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ARTICLES

Biuletyn Stowarzyszenia Kanonistów Polskich XXXIII (2023), nr 36 bis, s. 7-32

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

ANALIZA KANONICZNEGO PROCESU KARNEGO Z PERSPEKTYWY MINIMALNYCH WARUNKÓW ZASADY KONTRADYKTORYJNOŚCI

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Abstract

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

Keywords: canon law, adversarial principle, penal process

Abstrakt

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

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

Słowa kluczowe: prawo kanoniczne, zasada kontradyktoryjności, proces karny

Introduction

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

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

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

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

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

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

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

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

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

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

1. Action as an Impetus for Proceedings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Designation of the Object of the Process

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Equal Rights of the Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Disposition of the Parties

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

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

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

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

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

6. Independence and Impartiality of Judges

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

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

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

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

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

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

[29] See Andrzejewski 2021, 18-26.

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

Summary

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

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

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

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

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

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

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

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

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

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

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

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

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DEVELOPMENT OF COMPETENCES OF THE PRIMATE OF POLAND AND THE PRESIDENT OF THE POLISH BISHOPS' CONFERENCE

ROZWÓJ KOMPETENCJI PRYMASA POLSKI I PRZEWODNICZĄCEGO KONFERENCJI EPISKOPATU POLSKI

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Abstract

The rights and privileges of the primates of Poland were considerable. Polish primates crowned Polish kings, blessed royal marriages, and presided over the funeral rites of Polish kings. They were the first senators of the Kingdom, and in the king's absence they acted as his governor and *interrex*. They had the right to convene the Sejm, Senate councils and order general mobilisation; they were members of governmental bodies, had precedence before princes and dukes, sat before cardinals, had a princely title and a coat of arms, and wore purple robes. A turning point for the hierarchy came with the new legislation of the universal Church. Canon 438 of the 1983 Code of Canon Law expressly regulates that, apart from the prerogative of honour, the primate no longer has any power of governance, unless otherwise stated for some of them by apostolic privilege or approved custom. Canon 452 prescribes the election of the president of the bishops' conference. Currently, Primate of Poland is an honorary title for the metropolitan archbishops of Gniezno. The privileges inherent in the functions of the primate are precedence during liturgical celebrations, a permanent place in the Permanent Council of the Polish Bishops' Conference, the right to wear purple and to have 30 tassels in his coat of arms.

Keywords: Primate of Poland, Polish Bishops' Conference, President of the Polish Bishops' Conference, hierarchical organisation of the Church

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Abstrakt

Prawa i przywileje prymasów Polski były ogromne. Prymasi Polski dokonywali koronacji królów Polski, błogosławili małżeństwa królewskie, przewodniczyli obrzędom pogrzebowym królów polskich. Byli pierwszymi senatorami królestwa, w trakcie nieobecności króla byli jego namiestnikiem i pełnili funkcję *interrexa*. Posiadali prawo do zwoływania sejmu, rad senatu oraz pospolitego ruszenia, zasiadali w organach rządowych, mieli precedencję przed królewiczami i książętami, zasiadali przed kardynałami, posiadali tytuł książęcy, herb oraz nosili szatę purpurową. Przełom w hierarchii nastąpił wraz nowym ustawodawstwem Kościoła powszechnego. Kodeks Prawa Kanonicznego z 1983 r. w kan. 438 wprost reguluje, że oprócz prerogatywy honoru, prymas nie ma już żadnej władzy rządzenia, chyba że w odniesieniu do niektórych z nich stwierdzałoby się co innego na mocy przywileju apostolskiego albo zatwierdzonego zwyczaju, zaś w kan. 452 nakazuje wybrać przewodniczącego konferencji biskupów. Obecnie prymas Polski jest tytułem honorowym przysługującym arcybiskupom metropolitom gnieźnieńskim. Przywilejami wnikającymi z funkcji prymasa są: precedencja podczas uroczystości liturgicznych, stałe miejsce w Radzie Stałej Konferencji Episkopatu Polski, prawo do noszenia purpury oraz posiadania w herbie 30 chwostów.

Słowa kluczowe: Prymas Polski, Konferencja Episkopatu Polski, Przewodniczący Konferencji Episkopatu Polski, ustrój hierarchiczny kościoła

Introduction

This article presents the evolution of the hierarchical position and competences of primates of Poland, which along with the evolution of church law became decentralised. Now, the Primate of Poland holds an honorary position, and the remaining powers are vested in the Polish Bishops' Conference, headed by its president.

1. The origin of primacy in Poland

In Western Europe, during the early stages of the Church's organisation, there was a single patriarchate in Rome, which encompassed numerous local churches. In the fourth century, within the limits of this patriarchate arose the office of primate – first among equals. First, the primate's authority extended over several metropolia, then it typically covered local, national churches [Kumor 1983, 157-58].

The Catholic Church in Poland was fully organised when Pope Sylvester II crowned the efforts of Prince Bolesław I the Brave and erected an independent ecclesiastical organisation in 999 – the metropolis of Gniezno. Therefore, the archbishop metropolitan of Gniezno was considered the sole head of the entire Church in Poland, i.e. the primate of Poland. The application of this decision came in 1000, when during the Congress of Gniezno Emperor Otto III announced the creation of the first Polish metropolis comprising the territory of Bolesław the Brave's state of the time [Mielczarski 1993, 61-75]. The metropolis consisted of three suffragan dioceses of Kraków, Wrocław and Kołobrzeg [Wejman 2016, 2018]. As metropolitans, the archbishops of Gniezno were from the outset regarded as heads of the entire Church in Poland and as the highest ecclesiastical dignitaries.

In 1367, a second metropolis was erected in Halych. This being the case, there came the problem of hierarchical primacy in the Church. An attempt to resolve that was probably made already in 1414 at the provincial synod in Wieluń. There, the principle was laid down to give the metropolitan of Gniezno precedence over the metropolitan of Halych-Lviv, as the metropolitan seat was transferred from Halych to Lviv in 1412, in virtue of the seniority of Gniezno [Abraham 1904, 268]. The conferment of the title of Primate of Poland to the Metropolitan of Gniezno was confirmed shortly afterwards, during the Council of Constance in 1414-1418. During the council, Primate of Poland Mikołaj Trąba was invited to sit among primates, which at the time was tantamount to giving him this dignity. We have this information from the Polish historian Jan Długosz. Unfortunately, no written confirmation of the conferral has survived. It is noteworthy that Trąba's successors did not seek such a confirmation, either, which proves that their primacy was never disputed [Pietrzak 2011, 58].

The Holy See took nearly a century to confirm the title of primate of Poland for the metropolitan archbishops of Gniezno, and they did that, as it were, in passing. On 25 July 1515, at the request of Sigismund I the Old, Pope Leo X conferred on Jan Łaski the title of born legate (*legatus natus*) by his bull *Pro excellenti praeeminentia*[1] [Korytkowski 1888a, 120-22]. However, this act did not specify the scope of the primate's authority but placed the Lviv metropolis under the primate's and the legate's jurisdiction. The act also contains a vague statement that the scope of the primate of Poland's

[1] Leon X, *Pro excellenti praeeminentia*, Archdiocesan Archive of Gniezno, dipl. 625 (or.).

competence is "that which other legates have, and especially of the Primate of England at Canterbury by law, privilege and custom" [Nowacki 1937, 651-52]. Poland was an exception in Europe with respect to the order in which those dignities were conferred. This is because usually the title of primate was given to hierarchs already holding the dignity of born legate. In contrast, Poland was the opposite case [Osuchowska 2012, 148].

2. Prerogatives of Polish primates

From 1025, monarchs were crowned by Polish primates. This privilege was retained despite the fact that from 1320 coronations were held in Kraków. The primate of Poland celebrated the coronation Mass, swore the king in, anointed him with holy oils, handed him the sword, the sceptre and the orb, put the crown on his head, and intoned the hymn *Te Deum* [Lengnich 1836, 89-94]. Importantly, primates of Poland performed coronations of the spouses of Polish kings [Pietrzak 2011, 60-62].

In the 14th century, primates began blessing the marriages of Polish kings. Researchers claim that it was the primate's privilege to baptise the children of the royal couple [Przyboś 1984, 95-96]. Notably, from 1573 Polish kings could only marry on the advice of the Senate. Polish primates were senators and sometimes spoke out on that issue [Lengnich 1836, 184].

They presided over the funeral rites of the kings. This privilege became part of the ceremonial rules for royal funerals in Poland. Primates would lead the funeral procession, assisted by other bishops, celebrated the funeral rites, and delivered a sermon. Primates also presided over the funerals of queens [Rożek 1977, 58-95].

In the 14th century, the Royal Council was formed, which in the 16th century became the Senate. These bodies included the primates of Poland. The archbishop metropolitan of Gniezno sat to the right of the king; he was the first senator of the Kingdom, he spoke on behalf of the Senate and represented the Senate externally. Primates in Poland were referred to as princes of the Senate [Kromer 1977, 107] and even presidents of the Senate [Skrzetuski 1782, 153].

The arrival of the primate at the Sejm was a magnificent spctacle and followed a special ceremonial. Apostolic Nuncio Giulio Ruggieri wrote in 1565 that the metropolitan archbishops of Gniezno rode a thousand

horses to the Sejm.[2] The route led to the royal castle, where the primate visited the king, surrounded by his retinue. He was greeted on the first and last steps of the stairs by royal chamberlains and led to the last hallway, where he was in turn greeted by marshals of the Crown and Lithuania, and then led to the chamber where the king was waiting. Primate Krzysztof Szembek wrote in 1741 that the king received him ceremoniously as if he were a great imperial envoy, but with "greater distinction" [Skibiński 1913a, 670-73]. It should be noted that outside the Sejm, the primate's arrivals and audiences with the king followed a less spectacular protocol, according to the ceremonial used for senators [Lengnich 1836, 239]. The Sejm was inaugurated with the Holy Mass, usually celebrated by the archbishop metropolitan of Gniezno, with occasional exceptions to this rule [Pietrzak 1996, 49-51]. When the primate entered the senatorial chamber, the king greeted him from his throne with his head uncovered, which he nodded slightly, and the senators rose from their chairs. Foreign deputies holding posts in Poland paid him visits [Skibiński 1913a, 15].

From the 15th century, primates in Poland had special responsibility for the state in the king's absence. King Ladislaus Jagiello officially appointed Primate Mikołaj Kurowski royal governor. The archbishop metropolitan of Gniezno was granted the title *Vicarius Regni nostri Poloniae Generalis* for the duration of the war with the Teutonic Order in 1409-1411. The tradition of the primate substituting the king was continued by Cardinal Ferdynand Jagiellończyk [Korytkowski 1888a, 513, 787].

3. The primate of Poland as *interrex*

In 1575, Girolamo Lippomano, a Venetian envoy, wrote that the Polish primate was, as it were, a "royal governor" during an interregnum. In 1636, Apostolic Nuncio Onorato Visconti claimed that the primate had almost royal prerogatives, which he used during an interregnum. In 1670, Apostolic Nuncio Galeazzo Marescotii reported that during an interregnum the primate took the helm of the entire government [Dzięgielewski 2002, 43-44]. From 1573, the primate held the office of *interrex*, or head of state during each interregnum. During the convocation in Warsaw from January 6 to 29, 1573,

[2] *Relacje nuncjuszów apostolskich i innych osób o Polsce od roku 1548 do 1690*, edited by E. Rykaczewski, vol. 1, Berlin 1864, p. 163.

the Primate of Poland was acknowledged as *interrex* [Placa 1969, 28, 63]. During the Jagiellonian era, it happened that Polish primates convened electoral conventions and announced the election of kings. As *interrex*, the primate performed the following tasks: he announced the death of the king and the onset of an interregnum; after consultation with the senators, he appointed sejmiks and the Convocation Sejm; at the convocation (also at the electoral Sejm), he submitted the agenda; he appointed deputies from among the senators, received foreign deputies, and sent Polish deputies; during the election of a king, he pronounced the result of the vote by touring the electoral precinct on horseback, and if the election was unanimous, he nominated the king, whereupon he intoned *Te Deum*. He informed the king-elect of his election, he received the oath of *pacta conventa*. After the king's coronation, he handed over the Kingdom. Finally, at the coronation Sejm, he reported on the interregnum to respective estates [Lengnich 1836, 51, 73-75, 90, 97]. The primate made decisions independently or in consultation with the senators present. It was not until 1632 that the Convocation Sejm curtailed the primate's power as *interrex*. From that year, the primate would be assigned councillors from the Senate and the Chamber of Deputies. This practice ended during a convocation of 1764 [Pietrzak 2011, 68-69].

The rules for the functioning of the state when governed by the primate as *interrex* were customary, often based on precedent, because a relevant constitution had not been enacted. During the 1763-1764 interregnum, the primate appointed secular and clerical officials, approved by the king. It should be emphasised that the most important prerogative of the *interrex* was to nominate the king. Historically, the king was appointed by other bishops [Korytkowski 1888a, 118].

At the end of the 17th century, during the interregnum, the throne of the primate was placed before the royal throne. At the 1696 Convocation Sejm, a canopy was installed over the primate's throne [Bużeński 1860, 181], which took place by way of exception because it was opposed by the nobility [Walewski, 50-51].

The primate of Poland was competent to initiate Sejms, convene meetings of the Senate and collect and promulgate its resolutions in the king's absence and during interregnum [Kromer 1977, 107]. Nowadays, historians discuss this scope of the primate's prerogatives [Pietrzak 2011, 74-75]. The unquestioned prerogative of the primate of Poland acting as *interrex* was to convene Senate councils and the Convocation Sejm

during an interregnum; it also happened from time time that he summoned the nobility for an election [Walewski 1874, 74-75].

The primate of Poland, in the absence of the king, presided over the Senate and the Joint Chambers, but the floor was given by the crown marshal, just as he would if the king presided over the deliberations. During sessions, the primate was replaced by the highest-ranking senator [Uruszczak 1980, 169]. It occurred several times in Polish history that a general mobilisation was called by the primate of Poland. This happened in 1593, 1697 and 1764 [Korytkowski 1891, 337].

The primate was the guardian of the law. It is important to remember that at that time subjects enjoyed the right to resist a trespassing ruler. If the ruler behaved lawlessly, it belonged to the senators to admonish him, and as a last resort, the people could disobey him [Korytkowski 1888a, 126]. It was stipulated in the 1607 constitution that in a case like that, the primate was to admonish the king and, if the monarch would not listen, submit the matter to the Sejm [Lengnich 1836, 175]. Apostolic Nuncio Galeazzo Marescotti wrote that the primate had the power to remind the king of all that was important for the well-being of the Republic, for the exercise of laws and *pacta conventa*, and even to admonish the king if necessary [Ochmann-Staniszewska 2000, 251].

The 1764 constitution incorporated changes in the interpretation of the office of primate of Poland. This act treated the archbishop of Gniezno as an actual viceroy. Not only was the hierarch allowed to use the canopy, but those who challenged this distinction were intimidated. Feliks Szczęsny Czacki, the Deputy Crown Cup-Bearer, in his treatise *Myśli patriotyczne* argued that the primate should not only be *interrex*, but a viceroy, next to the king [Konopczyński 1966, 306-10].

In 1775, the primate sat on the Permanent Council [Karaskiewicz 2007, 229-30]. In 1776, the primate was the president of the Commission of National Education [Pietrzak 2011, 78]. Primates in Poland had precedence before royals and princes [Lengnich 1836, 233-34].

Innocent X, in his apostolic constitution *Militantis ecclesiae regimini* of 19 December 1644,[3] bestowed on cardinals the dignity of princes

[3] Innocentius PP. X, *Militantis Ecclesiae regimini* (19.12.1644), https://la.wikisource.org/wiki/Militantis_Ecclesiae_(Innocentius_X) [accessed: 03.05.2023].

of the blood, which was intended to ensure their proper rank in state precedence [Bączkowicz, Baron, and Stawinoga 1957, 446]. In Poland, cardinal's dignity was treated as alien and dangerous because it gave rise to disputes in state precedence and undermined the authority of the primate [Kawecki 2001, 484-85]. This problem was resolved at a general convention in Piotrków on 17 June 1451 by King Casimir Jagiellon, who issued the privilege *De praerogativis archiepiscopi gnesis et jure coronandi reges*. The provisions of the privilege were accepted by both the primate and the cardinal. It secured the rights and privileges of the archbishops of Gniezno, and "prerogatives of his hierarchical dignity" were secured for the cardinal [Korytkowski 1889, 413]. In order to avoid disputes between the cardinal and the primate, the principle of alternate participation in the Royal Council was introduced. The primate and the cardinal were obliged to come to the council meetings one at a time, when summoned by the king, and take the first seat in turn. For the future, bishops, including the primate, were barred from seeking or accepting the cardinal's hat without the permission of the king and the Royal Council, that is, the Senate. The cardinal's and primate's duty to come to sessions alternately and only when summoned by the king was still mentioned in the 1718 constitution [Idem 1888b, 228-30, 233-35]. By and large, Polish cardinals and primates avoided disputes over precedence, shunning simultaneous public appearances especially at the royal court, Senate councils and the Sejm. However, when it came to a joint presence at the Senate, the primate always took precedence. It occurred sometimes that some of the cardinals directly demanded precedence before the primates [Pietrzak 2011, 82-83].

In the 16th century, an apostolic nuncio was appointed in Poland. He enjoyed precedence before all foreign deputies. In its instructions to nuncios in Poland, the Holy See drew their attention to the high status of the primate in the Kingdom and his dignity of *legatus natus*. Therefore, they were required to show respect to the primate, to support him in work, and to act very carefully and prudently in protocol matters [Wojtyska 2002, 79]. Nuncios arriving in Poland were welcomed and received by the primates in their residences. The primate ranked higher than the nuncio, royal deputies or princes. The primate and the nuncio, however, preferred not to appear simultaneously [Lengnich 1836, 239].

From the time of Primate Uchański, the primates used the title of "First Prince" of the Kingdom. Primates enjoyed the privilege, modelled

on apostolic legates, of using a cross set on a long pole. They believed that their right to use the cross extended over the entire territory of the Kingdom and later the Republic. The right to use the cross was not given to primates nominees, who acquired it only after receiving a papal bull of approval. The cross was used in the presence of apostolic nuncios and cardinals, but not before a legate *a latere* [Czacki 1861, 331]. Primates used coats of arms, where the emblem displayed on the escutcheon indicated the pedigree, but all insignia surrounding it symbolised the ecclesiastical dignity [Weiss 1993, 729-36].

In the mid-18th century, primates were also given the privilege of donning purple robes and using the title 'eminence,' even if they were not cardinals. Following the example of monarchs and princes, they also maintained a large court that stayed wherever they resided. He also had the extraordinary right to use the cardinal title of eminence [Korytkowski 1888a, 125]. Interestingly, this custom has been preserved to this day. The privilege granted in 1749 by Benedict XIV was used by Archbishop Henryk Muszyński, Metropolitan of Gniezno, Primate of Poland.

The partitions of Poland surely affected the office of primate adversely. In the partition era, after the Second Partition, the primate, like all residents of Wielkopolska, became a citizen of Prussia. By decree in 1975, Prussian King Frederick William, considering that the title of Primate of Poland was a symbol of Polishness, forbade Archbishop Ignacy Krasicki to use the title of primate and granted him the title of prince instead [ibid., 138]. The Prussian government, after the Congress of Vienna in 1814-1815, openly sought to abolish the archdiocese of the metropolis of Gniezno. The plan was to substitute it with a metropolis in Wrocław [Barańska 2008, 63]. Eventually, Pius VII, in his bull *De salute animarum* of 16 July 1821,[4] elevated the bishopric of Poznań to the rank of archbishopric and united it by personal union with the archdiocese of Gniezno. From then on, both dioceses had one metropolitan archbishop [Hoffmann 1932, 43-44].

After Poland regained independence, a conflict of precedence emerged. In 1918, the country had two primates: Edmund Dalbor, Metropolitan Archbishop of Gniezno and Poznań, Primate of Poland, and Aleksander Kakowski, Metropolitan Archbishop of Warsaw, Primate of the Kingdom

[4] Pius PP. VII, *De salute animarum* (16.07.1821), "Gesetz-Sammlung für die Königlichen Preußischen Staaten" 12 (1821), p. 113-52.

of Poland [Zieliński 2007, 335-37]. The question was which archbishopric capital was to preserve the primate's legacy. The final decision was made by the Holy See, the Congregation for Extraordinary Causes of the Church by a decree of 5 February 1925,[5] abolishing primate jurisdiction in Poland and retaining the title of Primate of Poland for the Metropolitan Archbishop of Gniezno and the title of Primate of the Kingdom of Poland for life only for Aleksander Kakowski [Fąka 1977, 123-24].

4. The bishops' conference

In the 18th century, meetings of bishops slowly began to take shape, evolving into the institution of bishops' conferences. The turning point for this institution was the Second Vatican Council [Sztafrowski 1984, 22]. Existing bishops' conferences were accorded the status of institutions governed by universal law, and bishops of countries where such conferences did not yet exist were required to establish them [Dyduch 1998, 63-64].

Poland's first official Bishops' Conference was held on 10-12 December 1918 in Warsaw, with the participation of bishops from all Partitions. The plenary meeting of the bishops in the independent homeland was convened by Aleksander Kakowski, Metropolitan Archbishop of Warsaw, Primate of the Kingdom of Poland. The session was presided over by Apostolic Visitor, Achille Ratti. Unfortunately, Edmund Dalbor, Metropolitan Archbishop of Gniezno and Poznań, Primate of Poland did not attend, who was unable to come to Warsaw due to problems with transport communication links between Greater Poland and Warsaw [Hemperek 1977, 51].

Another meeting was held on March 12-14, 1919, in Warsaw. This meeting was also convened by Archbishop Kakowski and chaired by Ratii. This session was particularly significant because it was necessary to a position on church matters that were to be considered in the Parliament. In this meeting, the bishops started working on the rules of procedure for plenary meetings [Dyduch 2013, 4].

The third plenary meeting was called by Archbishop Dalbor, and took place on August 26-30, 1919, in Gniezno. The participants adopted the Rules of Procedure of the Polish Bishops' Conventions (*Regulamin Zjazdów Biskupów Polskich*). This act specified the participants, the subject matter

[5] See the letter in this matter: Fąka 1977, 123-24.

and the procedure of meetings, and the character of the Polish Bishops' Conventions [Manzanares 1980, 46-47]. Based on the 1919 Rules, the official name of the bishops' meetings was Convention of Bishops of Poland (*Zjazd Biskupów Polski*) [Krasowski 1992, 33].

The importance of the Polish Bishops' Conference increased following the Concordat of 1925.[6] A further increase in authority occurred during the period of the Polish People's Republic, both within the Church and in its relations with state authorities, as demonstrated by the appointment of the Joint Commission of the Polish Episcopate and the Government and the signing of agreements between them in 1950 and 1956 [Misztal 2011, 30-33].

In this connection, Cardinal Stefan Wyszyński must be mentioned, who from 1948 to 1981 was Metropolitan Archbishop of Gniezno and Warsaw, Primate of Poland and President of the Polish Bishops' Conference. Under the 1969 Statute,[7] the president of the conference was, by law, the Polish primate, and the plenary meeting did not elect him [Stępień 2019, 66]. Moreover, the Statute named the Primate of the Millennium as president of the Bishops' Conference. The next Statute (1987)[8] did not feature such a provision [Banduła 2022, 19].

With Cardinal Wyszynski's death, the episcopal capitals of Gniezno and Warsaw became vacant. By Pope John Paul II's decision on 7 July 1981, Józef Glemp, Bishop of Warmia (who was still president of the Polish Bishops' Conference under the 1969 Statute) became the new archbishop of Warsaw and Gniezno. Cardinal Glemp was the last hierarch to combine the function of Primate of Poland and president of the Polish Bishops' Conference [Kindziuk 2019, 206-207].

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[6] Concordat between the Holy See and the Republic of Poland, signed in Rome on 10 February 1925, Journal of Laws No. 72, item 501.

[7] *Statutum Conferentiae Episcoporum Poloniae. Varsaviae* (13.02.1969), "Akta Konferencji Episkopatu Polski", ref. II 013100, p. 1-10.

[8] *Decretum. Sacra Congregatio pro Episcopis. Poloniae de Statutorum Conferentiae Episcoporum recognitione* (10.10.1987), "Akta Konferencji Episkopatu Polski", ref. III 013100.

5. The president of the bishops' conference

The 1983 Code of Canon Law[9] does not mention the office of primate, but in Canon 452 it orders that the president of the bishops' conference be elected [Krukowski 2005a, 322-23]. Moreover, Canon 438 provides explicitly that, apart from the prerogative of honour, the primate no longer has any power of governance, unless provided otherwise by apostolic privilege or approved custom [Krukowski 2005b, 303-304].

The current 2009 Statute of the Polish Bishops' Conference[10] regulates that the Primate of Poland retains honorary precedence among the Polish bishops (Article 3), is a member of the Permanent Council and, along with the cardinals in charge of the dioceses, is effectively the only non-elected member of the Council (Article 22). The statute provides that the president and his deputy are elected from among the diocesan bishops by the plenary assembly for a term of five years. These functions can be exercised uninterruptedly for two consecutive terms (Article 26). The president's powers are to represent the Conference externally (Article 27), convene the Permanent Council, the Plenary Assembly and the Council of Diocesan Bishops, and preside over these meetings. Exceptionally and in special cases, the president invites other persons to meetings of the Conference, and having consulted the Presidium, submits reports and documents of plenary meetings and the Council of Diocesan Bishops to the Holy See through the Apostolic Nunciature (Article 28). Should the president be legally impeded, his function is taken over by the deputy chairman (Article 29).

Currently, Archbishop Wojciech Polak is the Metropolitan of Gniezno, Primate of Poland. He is the 90th Metropolitan Archbishop of Gniezno and 57th Primate of Poland. Archbishop Stanisław Gądecki, Metropolitan of Poznań, presides over the Polish Bishops' Conference, while Archbishop Marek Jędraszewski, Metropolitan of Kraków, is the deputy president.

As a side note, the coats of arms of the aforementioned hierarchs feature 30 tassels for the Primate of Poland, arranged half by half and pyramidally

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[9] *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.

[10] Polish Bishops' Conference, *Dekret* (25.08.2009), "Akta Konferencji Episkopatu Polski," ref. V 02-13-003-023.

on both sides of the escutcheon, and 20 tassels for the Metropolitan Archbishops of Poznań and Kraków. Cardinals, and since the 19th century also primates, are entitled to 30 tassels; bishops are assigned 12 tassels [Kitowicz 1950, 174].

Summary

In Europe, for centuries, no bishop had prerogatives as extensive as to the ones possessed by the Polish primate. This title was originally associated with the right to crown kings and jurisdictional supremacy in the Church in Poland, both over Gniezno and, in certain respects, also over Lviv. In the early 16th century, these powers were extended by the title and entitlements of *legatus natus*. The primate had the right to visit bishoprics and convene provincial (i.e., national) synods. He represented the entire Church in Poland externally, and was not lower in rank even to cardinals. He had the right to accept appeals from ecclesiastical courts throughout the Republic. He stood in for the king in his absence; he was the most important figure after the king; as a senator, he took the first place after the monarch and was not inferior even to the apostolic nuncio. At the Sejm of 1573, the primate was officially granted the office of *interrex*.

The consequences of the Partitions certainly struck at the office of primate, which was a symbol of the unity of the Church and Poland. Frederic William, King of Prussia, prohibited the Metropolitan Archbishop of Gniezno from using the title of Primate of Poland in 1795 and granted him the title of prince instead. Alexander I, Czar of Russia, obtained for the newly created archdiocese of the Warsaw metropolis in 1818 the title of Primate of the Kingdom of Poland. Following that event, there were two primates: the Primate of Poland and the Primate of the Kingdom of Poland. The Congregation for Extraordinary Ecclesiastical Affairs approved by decree the Archbishop of Gniezno as the Primate of Poland, and granted the Metropolitan Archbishop of Warsaw the title of Primate of the Kingdom of Poland for life. However, this decree abolished the primate's jurisdiction over other Polish dioceses, in which case, at the grass-roots level, conferences of bishops started to be formed within the Catholic Church, which was eventually regulated in the CIC/83.

Now, Primate of Poland is an honorary title held by the metropolitan archbishops of Gniezno. This role, however, has been radically curtailed

due to changes in the universal Church. No jurisdiction over other bishops or dioceses is vested in this title anymore. Privileges stemming from the primate's function include: precedence at liturgical ceremonies, a permanent seat on the Permanent Council of the Polish Bishops' Conference, the right to wear purple and have 30 tassels in his coat of arms.

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

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

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Abstract

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

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

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

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

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

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

Abstrakt

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

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

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

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

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

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

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Cooperation with Respect to Marriage Procedural Law

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

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

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

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

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

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

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

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

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

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

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

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

2.1. Requests Made by State Courts

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

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

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

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

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

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

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

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

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

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

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

2.2. Cooperation with Investigative Authorities and Criminal Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

2.3. Requests Made by Ecclesiastical Courts

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

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

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

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

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

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

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

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

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

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

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

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

[24] Ibid.

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

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

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

2.4. Mutual Notifications and Recognition of the Effects of Rulings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.1. Reporting Obligation

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

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

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

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

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

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

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

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

3.1.1. Polish Legal Reality

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

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

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

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

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

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

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

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

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

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

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

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

3.2. Granting State Authorities Access to Documents

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[40] Ibid.

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

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

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

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

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

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

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

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

3.3. Cooperation of state judicial authorities with the Church

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

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

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

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

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

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

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

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

4. Jurisdiction of state courts in "religious matters"

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

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

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

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

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

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

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

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

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

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

Conclusions

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

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

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

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

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

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

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

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

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

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

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

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

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

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JUST AND RIGHT ACCEPTANCE OF MASS OFFERINGS

SPRAWIEDLIWE I GODZIWE PRZYJMOWANIE OFIAR MSZALNYCH

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Abstract

The study contains elements of the contemporary canonical doctrine regarding the custom of accepting Mass offerings by priests. However, the text does not examine this complex issue exhaustively and synthetically, but it is intended to define clear rules of maintaining justice and the rightness of these activities. The subject matter addressed here can hardly be termed a "taboo," because the act of making offerings when requesting that the Mass be applied for the intention specified by the donor belongs among everyday activities of the Church; however, it seems that adherence to certain general rules characterising the discipline of canon law is of particular relevance and significance for this matter.

Keywords: justice, rightness, stipend, offering

Abstrakt

W opracowaniu zawarto treści współczesnej doktryny kanonistycznej na temat zwyczaju przyjmowania przez kapłanów ofiar mszalnych. Tekst nie stanowi jednak wyczerpującej syntezy tego złożonego zagadnienia, ponieważ założeniem Autora było podjęcie przyczynkowej próby określenia przejrzystych zasad zachowania sprawiedliwości i godziwości tych czynności. Trudno określić podjętą tematykę jako swego rodzaju temat „tabu", gdyż czynność składania ofiar na okoliczność składania prośby o sprawowanie Mszy św. w określonej przez darczyńcę intencji stanowi codzienność życia Kościoła, jednakże wydaje się, że wymiar zachowania przy tym pewnych ogólnych zasad, którymi cechuje się dyscyplina prawa kanonicznego jest szczególnie aktualne i istotne w tym zakresie.

Słowa kluczowe: sprawiedliwość, godziwość, stypendium, ofiara

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Introduction

As Przemysław Palka writes, a simoniac sins thrice: first, by valuing a thing that has no price; second, by selling a thing that is not his own, because the priest is only a minister; and third, by acting against the essence of a spiritual thing – a grace received gratuitously [Palka 2011, 226-27], therefore the legislator,[1] in the disposition of Canon 736, unconditionally prohibited requesting fees for sacraments and sacramentals not only directly, but also indirectly. Instead, the Code permitted the clergy to accept offerings of the faithful in a voluntary manner, that is, justly and rightly.

1. The evolution of the concept of Mass offering in the canonical legal order

In the science of canon law and everyday life one often speaks of stipends. Marian Pastuszko and Joaquín Calvo-Alvarez derive the concept of stipend from 1 Corinthians 9:7. The Greek term *ὀψώνιον* means 'payment,' 'compensation,' 'livelihood.' Thus, its meaning implies a kind of social dependence, gratitude for service [Pastuszko 1986, 113; Calvo-Alvarez 2010, 704; Rosik 2009, 300; Bauer 2001, 145].

Similarly, Edward Górecki justifies the right to accept offerings with the Church's deep-rooted custom, which goes back to the time of New Testament [Górecki 2011, 129]. Pastuszko believes this custom originates in the bringing of gifts by the faithful during the offertory during the celebration of Holy Mass. He argues that originally the point was not only to bring offerings needed for the celebration of the Mass, mainly bread and wine, but also other gifts serving to support the clergy and the needy. As he points out, these offerings were closely linked to the Eucharistic celebration itself [Pastuszko 1983, 73-79].

In addition, Paweł Lewandowski highlights that in the first centuries of the Church the faithful brought offerings in kind, mentions these, for example: bread, wine, incense and other items used to celebrate the Eucharist. Some of these offerings, in his opinion, were reserved for liturgy; the remaining items, however, were traded for the purpose of supporting

[1] *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].

presbyters, and the poor as well [Lewandowski 2019a, 171-72; Idem 2019b, 136]. Over time, other ancillary customs also developed from the custom of bringing gifts for the celebration of the Eucharist, such as the reading of a list of donors' names during the celebration of the Eucharist. As the number of the faithful increased, the number of offerings grew significantly, too. People started to bring them either in the sacristy or directly to the homes of presbyters and bishops in addition to the grain, grapes, lamp oil and incense, which were traditionally offered at the altar [ibid., 150]. It is worthy of note that at some point these gifts were turned into donations of money [Bączkowicz, Baron and Stawinoga 1958, 29]. This occurred following the Edict of Milan (313), which legally acknowledged Christianity by listing in among religions tolerated in the Roman Empire; this made it possible for the Church to acquire the right to property; this, in turn, gave rise to the custom of making monetary offerings for the celebration of sacraments and sacramentals [Lewandowski 2019b, 150].

According to canonists, it was not until CIC/17 that uniform terminology was introduced regarding Mass offerings. In this context, the Latin term *stipendium* became relevant. In the first place, like Greek *ὀψώνιον* mentioned above (1 Corinthians 9:7), the word means 'soldier's pay;' in the second sense, it denotes 'tax,' and in a further sense it refers to a 'donation for the Mass' [Jougan 2013, 643]. In the opinion of Pastuszko, however, it wasn't the most fortunate designation in the context of Holy Mass, as it connotated a soldier's pay, which would point to something owed to someone. As it happened, the term was featured in the CIC/17, Book III, Title *De missarum eleemosynis seu stipendiis*, alongside the word *eleemosyna* [Bączkowicz, Baron, and Stawinoga 1958, 29]. The above-mentioned catalogue involves a contradiction of some kind, since *eleemosyna* denotes 'offering,' hence something not due, while *stipendium*, as the principal term among those referring to mass offerings, meant 'soldier's pay' in the strict sense, thus something that is due, since according to the denotation of the juridical word 'stipend' the case involves a payment for the celebration of Holy Mass [Pastuszko 1986, 113]. Therefore, in the 1917 Code one finds two contradictory terms side by side in one title. Hence, Pastuszko accurately noted that in both the 1975 schema and ones that followed it was decided against the use of the term 'stipend' (*stipendium*), but to speak of *oblata ad*

Missae celebrationem stipe.[2] It was reasoned that the Latin term *stipendium* is not appropriate for Mass offerings. As a result, the 1983 Code of Canon Law[3] introduced the term *stips*, which in Polish means 'gift,' 'monetary offering,' 'alms,' 'reward,' 'contribution' [Górecki 2011, 128; Jougan 2013, 644]. According to Lewandowski, the term *stips*, in keeping with its historical interpretation, means 'the contribution of the faithful to a work' (*stips a fidelibus oblata*) [Lewandowski 2019b, 136; Idem 2017, 154-55].

Pastuszko believed that the continued use of *stipendium* is not advisable. He also argued that *stips* should not be translated as *stypendium* in Polish (Eng. 'stipend'), since the word *stipendium* was deliberately omitted from the CIC/83. Accordingly, he clarified the meaning of the Latin term *stips* as belonging to the category of 'offering' or 'mass offering,' explaining that one speaks of an offering made in honour of God or for the benefit of a public work, or for the maintenance of the poor. In his view, such a term is more appropriate to the sacrificial nature of Holy Mass. In this context, he noted that the expression 'Mass offerings' is slightly defective, since it alludes to offerings placed on the tray during Mass (often referred to in this way, too), which are substantially different from the offerings described above, which the faithful make wishing that the fruits of Mass be applied according to their will [Pastuszko 1986, 113-14]. According to Arkadiusz Domaszk, the phrase 'Mass intentions' is also used for situations where the faithful specify in detail for which intention, or for whom, Mass is to be celebrated. [Domaszk 2020, 161].

To conclude the above reflections, it seems relevant to cite Górecki, who stressed that the provisions of the CIC/83 on Mass offerings are largely based on older law. He observed that among the 14 canons featured in Chapter III, Book IV of the 1983 Code, only Canon 946 is new; all the others were already present in CIC/17. Górecki believed that the CIC/83 merely refined their content or editing [Górecki 2011, 129]. Still in this vein, we should note that the old-fashioned term 'stipend' (*stipendium*) is still used quite

[2] W. Onclin (relator), *De oblata ad missae celebrationem stipe*, "Communications" 4 (1972), no. 1, p. 57-59; M. De Nicolò (relator), *De oblata ad missae celebrationem stipe*, "Communicationes" 13 (1981), no. 2, p. 430-39.

[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]; legal state as of 18 May 2022.

often, especially in pastoral practice and studies going beyond canonical science [Lewandowski 2015, 97].

2. Just acceptance of Mass offerings

Looking at the interdependence between the CIC/17 and CIC/83 codifications, as pointed out by Górecki, it is worth citing the legal norms concerning the just character of accepting Mass offerings in CIC/17. In the first codification, a priest's right to accept Mass stipends resulted from a legal custom; the very fact of accepting an offering, on the other hand, was linked to the duty of just celebration of Holy Mass according to the donor's intentions even if the stipend had been lost through no fault of the priest. At the same time, one had to apply as many Masses as there were stipends accepted. On the other hand, when the donor did not specify their number, then it had to be determined according to the customary local rate [Bączkowicz, Baron, and Stawinoga 1958, 30].

Similarly, modern canonists point out that the codified provisions stipulating that a priest incurs the obligation to apply the ministerial fruits for a specific intention follow from legal custom linking it to the "title of justice" [Pastuszko 1986, 114-29; Górecki 2011, 128-40]. An agreement in respect of justice was captured in general terms in Canon 948 CIC/83, and its specification in the form of prescript can be found in Canon 949: "A person obliged to celebrate and apply Mass for the intention of those who gave an offering is bound by the obligation even if the offerings received have been lost through no fault of his own." In this regard, Górecki says that by reason of accepting an offering, a cleric is obliged to celebrate and apply Holy Mass for the intention indicated by those who made the offering. Moreover, regarding cases a Mass offering getting lost, he cites the Roman principle of *res perit domino*, so we can presume that Górecki's thinking is that the title of just compensation lies not in the recipient but in the thing itself since, as he writes, the thing calls out to its owner. On this view, the agreement between the donor and the recipient of a Mass offering contains two elements: a pledge to celebrate Holy Mass and a sum of money. Therefore, if the promised offering is not received by the addressee, then the obligation to apple Mass to the intention does not arise, since the title of just relationship inheres in the thing, not in the recipient [Górecki 2011, 132-33].

A very precise definition of the justice principle in respect of accepting Mass offerings is formulated by Zbigniew Janczewski, who underlines that each offering, by virtue of the justice principle, requires that it be celebrated separately for the intentions of those for whom it was offered and accepted [Janczewski 2014, 76]. It should, then, be noted that Janczewski places lays more emphasis on the fact of accepting an offering than on the recipient himself.

The aspect of maintaining justice in the acceptance of Mass offerings is described the most extensively by Pastuszko. He argues that the Church observes a general rule whereby no agreement is to be made with respect to spiritual things. In his opinion, however, there is an exception to this rule: an agreement arising between the donor and the celebrant. He wrote that canonists universally claim that this agreement binds the recipient of a Mass offering by virtue of justice, who in this way assumes a grave moral responsibility under the norms of Canons 948 and 949 CIC/83 [Syryjczyk 1986, 121]. At the same time, he emphasises that the priest can withdraw from the agreement if he is unable to deliver on his commitment. This can occur if he celebrated Holy Mass invalidly or was unable to celebrate the Eucharist because he lost his health. In this situation, he is obliged to return the whole Mass offering to the donor [ibid.]. This view is not endorsed by Górecki, who claims that a Mass pledge cannot be withdrawn [Górecki 2011, 133].

In his argument, Pastuszko also addressed the *ratio legis* of Canons 948 and 949 CIC/83. He demonstrated that the original 1975 schema of the law on the sacraments envisaged a second paragraph, which would allow the priest to satisfy multiple donors with one Mass sacrifice. He argued that this provision was to become the basis for the practice of collecting small offerings and giving them to the celebrant to request the application of one Mass. At the discussion phase, however, it was pointed out that such an arrangement could become a pretext for abuse if the celebrants themselves, not the donors, began to combine offerings and apply them to a single Mass and thus departing from established agreements. For this reason, the proposal ultimately did not find its way into CIC/83. To understand the legislator's intent even better, the principle "the end does not justify the means" is invoked, pointing out that nothing will justify the aggregation of agreements, not even noble motives [Pastuszko 1986, 122]. Further, while commenting on Canon 949, the legislator observed

that if an agreement for the application of a Mass intention is to be valid, it is immaterial whether the priest lost the offering in good or bad faith, through his own fault or through a random event [ibid.].

In this context, we encounter very practical guidelines for priests helping them to avoid abuse attempted by the lay faithful when entering into Mass agreements. Pastuszko advises against accepting more than one offering from the faithful who the priest is not familiar with and do not reveal their own whereabouts; if they gave, for example, their place of residence, it would be possible, hopefully, to discuss the matter. As Pastuszko argues, if the worshipper misrepresented the amount of the Mass offering placed, then the priest would not incur the obligation to celebrate it. He goes on to explain that if the person did not specify the amount, and the priest agreed to celebrate Mass, then the agreement would be in force. Like Górecki, Pastuszko emphasizes that the agreement becomes effective as soon as the Mass offering is accepted; if this did not occur, the obligation would not materialise [ibid., 122-23].

Ángel Marzoa, too, draws attention to a justice relationship existing between the priest and a worshipper who is making a Mass offering. He does not exclude the right of the priest to refuse the agreement by not accepting the offering. In his opinion, if a presbyter accepts alms nonetheless, then there would be a "relationship of justice" based not on the offering itself, but on the fact of its acceptance. Marzoa believes that the priest who receives and accepts the offering undertakes to celebrate Mass according to the intentions and conditions that the donor has specified. He also recognises two moments in the conclusion of a Mass agreement: receiving a gift and accepting it; only after that an agreement is made [Marzoa 2011, 713].

By way of systematisation, as declared in Canon 948, the acceptance of any offering from a believer obliges the priest to apply his or her intentions in accordance with the agreement, since in such a situation the so-called "knot of justice" is created. The legal grounding of this type of agreements is to be sought in the centuries-long practice alluded to in Canon 945. In Lewandowski's opinion, a just remuneration for a priest performing sacred services derives not only from custom, but also from natural law [Lewandowski 2019a, 171].

If we apply Hervada's definition of justice in the area of Mass offerings, we will see that both the obligation to guarantee the thing – Holy Mass

– and the other party's obligation to provide a Mass offering, do not lie, essentially, in justice interpreted as the priest's or the worshipper's virtue, since the core of morality is not the virtue of justice, but the law (*lex*) that does justice. In the case of Mass offerings, what matters is the custom of making offerings when placing Mass intentions. This custom forms the legal basis for the obligation title, which inheres not in persons but in things. What is just is precisely what is due, no more and no less. As Hervada elaborates, whoever gives less does not give to another what belongs to him, what is due to him – this is injustice; whoever gives more gives something that is not due to another – this is magnanimity. On that account, what is just is equal to what is due. Therefore, what is due to a member of the faithful requesting Mass for a specific intention is the specific Mass he asks for, while what is due to the priest from that person is the concrete offering he or she gives [Hervada 2011, 22-42]. As Robert Kantor notes, the existence of law gives rise to the virtue of justice, and not the other way around [Kantor 2017, 149]. In other words, the law (*ius*) – in this the offering – obliges the priest to deliver on the agreement, but not whether it is inherently just or unjust. Similarly, if a believer requests Mass to be applied for an intention, it is less important whether this person leads a holy life or professes low moral standards; as a result, the legal title to submit an intention and demand its application lies not in the worshipper himself, but in the offering. What is more, as noted by Tomasz Jakubiak, the 1983 Code abolished all prohibitions related to the application of Holy Mass (Canon 901) [Jakubiak 2010, 165-66]. If a priest undertakes to fulfil the requesting person's wish regarding Mass, they will incur an obligation, by virtue of natural law and custom, and if he or she gives an offering, they will perform an act of justice [Calvo-Alvarez 2016, 771].

However, in addition to commutative justice (the thing-for-thing relationship), Hervada also provides criteria to be followed when applying so-called distributive justice, that is, equality, which is not based on the entitlement to possession, but such equality that is based on the proportion between things and persons. Thus, a member of the faithful, when placing a Mass offering, might consider the priest's status, his abilities, his contribution to society, and his needs [Hervada 2011, 22-36].

The third way in which equality can be warranted is legal justice, based on the premise that a person becomes indebted to the community, so it can demand that the individual contribute to the common good. At this point,

however, we ought to ask: Does this particular agreement seeks to achieve the goal that the existence of the community entails? On this reading, the justice criterion of the act would lie in its orientation towards common good [ibid.]. Tomasz Gałkowski points out that in any law the legislator is concerned with the transmission of the faith contributing to the growth of the community to guarantee the sort of justice that follows from the status of the faithful in the community of the Church [Gałkowski 2020, 188]. Pio Vito Pinto, referring to the general principle formulated in Canon 848, writes that priests should take care that the needy are not denied the help of the sacraments by reason of their poverty, since their very presence in the Church warrants their right to access sacramental graces, and not merely a title resulting from the offering they have made [Pinto 2001, 575].

In this connection, it seems pertinent to ask: Does the amount of the Mass offering, then, matter from the perspective of the justice relationship? In order to answer this, we should note that Canon 952 stipulates that the amount of a Mass offering may be determined by the provincial synod, the assembly of the provincial bishops, or, if relevant instructions were lacking, the prevailing legal custom. This regulation originates in Canon 831 CIC/17, which stipulated that the local ordinary should determine the amount of stipends at a synod or independently, which must be obeyed by all, even non-episcopal orders; a lower stipend may be accepted unless expressly forbidden by the ordinary of the place [Bączkowicz, Baron, and Stawinoga 1958, 31]. At this point, it should be noted that as early as in CIC/17, the fixing of the amount of the Mass offering did not have the nature of a law restricting the exercise of rights, since the universal legislator at that time required local ordinaries to place a separate act forbidding the acceptance of lower stipends than those established by the particular legislator. All the more so nowadays, as Górecki and Pastuszko underscore, a priest may accept a lower offering than an acto of particular law or local custom prescribes, especially that he is urged to do so by Canon 945 § 2 CIC/83 § 2011 [Górecki 2011, 135; Pastuszko 1986, 127-28]. Thus, from the perspective of systemic solutions, any offering made by a member of the faithful and accepted by the priest is just, since the legislator does not assume bad faith in those faithful who ask to apply Mass for their intentions (the intention to deceive, make a low offering out of disrespect or calculation). On the contrary, priests are encouraged to celebrate Mass even without an offering placed, as per Canon 945 § 2. Nowhere in the CIC/83

does the legislator obligate the faithful to make an offering [Calvo-Alvarez 2016, 773-74].

Of course, the opposite can also happen when the faithful make very high offerings. In those cases, as believed by canonists, justice requires that the amount offered be split and stipends be funded for other priests in accordance with the amount adopted in the particular legislation or established by custom – unless the donor makes a point of applying the offering for one Mass; in such a situation, the will of the donor should be respected. It may also happen that the donor will not specify the number of Masses, in which case the priest should apply a rate acceptable for the donor's place of residence; if there were indications of this, it could also be presumed that the donor meant the rate established for the place of residence of the celebrant [Bączkowicz, Baron, and Stawinoga 1958, 30; Górecki 2011, 133; Pastuszko 1986, 123-24].

At the same time, we should note that in Canon 953 the legislature provides for a cap on the number of agreements between one priest and a member of the faithful for the application of Mass intentions. To wit, a priest may not accept too many Mass offerings that he will not be able to satisfy within a year counting from the date of acceptance. Instead, he may transfer them unless the donor wishes otherwise [Gałkowski 2019, 2678]. For this reason, it is suggested that the date of acceptance of the intention be recorded, since after some time the recipient may forget when the intention was accepted, because, as a rule, he should not hold any intention unsatisfied for more than a year according to Canons 953, 955, 956 [Pastuszko 1986, 118-34]. Referring to Hervada's theory of justice, it can be said that since there is no legal basis because the legislator imposes a limitation on the number of possible agreements, the priest has no title to hold "excess" offerings, but is to transfer them elsewhere [Hervada 2011, 38]. Further, if someone asks to apply 400 Masses, the priest has no right to accept them all for himself [Pastuszko 1986, 128]. Domaszk, in contrast, points out that it must be remembered that of paramount importance is the fulfilment of the Church's mission, not the mere accumulation of goods or money for an unspecified cause [Domaszk 2016, 87].

In order to understand the mechanism of receiving Mass offerings, it is necessary to refer to the nature of offerings, as provided by Canon 946 CIC/83, which lists three purposes of Mass offerings: particular Churches, maintenance of priests, and works of the Church. In the original

schemata for this canon, the power to dispose of Mass offerings was transferred wholly from the priest to the diocesan bishop, with a proviso, however, that if the bishop determines such ecclesiastical purposes for which all Mass offerings must be given in full, it then becomes unobvious who will be obliged to apply the fruits of the Mass in virtue of the offerings accepted.[4] Ultimately, this proposal was dismissed, but the adopted version of Canon 956 retains the element of gradation by stipulating that Mass offerings first serve the good of the particular Church, then the maintenance of priests and the good of the universal Church. Pastuszko underlines that for this reason Mass offerings cannot be viewed as a means to "take care of the needs of the Church," but they "add to the welfare the Church" as a manifestation of the faithful's shared concern for the maintenance of ministers and various works. In his opinion, the universal legislator prescribes on many occasions that intentions for which a small offering has been donated should be accepted, as these should not be the main source of the priest's livelihood, because if Mass offerings did not exist, after all, the church community would still bear the cost of the priest's upkeep. Similar conclusions were drawn by German canonists, suggesting that a priest should celebrate the Mass for the intentions of the poor, as this is one of the duties arising from the fact that the community of the Church provides him with means of sustenance [Pastuszko 1986, 122, 127-28; Aymans and Mörsdorf 1991, 945].

Thus, in compliance with a general rule, no matter how many Masses a priest celebrates in a day, he can only accept one Mass offering for the application of the fruits of the Mass. Even a poor priest cannot retain an offering for the application of the second or third Mass. Only an indult from the Holy See could authorize a priest to keep a Mass for himself offering made by reason of bination or trination. Local ordinaries sometimes enjoy such an indult, so they allow a binating priest to collect a Mass offering on account of the application of the second, possibly third Mass according to the intention of the donor, but with the obligation to return the Mass offering to the ordinary. The norm set forth in Canon 951 § 1 is subject to only one exception: a priest is allowed to celebrate three Masses on Christmas Day, and he may accept Mass offerings for each of these

[4] W. Onclin (relator), *De oblata ad missae celebrationem stipe*, p. 57-59; M. De Nicolò (relator), *De oblata ad missae celebrationem stipe*, p. 430-39.

applications. However, as we have noted, it is also possible to apply the *Missa pro populo* on Sunday without accepting any offering and, by reason of the second Mass celebrated on the same day, accept a Mass offering. This entitlement, granted in Canon 951 § 2, can be used by all those obligated to celebrate Mass for the people entrusted to their pastoral care on all Sundays and holy days of obligation in the diocese. Pastuszko gives a detailed listing: the Roman Pontiff and the other diocesan bishops (Canon 388), territorial prelate (Canon 370), territorial abbot (Canon 370), apostolic vicar (Canon 371 § 1), apostolic prefect (Canon 371 § 1), apostolic administrator appointed on a permanent basis (Canon 371 § 2), superior of a personal prelature [Pastuszko 1986, 127], administrator of a vacant diocese (Canon 429), pastor (Canon 534), the priest of a quasi-parish (Canon 516 § 1), pastor of a mission parish (Canon 374 § 1), pastor of a personal parish (Canon 518), a parochial vicar in charge of a vacant parish before a parish administrator is appointed by the bishop (Canon 541 § 1), parish administrator (Canon 540 § 1), one of the priests appointed pastor *in solidum* (Canon 543 § 2, 2º) [ibid., 124].

To conclude, from the perspective of the principle of justice, the amount of an offering is only relevant in the case of a large offering, because then the question emerges whether the priest has divided the money in keeping with prescribed rates, since these implicitly individual agreements will be valid, not one collective agreement. Importantly, too, if a priest accepts more offerings than mandated by the law, not for himself but with the intention of transferring them elsewhere, these agreements will also be valid.

3. Right acceptance of Mass offerings

The issue of the right acceptance of Mass offerings is related to the issue of agreements. As Domaszk points out, an essential part of any administration is the conclusion of agreements, which he defines as legal acts manifesting the agreed declarations of intent of the contracting parties, where the parties are physical or legal persons. In his clarification of this issue, he notes that canon law is the essential reference point for an ecclesiastical subject who enters into an agreement; as regards the pertinent general legal principles, is will be equity [Domaszk 2016, 87].

With respect to this issue, he invokes the principle set forth in Canon 947: "Any appearance of trafficking or trading is to be excluded entirely

from the offering for Masses." He explains that in the phrase *negotiatio vel mercatura*, the word *negotiatio* means 'trading financial instruments' or 'exchange rate speculation,' while *mercatura* denotes 'a commodity transaction' [Pastuszko 1986, 121].

In a sales agreement, the exchanged goods should be of equal value, but by definition not the same; the thing sold is the object and the amount paid is expressed in money [Hervada 2011, 36]. Considering this principle, we must stress as forcefully as possible that Christ present in the Eucharist cannot be equated with money – this would be reprehensible, which is why the legislator in Canon 947 orders unconditionally that even a semblance of monetary speculation and trading must be eschewed.

According to Remigiusz Sobański, the canon involves the presumption of equity, both natural and that which springs from the tenets of Christianity. It is assumed that ecclesiastical law embodies the spirit of Christianity, including clemency and gentleness; also, church laws are in force because they are equitable, and their application is "the fulfilment of equity" [Sobański 2001, 99-100]. To meet the criteria of Canon 947, it seems that for Mass agreements the case involves not so much a sale agreement but rather an exchange agreement. In an exchange agreement, as Hervada emphasises, things are not identical – and this goes without saying – but should be of equal value. However, he points out that there is no correlation or compliance between a person and money in the case of goods of a different nature – that is, what matters here is not impossibility of monetary valuation, but the lack of link. From the perspective of justice, there is no duty to make a monetary compensation as valuation is impossible; an impossible equitable compensation can be substituted with monetary compensation that satisfies the principle of equity. This compensation is only equitable because in this case it cancels a debt of justice [Hervada 2011, 59-60]. There are cases, in fact, where the inequality between the subjects creates such an imbalance between what is due and what is offered that the debt cannot be satisfied except only partially; as Hervada explains, this is because what is given and what is received follows from goods of a different nature [ibid., 39].

He further argues that the act of valuing Holy Mass is impossible justice-wise, so the valuation of a Mass intention therefore is done not in the categories of justice, but equity. Similarly, according to Tomasz Jakubiak, the priest's application of the ministerial fruits, which fall to the one

for whom the Mass is celebrated whether he or she attends the Mass, should be considered as a right rather than just act, since it is an undeserved gift, which is based on a custom endorsed by the Church and expressed in the fact that someone wants to benefit from the sacrifice of Holy Mass for himself or prays for others [Jakubiak 2010, 157-58].

In this connection, therefore, there comes the question what will happen if a member of the faithful requests the Mass to be applied for his or her intentions, but does not make an offering, and thus the priest does not fall under an obligation, since the relation of justice does not obtain. The interpretation of this case will rely on Canon 945 § 2, which provides as follows: "It is recommended earnestly to priests that they celebrate Mass for the intention of the Christian faithful, especially the needy, even if they have not received an offering." This regulation, according to Calvo-Alvarez, demonstrates that the legislator is guided not by justice, but by equity. In other words, then, we are not dealing here with a duty, hence conduct that is just but equitable. Referring to this hypothesis, Vito Pio Pinto stresses that a priest should always be ready to celebrate Mass for the intentions of the poor, even without accepting any offerings [Calvo-Alvarez 2016, 774; Pinto 2001, 575].

The wording of Canon 945 § 2 has the form of an earnest recommendation. Referring to this issue, Gałkowski writes that "the priest is not to require the faithful to make an offering but may accept one already made and should remove any appearance of transaction or commercialism in the celebration of the sacraments, always remembering the poor" [Gałkowski 2019, 2678]. This reflection should be regarded as encapsulating the doctrine of preserving the principles of justice and rightness in the reception of Mass offerings. Particularly noteworthy in the context of the relationship between the priest and the donor is the assertion that "the priest is not to require the faithful to make an offering but may accept one already made." As we have demonstrated above, the offering made organically fits into the relationship of justice here. Also, it should be noted that the system solutions do not preclude accepting a Mass intention and its application without collecting an offering. This hypothesis clearly reveals the discretionary nature of the relationship grounded in the idea of equity [Calvo-Alvarez 2016, 774; 2010, 706]. As emphasized by Sobański, there is no doubt that canonical equity should be applied when there is no provision of law for a particular case. From the wording of Canon 945 § 2,

which does not have the nature of a prescriptive norm, it should be inferred that the above is a case of equitable conduct. This thesis is borne out by the doctrinal assertion that the lack of payment cannot prevent the celebration of Mass [Sobański 2001, 100; Calvo-Alvarez 2016, 774]. Ireneusz Staniszewski believes that equity is but one manifestation of rightness. It should be emphasized that right conduct is both dignified and equitable. It should be clarified that conduct is good if it is intended to respect the dignity of the human person, and if it goes a step further to affirm this dignity; and equity is the result of a good intention and good conduct, just as justice is the result of obeying the law. Applying this doctrine to the area of Mass offerings, both the one who administers the sacrament and the one who receives it through his or her action (which in this case are "the manner of performance" and "the satisfaction of the conditions for its reception") affirm the dignity of this sacrament and thus Christ Himself and His sacramental grace [Staniszewski 2007, 389].

In the context of our analysis, there emerges the problem of simony. As aptly pointed out by Palka, not every agreement on Mass offerings and applications of intentions is simoniacal [Palka 2011, 226-27]. It is generally accepted in the doctrine that such agreements meet the criteria of justice; however, not every agreement whose objects are the sacrifice of Holy Mass on the one hand and a Mass offering on the other can be described as just. However, the fact that it is not just does not make it unright [Calvo-Alvarez 2010, 713].

To sum, the priest, in addition to behaving justly when accepting an offering for the celebration of the Mass, should also be an act right by applying it for the intentions of the person ordering it even if the person does not give an offering, since this aligns with the nature of Christ's sacrifice made during the celebration of the Eucharist.

Ultimately, the issue of accepting Mass offerings, while apparently very practical, is a rather sensitive issue. Injustice shown when accepting Mass offerings may be, in fact, not so much a realization of justice as a violation of the law – an offence occurring when the priest sets (i) a smaller number of Masses than the offering can cover; (ii) when the donor does not indicate the number of Masses to be celebrated (Canon 950) and the priest accepts more than one offering for himself on one day except on Christmas (Canon 951 § 1); (iii) when he combines intentions and Mass offerings accepted separately (Canon 948). Górecki gives a detailed list of what

constitutes an offence related to acceptance of Mass offerings and undermines the validity of the proper understanding of Holy Mass: collecting intentions in one country in order to pass them to another country at a profit; collecting intentions and Mass offerings with the intention of handing them over to another celebrant for some consideration; increasing the requirements by virtue of an extrinsic title in bination and trination of the Mass (Canon 952 § 1) except in the case of reimbursement of expenses incurred; taking away from a Mass offering when giving it to other priests to celebrate Mass (Canon 955 § 1) [Górecki 2011, 131].

Conclusion

In cause-and-effect terms, an external observer can precisely identify the interdependence between a Mass offering made and the cleric's duty to celebrate Mass. This is because norms governing obligations and agreements are at play here. However, focusing only on the external dimension, that is, on the thing represented by the sacrifice of Holy Mass and the "service" of Mass celebration would be a peculiar distortion of the essential issue, so the present study pays special attention to the values integral to the nature of canon law, such as justice and rightness. Only their realization in the process of incurring Mass obligations is decisive for the authentic good of the souls of both the priest, the faithful, and particular Churches, and the universal Church.

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PRINCIPLES OF STATE-CHURCH COOPERATION TOWARDS FORMATION FOR MARRIAGE AND THE FAMILY

ZASADY WSPÓŁDZIAŁANIA PAŃSTWA Z KOŚCIOŁEM NA RZECZ FORMACJI DO ZAWARCIA MAŁŻEŃSTWA I ZAŁOŻENIA RODZINY

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Abstract

The issue of cooperation between the State and the Church for the sake of marriage and families seems, at least at first blush, contains some areas in want of improvement. Indeed, it is assumed here that cooperation between the two subjects of power that is expected to occur in different areas for the good of the family can be, in some respects, either direct or indirect. Indirect cooperation, aimed at the formation of people for marriage and having offspring, should be properly structured and have the proper status. These issues are addressed in part 3 of the paper, point 3.2, "The duty of cooperation between the State and the Church towards formation for married life and the family." The two preceding parts, "Re-reading the genesis of the institution of marriage and family" and "The need to strengthen the awareness of the value of marriage and the family", aim to underscore the special role of the Church and the State in the promotion of marriage and the family in the light of requirements for marriage and the family vis-a-vis the teaching of Church and the principles of ecclesiastical and civil law.

Keywords: marriage, family, Church, state, formation, cooperation

Abstrakt

Temat w brzmieniu: *Zasady współdziałania Państwa z Kościołem na rzecz formacji do zawarcia małżeństwa i założenia rodziny* wydaje się – na pierwszy rzut oka – tematem co najmniej „roszczeniowym". Autor wychodzi wszakże z założenia, iż współdziałanie, jakie powinno występować między obu podmiotami władzy

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na rzecz dobra rodziny może w pewnych obszarach mieć charakter bezpośredniego, w innych, pośredniego współdziałania. Otóż pośrednie współdziałanie Państwa z Kościołem na rzecz formacji do zawarcia małżeństwa i założenia rodziny, winno znaleźć odpowiedni wymiar i swoje właściwe miejsce. Kwestie te stały się przedmiotem refleksji części 3 artykułu, w punkcie sygnowanym 3.2. pod tytułem: *Obowiązek współdziałania Państwa z Kościołem na rzecz formacji do życia w małżeństwie i rodzinie*. Natomiast dwa poprzednie części: 1. *Relektura genezy instytucji małżeństwa i rodziny* oraz 2. *Potrzeba wzmacniania świadomości wartości małżeństwa i rodziny*, mają na celu podkreślenie szczególnej roli Kościoła i Państwa w promocji małżeństwa i rodziny w świetle wymagań stawianych małżeństwu i rodzinie, zgodnie z nauką Kościoła oraz w świetle zasad prawa kościelnego i państwowego.

Słowa kluczowe: małżeństwo, rodzina, Kościół, państwo, formacja, współpraca

Introduction

Marriage and the family that springs from it, having always enjoyed a unique status and importance in the life of societies and nations, is a special object of concern and protection for the Church and the State. The more effectively and efficiently the two institutions perform this crucial role, the greater is the rapport between them: interaction and cooperation, which is required by the positive interrelationship between the two institutions.

As far as the attitude and position of the Church are concerned, whose overarching vocation is to serve man – for his spiritual and moral good and ultimately his salvation – the family becomes the primary and privileged milieu for the Church's activity. For this reason, the Catechism of the Catholic Church reminds us: "The vocation to marriage is written in the very nature of man and woman as they came from the hand of the Creator."[1] And while the natural form and dimension of the family, that is, giving birth, and the external institutional forms of its life seem to reduce human life to the purely natural sphere, as the Church teaches in respect of divine revelation: "Marriage is not a purely human institution despite the many variations it may have undergone through the centuries in different cultures, social structures, and spiritual attitudes" (CCC 1603).

[1] *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997; English text available at: https://www.vatican.va/archive/ENG0015/__P51.HTM [henceforth: CCC].

In light of the above, the question arises that invariably accompanies the Church and scholars dealing with marriage and family, as well as legislators: Has enough been done for the institution of marriage and the family to occupy an adequate position and the attention proportional to their value and importance? In this paper, our attention and reflection will revolve around these issues, with particular regard to the need for proper formation for marriage and family – both on the part of the Church and the State – in their mutual interaction.

1. Re-reading the genesis of the institution of marriage and family

Marriage and the family, like every institutional reality, given their purposeful creation, hence existing and functioning, clearly illustrate such and no other nature and structure, precisely in view of their origins (Genesis 1:27).[2]

One might say that it was fortunate (not coincidental) that this particular subject received a lot of recognition from and was confirmed by Jesus Christ during his conversation with the Pharisees (Matthew 19:3-7). In contemporary times, this issue drew the attention of John Paul II, who examined it with his characteristic intuition and insight, drawing on the teaching of the Second Vatican Council, mainly in: *Familiaris consortio*,[3] *Letter to Families*[4] and *Evangelium vitae*.[5]

1.1. Vocation for a life in marriage and the family

How closely and inseparably God joined the act of creating man with his vocation, with his mission and tasks, is demonstrated by His special

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

[3] Ioannes Paulus PP. II, Adhortatio apostolica *Familiaris consortio* de familiae christianae muneribus in mundo huius temporis (22.11.1981), AAS 74 (1982), p. 81-191; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html [henceforth: FC].

[4] John Paul II, *Letter to Families* (02.02.1994), https://www.vatican.va/content/john-paul-ii/en/letters/1994/documents/hf_jp-ii_let_02021994_families.html [henceforth: LF].

[5] Ioannes Paulus PP. II, Litterae encyclicae de vitae humanae inviolabili bono *Evangelium vitae* (25.03.1995), AAS 87 (1995), p. 401-522; English text available at: https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html [henceforth: EV].

blessing, addressed to the first human beings: "Be fruitful and increase in number; fill the earth and subdue it" (Genesis 1:28).

In his explanation of this fundamental truth, referring to the Vatican II's teaching,[6] John Paul II stressed: "To defend and promote life, to show reverence and love for it, is a task which God entrusts to every man, calling him as his living image to share in his own lordship over the world" (EV 42). These issues, as mentioned earlier, the Pope discussed at length and depth in FC 11 and LR, addressed specifically to spouses and families.

Referring in the aforementioned documents to the teaching of the Second Vatican Council, John Paul II, himself its active participant, noted with anxiety: "Our era needs such wisdom more than bygone ages if the discoveries made by man are to be further humanized. For the future of the world stands in peril unless wiser people are forthcoming" (FC 8). "Modern culture must be led to a more profoundly restored covenant with divine Wisdom. Every man is given a share of such Wisdom through the creating action of God. And it is only in faithfulness to this covenant that the families of today will be in a position to influence positively the building of a more just and fraternal world" (FC 8). In addition, it is worth noting that these momentous remarks, especially those in the FC, echoed significantly the *Charter of the Rights of the Family*,[7] announced a year earlier by the Holy See to all people, institutions and authorities, who were interested in the mission of the family in the modern world, which in turn, two years later, was sanctioned by the legislation of the Code of Canon Law.[8]

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[6] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025-115 [henceforth: GS], no. 51.

[7] Pontifical Council for the Family, *Charter of the Rights of the Family* (22.10.1983); published in Italian in: *Enchiridion della Famiglia. Documenti Magisteriali e Pastorali su Famiglia e Vita 1965-2004*, ed. Pontificio Consiglio per la Famiglia, EDB, Bologna 2004, p. 1489-506; Polish translation in: *Karta Praw Rodziny*, Wydawnictwo Wrocławskiej Księgarni Archidiecezjalnej TUM, Wrocław 1994; English text available at: https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html [henceforth: Charter].

[8] *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; Canons 1055 § 1 and 1057 § 1-2.

1.2. The right and duty of spouses to establish a family

It should be noted in this context that the new designation given to marriage, *matrimoniale foedus* (marriage covenant),[9] is a close reference to the first Covenant, made by God with the first human being – man and woman – in the act of creation of the first humans. In other words: God, in creating man, by the same act created a marriage covenant: a covenant with himself and a covenant of the first people with each other.[10] So, both accounts of how the first humans were created, especially the second (in the second chapter of *Genesis*), indicate that "man and woman were created for one another […]: 'So they are no longer two, but one flesh' [Mt 19:6]" (CCC 1605). In turn, this unique fact created a situation obliging both of them to carry out God's decision. "That is why a man leaves his father and mother and is united to his wife, and they become one flesh" (Genesis 2:24). So, one might say that God, in the act of creating man – both a male and a female – in his image and likeness, he called into existence the family.

This truth was highlighted profoundly by the Second Vatican Council in these words: "For, God Himself is the author of matrimony, endowed as it is with various benefits and purposes. All of these have a very decisive bearing on the continuation of the human race, on the personal development and eternal destiny of the individual members of a family, and on the dignity, stability, peace and prosperity of the family itself and of human society as a whole" (GS 48). Thus, the following was added: "[…] the very institution of marriage and conjugal love are ordained to the procreation and education of children, in whom they find their crowning" (FC 14).[11]

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[9] Canon 1055 § 1: "Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationam ordinatum, a Christo Domino ad sacramenti dignitatem inter baptisatos evectum est."

[10] "So God created mankind in his own image, in the image of God he created them; male and female he created them (Genesis 1:27). See also Genesis 2:22-24. See also Chiappetta 1990, 9-15; Styczeń 1981, 19-29.

[11] Cf. International Theological Commission, *Proposition on the Doctrine of Christian Marriage* (1977); English text available at: https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html. See also Scola 2000, 70-76; Corecco 1990, 185-93; Góralski 2006, 25-31; Pawluk 1996, 20-21.

2. The need to strengthen the awareness of the value of marriage and the family

The formulation of the second part was dictated by a unique title preceding the provisions related to marriage law currently in force. Title VII, "Marriage," and some introductory canons on the institution of marriage, are followed by chapter 1 titled "Pastoral care and those things which must precede the celebration of marriage" (Canon 1063). Significantly, of ten canons (1063-1072), the norm of Canon 1063 was dedicated to special pastoral care for preparation for marriage; thus, in the long run, for starting a family. At this point, it should be noted that, *for the first time*, the legislator – so clearly – when specifying the forms and ways of preparing for marriage, imposes a strict obligation on pastors to "take care that their ecclesiastical community offers the Christian faithful the assistance by which the matrimonial state is preserved in a Christian spirit and advances in perfection" (Canon 1063), which we shall elaborate on in what follows.

2.1. The Church's role in raising awareness of the value of marriage and the family

The extensive wording of Canon 1063 (four points) lays down directives and indications, imposing the obligation, as already mentioned, to organize pastoral forms of assistance, with the aim of preparing for marriage; in a further perspective, to establish a family (Canon 1063). The four points are preceded by a crucial observation that "pastors of souls are obliged to take care that their ecclesiastical community offers the Christian faithful the assistance by which the matrimonial state is preserved in a Christian spirit and advances in perfection" (Canon 1063). And since the first, proper ecclesiastical community in a particular Church is a parish entrusted to a pastor as its proper shepherd (Canon 515 § 1); he – as the first among other presbyters – in under the obligation to care for his parish, which is spelled out in detail in Canon 528.[12] The Church, drawing knowledge from experience, authoritatively states how important this duty is, saying that through the assistance of the "ecclesiastical community" "the matrimonial state is preserved in a Christian spirit and advances in perfection" (Canon 1063). How this assistance should be organized is splendidly suggested by,

[12] See also Canon 529 § 1-2.

among others, the prominent canonist Luigi Chiappetta, who, commenting on the aforementioned dispositions of Canon 1063, refers directly to John Paul II's indications taken from FC 70 [Chiappetta 1990, 63-69].[13] In contrast, the institutional organisation of such assistance is entrusted to the local ordinary, who is expected to hear "men and women proven by experience and expertise if it seems opportune" (Canon 1064).[14] However, it should be noted that the above wording of the norm may seem somewhat surprising, since the Council (GS 52) and the teaching of John Paul II attribute a great deal of importance to cooperation with the lay faithful, especially on issues related to marriage and the family (FC 75).

2.2. The need for the State's more active involvement in shaping public awareness of the value of marriage and the family

The need (or, necessity) for a more active contribution of the State in the process of shaping the awareness of the value of marriage and the family becomes not only advisable, but rather urgent in the reality of today. For if, on the one hand, we take into account the value and importance of the institution of marriage and the family (GS 48; FC 3, 14-15; FGC; LF), on the other hand, the serious threats and the difficult condition of many marriages and families, as pointed out by Vatican II (GS 47), one cannot uncritically accept the current position of public authorities towards marriage and the family. Of importance are only legal regulations: the current provisions of the Polish Constitution,[15] their elaboration in the provisions of the Family and Guardianship Code[16] and in other normative acts governing institutions designed to support marriage and the family.

Such important issues and problems can, inevitably, be touched upon briefly here, but to illustrate, let us recall the opinion of an outstanding

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[13] See also FC 71-75.

[14] See also Canon 226 § 1, 228 § 1-2, 229 § 1-3; John Paul II, Adhortatio apostolica post-synodalis de vocatione et missione laicorum in Ecclesia et in mundo *Christifideles laici* (30.12.1988), AAS 81 (1989), p. 393-521; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_30121988_christifideles-laici.html; no. 26.

[15] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended [henceforth: Constitution].

[16] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 1964, No. 9, item 59 as amended. (henceforth: FGC).

expert on the subject, Jan Winiarz: "The FGC provisions do not define the institution of marriage. They are not preceded by a preamble, either, to define the basic aims of the regulations, nor are the basic principles of family law highlighted in the introductory provisions, as is done in some legislation of other countries. This is because these basic principles are expressed directly in the Constitution, and they are elaborated in the provisions of the FGC and other normative acts" [Winiarz 1996, 39].

It is over 40 years since the Holy See promulgated the famous Charter on the Rights of the Family, drawn up at the request of the Synod of Bishops, at the behest of Pope John Paul II, which "[...] is addressed primarily to governments" (Charter, Introduction). "Acknowledging – for the good of society – the universal awareness of the fundamental rights of the family, the 'Charter' provides all those who share responsibility for the common good with a model and a reference point for the development of family legislation and policy, and a direction for programmes of action" (Charter, p. 5). The embodiment of the above thought in the introduction is, notwithstanding the numerous allusions in other articles, Article 3 of the Charter.

3. Cooperation of the Church and the State in the process of formation for marriage and the family

This part contains a proposal of some kind, resulting from the reflections presented in the two preceding parts, suggesting a desirable interaction between the two actors, the Church and the State, for the sake of the family and marriage. It follows there is apparently a greater, urgent and real need (or rather, necessity) for closer cooperation (indeed, cooperation) between the Church and the State for more effective protection, defence, and consequently creation of favourable conditions for the development of marriage and the family: for their own well-being, for the good of the Church, and ultimately for the nation and the State. For all these institutions and communities, their fate, their effective and fruitful functioning, depend on the dynamics and strength of marriage and the family.

3.1. The scope and nature of formation for marriage and the family in the Church

Referring to the content of paragraph 2.1., it is necessary to pay more attention, as envisioned by the legislator, to the provision of Canon 1063,

whose four detailed dispositions outline the successive stages of provision of pastoral assistance to the faithful in their preparation for marriage and, in the longer term, for setting up a family. It should also be noted, very importantly, that this pastoral care, prescribed by the legislator, is of an obligatory character (Canon 1063). More than that, we can say that "despite the formally unoppressive" formulation of the norm, its content contains elements of an "imperative" character [my emphasis], as suggested by the teaching of the Second Vatican Council,[17] significantly enhanced by the explanations and indications of Pope John Paul II (FC 66-67).[18]

3.2. The duty of cooperation between the State and the Church towards formation for married life and the family

Considering the place, significance and role of the family in the nation's social life, we can address to the public authorities of the State (at all levels), if not a postulate, then a clear-cut demand for a definition of specific forms of cooperation with the Church vis-a-vis their duty of care for formation towards a life in marriage and the family.

In this connection, it is worth referring to, important as it is, this provision of the Constitution: "We call upon all those who will apply this Constitution for the good of the Third Republic *to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others* […]" [my emphasis] (Constitution, Preamble).

The constitutional principle formulated in this way entitles one to expect State authorities to support the Church in its concern for people's formation for marriage and family life.[19]

After all, it should be noted that chapter 2 of the FGC titled "Relations between Parents and Children" (Articles 87-113), which defines parental

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[17] "Public authority should regard it as a sacred duty to recognize, protect and promote their authentic nature, to shield public morality and to favour the prosperity of home life. The right of parents to beget and educate their children in the bosom of the family must be safeguarded. Children too who unhappily lack the blessing of a family should be protected by prudent legislation and various undertakings and assisted by the help they need" (GS 52).

