then the hierarchy of goods can be considered to have been formulated incorrectly. Baura de la Peña strongly emphasized that if someone's rights are infringed (harm is done), dissimulation is certainly not justifiable [Baura de la Peña 2015, 33]. Negligence is also the improper exercise of one's office. This includes culpable ignorance of the basic knowledge that a superior should have. If the lack of this knowledge has contributed to harm or other damage, then the negligence of the office holder is apparent, and this can sometimes give rise to his criminal liability. It should also be recalled that in circumstances where dissimulation should cease, it becomes mandatory for the ecclesiastical authority to respond. When this is omitted, there is a possibility of negligence.

## Conclusion

Inactivity or "turning a blind eye" to law violations that take place in the Church are not always criminal phenomena. The institution of dissimulation we have discussed shows how complex and multifaceted is the problem of the ecclesiastical authority failing to react. The goal of the above reflections was to draw a line between dissimulation and negligence. The latter clearly emphasises a specific harm, damage, and misconduct in office. In contrast, dissimulation consists in conscious recognition that it is better not to react to avoid the perpetration of a greater evil. Canonical sources can be helpful in assessing what it is more important to protect. In this case, of special relevance are the CIC/83, VELM and CMA. There, one finds criteria for the evaluation of responses of church superiors, and the liability they incur for their actions *vis-à-vis* a particular evil. Within such a framework, it is possible to build a hierarchy of values that cannot be reshuffled to justify dissimulation. In light of the considerations presented in this paper, it can be concluded that sometimes a departure from *rigor iuris* is advisable. For all that, there are situations in which a superior's lack of response is negative. Therefore, in order to determine the legal and moral responsibility of superiors for omitting to take action, each situation should be examined thoroughly, considering its multidimensional character and the arguments used by a particular superior to justify his decision not to act.

## REFERENCES

Auguścik, Mariusz. 2014. "Miejsce i rola słuszności w prawie kościelnym." *Łódzkie Studia Teologiczne* 23, no. 2:7-26.

Aymans, Winfried, and Klaus Mörsdorf. 1991. *Kanonischest Recht. Lehrbuch aufgrund des Codex Iuris Canonici.* Vol. 1: *Einleitende Grundfragen. Allgemeine Normen*. Padeborn–München–Wien–Zürich: Ferdinand Schöningh.

Baura de la Peña, Eduardo. 1999. "Le esigenze giuridiche nel rilascio di dispense." *Ius Canonicum* [Escritos en honor de Javier Hervada. Volumen especial], 379-94.

Baura de la Peña, Eduardo. 2015. "Misericordia e diritto nella Chiesa." In *Ius quia iustum. Festschrift für Helmuth Pree zum 65. Geburtstag*, edited by Elmar Güthoff, and Stephan Haering, 23-37. Berlin: Duncker & Humbolt.

Capello, Felix M. 1923. *Summa Iuris Publici Ecclesiastici ad normam codisis iuris canonici et recentiorum S. Sedis documentorum concinnata*. Romae: Apus Aedes Universitatis Gregorianae.

Caprara, Leonardo, and Anna Sammassimo. 2019. "La dissimulatio tra esigenze di misericordia, legge canonica e centralità della persona." *Jus-online. Rivista di scienze giuridiche a cura della Facoltà di Giurisprudenza dell'Università Cattolica di Milano* 3:279-317.

Di Pauli, Andreas. 1912. "Dissimulare poteris." *Archiv für katholisches Kirchenrecht* 92:250-69, 397-414.

Dzierżon, Ginter. 2020. *Dyspensa w kanonicznym porządku prawnym. Studium prawno-historyczne*. Warszawa: Wydawnictwo Naukowe Uniwersytetu Kardynała Stefana Wyszyńskiego.

Fornés, Juan. 1998. "Legalidad y flexibilidad en el ejercicio de la potestad eclesiástica." *Ius Canonicum* XXXVIII, 75:119-45.

Gałkowski, Tomasz. 2013. "Dyspensa od prawa bożego." *Łódzkie Studia Teologiczne* 22:67-79.

Gerosa, Libero. 2003. *Interpretacja prawa w Kościele. Zasady, wzorce, perspektywy*, translated by Katarzyna Kubis, and Andrzej Porębski. Kraków: Wydawnictwo WAM.

Kaleta, Paweł. 2022. "Kan. 1378." In *Komentarz do Kodeksu Prawa Kanonicznego*. Vol. IV/2: *Księga VI. Sankcje karne w Kościele*, edited by Józef Krukowski, 253-57. Poznań: Pallottinum.

Krukowski, Józef. 2022. "Kan 1341." In *Komentarz do Kodeksu Prawa Kanonicznego*. Vol. IV/2: *Księga VI. Sankcje karne w Kościele*, edited by Józef Krukowski, 139-42. Poznań: Pallottinum.

Lefebvre, Charles. 1947. "La dissimulation et la dispense tacite." *Ephemerides Iuris Canonici* 4:606-26.

Majer, Piotr. 2020. "Odpowiedzialność kanonicznoprawna biskupa w przypadku przestępstw seksualnych duchownych wobec małoletnich." In *Odpowiedź Kościoła na dramat wykorzystania seksualnego małoletnich. Aspekt prawny, dokumenty i komentarze*, edited by Piotr Studnicki, and Marta Dalgiewicz, 140-48. Ząbki: Apostolicum.

Michiels, Gommarus. 1949. *Normae generales iuris canonici. Commentarius Libri I Codicis iuris canonici*. Vol. 2. Parisiis–Tornaci–Romae: Typis Societatis S. Joannis Evangelistae, Desclée et Socii.

Olivero, Giuseppe. 1953. *Dissimulatio e tolerantia nell'ordinamento canonico*. Milano: Dott. A. Giuffré Editore.

Październik, Stanisław. 2000. "Dysymulacja a dyspensa milcząca." In *Plenitudo legis dilectio. Księga pamiątkowa ku czci O. Prof. Dr hab. B. Zuberta*, edited by Antoni

Dębiński, and Elżbieta Szczot, 517-42. Lublin: Redakcja Wydawnictw Katolickiego Uniwersytetu Lubelskiego.

Październik, Stanisław. 2001. "Powody skłaniające przełożonego kościelnego do tolerancji lub dysymulacji." In *Divina et humana. Księga jubileuszowa w 65 rocznicę Urodzin Księdza Profesora Henryka Misztala*, edited by Antoni Dębiński, Wiesław Bar, and Piotr Stanisz, 649-60. Lublin: Redakcja Wydawnictw Katolickiego Uniwersytetu Lubelskiego.

Pree, Helmuth. 2000. "Le tecniche canoniche di flessibilizzazione del diritto: possibilita e limiti ecclesiali di impiego." *Ius Ecclesiae* 12:375-418.

Pree, Helmuth. 2019. "Flexibilisierungsinstrumente im katholischen Kirchenrecht." *Ancilla Iuris* 58-95.

Prosperi, Adriano. 2009. "Confessione e dissimulazione." https://journals.openedition.org/dossiersgrihl/3671 [accessed: 09.03.2023]. https://doi.org/10.4000/dossiersgrihl.3671

Sobański, Remigiusz. 2001. *Nauki podstawowe prawa kanonicznego*. Vol. 2: *Teologia prawa kościelnego*. Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego.