

THE OFFENCE OF FAILING TO OBSERVE THE DUTY TO EXECUTE A PENAL SENTENCE OR DECREE (CANON 1371 § 5 CIC)

PRZESTĘPSTWO NIEWYKONANIA WYROKU LUB DEKRETU KARNEGO (KAN. 1371 § 5 KPK)*

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Abstract

This article discusses the offence of failure to observe the duty to execute a penal sentence or decree.¹ This is a new offence in the Code of Canon Law defined during the recent revision of criminal canon law by the Apostolic Constitution *Pasce gregem Dei* of 23 May 2021. Canon 1371 § 5 addresses the negative experience of recent years especially with regard to the sexual abuse of minors by clerical persons. The active subject of the offence is the ecclesiastical Superior who is obliged to effectively execute an executive sentence and carry out the orders and prohibitions contained therein against the offender. However, the concept of executing an executive sentence is vague. Some doctrinal representatives even question the need for the concept, considering that the punishment is effective in itself, without the need for additional “execution.” This, in light of Canon 18, could make it difficult to enforce the new provision.

Keywords: canon criminal law, canonical delicts, bishop’s responsibility, penal sentence, extrajudicial penal decree, execution of the sentence, executive decree

Abstrakt

Artykuł zawiera omówienie przestępstwa niewykonania wyroku lub dekretu karnego. Jest to nowe przestępstwo określone w Kodeksie Prawa Kanonicznego

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¹ Instead of ‘judgement’ I use the term ‘sentence’ as preferred by the CLSA translation of the Code available on Vatican’s website.

podczas ostatniej nowelizacji kanonicznego prawa karnego na mocy konstytucji apostołskiej *Pascite gregem Dei* z 23 maja 2021 r. Pojawienie się przepisu kan. 1371 § 5 jest owocem negatywnych doświadczeń ostatnich lat zwłaszcza w odniesieniu do wykorzystywania seksualnego małoletnich przez osoby duchowne. Podmiotem czynnym przestępstwa jest przełożony kościelny zobowiązany do skutecznego wprowadzenia w życie wyroku lub dekretu karnego i realizacji zawartych w nich nakazów i zakazów względem skazanego. Pojęcie wykonania wyroku lub dekretu karnego jest jednak niejasne. Niektórzy przedstawiciele doktryny kwestionują wręcz taką potrzebę, uznając, iż kara jest skuteczna sama w sobie, bez potrzeby jej dodatkowego „wykonania”. To, w świetle kan. 18, może utrudnić egzekwowanie nowego przepisu.

Słowa kluczowe: kanoniczne prawo karne, przestępstwa kanoniczne, odpowiedzialność biskupa, wyrok karny, pozasądowy dekret karny, wykonanie wyroku, dekret wykonawczy

Introduction: A new offence in the canonical legal order

Under the Apostolic Constitution *Pascite gregem Dei* of 23 May 2021,² Pope Francis added to Book VI of the 1983 Code of Canon Law³ a definition of the new canonical offence involving failure to execute an executive penal sentence or decree. The newly added Canon 1371 § 5 provides: “A person who fails to observe the duty to execute an executive penal sentence or executive penal decree is to be punished with a just penalty, not excluding a censure.”⁴

The offence so defined is new – it does not have an equivalent in the 1917 Code of Canon Law,⁵ although the reform of canonical criminal law made reference to the previous Code several times to restore the sanctions once in force in the Church. The grounds for this new canon have not been officially disclosed yet. The President of the Dicastery for Legal Texts, in a paper delivered at a scholarly conference in Warsaw, clarified that

² Promulgated in *L'Osservatore Romano*. Edizione quotidiana 161 (2021), no. 122, 01.06.2021, p. 2-4.

³ *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].

⁴ Note the erroneous English translation of this Canon on the Vatican website.

⁵ *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].

“the legislator found it advisable to classify certain types of conduct that had begun to spread and cause harm and depravity in the Church community” [Iannone 2021]. Other legal scholars, too, indicate that the new canon 1371 § 5 stems from negative experiences in recent years [Astigueta 2021, 372; Pighin 2022, 342], specifically, failure to enforce penalties imposed on clerics for pedophile acts [Kaleta 2022, 228]. In Poland, too, the media reported cases in which the superiors of clerics who committed sexual offences did not implement executive decisions, and those found guilty in canonical penal processes were not held accountable for a long time.

It must be emphasised at the outset, the active subject of the offence in question is not the convicted person who fails to comply with the obligations imposed by the penal sentence (e.g. does not appear to do penance at a specified place), but this offence is committed by an ecclesiastical superior [Bernal 2022, 784] who does not order the offender to do such penance or fails to react when the offender manifests disobedience by refusing to comply with the penalty or interrupts or terminates his stay at the place of penance. A violation of obligations imposed by a penalty, pursuant to 1371 § 2,⁶ differs from the offence addressed here and regulated in Canon 1371 § 5.

1. Execution of a sentence and an administrative decree in general

What does the execution of a judicial sentence consist in? It is an act differing from the mere rendition of a sentence and consists in the actualisation (or practical implementation) of the decision of the court, which resolved the dispute (in a contentious process) or ruled on the guilt or innocence of the defendant and imposed a penalty on him or – for the reasons provided by law – did not impose it. Activities leading to a sentence involve a cognitive process. The judge, based on the evidence provided, strives to find out the truth and resolve the controversy on the basis of what he has examined and reasonably analysed – we say that the judge “recognizes” the case. In contrast, the execution of a decision is a separate and autonomous act from the decision itself – it has already been made. Once the cognitive and decision-making process is complete, the time

⁶ Canon 1371 § 2: “A person who violates obligations imposed by a penalty is to be punished with the penalties mentioned in can. 1336 §§ 2-4.”

comes to implement the judge's decision. The executive process starts – that is, the implementation of what the court has decided. One author observes aptly that after the final sentence is rendered, the judge steps off the stage and the ordinary comes onto it [Calabrese 2006, 203]. Therefore, it is accepted that the execution of a sentence is not a judicial act, but is administrative in nature [de León 1996, 1746; Padovani 2012, 560; Ramos and Skonieczny 2014, 427], although in the past canonist doctrine there was no consensus on this and some jurists considered that also the execution of a sentence lies within judicial power [Cabreros de Anta 1964, 652-53].

A sentence that has the status of *res iudicata*, “establishes the rights between the parties and permits an action for execution” (Canon 1642 § 2). The Latin original puts it more directly: *facit ius inter partes*, meaning “becomes law for the parties.” Thus, the sentence determines what obligations the parties have towards each other – what things and what behaviours they owe to each other. Once the sentence has become final – when it is no longer impossible to reverse it by filing an ordinary appeal, the sentence is subject to execution, that is, the decision of the sentence must be effectively implemented – the adjudicated thing must be handed over to a specified person, the ordered payment of a sum of money must be effected, the prescribed act must be performed or the prohibited behaviour must be discontinued. The execution of a sentence thus involves all acts intended to effectively implement it [Cenalmor and Miras 2022, 487].

For a judgement to be executed, its finality – that is being a *res iudicata* – is not sufficient (Canon 1650 § 1),⁷ but it is necessary – for validity [Papale 2012, 168] – to order its execution by a decree issued by a judge (Canon 1651) – the judge's decision that the sentence be executed. Such a decree, according to the provision of Canon 1651, is included in the sentence as an enforcement clause; alternatively, it can be issued separately.⁸

⁷ In practice, a *res iudicata* is equated with the finality of a sentence [de Diego-Lora 2023b, 1001]. Under the circumstances described in Canon 1650 § 2, however, it is possible to provisionally execute a sentence that has not yet become *res iudicata*.

⁸ The decree is rendered by the judge of first instance – either after the sentence becomes *res iudicata* if an appeal has not been registered within the prescribed time limit or only after a sentence is handed down by an appellate tribunal or if no appeal has been brought [Ramos and Skonieczny 2014, 425]. Another author argues that an executive decree can be issued by both a judge of first instance and one of the successive instance [García Failde 2018, 791].

The offender must be notified of the decree.⁹ The authority in charge of executing the decree is not the court, but – either personally or through someone else – the bishop of the diocese where the first instance sentence was handed down (Canon 1653 § 1), even if the sentence had been changed on appeal. If a dispute is between religious, the execution of the sentence lies with the superior who rendered the sentence or delegated a judge (Canon 1653 § 3).

In ecclesiastical judicial practice, the most common issue is the execution of a sentence in a case of nullity of marriage, which consists in instructing the local ordinary (unlike in the general provision, it need not be the diocesan bishop) to make a note in the marriage register and in the baptismal registers of both parties of the declaration of the nullity and any prohibitions imposed (Canon 1682 § 2) [Pinto 2021, 425].

The execution of a sentence is not at conflict with the possibility of filing an action for nullity of the sentence or an action for restitution, since these are extraordinary remedies.¹⁰ In matrimonial cases, execution (i.e., annotating baptismal and marriage registers) is not impeded by the fact that cases concerning the status of persons never acquire the status of *res iudicata* (Canon 1643).¹¹

As for the execution of an administrative decree, it is, like the execution of a court sentence, a series of acts performed by the issuer of an administrative act (decree) or other authority that are aimed at implementing the act, i.e., causing the effects stipulated in it [Miras, Canosa, and Baura 2001, 169]. There are administrative acts placed *in forma gratiosa*, which require

⁹ If the executive decree is not communicated within the time limits prescribed in Canon 1362, the action to execute a penalty is extinguished by prescription (Canon 1363).

¹⁰ For all that, the mere registration of a petition for restitution suspends the pending execution of the sentence, unless the judge determines that the petition was filed precisely to delay the execution of the sentence, in which case he may order that the sentence be executed after establishing, however, a guarantee so that the person requesting restitution will be indemnified should the restitution is nonetheless granted. See Canon 1647 § 1 and 2.

¹¹ Execution of the sentence is suspended not only by a complaint of nullity, but the executor himself can suspend execution thereof if he comes to the conviction that the sentence is null or manifestly unjust. In this case, the executor is to inform the parties and refer the matter to the tribunal which issued the sentence (Canon 1654 § 2). Eastern law also allows for suspension of execution when a third party opposes [Ramos and Skonieczny 2014, 428-33].

no executor, as they are addressed directly and exert a legal effect once the addressee receives the relevant document (Canon 54 § 1) or, in the case of re-scripts, from the moment the author issues the act (Canon 62). In contrast, some administrative acts – placed *in forma commissoria* – are to be executed by a designated executor (Canons 40-45) and produce legal effects only after execution [ibid., 170-73; Krukowski 2011, 394-402]. The various obligations and powers of the executor regulated in the 1983 Code of Canon Law include the one provided for in Canon 41: if the executor notices that the execution of an administrative act seems inappropriate by reason of the circumstances of person or place (not only manifestly unjust, as in the case where a judicial sentence is executed; see Canon 1654 § 2), he should suspend its execution and immediately inform the authority who issued the act. This may be of special significance for the execution of a penal decree.

2. The characteristics of the execution of a canonical penal sentence or decree

Legally speaking, the execution of a penal sentence or decree does not mean the compliance of the *convicted person* with the content of the sentence, but consists in the relevant *superior* of the convicted offender rendering the sentence effective – in other words, putting the sentence into effect. The sentence itself has “potential” enforceability, that is, the abstract capacity of being executed; an executive decree issued by a judge means that the abstract capacity becomes a concretized capacity [Papale 2012, 168].

There is no agreement among various authors as to whether a sentence handed down in a penal process is executable at all, and how this execution is to be effected.

There are opinions that, just as was the case with the CIC/17 [Pawluk 1978, 184-85], a sentence in a penal process should be executed in accordance with the rules applicable to contentious trials [Papale 2012, 168-69; Pighin 2022, 559]. As it happens, 1728 § 1 contains a reference to canons on processes in general and the ordinary contentious process, which are to be applied also in a penal process, unless the nature of things indicates otherwise or separate prescripts regulate the penal process. Therefore, when a penal sentence becomes *res iudicata*, the bishop of the diocese in which the penal trial was handled in first instance (regardless of whether the case was also heard in consecutive instances or ended as such) is obliged to issue

an additional (besides the sentence) administrative decree (Canon 48), in which, citing the penalty imposed or declared by the sentence, he will put into effect what was ordered by the sentence [Calabrese 2006, 203].

On the other hand, according to Vito Pio Pinto, who is a former dean of the Tribunal of the Roman Rota, there is absolutely no need to execute a sentence in a penal trial, for in a conviction the penalty is immediately enforceable, and in the case of acquittal the sentence restores justice by itself [Pinto 2021, 424]. However, in light of the new Canon 1371 § 5 such an opinion seems misguided – if the execution of a penal sentence were not required, its omission could not give rise to penal liability. Also Canon 1363 § 1 explicitly mentions the necessity of issuing an executive decree in a penal process and notifying the offender of it; otherwise, after the prescribed time limits elapse, the action to execute a penalty may be extinguished by prescription.¹² While Canon 1371 § 5 is new and authors writing before 2021 about penal sentence execution had no way of citing it, the wording of Canon 1363 § 1 was identical before Pope Francis amended the penal law, and this canon explicitly provides for the obligation to issue a judicial executive decree, without which the penalty cannot be effective.

Only with regard to censures Canon 2243 § 1 CIC/17 stipulated that the censure imposed by a sentence takes effect the moment the sentence is made known, and therefore does not require an enforcement decree, since the sentence itself contains an obligation to enforce it.

According to German canonist Klaus Lüdicke, the censures of excommunication, interdict and suspension – whether imposed or declared – do not need execution and are effective as soon as the sentence is notified. In contrast, expiatory penalties, at least in some cases, call for additional action on the part of the superior of the punished person [Althaus and Lüdicke 2015, 419]. However, the author claims that only the no longer existing penalty of transferring one to another office required the intervention of the bishop to take full effect (which, however, the author does not consider an execution),¹³ while the application of other expiatory penalties

¹² Canon 1363 § 1: “Prescription extinguishes an action to execute a penalty if the offender is not notified of the executive decree of the judge mentioned in can. 1651 within the time limits mentioned in can. 1362; these limits are to be computed from the day on which the condemnatory sentence became a *res iudicata*” [emphasis: P.M.].

¹³ Canon 1336 § 1, 4° before the 2021 reform. This is because the bishop had to install the removed person in another office, and such powers are not vested in judges.

may be accompanied by certain actions of the superior, but they do not change the fact that the penal sentence in itself is sufficiently effective and as such does not require a judge to render an executive decree.

Despite divergent opinions among representatives of doctrine, it is therefore necessary – even more so in the new legal state after the reform of canonical penal law – to argue that a penal sentence requires execution. “A sentence contains not only a rational judgement, but also an order issued by the judicial authority that makes it binding and also enforceable – when it contains an order to release a thing, do something or refrain from doing something” [de Diego-Lora 2023a, 983]. Since a penal sentence contains such elements, it is no doubt an enforceable sentence, which is the responsibility of the competent ecclesiastical superior. It is aptly pointed out that the new criminal type that is featured in the Church’s reformed penal law enhances the enforcement of the imposed penalties by threatening with a sanction that subject of ecclesiastical power that should make sure the penalty is executed but fails to do so. The establishment of a new offence should therefore streamline the control of sentence execution, which in this case is not limited to notifying the convict of the sentence, but also contains an assurance that he carries out the obligations imposed by the sentence as long as it lasts [Medina 2022, 1166].

It is commendable that the execution of a sentence lies with the bishop of the diocese in which the penal trial was conducted in first instance. In cases where the convicted person is a cleric (and in practice this is most often the case), this will generally (though not always¹⁴) be the bishop of the diocese where the cleric is incardinated. This bishop, who is well aware of the local circumstances and the cleric himself, will find it easier to make decisions to effectively execute the penalty (e.g. direct the punished person to a specific place of residence or appoint a guardian (curator),¹⁵ who will monitor the execution of the penalty and the person’s rehabilitation – or, in ecclesiastical terms, his conversion, including his spiritual

¹⁴ Indeed, a penal trial can also be initiated in the diocese where the offence (delict) was committed (Canon 1412), and it need not be the diocese of the cleric’s incardination.

¹⁵ Admittedly, canon law does not envisage such a function (there is the possibility of placing the offender under supervision – cf. Canon 1346 § 2), but it can be provided for in diocesan regulations or prevention programmes established in particular Churches or religious institutes. There is nothing to prevent the bishop from appointing such a guardian by virtue of his broad executive powers (Canon 381 § 1).

path. He will be able to assign to the convicted person such tasks that not only will be in keeping with the sentence but may assist in the convict's conversion. He will be able to take measures to remedy the scandal caused by the delict, etc.).

The actions taken to implement the orders contained in a sentence/decreed can be diverse, depending on the punishment imposed and the content of the decision. In addition to issuing a singular precept, in which the superior orders the convicted subordinate to behave in a certain way (e.g., ordering him to stay in a particular place designated by him and at a certain time, specifying in detail the conditions of this stay – including material conditions); the bishop is also in charge of enforcing the obligations imposed by the penalty (e.g., if a fine was ordered¹⁶). If the convicted person has been deprived of an ecclesiastical office, the bishop should translate this decision into local conditions, appoint a successor and order the transfer of the office (e.g., in terms of property). The bishop is also to make sure that the convicted person complies with his punishment (by, e.g., not engaging in certain activities, not staying in a particular place or territory, not using clerical vestments, not using his powers, privileges, insignia and titles – if prohibited from doing so in accordance with Canon 1336 § 3). The bishop has another important role to play: to inform the church community of the penalty imposed and the prohibitions stipulated – not only for the faithful to know that the offender has been punished justly, which is important for people's awareness that the ecclesiastical justice system is functioning effectively and for remedying the scandal, but also to prevent or at least deter the convicted person from violating the duties imposed by the penalty – such as by carrying out the proscribed priestly ministry. Once the punishment is publicly announced, control over the offender is exercised not only by the bishop or other superiors of this person, but also, in a sense, by the entire community, which has been informed of the restrictions imposed.

At this point it should be remembered that preventive measures, previously taken against a suspect if necessary, automatically lose force by the law when the penal process ends (Canon 1722). Here, one speaks of “cessation” of a penal process, which leads not only to an acquittal,

¹⁶ Canon 1336 § 2, 2° provides for an intervention of the bishops' conference for the purpose of adjusting the rates and collection of fines according to local circumstances.

but also to a condemnatory sentence. Thus, a convicted person – on whom certain restrictions (e.g., an order to stay in a certain place, a ban on public ministry) were placed when he was merely a suspect – is no longer bound by these restrictions despite his conviction and might appear to enjoy complete impunity were it not for the actions taken by the diocesan bishop to execute the sentence. Such impunity could easily cause scandal and give rise to justified criticism and accusations of the Church's passivity, as well as posing a danger to potential victims of the offender. Unfortunately, in the revised version 2.0 of the *Vademecum on Certain Points of Procedure in the Treating Cases of Sexual Abuse of Minors Committed by Clerics*, issued by the Dicastery for the Doctrine of the Faith on 5 June 2022,¹⁷ there is no indication regarding the execution of a sentence or a decree in a penal trial involving this type of offence, and such assistance in the form of specific guidance would certainly be greatly appreciated by bishops.

Although the doctrine recognizes that acquittals do not require to be executed since execution is inherent in them [Cabrerros de Anta 1964, 652; Althaus and Lüdicke 2015, 420], it should be supposed that also in such a case the bishop should take specific measures and do his utmost to restore the good name of the accused¹⁸ who was acquitted.¹⁹

Not all above-mentioned acts of the bishop constitute the execution of a sentence in the strict sense of the term. Performing some of them is dictated by prudence in the exercise of executive power. Considering the need for a strict interpretation of the penal precepts (Canon 18), only

¹⁷ Congregazione per la Dottrina della Fede, *Vademecum su alcuni punti di procedura nel trattamento dei casi di abuso sessuale di minori commessi da chierici* (05.06.2022), "Communicationes" 54 (2022), p. 161-193 [henceforth: *Vademecum*]; English text available at: https://www.vatican.va/roman_curia/congregations/cfaith/ddf/rc_ddf_doc_20220605_vademecum-casi-abuso-2.0_en.html.

¹⁸ This is mentioned – but only with regard to situations where a preliminary canonical investigation has not proved the report of an offence to be legitimate – in Article 8(2) of Annex 2 to *Wytyczne Konferencji Episkopatu Polski dotyczące etapu wstępnego wewnętrznego postępowania kościelnego w przypadku oskarżeń duchownych o czyny przeciwko szóstemu przykazaniu z osobą małoletnią* [Guidelines of the Polish Bishops' Conference regarding the preliminary stage of internal ecclesiastical proceedings when clergy are accused of acts against the Sixth Commandment with a minor] (08.10.2014), "Akta Konferencji Episkopatu Polski" 22 (2019), no. 31, p. 268.

¹⁹ Lüdicke believes, however, that these acts do not constitute the execution of an acquittal but result from the application of Canon 220 [Althaus and Lüdicke 2015, 420].

the bishop's non-performance of the acts that are prescribed by law – not all those that wisdom dictates – is an offence.

It is an offence not to execute a sentence or decree that is “subject to execution” (*exsecutivam*). A penal sentence can be executed only after it has become *res iudicata*; in other words, if neither the convicted person nor the promoter of justice files an appeal²⁰ within the period specified by law or if the sentence has been passed in second instance.²¹ Dismissal from clerical state, just as the above-mentioned declaration of marriage nullity, belongs to the category of matters involving the state of persons and never becomes *res iudicata*. This, however, does not prevent the execution [Calabrese 2006, 203]. In order to execute a sentence, in addition to becoming *res iudicata*, a judge's decree ordering execution is necessary, as mentioned earlier.

Neither in the CIC/83 nor in the *Norms* concerning delicts reserved for the Congregation for the Doctrine of the Faith, nor in the latest *Vademecum* 2.0, do we find any special provisions on the execution of a penal decree in the case of a penalty imposed by extrajudicial decree. Although the doctrine indicates that the rules governing the canonical judicial process can be applied in extrajudicial proceedings [Papale 2012, 42], it seems that a special executive decree is not necessary, particularly that the administrative process is typically conducted by the ordinary or his delegate, who will himself implement and enforce the decree – therefore, it can hardly be expected that he will give orders to himself. If, on the other hand, an extrajudicial penal decree has been issued by the Dicastery for the Doctrine of the Faith, it contains a clause on its execution: if recourse is not filed,

²⁰ Also, if it was not supported by either of them in the appeal instance within one month (Canon 1633), or if the case was closed in appeal instance (Canon 1520) or if the promoter of justice revoked the appeal (Canon 1724 § 1). For trials of offences reserved for the Dicastery for the Doctrine of the Faith, see Congregation for the Doctrine of the Faith, *Norms De delictis reservatis* (11.10.2021), “Communicationes” 53 (2021), p. 437-45 [henceforth: *Norms*]; English text available at: https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20211011_norme-delittiriservati-cfaith_en.html; see Article 18.

²¹ It should be remembered that in penal processes the compatibility of sentences is not requisite (as wrongly believed by Calabrese 2006, 203). It suffices if the sentence is given on appeal (whether it upholds or overturns the judgement rendered in first instance) [Althaus and Lüdicke, 2015, 56]. See *Norms*, Article 18; *Vademecum* 2.0, no. 88.

the decree will be executed and will have effects the moment it is notified.²² It lies with the ordinary to whom the Dicastery transmits the decree rendered and whom it expressly instructs to notify and send feedback to the Dicastery on this act. The Dicastery does not expressly require the bishop to perform any other activities, presumably recognizing that this is clearly follows from the content of the penal decree.

A penal decree becomes enforceable when the time limits for filing a request for revocation or emendation of the decree have expired (Canon 1734 § 2) or to have a recourse (Canon 1737 § 2) or, in the case of delicts reserved to the Dicastery of the Doctrine of the Faith, the Dicastery's promoter of justice or the accused himself did not file a recourse within the prescribed period, and when the Dicastery, after considering the recourse, issued a definitive decree against which there is no further appeal (Article 24 § 1 of the *Norms*).²³

3. Elements of the offence of failing to execute a penal sentence or decree

The delict classified in Canon 1371 § 5 is rightly described as a crime “against the administration of justice” [Graulich and Hallermann 2021, 189], just as with Polish law.²⁴

We noted above that there appears to be a fundamental difference of opinion among canonists on the execution of a penal sentence. Some argue that such a sentence does not require execution and is self-effective. This, however, would mean that the offence of failing to execute a sentence would be unwarranted. This doctrinal dispute will surely impact the interpretation of the new Canon 1371 § 5 and can certainly make it difficult

²² “Si informa che, a norma dell’art. 27 mp SST, contro il presente decreto si può presentare ricorso al Collegio per l’esame dei ricorsi in materia di delicta reservata entro il termine perentorio di sessanta giorni utili, trascorsi i quali, se non verrà presentato alcun ricorso, *il decreto sarà messo in esecuzione e produrrà gli effetti di legge dal momento della sua comunicazione.*” Prot. N. 584/2018.