[18] Chiappetta 1990, 63-66.

[19] Article 18 of the Constitution merely states: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland."

authority, is significantly convergent with the principles of the 1983 Code of Canon Law (Canon 1134-1140). We can, therefore, objectively state that there appears to be (given the considerable overlap of the two legal orders) a platform, and therefore the need for cooperation between the State and the Church, for formation and education of offspring. Thus, it can be said that the FGC is a special manifestation of the State's concern for the protection and defence of marriage and the family (except for Articles 56 § 2-3, 57 § 1-2, 58 § 1-4). These issues are analysed in great detail by Józef Krukowski in his article "Małżeństwo fundamentem rodziny. Wprowadzenie do problematyki" (Marriage as the foundation of the family: An introduction) [Krukowski 2017, 7-22].

Concluding this issue, covered here as briefly as it is, it is pertinent to highlight, in the context of the issue at hand, an important and fundamental quality of marriage – emphasised by Winiarz, an above-mentioned author: "The principle of permanence of marriage, although not stated expressly in the Constitution or in the provisions of the Family and Guardianship Code, can be inferred from the totality of those provisions" [Winiarz 1996, 44-45].[20]

Conclusion

The multi-layered and complex topic, discussed very briefly and not conclusively here, should, it seems, be researched more extensively and in greater detail, especially the themes presented in parts 1 and 2 of the paper. They should be shown in the context of the supposedly "competitive" trends that are ever more boldly manifested in some communities and milieus. These are so-called informal unions or homosexual unions, which – alas! – aspire to be "equivalent" to marriage. And this, one might say, might qualify as an attempt to "assassinate" the natural, sacred institution of marriage, which has always been the foundation of the social life of the Church and the nation – and the human race, too. It is, then, beyond question that both realities, the institution of marriage and the family founded upon it, require urgent and attentive protection and, should they be threatened, adequate defence. The matter certainly becomes extremely relevant if the two institutions – the Church and the State – cooperate in this regard in concert and solidarity.

[20] See also: Chiappetta 1990, 26-27; Pawluk 1996, 46-48, 210-17; Góralski 2006, 248-56.

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PREGNANCY AS THE OBJECT OF DECEPTION (CANON 1098) IN PETITIONS ACCEPTED BY THE LUBLIN METROPOLITAN TRIBUNAL

CIĄŻA PRZEDMIOTEM PODSTĘPU (KAN. 1098 KPK) W POZWACH PRZYJĘTYCH PRZEZ SĄD METROPOLITALNY W LUBLINIE

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Abstract

The addition of a new title of nullity of marriage to the new 1983 Code of Canon Law, and its incorporation into the Code of Canons of the Eastern Churches, indicates the development of canon law in accordance with the principle *ius sequitur vitam*. The legislator clearly indicates the elements of the new legal figure: the intention and purpose of the deceiver, victim, error induced by deceit, and the object of deceit. The inclusion in canon law of the machination intended to obtain marital consent results from the protection of the aggrieved person who has been deceived as to an essential quality of the other party to the marriage contract.

The judge, on the basis of the petitioner's *libellus*, may initiate legal proceedings aimed at finding the truth about the valid conclusion of a particular marriage. A *libellus* is a petition addressed to the tribunal in which the petitioner provides facts on the basis of which the procedural doubt formula is established. The petitions in question come from the archives of the Lublin Metropolitan Tribunal, and they concern cases in which the object of deceit was pregnancy. It should be noted that such a deception, usually perpetrated by a woman, may involve either misrepresentation of the very fact of pregnancy or misrepresentation of the paternity of the child.

Keywords: nullity of marriage, canonical process, victim, perpetrator

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Abstrakt

Dodanie nowego tytułu nieważności małżeństwa do nowego Kodeksu Prawa Kanonicznego z 1983 r. oraz umieszczenie go w Kodeksie Kanonów Kościołów Wschodnich wskazuje na rozwój prawa kanoniczego w myśl zasady *ius sequitur vitam*. Ustawodawca jasno wskazuje na elementy nowej figury prawnej: intencję i cel sprawcy podstępu; ofiarę; błąd, który jest skutkiem działania podstępnego; przedmiot podstępu. Ujęcie w prawie kanonicznym machinacji działania, która ma na celu uzyskanie zgody małżeńskiej wynika z ochrony osoby poszkodowanej, która została oszukana odnośnie do istotnego przymiotu drugiej strony umowy małżeńskiej.

Sędzia, na podstawie pozwu, może wszcząć postępowanie sądowe, które ma na celu odnalezienie prawdy na temat ważnego zawarcia konkretnego małżeństwa. Pozew jest prośbą skierowaną do sądu, w której strona powodowa podaje fakty, na podstawie których ustalana jest formuła wątpliwości procesowej. Przeanalizowane pozwy pochodzą z archiwum Sądu Metropolitalnego w Lublinie. Dotyczą one spraw, w których przedmiotem podstępnego działania była ciąża. Należy zaznaczyć, że taki podstęp, dokonany zwykle przez kobietę, może dotyczyć bądź wprowadzenia w błąd odnośnie do samego faktu ciąży, bądź wprowadzenia w błąd odnośnie do ojcostwa dziecka.

Słowa kluczowe: nieważność małżeństwa, proces kanoniczny, ofiara, sprawca

Introduction

Pope John XXIII, considering the demands of many canonists, established the Pontifical Commission for the Revision of the Code of Canon Law on 28 March 1963. The consultors proposed that a new title of nullity of marriage be added to the new Code of Canon Law: *deceptio dolosa* (deceitful misrepresentation). The outcome of the deliberations was a single canon, whose content expresses the ecclesiastical legislator's concern for the victim who was deceitfully led into error about a specific quality of the other contracting party.

In this paper, we will discuss the legal figure of deceitful misrepresentation and the required criteria that a petition is to cite. We will also see examples of all petitions where the object of deceit was pregnancy, considered by the Metropolitan Tribunal in Lublin.

1. *Deceptio dolosa* explained

The added Canon 1098 of the 1983 Code of Canon Law[1] and Canon 821 of the Code of Canons of the Eastern Churches[2] fall into the category of *error facti*, which has no equivalent in the previous codification. In this prescript, deceit (*dolus*) is defined as a cause of marriage nullity: "A person contracts invalidly who enters into a marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner which by its very nature can gravely disturb the partnership of conjugal life." The prescript indicates the elements that must exist to prove a deceitful misrepresentation: deceitful conduct, intent and purpose of the deceiver, a victim of the deception, the effect of the deception (error), and the object of deception.

The deceiver's act is intended to lead the victim into error so that his or her decision to marry will be manipulated. Ignorance of the deception will only attribute the victim's error to themselves, as mentioned in Canons 1097 § 2 CIC/83 and 820 § 2 CCEO. Thus, deceit causes error, and affects the will of the contractant party indirectly. It transpires, then, that deceitful conduct must be clearly stated in the *libellus*, among other things.

Deceit is intended to obtain marital consent. The purpose of intentional and deceitful conduct is to mislead the prospective spouse about a particular quality of the other party. Inveigling a person into consenting to marry is a prerequisite for declaring a marriage contract invalid. The ecclesiastical legislator requires that the deceiver's conduct be objective; also, there must be a causal link between a deception and error. Either a contractant or a third party can be a deceiver in this regard [Góralski 2001, 88].

The invalidity of marital consent should not only be sought at the time of its expression, but also in the process of its formation. The ecclesiastical legislator protects prospective spouse from the interference of third parties in their autonomous decision whether to marry or not. The existence of error is a necessary component of deceit, error is caused by deceit

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[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.

[2] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045-363 [henceforth: CCEO]; the English translation I used is available at: https://avemarialaw.libguides.com/c.php?g=265706&p=1776916 [accessed: 27.10.2023].

and could not exist without it [Majer 1998, 124]. The most important thing is that the deceived person is actually in error or remains ignorant about the concealed quality of another. If there is an indication of any knowledge of the quality, there is no deceit in the legal sense [Góralski 1991, 113].

The integral part of the legal figure of Canons 1098 CIC/83 and 821 CCEO is deceitfully induced error. There must be a causal link between the perpetrator's conduct and the resulting error in the victim. A deception alone is not the grounds for nullity since it should cause an erroneous perception of reality and thus impact the will to marry. Error must be the main reason, not one of the motives for marriage [Idem 2004, 107-108].

The new legal figure does not list potential qualities that could seriously disrupt the community of conjugal life, since a closed list would not take into account all circumstances [Rybczyk 1963, 133]. 'Quality' should be understood broadly – it should not refer to only a quality of character associated with personality. According to jurisprudence, this category should include, for example, certain circumstances, or facts or events in the history of a particular person, bearing on marital life, such as children from another relationship, a crime, or education. Qualities can be physical, moral, social, cultural or spiritual; they can be innate or acquired, but they cannot be anything incidental or external, like expectations or false promises [Rola 1986, 215]. Therefore, a quality should be a current, real, specific and precisely defined attribute [Majer 1998, 136]. It should "by nature" be capable of seriously disturbing the community of marital life – that is, it should be able to do this by itself, having the inner ability to do so [Góralski 2004, 118].

The disturbance of the partnership has to be grave, as indicated in Canon 1098 CIC/83. Simply anticipating difficulties in married life is insufficient. The canon also does not mention that a serious disturbance has already occurred, but its possible occurrence is implied (*potest*). Therefore, the ecclesiastical legislator points to the severity of the quality as a potential cause of disruption rather than the actual conflicts associated with it [ibid., 125].

2. The content of the *libellus*

The Catholic Church is competent to recognise and adjudicate marriage cases of baptised persons (Canons 1671 CIC/83 and 1357 CCEO). The current Codes contain various formulations that merit our attention. The CIC/83 contains the expression that matrimonial matters belong *ad*

iudicem ecclesiasticum (to the ecclesiastical judge), while in the CCEO the expression is *ad Ecclesiam* (to the Church). The term *ad Ecclesiam* is more appropriate, since the declaration of presumed death, dissolution of marriage that benefits the faith, or unconsummated marriage are matters of administrative process, not litigation.

The principle *nemo iudex sine actore* is respected in canon law, for a judge cannot initiate a process unless asked to by a person capable of doing so. The right to challenge a marriage is vested in Catholic and non-Catholic spouses, as well as the promoter of justice in situations where the invalidity of the marriage is made public, and where it is not possible or advisable to convalidate it (Canons 1674 CIC/83 and 1360 CCEO). The ordinary contentious process ensures greater justice, so nullity cases cannot be handled in an oral contentious process (Canons 1690 CIC/83 and 1375 CCEO; Article 6 of *Dignitas connubii*[3]).

A petition, according to Sztychmiler, is necessary for the benefit of the parties and the sake of the judge. It ensures the petitioner the option to formulate a demand, based on which the judicial route can be pursued to assert the petitioner's rights. The respondent can learn about the petitioner's claim, and the judge is enabled to deal with the matter in dispute [Sztychmiler 2003, 46-47]. DC indicates the role of the judicial vicar (official), who, when the petitioner is impeded in his presentation of a *libellus*, can order the notary to put the petition in writing, which has the same legal force as a libellus submitted by the petitioner (Canons 1503 CIC/83 and 1186 CCEO; Article 115 § 2 DC).

The judicial vicar, after reviewing the content of the *libellus*, should issue a decree accepting or rejecting it (Canons 1505 CIC/83 and 1188 CCEO). Once the *libellus* has been accepted, the respondent is to be notified immediately, and a citation containing the decree of citation and the *libellus*, in order to ensure his or her full right to participate in the trial (Canons 1508 CIC/83 and 1191 CCEO; Articles 114-125 DC). Based on many concordant opinions among canonists, Majer indicates that the citation

[3] Pontificium Consilium de Legum Textibus, *Instructio „Dignitas connubii" servande a tribunalibus dioecanis et interdioecesanis in pertractandis causis nullitatis matrimonii* (25.01.2005), Libreria Editrice Vaticana, Città del Vaticano 2005; English text available at: https://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html [henceforth: DC].

and the decree of the official are mandatory procedural acts that are based on natural law. Their absence can be grounds for challenging the sentence [Majer 2002, 167-68]. In a situation where the respondent refuses to attend the trial, the judicial vicar, having made sure that the respondent has been duly notified, should apply the provisions on non-appearance of the parties referred to in Canons 1592-1595 CIC/83 and 1272-1275 CCEO.

According to DC, a *libellus* in a nullity case must: indicate the competent tribunal and the object of the case (i.e., the specific marriage), request a hearing, provide the reason for petitioning, that is, the ground or grounds of nullity, present general facts and evidence supporting the petitioner's claim, bear the signature of the petitioner or his attorney, show the exact date, specify the residence of the petitioner or his attorney (or postal address), and specify the respondent's domicile or quasi-domicile of the other party. In addition, an authentic copy of the marriage certificate must be attached, and, if required by the case, a copy of the civil divorce decree (Article 116 DC). The Instruction encourages both spouses to take an active part in the process "in order for the truth to be more easily discovered" (Article 95 DC).

In a trial *coram Episcopo*, or so-called summary trial before a bishop, the *libellus* should also be presented by both spouses or by one with the consent of the other. In this case, the *libellus* must be accompanied by evidence indicating the circumstances of facts and persons, which will be supported by testimony and documents. They must incontrovertibly indicate the invalidity of the marriage, that is, without the need for a detailed examination or investigation (Canons 1683 CIC/83 and 1369 CCEO). In the Apostolic Letters motu proprio *Mitis Iudex Dominus Iesus*[4] and *Mitis et misericors Iesus*,[5] in 2015, Pope Francis reformed the prescripts of both Codes regarding cases for the declaration of nullity of marriage. In Article

[4] Franciscus PP., Litterae apostolicae motu proprio *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 9 (2015), p. 956-70; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html.

[5] Franciscus PP., Litterae Apostolicae Motu Proprio datae *Mitis et misericos Iesus* quibus canones Codicis Canonum Ecclesiarum Orientalium de causis ad matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 9 (2015), p. 946-57; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-et-misericors-iesus.html.

14 § 1, both letters refer to the said circumstances of things or persons that allow the application of a process *coram Episcopo*. Among them are circumstances of a marriage contracted for a reason completely foreign to married life or a woman's unexpected pregnancy.

3. The content of selected petitions received by the Lublin Metropolitan Tribunal

In the archives of the Lublin Metropolitan Tribunal, there are petitions in which marriages were challenged by reason of deceitful misrepresentation, where the object of deception was pregnancy. The oldest files relate to a process that ended in 2000, and the most recent ones are from 2019. Upon examination, we see there are two types of a person's quality, that is, deceit concerning the paternity of the child and lying about the woman's alleged pregnancy. Most of the cases were of the first type, in which elements of the legal figure of Canon 1098 CIC/83 could easily be found, which is deceitful conduct, the deceiver's intent, a victim of deceit, deceitfully induced error, and a quality.

Among the process records examined, in two cases action was filed by the deceiver. In the case c. Cieszkowski of 17 November 2000, the petitioner asked the court to declare her marriage, contracted in 1990, invalid by reason of having been deceived. Since May 1989, the woman had been the fiancée of the baby's father. In December that year, having learnt of the pregnancy, she decided to tell the man about it. Unfortunately, she found him cohabitating with another woman, which is why she ended her acquaintance with him without informing him of her pregnancy. In February 1990, she met the respondent, they quickly started an intimate relationship, and after a month she communicated to him that she was pregnant with him. The respondent quickly agreed to marry her. The petitioner stated: "[…] all this time I wouldn't say that I was pregnant with someone else because I was afraid he would dump me." After the birth, the respondent realized that it was not his child, he abandoned the petitioner while she was still in the hospital. The woman spoke with the man after leaving the hospital: "[…] we made up, he acknowledged the child as his own." Over time, they had a child together, but immediately after its birth, the respondent filed for a civil divorce because he was dating another woman.[6]

[6] Lublin Metropolitan Tribunal, file no. I/2000/5052.

