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THE CONSTRUCTION OF CANON 15 § 2 OF THE 1983 CODE OF CANON LAW AND ITS IMPLICATIONS

KONSTRUKCJA KAN. 15 § 2 KODEKSU PRAWA KANONICZNEGO Z 1983 ROKU ORAZ JEJ IMPLIKACJE

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Abstract

The presented article analyses Canon 15 § 2 of the 1983 Code of Canon Law with respect to its construction and *ratio legis*. It is shown that the principles included in the first part of the sentence of the regulation have the nature of general rules. The adoption of such a solution results from the fact that the premises included in the provision refer to the prescriptive or prohibitory laws, which, in the aspect of nullity of the act, are less radical than the invalidating or incapacitating laws (Canon 10), to which the legislator referred in Canon 15 § 1. Moreover, the analysis of the regulations outside the first book of the Code of Canon Law as well as the doctrinal heritage demonstrates that, in relation to the area defined in Canon 15 § 2, in the canonical legal order there still exist prior principles resulting from the systemic assumptions and the general theory of a legal act resulting in the fact that, in certain circumstances, the general rules are not valid.

It is claimed that the introduction of the presumption *iuris tantum* in the second part of the sentence of Canon 15 § 2 was due to the fact that a non-notorious fact of another is not characterized by such obviousness as one's own or another's notorious fact.

Keywords: general rule, presumption, prescriptive laws, prohibitory laws, penalty, fact concerning oneself, fact concerning another, non-notorious fact

Abstrakt

W zaprezentowanym artykule Autor podjął analizę kan. 15 § 2 Kodeksu Prawa Kanonicznego z 1983 r. pod kątem jego konstrukcji i jej *ratio legis*. Wykazał, iż zasady ujęte w pierwszej części zdania regulacji mają charakter zasad ogólnych.

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W jego opinii przyjęcie takiego rozwiązania wynika z faktu, iż przesłanki ujęte w zapisie odnoszą się do ustaw nakazujących lub zakazujących, które w aspekcie nieważności aktu mają charakter mniej radykalny aniżeli ustawy unieważniające lub uniezdalniające (kan. 10), do których prawodawca odniósł się w kan. 15 § 1. Ponadto dowiódł, analizując regulacje występujące poza pierwszą księgą Kodeksu Prawa Kanonicznego, a także dorobek doktryny, iż w relacji do obszaru określonego w kan. 15 § 2 w kanonicznym porządku prawnym funkcjonują jeszcze zasady uprzednie, wynikające z założeń systemowych oraz generalnej teorii aktu prawnego skutkujące tym, iż w pewnych uwarunkowaniach zasady ogólne nie obowiązują.

Zdaniem Autora, wprowadzenie domniemania *iuris tantum* w drugiej części zdania kan. 15 § 2 wynikało z faktu, iż fakt cudzy nienotoryjny nie charakteryzuje się taką oczywistością jak fakt własny czy fakt cudzy notoryjny.

Słowa kluczowe: zasada ogólna, domniemanie, ustawy nakazujące zakazujące, kara, fakt własny, fakt cudzy, fakt nienotoryjny

Introduction

Title I "Ecclesiastical Laws" of Book I "General Norms" of the 1983 Code of Canon Law[1] contains Canon 15, in which we find paragraph 2, which reads: "Ignorance or error about a law, a penalty, a fact concerning oneself, or a notorious fact concerning another is not presumed; it is presumed about a fact concerning another which is not notorious until the contrary is proven." The cited paragraph is analysed by commentators only occasionally, but its construction is extremely interesting regarding its theoretical aspect. On the face of it, one might suppose that the legislator included in both parts of the sentence different (and very well-known) kinds of presumption: *iuris et de iure* and *iuris tantum*. This, however, is not the case. Valesio De Paolis and Andrea D'Auria aptly observed that the first part of paragraph 2 does not stipulate that knowledge or error is presumed, stating instead that ignorance or error is not presumed. Therefore, doctrine does not employ the category of presumption in relation to this hypothesis, but with the category of "general principles" [Socha 1983, ad 15, n. 11]. Such a thesis provides a point of departure for an analysis of the problem that the norm apparently poses in terms of defects in the cognitive

[1] *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.

sphere: ignorance and error [De Paolis and D'Auria 2008, 141]. Interestingly, in the second part of the normative sentence, the legislator employed another construction, namely a presumption stipulating that ignorance or error regarding another's non-notorious fact is presumed [Jimenez Urresti 1985, 26]. Therefore, we see that in Canon 15 § 2 there are, on the one hand, general principles concerning ignorance or error about a law, a penalty, or a fact concerning oneself or a notorious fact concerning another; on the other hand, there is a presumption about the possibility of ignorance or error arising with respect to another's non-notorious fact. This non-uniform structure generates an important research question about the *ratio legis of* such a legislative device. For this reason, we shall attempt here to answer this important question.

1. General principles

The general principles included in Canon 15 § 2 are not uniform. This is because the first two premises concern law (an enacted law, a penalty), while the other two relate to facts (a fact concerning oneself, a notorious fact concerning another).

1.1. Principles relating to law

1.1.1. Laws

Regarding the first component of the normative provision – the laws – it should be stated at the outset that in interpreting this issue one cannot ignore the context, which in this case is the content of Canon 15 § 1, in which the legislator introduced the principle that ignorance or error with respect to invalidating or incapacitating laws does not annihilate their legal effect. This amounts to saying that paragraph 2 of Canon 15 is not about the categories of laws referred to in Canon 10, but merely prescriptive or prohibitive laws.

The source of this principle is traced to Rule 13 in VI:[2] *ignorantia facti, non iuris excustat* (ignorance of facts excuses, but ignorance of the law does not). It was taken from Paulus' paremia: *iuris quidem ignorantiam cuique*

[2] *Liber Sextus Bonifatii VIII*, in: *Corpus Iuris Canonici*, vol. 2, Emil Friedeberg, Lipsiae 1881.

nocere, facti vero ignorantiam non nocere (ignorance of law does harm, ignorance of fact does not).[3]

The literature points out that the *ratio legis* of the code rule follows from the assumption that the addressees of the law, once it is promulgated, are obliged to know it [Aymans and Mörsdorf 1991, 175; Socha 1983, ad 15, n. 11], due to the moral and legal obligation to observe it [Kroczek 2011, 233]. This principle posits that the effectiveness of the actions taken by the subject is independent of his lack of knowledge or the state of error he is in [Lombardía 2018, 97]. In light of doctrine, however, this principle is not absolute. In his analysis of this issue, Luigi Chiappetta pointed out that in Canon 16 § 2 of the 1917 Code of Canon Law[4] contains the word *generatim*, which was translated as "without going into details". It was actually removed in the course of the codification work, but the Italian canonist believes that it should not be omitted in an analysis. He argued that in the case of juvenile persons under 16 such ignorance can be presumed; in other words, it cannot be ruled out [Chiappetta 1996, 61]. Chiapetta's view was not isolated – already when the NCP/17 was in force, Adolf van Hove pointed out that at the time there was a prevalent written doctrine that ignorance could be presumed in juvenile or uneducated people [van Hove 1928, 245].

1.1.2. Penalties

Another premise referred to in Canon 15 § 2 are penalties. It is worth noting that the cited regulation is a law restricting the free exercise of powers. Thus, in keeping with the interpretive principle embodied in Canon 18 it should be interpreted strictly [Dzierżon 2021, 300-303]. This implies that the general principle we are interested relates only to penalties. If we analyse the regulations of substantive criminal law, one can easily see that it contains regulations worded in a way that should be regarded as a departure from the principle specified in paragraph 2. And so, we read in Canon 1323, 2º: "No one is liable to a penalty who, when violating a law or precept […] was, without fault, ignorant of violating the law or precept;

[3] *Pauli Libri Quinquae Sententiarum*, in: *Fontes Iuris Romani Anteiustiniani*, Pars Prima, ed. G. Barbèra, Florentiae 1908, p. 261-344, PS. 22, 6, 9.

[4] *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].

inadvertence and error are equivalent to ignorance." Canon 1325 provides: "Ignorance which is crass or supine or affected can never be taken into account when applying the provisions of cann. 1323 and 1324." Moreover, Canon 1324 § 1, 9º provides: "The perpetrator of a violation is not exempted from penalty, but the penalty prescribed in the law or precept must be diminished, or a penance substituted in its place, if the offence was committed by […] one who through no personal fault was unaware that a penalty was attached to the law or precept."

We cannot accept the opinion expressed by Jerzy Syryjczyk that in Canon 15 § 2 we are dealing with an ordinary legal presumption [Syryjczyk 2008, 132]. This thesis does not chime in with the normative phrase just quoted: "ignorance or error is not presumed." With regard to this normative phrase, we should keep in mind that the legislator introduced it purposefully to avoid doubt as to whether the wording in question is presumptive.

Commentators agree that the principle should be linked to non-culpable ignorance (error). They derive their position deductively from the content of Canon 2202 § 1 CIC/17, stressing that no violation of the law is imputed in the case of non-cupable ignorance. Referring to this principle and citing the principle *nihil volitum, quin praecognitum* (nothing is willed unless foreseen), Gommarus Michiels maintained that its *ratio* follows from the assumption that only conscious actions can harm the law [Michiels 1929, 356]. Antonio Calabrese, presenting the penal concept of ignorance (error), pointed out that it is based on a person's good faith reflected in the fact that, acting subjectively, he or she is convinced that taking an action or refraining from acting is permissible [Calabrese 2006, 54].

To round up this argument, we need to see that in contradistinction to the principle set forth in Canon 15 § 1 concerning invalidating and incapacitating laws (Canon 10), with respect to the other categories of laws, referred to in the first part of the sentence of Canon 15 § 2, one should only speak of a general rule [Aymans and Mörsdorf 1991, 175]. It was shown that it finds application only in the case of non-culpable ignorance (error) [Michiels 1929, 356], as reflected in Canons 1323, 2º and 1325.

1.2. Principles relating to facts

The second category we find in Canon 15 § 2 refers facts: a fact concerning oneself and a notorious fact concerning another. In Latin, *factum*

includes senses such as 'deed,' 'work,' 'action,' as well as 'object of obligation' and 'performance.'

1.2.1. A fact concerning oneself

The first of the next two principles formulated in Canon 15 § 2 concerns a fact of concerning oneself, which is not presumed. It follows from the premise that no prudent person can ignore (err) the facts arising from an act taken by him in a human way (*actus humanus*) [Michiels 1929, 356]. It should be noted here that this principle has already been articulated in X 1, 3, 41,[5] where it was noted with regard to the excommunicated person that he should be certain of his fact (*de facto suo certus esse debet*). Addressing this principle, canonists stress that it is applied when the fact is obvious (*offenkundig*) [Aymans and Mörsdorf 1991, 175; Socha 1983, ad 15, n. 11]. To explain the principle, Aymans i Mörsdorf used the following example. If a precious chalice were stolen when the thief wanted to sell it to a trader, as a matter of principle, he could not deny the fact that it was stolen. He would have to prove that he was obviously not aware of that he was obviously not aware of that [Aymans and Mörsdorf 1991, 175]. As with the principles discussed above, a different possibility cannot be excluded. According to Javier Otaduy, it would be irrelevant when the subject acting for natural reasons forgot about a specific fact [Otaduy 1996, 349]. In pre-conciliar canon studies, such an eventuality was not ruled out by Anaclet Reiffenstuel, who noted that this was possible in the case of a remote fact, or in situations where many activities were at play or where the action was taken in extreme circumstances [Reiffenstuel 1870, 44].[6]

1.2.2. A notorious fact concerning another

The next premise referred to in Canon 15 § 2 refers to a notorious fact concerning another person. Given the normative phrasing, commentators

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[5] *Decretales Domini papae Gregorii*, in: Ch. H. Freiesleben alias Ferramontano, *Corpus Iuris Canonici academicum*, vol. II: *Gregorii papae IX Decretales una cum libro Sexto, Clementis et extravagantibus*, Acc. Septimus decretalium et J.P. Lnacelotti Institutiones iuris canonici, Praguae 1728.

[6] R. J. 13 in VI, n. 11, p. 44: "[…] nisi forsan valde antiqua sint, vel in plurimis negotiis implicatus, aut in extremum existens foret, indeque verisimilis oblivio prudenter praesumi valeret."

are particularly interested in the legal meaning of the word 'notorious.' When considering this theme, we should first specify that in this case we are speaking of factual notoriety. Canonists claim this is a commonly known fact [Socha 1983, ad 15, n. 11]. Chiappetta writes about a well-known fact that is indisputable [Chiappetta 1996, 61]. In this context, commentators note that factual notoriety is not necessarily characterized by objective obviousness, as it can also be relative. For example, a fact may be notorious in a certain community, but not outside of it; it may be notorious in some country by being disseminated in the mass media, but not necessarily so in a town or village where the mass media do not reach. That is why the superior or judge should decide in a particular case whether notoriety meets the conditions set forth in Canon 15 [Jimenez Urresti 1985, 26]. In canon law, the principle at hand, like many others, was drawn from Roman law [van Hove 1928, 243]. Again, this principle is based on Rule 13 in VI, which in turn refers to the words of Ulpian: *Qui enim, si omnes in civitate sciant quod ille solus ignorat* (It does not matter if everyone knows what only one person is ignorant of) (D. 1,9,12,6)[7] [Regatillo 1961, 80].

Reiffenatuel, referring to the paremia *Ignorantia facti, non iuris excusat*, mentioned earlier, claimed that ignorance of a fact would be excusable if it did not result from serious negligence. This principle is refuted the hypothesis that everyone in town knows about this fact. This could happen if ignorance of the fact could not be overcome [Reiffenstuel 1870, 45].[8] According to Michiels, its *ratio* follows from the assumption that ignorance of notorious facts – in the case of both factual and legal notoriety that afflicts almost all members of a community or region, is insurmountable even on the assumption that it arose from negligence [Michiels 1929, 354].[9] This Belgian canonist, citing Reiffenatuel, Barbosa and Ojetti, believed that

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[7] Digesta Iustiniani Augusti, in: *Corpus Iuris Civilis*, vol. 2 (editor maior), ed. T. Mommsen, Berolini 1860-1870.

[8] R. J. 13 in VI, n. 19, p. 45: "Sed facti ignorantia ita demum cuique non nocet, si non ei summa neglegentia objiaciatur; qui denim, si omnes in civitate sciant, quo ille solus ignorant, cum concordant, qumavis haec propria fallentia dici vix queat; cum hujusmodi casibus censetur adesse supina vincibilis ignorantia facti, sicut in illis factis, quae quis vi status et conditionis scire tenetur: de qua ignorantia quia non loquitur regula per dicta n., fallentiae in dictis casibus proprie non censetur subiecta."

[9] "[…] ratio est, quia ignorantia factorum notorium, sive notorietate facti, sive notorietate iuris, que fere cunctis in communiatate vel ragione patent a quovis, modica dumtaxat adhibita dilegentia, sciri possunt, omnino vinciblis, imo supina apparet."

if there existed legal and regular notoriety in a community, it could take the form of factual notoriety over time. In his opinion, equivalent to this form of ignorance is ignorance of facts concerning other people, which we should know (*ex officio scire debemus*). He believes this principle is grounded in the following paremia: *non potest esse pastoris excusatio, si lapus oves comedat et pastor nesciat* (a shepherd is not excused by the fact that a wolf eats his sheep, and he does not know about it) [ibid.].

2. Presumption *iuris tantum*

As we have mentioned, the second part of the sentence of Canon 15 § 2 contains a presumption *iuris tantum*: "it is presumed about a fact concerning another which is not notorious until the contrary is proven." Also here, the presumption is based on Rule 13 in VI. Basically, it was introduced because it is impossible to know all innumerable facts concerning others [Reiffenstuel 1870, 43-44; Michiels 1929, 354; Jone 1950, 35].

It should also be noted that compared to presumption *iuris et de jure*, the construction of presumption *iuris tantum* is different, since in this case evidence to the contrary is admitted. Thus, presumption ceases when the opposite is proven – when it is shown that in a specific situation ignorance (error) did not exist [De Paolis and D'Auria 2008, 141]. The source of the principle adopted lies in Rule 47 in VI, whereby *praesumitur ignorantia, ubi scientia non probatur* (ignorance is presumed where knowledge is not proven) [Michiels 1929, 355]. According to Socha, ignorance need not be proven by the one who claims it, but by the one who would actually benefit from it [Socha 1983, ad 15, n. 11].