²³ See *Norms*, Article 25.

²⁴ Act of 6 June 1997 – The Penal Code, Journal of Laws No. 2022, item 1138, as amended; Articles 232–47. Every delict offends justice, so one of the aims of canonical penalties is to restore justice which has been breached – see Canons 1311 § 2, 1335 § 1, 1341, 1343, 1345.

to enforce this criminal provision, especially if we take into account the necessity of a strict interpretation of penal laws (Canon 18).

Given the current state of knowledge, let me say that the offence regulated in Canon 1321 § 5 constitutes any culpable²⁵ action or, more likely, inaction of the diocesan bishop or other ordinary charged with implementing the provisions of a penal sentence or decree, which results in leaving the offender unpunished in fact. Thus, the following will be criminal acts: the ordinary's failure to notify the convicted person of the decision issued, the ordinary's failure to specify any decisions made in general form,²⁶ his making decisions that are contrary to the penalty imposed or declared,²⁷ failure to make those decisions that are essentially required as consequences of the penalty imposed or declared.²⁸

What is the time limit for the diocesan bishop or other ordinary to take the requisite action? Since the execution of a penal sentence, let alone an extrajudicial decree, is within the competence of executive authority, the provision of Canon 57 § 1 applies, whereby whenever the law orders the issuance of a decree, the competent authority should deal with the matter within three months of receiving the request – in this case, from the receipt of a sentence containing a judicial executive decree or a penal executive

²⁵ Bruno Fabio Pighin believes that since the legislator does not explicitly indicate that the offence of not executing a penal judgement or decree can also be committed through negligence, i.e., omission of due diligence, and thus “of culpability” (Canon 1321 § 2), a superior can be punished only for a wilful violation of the law (Canon 1321 § 3). However, as Pighin rightly points out, also the possible unintentional negligence of a diocesan bishop in this regard can be the grounds for his removal from office under the *motu proprio Come una madre amorevole* of 4 June 2016 – AAS 108 (2016), pp. 715-17 [Pighin 2022, 341-42]. Also, the provision of Canon 1378 § 2 must be taken into account: “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.”

²⁶ For example, when a person was placed in a certain place (Canon 1336 § 2, 2°), which is not, however, precisely indicated, it is up to the ordinary to determine both the place and the conditions (e.g., financial) of the convict's stay.

²⁷ For example, by assigning a pastoral office to the convicted person, when he has been forbidden to exercise priestly ministry, or directing him to conduct school catechesis in violation of a ban on pastoral work with youth and children.

²⁸ For example, by failing to revoke authorizations or permissions that may have been granted, which the offender is not to use when punished.

decree. It does not appear that a delict would constitute only such a delay that it causes the prescription of an action to execute a penalty, according to the provisions of Canons 1362 and 1363.

On the other hand, no offence occurs if an ecclesiastical superior fails to carry out other acts that the law does not explicitly prescribe, but which pastoral prudence dictates to place – such as informing the community of the faithful of the punishment and prohibitions that the offender has incurred. Nor is it an offence (in the strict sense) of failing to execute a judgment or decree if there is no response to a convict's violation of the provisions contained in a criminal decision, that is, his or her conduct contrary to the prohibitions or orders imposed on them.²⁹ However, in such a case (as omitting the obligations imposed by the penalty constitutes a separate delict – Canon 1371 § 2) the ordinary should undertake a preliminary investigation and, if the allegations are confirmed, initiate penal proceedings, in accordance with Canon 1717 *et seq.* Nevertheless, an ordinary who fails to respond as required by the law (by admonition and, in absence of improvement, by initiating a criminal procedure) to such conduct could himself incur liability for the offence referred to in Canon 1378 § 2.

The active subject of the offence of non-performance of a penal sentence or a decree is the diocesan bishop in the case of a judicial sentence;³⁰ in the case of an administrative decree the issue is not so clear-cut. If it was the ordinary or his delegate who conducted the penal process out of court, it seems that he himself is also the executor of the decree. However, when the trial was conducted by one of the vicars of the diocesan bishop and by his order, it would be legitimate to argue that the diocesan bishop himself should make sure that the penal decree is executed. If the trial were conducted by the Dicastery of the Doctrine of the Faith – it seems that the ordinary responsible for the enforcement is the ordinary whom the Dicastery instructs to inform the offender of the decree (in most cases,

²⁹ For example, when the convict leaves the ordered place of residence to engage in forbidden activities (e.g., to hold a priestly service in public if he has been forbidden to do so).