The responding party, unfortunately, ignored the *libellus*, and was therefore deemed absent from the trial. It is extremely rare for a deceiver to ask the court to declare a marriage invalid, much less citing only one title of invalidity and on his part. The victim's testimony would provide an extremely valuable research material, so would the attitude to the harm suffered and the canonical process.

The second statement of claim comes from the file c. Bzdyrak of 12 August 2019. The petitioner, at the age of eighteen, started a relationship with the respondent, three years older than herself. They quickly engaged in sexual relations with each other, the outcome of which was a pregnancy. She also learned of the petitioner's cases of infidelity but decided to forgive the man for the sake of the child: "Pregnancy became the main reason for getting married; I was young, scared, I didn't have the right support, I felt strong pressure from my father." The parties were married in 2009. After two years, the petitioner left the respondent because his gambling addiction was aggravating, the symptoms of which she had already seen during their premarital acquaintance.[7] This lawsuit, unfortunately, did not meet the criteria of deceitful misrepresentation, because the petitioner herself admitted that her pregnancy was the reason for the marriage, but there was no deception on her part, which should have been conscious and with the intent to mislead in order to obtain marital consent.

Several other lawsuits also relate to deceitful misrepresentation of the child's paternity. Their content is quite different, as the victim accuses the deceiver of fraud. There was also a response from the respondent to the charges against him, which typically make it clear that the perpetrator is not fully convinced of his guilt. In such cases, it must be demonstrated that the perpetrator was aware of the deceitful conduct.

The file of the case c. Cieszkowski of 1 December 2005 contains a claim in which the petitioner describes the beginning of his relationship with the defendant. They met in May 1976, and after a month started a sexual relationship. After the summer holidays, the respondent announced that she was pregnant. Without asking how old the pregnancy was, the man took the woman's word for it: "Our acquaintance, although so short, had to end with a wedding without us knowing each other intimately." At the end of 1976, a son was born. The petitioner wrote: "I and my family

[7] Ibid., no. I/2017/540.

were surprised by the fact that it was too soon after our wedding and our first contact. My wife's family, in contrast, argued that it was due to holiday fatigue […]. I believed that and, frankly, I was a little ashamed to look into the matter more, and so I left it that way." During an interview in 2004, the woman said that N. was not his child, and he had no right to him, only that she was the mother, and he was not his father. Having heard those words, the man turned to the Department of Forensic Medicine in Lublin for genetic testing, which ruled out his paternity. In addition, the petition includes information about the mental illness of the respondent's father, of her and also of her son.[8]

The case, with a sentence c. Cieszkowski of 21 September 2006, includes a petition in which the false paternity of the child is made clear. The acquaintance began in 1995, which was characterized by longer intervals between meetings. In 1998, before going to the army, the respondent told the petitioner that she was pregnant. The child was born in early 1999. The respondent wrote that his wife had been cheating on him, and during one serious conversation she stated that he was not the child's father. The petitioner, citing the result of genetic testing, claimed that he was not the biological father of the child. This information brought about a separation and civil divorce through the fault of his wife.[9]

The petition in a nullity case with a sentence c. Bzdyrak of 10 July 2014 contains information that the petitioner, aged eighteen years, met the respondent three times at a disco club. During their last meeting they went to her house, where he was intoxicated with alcohol by the woman's father. In the morning, he woke up in bed in his underwear, and the respondent informed him of their intercourse last night. After three months after the incident, the woman found the petitioner and told him that she was pregnant with him. The petitioner's parents, despite his explanations, coerced him into marrying the respondent. In his petition, the man wrote: "[…] had it been obvious that it wasn't my child, my parents wouldn't have forced me to get married." After their marriage, they moved in with their in-laws, from where the petitioner was thrown out because he refused to suffer humiliation and exploitation at work. He bought a flat, where they moved in with his wife and child. The woman would betray her husband,

[8] Ibid., no. I/2005/5846.
[9] Ibid., no. I/2006/6011.

and after one of the many rows, she left home with the child. In a phone conversation, she told him to let them alone, because the child was not his and he would have no contact with the child. The man, taking the opportunity to obtain genetic material from the child, did private tests that ruled out his paternity. Based on these, a forensic reexamination was ordered, which confirmed the previous result. The respondent, in her reply to the *libellus*, stated in writing: "[…] my ex-husband knew that I was not pregnant with him, but he accepted this fact and did not hold it against me."[10]

The woman's response shed a different light on the petition c. May of 24 April 2017. The petitioner informs that the parties met in late 2005. In early 2006, they were a couple, and they began cohabiting in September of the same year. After two years of cohabitation, they separated for several months. At the time, the respondent had other partners. After renewing the relationship, the parties decided to care more about it. In late 2008, the respondent announced her pregnancy and "[…] implied that I was the father of the child; as it later turned out, someone else was the father; the respondent once again cheated on me. Thinking that I was the father of the child I proposed to her." They married in April 2009, but disagreements started a year after the marriage, when the respondent became certain that the petitioner was not the child's father. He stated that this fact was the reason why she stopped fulfilling her marital obligations. The man learned that he was not the father of the child only after the divorce. The respondent stated in her response to the petition that at the time of the pregnancy "[…] she had no doubt that it was the plaintiff's child." She added that only when genetic tests were done after the divorce did it become clear that the petitioner was not the father.[11] This shows that until the tests, the respondent believed that the petitioner was the child's father. From the information provided, it appears that only the testimony of the parties can help find the truth.

Of the files examined, a very interesting petition can be found the case c. Dudziński of 28 May 2018. The petitioner was represented by an attorney, who was a church advocate. The petition includes information that both parties were nineteen years old when they met. Less than a year after the beginning of their acquaintance, the respondent revealed she was

[10] Ibid., no. I/2014/7706.
[11] Ibid., no. I/2016/187.

pregnant. The petitioner proposed marriage: "[…] it was a natural thing to do for him." In October 2006, they entered into a civil union, and in December of that year, a baby was born. They were sacramentally married in April the following year. In June, the husband went to the army, and upon his return, his friends informed him that he was probably not the father of the child and that his wife was seeing another man. The petitioner tried to save the marriage but learnt from his wife that he was not the father of the child, which became the reason for the definite breakup of the marriage. To avoid paying alimony, the petitioner filed a paternity denial case.[12] It follows from our analysis of this petition that the advocate tried to clearly present the elements of the legal figure of Canon 1098 CIC/83. Unfortunately, the lack of a response from the respondent makes it possible to learn about the case only from the perspective of one party.

Among the case files examined, two petitions were found with presumption of pregnancy. The petitioner was always the victim of deceit. The first case involved a deliberate deception perpetrated by a woman who used a false medical certificate to extort marriage consent despite the man's continued reluctance. In the case c. Guz of 22 February 2011, the plaintiff stated facts related to the beginning of their acquaintance. He did his military training at the age of twenty. Like other soldiers, he wanted to meet his girlfriend on leave. A friend suggested that he meet a 19-year-old woman, giving him her address, which prompted their acquaintance. During the third meeting, he learnt of her pregnancy, which was supported by a medical certificate. The petitioner wrote that "[…] he didn't know her very well, he didn't see his future with her." The woman pushed hard for a wedding, but he and his parents were against a quick marriage. Nevertheless, the woman resolved to get married and started preparations with her parents, but there was not even an engagement. All this time, the petitioner was in the military and was not interested in preparing for the wedding. During the court hearing – as he was not yet of the prescribed age – the respondent produced a falsified medical certificate of pregnancy. The man admitted: "[…] until the last moment before the wedding I had doubts about whether I was doing the right thing, but I tried to explain everything with the good of the child." The day after the wedding, the petitioner returned to the military unit, and the respondent moved in with his parents.

[12] Ibid., no. I/2017/305.

The woman would get drunk, which was the reason she returned to her family home. Their marriage practically didn't exist, because the petitioner was in the army the whole time – they only met during his leave. In one conversation, she admitted to not being pregnant and that she had falsified the certificate with a doctor she knew. After the wedding, she had become pregnant with another man. This information aroused a feeling of being deceived in the petitioner. He left his wife after six months of marriage.[13]

In the other case, c. Bzdyrak of 7 March 2019, it was difficult to prove only on the basis of the petition the formula of procedural doubt as deceitful conduct on the part of the woman. The petition itself did not furnish enough evidence to apply Canon 1098 CIC/83. In addition, the respondent gave this reply to the petition: "[…] the reason for the marriage was a suspected pregnancy. I deny misleading him on purpose." The petitioner characterized the time of their acquaintance prior to the wedding as very turbulent, and at the time when he wanted to end it, he found out about her pregnancy. He also added that the woman "[…] was a very possessive person and wanted to own him." The couple was married in 1998. A few weeks after the wedding, it turned out that the pregnancy was false. During their marriage, they had two children. The man learnt that the woman had undergone psychiatric treatment before the marriage, of which he was not told. The disease returned, in 2005 they were separated, but for the sake of the children the petitioner decided to save the marriage.[14] Our analysis of the petition and the respondent's reaction, it was difficult to identify the elements of deceitful misrepresentation. A more appropriate title of nullity would be error concerning the person (Canons 1097 CIC/83 and 820 CCEO).

Conclusion

Canons 1098 CIC/83 and 821 CCEO included the elements of a new legal figure that must exist cumulatively to challenge the validity of a concluded marriage. From the wording of the canon, it follows that the essence of the provision is the existence of deceit in order to obtain marital consent from the contracting party. It should be noted that deceitful conduct

[13] Ibid., no. I/2011/6822.
[14] Ibid., no. I/2017/579.

alone is insufficient, the defectiveness of consent is determined by the resulting error in the prospective spouse, which was instrumental in the formation of marital consent. The presence of deceit makes it possible to apply the provision *deceptio dolosa*, rather than citing the error of person referred to in Canons 1097 CIC/83 and 820 CCEO.

A *libellus*, by its nature, has no evidentiary value, but on its basis a judge may initiate a canonical process. The petitioner, meeting the formal requirements, should clarify in the statement of claim the specific grounds that can support his or her claim regarding the invalidity of the marriage. It would be difficult to require a precise indication of all the elements of deceitful misrepresentation, so the judicial vicar, proposing the title of procedural doubt, provides an opportunity to find the truth about the existence of deceitful misrepresentation through the instruction of the case.

The *libellus* in question involved deceitful misrepresentation about the person's quality, which was pregnancy. In most cases, the petitioner was the victim of deceit. It is also worth noting the difficulty of clearly identifying the deceitful conduct of the perpetrator when he does not respond to the citation or does not actively participate in the process. The best chance of ascertaining the truth is by means of evidence – that is, statements of the parties, especially judicial or extrajudicial admissions, statements of credible witnesses and documentary evidence.

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GRAVE DEFECT OF DISCRETION OF JUDGEMENT IN DOCTRINE AND JURISPRUDENCE

POWAŻNY BRAK ROZEZNANIA OCENIAJĄCEGO W DOKTRYNIE I ORZECZNICTWIE

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Abstract

Discretion of judgement can be defined as the level of maturity of a free and rational person capable of self-management and of his actions, which is proportionate to the object of the conjugal consent whereby a man and a woman establish a community to which they are entitled, being indebted to each other. Without this degree of self-control, the subject is unable to legally transfer marital rights to himself or assume obligations. This article aims to answer the basic question: Does a grave defect of discretion have to result from some mental anomaly, and does it always have to concern marital rights and obligations? In my opinion, we cannot speak of a grave defect of discretion as reason enough for marriage nullity if only one of the above-mentioned conditions is met, i.e. when there is a mental anomaly, but there is no reference to specific marital rights and obligations, or when this reference is present in terms of critical faculty and inner freedom, but mental anomaly has been found, because both doctrine and jurisprudence clearly indicate the need for both criteria to be present.

Keywords: mental anomaly, marital rights and obligations, discretion of judgement, consensual incapacity

Abstrakt

Rozeznanie oceniające można zdefiniować jako poziom dojrzałości wolnego i rozumnego człowieka zdolnego zarządzać sobą i swoim działaniem proporcjonalny do przedmiotu zgody małżeńskiej, dzięki któremu mężczyzna i kobieta ustanawiają między sobą wspólnotę, do której mają prawo i są sobie wzajemnie dłużni. Bez tego stopnia władzy nad sobą podmiot nie jest zdolny, w sposób wywołujący skutki prawne, przekazać praw małżeńskich do siebie ani przyjąć obowiązków.

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Niniejszy artykuł jest próbą odpowiedzi na podstawowe pytanie: czy poważny brak rozeznania musi wynikać z jakiejś anomalii psychicznej i czy zawsze musi odnosić się do praw i obowiązkow małżeńskich? W moim przekonaniu nie można mówić o poważnym braku rozeznania jako tytule nieważności małżeństwa, gdy spełniony jest jedynie jeden z wyżej wskazych warunków, czyli wówczas gdy istnieje anomalia psychiczna, ale nie ma odniesienia do konkretnych praw i obowiązkow małżeńskich, albo gdy jest owo odniesienie w kontekście zdolnolności krytycznej i wolności wewnętrzej, ale nie ma stwierdzenia istnienia jakiejś anomalii psychicznej, gdyż zarówno doktryna, jak i orzecznictwo wyraźnie wskazuje na konieczność zaistnienia obydwu kryteriów.

Słowa kluczowe: anomalia psychiczna, prawa i obowiązki małżeńskie, rozeznanie oceniające, niezdolność konsensualna

Introduction

The act of marital consent, which a person performs, should be conscious and free. This implies that it should be made without any external or internal coercion, which would deprive the person of the ability to make a choice and a decision to marry. Here, we are speaking of the absence of external coercion and the necessary inner freedom to perform the act of marital consent.[1] This freedom, as emphasized by Pompedda, means that the human will is capable of dismissing all internal pressures to the extent that they do not determine the subject's decisions. The human being, despite his or her subjection to diverse conditions springing from upbringing, culture, environment, affectivity, as well as the subconscious, is capable of making a conscious and prudent decision through an act for which they feel responsible. People, as rational and uniquely spiritual beings, can come to terms with themselves and make, perhaps with the utmost difficulty, rational and motivated decisions, giving them a sense of agency [Pompedda 1999, 31-32]. In practice, this inner freedom

[1] Sent. c. Ewers of 10 January 1980, RRD 72 (1980), p. 49. It says: "Consensus matrimonialis certo certius actus humanus sit oportet: verum ad istum ponendum homo debet esse sui actus dominus, quidem per rationem et voluntatem. Quod importat eliciti actus libertatem. Libertas autem duplicem rem seu subiecti conditionem requirit: idest, indeterminationem atque simul potestatem determinandi seu decisionis. Loquimur imprimis de indeterminatione, idest de illa hominis conditione in qua, praesuppositis omnibus exstantibus necessariis ad agendum, ipse potest agere vel non agere, agere ita vel aliter. Sed requiritur insuper potestas sese determinandi, vi cuius homo ex seipso valet auferre illam indeterminationem atque decernere actionem vel non, actionem istam vel aliam."

means that the subject can choose to marry or choose any other path of life, choose one person or another as a future spouse, evaluate motives and freely take a certain action.