Conclusion

The above-presented considerations give rise to many questions. Our argument shows that in Canon 15 § 2 the first two prerequisites relate to laws (*leges*) and penalties (*poena*). Therefore, it should be asked: Why did the legislator not include them in Canon 15 § 1? To answer that, we need to see that the character of both paragraphs of Canon 15 is different. The content of Canon 15 § 1, relative to paragraph 2, is more categorical. From the legislative perspective, this was required by the categories of invalidating and incapacitating laws (Canon 10). This is because their specific

nature regarding effects calls for legal certainty [Dzierżon 2010, 733-40]. The prescriptive or prohibitory laws have a slightly different character, as their dispositions are not subject to sanction of nullity, but only legitimacy. It should be noted that violations of the disposition of such norms do not result in such radical consequences in terms of validity as in the case of invalidating or incapacitating laws [Bunge 2006, 81]. Apparently, it was mainly the different nature of the laws that determined that *leges* and *poenae* were included in paragraph 2 of Canon 15.

The content of Canon 15 § 2 is not as categorical as that of Canon 15 § 1. Doctrine considers most of its provisions as general principles, which raises another question about their value and significance. It follows from our analysis that the primary sources of the principles included in Canon 15 § 2 were legal rules taken from the *Liber Sextus*; these, as a rule, were recycled in the canonical legal order from paremias functioning in Roman law. Discussing the formation of legal principles, Tomasz Gałkowski noted that their final shape is the result of a centuries-old process of generalising legal rules [Gałkowski 2020, 144-45]. This no doubt is the case of the rules defined in Canon 15 § 2. On the other hand, it should be highlighted that their general, formalised nature [Berlingò 2015, 267-69] is inherently aligned with the purpose of Book I CIC/83 *General Norms*, which is to provide a platform for reading and interpreting the norms of the Code in a particular way, as well as norms outside of it [De Paolis and D'Auria 2008, 53].

Our study shows that "parallel" to the principles included in paragraph 2, doctrine also points to other, earlier and non-formalized, principles that canonists deduced from the systemic principles of the canonical legal order and the assumptions of the theory of legal act. Thus, according to commentators, in a subjective sense, principles concerning law are irrelevant if insurmountable ignorance (error) occurs. It should be mentioned that this position is deduced from the anthropological-legal assumption that only acts done in a human way (*actus humanus*) are legally effective. Therefore, it would be difficult to claim the effectiveness of an act if it was intellectually impossible. This position is grounded in the paremia *ad impossibile nemo tenetur* (a person cannot be forced to do impossible things), springing from natural law.

Further, it should be said that the subjective aspect of a legal act is crucial *vis-a-vis* rules concerning fact. For in this case, formalized rules are

closely linked to the obviousness of facts; this obviousness, in turn, as already shown, can be relative in certain circumstances. Thus, if no such obviousness occurred in specific circumstances, then by their very nature, the general principles articulated in Canon 15 § 2 related to a notorious fact concerning oneself or another person could not be applied.

It seems that it was the lack of obviousness in the case of a non-notorious fact concerning another person that largely prevented the legislator from formulating a general rule in the second part of the sentence, who instead introduced the presumption that ignorance or error "is presumed about a fact concerning another which is not notorious until the contrary is proven". It should also be noted that its content manifests its nature; there is no doubt that it is a presumption *iuris tantum*.

Importantly, the nature of this presumption is such that it should be regarded as a logical instrument for resolving doubts that have arisen in practice [Sánchez-Gil 2012, 432]. In the case of presumption, relative to the general principle, inference is different, since it involves an intellectual operation in which the problem is solved like this: from some facts at some point in time, one deduces the probability (not possibility) of other facts [Idem 2006, 33]. It appears that the introduction of this mechanism into Canon 15 § 2 was due to the fact that, objectively, a non-notorious fact concerning another is largely not characterized by such obviousness as a notorious fact concerning another. Therefore, it was possible to formulate a normative thesis based on probability. In contrast, the situation is different in the case of general principles, where, based on deductive reasoning, one chooses to apply the disposition of the norm to a particular case.

In conclusion, therefore, it should be noted that there is a difference between the general rules and the presumption included in Canon 15 § 2, resulting mainly from mental constructs associated with the interpretation of law or facts. However, the inclusion of prior and non-formalised principles in doctrine shows that the interpretation of law in the canonical system is not based on legal positivism, because it is grounded is natural law and divine positive law.

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