³⁰ The view that the offender is “the ecclesiastical authority which rendered an enforceable sentence and yet did not execute it” is oversimplified [Kaleta 2022, 228]. This is because there is no necessary equivalence between the authority that punished the offender and the authority that is to implement the penal decision. In the case of a judicial sentence, such identity never occurs, since the sentence is passed by the court and the diocesan bishop is the one to execute it.

it will be the diocesan bishop). The penalty for the offence of failing to execute a sentence or penal decree is indefinite – *iusta poena puniatur* – but it can even be a censure. This is how the legislator lets the punishing authority adjust the penalty according to the severity of the offence [Kaleta 2022, 228-29].

The offence in question does not fall into the category of offences reserved to the Holy See, despite some resemblance to the offence of thwarting or impeding criminal investigations, commonly referred to as “covering up paedophile crimes,” as defined in Article 1 § 1b of the motu proprio *Vos estis lux mundi*³¹ [Majer 2021, 315-22]. It should be remembered, though, that only the Roman Pontiff is competent to conduct a possible penal trial against a bishop (anyone having episcopal orders, not just a diocesan bishop) (Canon 1405 § 1, 3°), who usually operates through dicasteries of the Roman Curia for this purpose. In contrast, other ordinaries who commit this offence (vicars general and episcopal vicars) are to be tried by the diocesan bishop or, in the case of religious ordinaries, by the highest superior (Canon 1427 § 2).

Summary

Canon 1371 § 5, which stipulates a new offence in the canonical legal order, gives rise to interpretative problems. The most problematic thing is that some authors question the very need to execute penal decisions. This is not just an opinion of doctrine, but it is reflected in Canon 2243 § 1 of the 1917 Code, which stipulated that censures are effective the moment they are imposed without the need for separate execution. This would mean that, for example, in the case of suspension, the only obligation for a superior is to notify the convict of the sentence. The second complication is the lack of a precise definition of what acts are entailed by penalty execution. A third problematic issue is that the regulations do not indicate precisely which authority is in charge of executing an extrajudicial penal decree, and thus who may be a possible subject of the offence. In light of the legalism principle inherent in criminal law and underlying Canon 18,

³¹ Francis, *Litterae apostolicae motu proprio datae Vos estis lux mundi* (25.03.2023), “L’Osservatore Romano” (Edizione quotidiana) 163 (2023), no. 71, p. 8-10.

which mandates a strict interpretation of penal laws, may create difficulties in enforcing the new provision.

So far, there have been very few commentaries on the Church's new criminal law, and there are virtually no studies on the newly classified offence. When such studies are conducted, they will likely help to clarify the issue and correctly interpret the new precept. Perhaps this will be influenced by the jurisprudence and practice of the Roman Curia, as long as its decisions and their justifications are publicized.

One may ask why the canonical legislator distinguished a criminal act involving a church superior's failure to execute a penal sentence or decree. After all, there is the offence of abuse of power, which also includes omission, that is, failing to place an act of governance that ought to have been issued.³² It seems that even if the amended Book VI of the 1983 Code did not contain the new Canon 1371 § 5, there would be a legal basis for punishing an ordinary who failed to implement a decision to punish his subordinate. Pope Francis' decision to define the new offence and isolate it from the delicts that make up the general category of abuse of power reflects not only the general trend towards purging the Church of perpetrators of sexual abuse against minors, but also the new "philosophy" mapped out by the provisions of the Apostolic Constitution *Pascite gregem Dei*, in which the Pope reminds us that the application of criminal law in the Church is not an extraordinary measure, but a necessity and a determinant of the proper exercise of the pastoral office in the Church.

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³² Canon 1378: "§ 1. A person who, apart from the cases already foreseen by the law, abuses ecclesiastical power, office, or function, is to be punished according to the gravity of the act or the omission, not excluding by deprivation of the power or office, without prejudice to the obligation of repairing the harm. § 2. 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."

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