The issue of a serious lack of discretion of judgement *vis-a-vis* the essential marital rights and obligations, both given and assumed, as generally referred to in Canon 1095, 2º of the 1983 Code of Canon Law,[2] is linked to the concept of inner freedom and the subject's critical faculty to validly give marital consent. This capacity presupposes both discretion of judgement, which is proportional to the object of marital consent, and the necessary inner freedom to give that consent [Pompedda 1987, 543]. However, the question arises: Does the grave defect of discretion of judgement always result from some disturbance in the psychical nature of the person, or can interpretation ignore such a cause? Also, should a grave defect of discretion of judgement concern marital rights and obligations? Therefore: Is it necessary to meet both criteria to be able to speak of a grave defect of discretion as the grounds for the nullity of marriage or will, for example, the criterion of mental disorder suffice only? Or is the existence of some mental disorder not necessary, as some authors or advocates claim, whereas the lack of critical capacity may be due to a slight emotional disturbance?

1. The inner freedom of a contracting party

The act of marital consent does not call for the person to be fully free, which, incidentally, is not possible. It only requires a degree of inner freedom that is proportional to the object of marital consent. The object is the community of life and love, and the spouses themselves, who transfer and receive the right to each other. In the sentence c. Caberletti of 31 July 2014,[3] we read that the subject of discretion of judgement concerns marital rights and duties defined as essential, and therefore pertaining to the essence of marriage, oriented towards the spouses' well-being, giving birth and raising offspring, and the unity and indissolubility of marriage [Góralski 2023, 53].

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[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.

[3] Sent. c. Caberletti of 31 July 2014, RRD 106 (2014), p. 247.

Inner freedom chiefly refers to a person's ability to direct his or her own actions in accordance with an option determined by the intellect.[4] As Październior notes, inner freedom is the property of a person causing that the object which is known and appraised as positive (i.e., sufficiently motivated) is voluntarily and personally accepted by that person [Październior 2004, 15-46].

This freedom is not of an abstract nature but should be construed in the context of all the real conditions of man's existence, both external and internal, which jointly affect the functioning of his will. Under normal circumstances, the influence of these conditions is not strong enough for a person to be unable to direct his or her actions in accordance with the option chosen by the intellect.[5] It follows that inner freedom does not exclude – but on the contrary – presupposes the impact of instincts, emotions, habits and many other elements constituting human personality on the actions the person takes [Leszczyński 2004, 242]. If, nonetheless, the influence of these elements is too powerful, the person's conduct cannot be described as free and undertaken responsibly. In this case, one can speak of the lack of inner freedom necessary for marital consent [Gil de las Heras 1988, 289].

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[4] Sent. c. Huber of 26 March 1997, RRD 89 (1997), p. 237. It says: "Vera habetur libertas cum voluntatis determination, quae dicitur election, libera est ab intrinseca determinatione ad unum, ita ut posit agree vel non agree, agree unum vel oppositum ex extremis, iudicio indifferenti proposition […]. Deest libertas interna si voluntas absque manifesta lesione intellectus speculative determinatur ex eo, quod intellectus practicus nullo modo vel saltem non sufficienter motive electionis aestimare valet."

[5] See also Sent. c. Egan of 12 January 1984, RRD 76 (1984), p. 3; Sent. c. Fiore of 16 February 1985, RRD 77 (1985), p. 89. It says: "Reapse, cum intellectus et voluntas sint facultates animae apprime inter se distinctae et unaquaeque in suo exercitio peculiaribus functionibus organicis subiiciatur, quamplures sunt morbi seu etiam perturbationes organicae quae ideo perturbationem quoque inducunt sive tantum functionis intellectivae, sive tantum functionis volitivae sive etiam utriusque hominis facultatis spiritualis. Cum tantum voluntas perturbatur, intellectus manere potest etiam integer in sua functione, seu voluntarium deficit, praecise quia voluntas non habet dominium suorum actuum. Cum autem obiectum proprium voluntas, quae est facultas critica, recipiat ab intellectu, deficiente functione hominis intellectiva necessario corruit etiam functio volitiva etiam si huius propriae functiones organicae integrae sint et sanae, praecise quia ad actum humanum constituendum requiritur una simul sive praevia adaequata cognitio ex parte intellectus, sive etiam libera a quavis compulsione intrinseca determinatio voluntatis."

2. Discretion of judgement

The incapacity defined in Canon 1095, 2º CIC/83, which is a declaration of natural law, presupposes in the contracting party not only a sufficient use of reason, but also a certain maturity of judgement. Such a judgement is formed not only by the intellect, but also the will in their joint action [Paździor 2004, 15-16], that is why the jurisprudence of the Roman Rota, both prior to 1983 and later, betrays a visible trend pointing to a disturbance in intellectual and volitional functions as causing the lack of discretion of judgement.[6]

The concept of *discretio iudicii* includes three constituents: intellectual cognition of the object of marital consent, critical appraisal, i.e., the right judgement about the marriage to be contracted, and inner freedom to make an unimpeded choice. So, the first two elements involve the cognitive sphere, while the third relates to volitional faculty [Góralski 1996, 25-42].[7]

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[6] Sent. c. Colagiovanni of 20 July 1984, RRD 76 (1984), p. 488. It says: "Amplissimus et aliquando ambiguus fuit usus in doctrina necnon in iurisprudentia capitis nullitatis quod sub nomine defectus discretionis iudicii sumitur. Apte nunc canone 1095 triplex distinguitur fons nullitatis reducibilis, at diversimode, defectui consensus matrimonialis. Praeter enim casum carentiae usus rationis sufficienti, saltem uti recensetur sub can. 1096, haberi poterit defectus gravis discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda. Sive prior quam alter casus respicit ipsum subiectum contrahens qui inhabilitatus est relate ad intellectionem et liberam volitionem, tertius casus in canone recensitus se attinet potius ad obiectum seu ad capacitatem assumendi tales obligationes. Defectus discretionis iudicii duo elementa implicat: sufficientem cognitionem – cribrationem; sufficientem deliberationem seu capacitatem sese determinandi inter alternativas, in philosophia thomistica veluti classicas, seu agendi vel non agendi et agendi hoc vel illud."

[7] Sent. c. Annè of 26 January 1971, RRD 63 (1971), p. 66-67; Sent. c. Davino of 5 February 1975, RRD 67 (1975), p. 42; Sent. c. Ragni of 26 November 1985, RRD 77 (1985), p. 545; Sent. c. Jarawan of 24 October 1990, RRD 82 (1990), p. 716-17. It says: "Discretio iudicii necessaria ad validum matrimonium contrahendum exigit ut nupturiens, praevia scientia de qua in can. 1096, circa iura et officia matrimonii essentialia mutuo tradenda et acceptanda, non in abstracto sed in casu concreto considerata, ita deliberare valeat, ut decisio contrahendi sit libera et responsabilis. Quamobrem, graviter perturbatis, vel facultate critica ad ponderandas, ex una parte, rationes quae ad matrimonium alliciunt, et, ex alia, quae ab eodem deterrent, vel voluntate ad liberam decisionem sumendam, matrimonium invalidum est... Recolere liceat quod essentialia iura et officia matrimonialia sunt, non solum quae proprietates essentiales unitatis et indissolubilitatis exigunt, verum etiam illa sine quibus vitae consortium exsistere nequit."

At this point, it should be noted that intellectual cognition refers to the sufficient use of reason and as such as an element common to the form of incapacity referred to in Canon 1095, 1° [Bianchi 2006, 193-94]. The element setting apart discretion of judgement from the sufficient use of reason (necessary to posit a human act) is critical faculty, i.e., proper judgement about the marriage to be entered into, and inner freedom. Indeed, as we read in the judgement c. Pompedda of 3 July 1979, for valid marital consent a purely abstract cognition as to marriage and its attributes is not sufficient, but it is necessary to be able to critically evaluate the motives that suggest one and not the other choice with regard to marital rights and obligations [Mendonça 1987, 86].[8] Moreover, critical capacity is not sufficient, but inner freedom is necessary to enable a free choice [Zhurowski 1983, 270]. This is because no judgement is neutral but requires the involvement of the will. This will, as we read in the sentence c. Stankiewicz of 23 February 1990, does not entail a desire to make a decision, but the ability to make a free choice.[9] For this freedom gives the subject, as we read in c. Colagiovanni of 30 June 1992, the possibility of both indetermination

[8] Sent. c. Pompedda of 3 July 1979, RRD 71 (1979), p. 392. It says: "Ad sufficienter deliberandum haud sufficit cognitio speculativa matrimonii huiusque proprietatum essentialium: etenim quo intellectus valeat elicere iudicium practicum valoris, utrum nempe matrimonium contrahendum sit necne, interveniente appetitu sensitivo debet percipere atque aestimare motiva, adeo ut sufficienter conferre seu opponere possit motiva ad nuptias inducentia cum aliis dissuadentibus. Cum autem in matrimonio assumenda sint onera atque officia graviora in perpetuum ac vicissim paria iura tradenda, consequitur necessitas aptae aestimationis illorum officiorum-iurium a contrahente peractae iudicio critico."

[9] Sent. c. Stankiewicz of 23 February 1990, RRD 82 (1990), p. 154-55. It says: "Eapropter in conceptum gravis defectus discretionis iudicii, iuxta terminos a iurisprudentia digestos, includi solent non solum perturbationes facultatis cognoscitivae, criticae vel aestimativae, impedientes rectam apprehensionem debitamque ponderationem naturae et substantialis valoris normativi mutuae personarum traditionis et acceptationis in totius vitae consortium, essentialibus iuribus officiisque coniugalibus praeditum, verum etiam conturbationes facultatis electivae, praepedientes libertatem internam in deliberanda electione personae compartis in consortium coniugale ducendae. Agitur enim de capacitate psychica perficiendi realem integramque electionem irrepetibilis personae compartis intuitu aequalis consortii matrimonialis, non vero de perficienda electione substitutiva cuiusdam figurae parentalis vel imaginariae aut complementaris, puta in functione exclusiva acquirendi veluti quandam corporis alterius partis proprietatem in simplex concupiscentiae remedium, absque ulla consideratione aequalium iurium officiorumque coniugalium, quae nupturientes mutuo tradere et acceptare debent […]."

and self-determination, i.e., the ability to choose among many possible options or to select one indicated motive.[10]

Discretion of judgement can be therefore defined, as Viladrich does, as a level of maturity of free and rational management of oneself and one's conduct, proportional to the object of marital consent, by which a man and a woman establish between themselves a community to which they are entitled, being indebted to each other. Without this degree of power over himself, the subject is not able, in a way that produces legal effects, to transfer marital rights to himself or assume obligations [Viladrich 2000, 63].

As observed by Żurowski, it is commonly assumed that after reaching maturity, everyone has sufficient discretion of judgement necessary to enter into marriage. This basic presumption contains another presumption that physical development goes hand in hand with mental and psychological development. However, practice shows that reality can be different, and presumption gives way to the truth [Żurowski 1985, 10].

It should be noted here that the legislator does not require the contracting party to have full discretion of judgement, but it is commensurate with the object of marital consent. For this reason, Góralski notes that in the jurisprudence of the Roman Rota it is generally accepted that in assessing the presumed nullity of marriage under Canon 1095, 2º one should employ the criterion of proportionality between the degree of disruption of the very cognitive-volitional and emotional capacity and the substantive and formal object of marital consent [Góralski 1996, 30].

3. A grave defect of discretion of judgement

A grave defect of discretion of judgement, as we read in the sentence c. Pompedda of 25 November 1978, occurs in three cases: the lack of intellectual cognition of the object of marital consent, the lack of discretion of judgement commensurate with the marriage contract, i.e., lack of critical capacity, and the lack of inner freedom necessary for marital consent.[11]

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[10] Sent. c. Colagiovanni of 30 June 1992, RRD 84 (1992), p. 386.

[11] Sent. c. Pompedda of 25 November 1978, RRD 70 (1978), p. 509-10. It reads: "Iamvero tunc discretio seu maturitas iudicii deficere posse videtur, cum aliqua ex tribus sequentibus conditionibus seu hypothesibus verificatur: 1) aut deest sufficiens cognitio intellectualis circa obiectum consensus praestandi in matrimonio ineundo; 2) aut nondum contrahens

As we have seen, the legislator does not require the contracting party to have a full discretion of judgement as to the essential marital rights and obligations, but discretion that is proportional to the contract of marital consent [Gramunt and Wauck 1991, 543]. That is why the legislator, in defining the degree in which discretion of judgement may be lacking thus causing the contracting party's consensual incapacity, speaks of a grave defect of discretion of judgement. We are dealing with a grave defect of discretion of judgement when the contracting party, as we read in the sentence c. Di Felice of 14 May 1984, is not capable of a judgement that would be proportional to the object of marital consent, that is, marital rights and obligations.[12]

The criterion of proportionality, *discretio iudicii*, used in jurisprudence in relation to marital rights and obligations, involves an assessment of how severe is the lack of discretion using two parameters: subjective and objective. In the subjective aspect, the lack of discretion remains linked to the subject's psychological pathology, whereas the objective aspect concerns the importance of essential marital rights and obligations. By adopting both parameters, rotal jurisprudence always requires the presence of a serious abnormality or psychic pathology[13] to find a person incapable of consent due to his or her lack of discretion of judgement.

For marital rights and obligations, a grave defect of discretion of judgement entails incapacity for a proportional judgement about the essence of marriage and a lack of inner freedom, which is necessary for marital consent. The lack occurs when there is a serious impairment of cognitive, critical and volitional faculties *vis-a-vis* the transfer and acceptance of marital rights and obligations [Leszczyński 2009, 185].

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attigit illam sufficientem aestimationem proportionatam negotio coniugali, idest cognitionem criticam aptam tanto officio nuptiali; 3) aut denique alteruter contrahens caret interna libertate idest capacitate deliberandi cum sufficienti motivorum aestimatione et voluntatis autonomia a quolibet impulsu ab interno."

[12] Sent. c. Di Felice of 14 May 1984, RRD 76 (1984), p. 81. It reads: "Discretio iudicii semper requiritur matrimonio proportionata, quae tamen sufficienter componitur etiam cum animi vitiositatibus liberam deliberationem minime auferentibus." C. Burke observes: "Essential rights and obligations derive from the essence of matrimony, and from everything necessarily connected with the essence, such as the essential properties, but as I see it, they do not derive from the ends […]" [Burke 1992, 386].

[13] Sent. c. Pompedda of 19 May 1994, RRD 86 (1994), p. 208.

4. Causes of a grave defect of discretion of judgement

Personal health is a difficult concept to define. Nonetheless, by analysing the reality of man, medicine and psychology are trying to define the boundaries between health and disease to be able to define a particular person as a healthy individual or afflicted by a specific disorder or disease. Health is the opposite of disease or a disorder. Therefore, it could be said that the absence of disease or a disorder in the person means his or her health. Such a definition of illness, however, seems to be a purely tautological formulation: illness is a state of complete physical, mental and social well-being, not just the absence of disease or infirmity. In recent years, the fitness to lead a productive social and economic life has been added to the definition. Disease is the opposite of a state of normality. It is a limitation of the value of the body, something detrimental, a negative value [Jaspers 1964, 830].

The term 'mental health' refers to psychological and emotional well-being. Mental health can be defined as a state of mental and emotional well-being. In a state of mental health, a person is capable of using his cognitive, volitional, emotional abilities, function in society and meet the demands of everyday life. It should be noted, however, that there is no single official definition of mental health, as cultural differences, subjective feelings and competing professional theories affect the understanding of this term. The only aspect that most experts accept is that mental health and a mental disorder are not opposing terms. This means that the absence of a diagnosis of mental illness or disorder does not indicate mental health, especially since the term 'illness' actually refers to few disorders, usually with an organic background. What is more, mentally ill people only manifest a different way of life, closed, inaccessible, contrary to ostensible normality – a way in which they function under strict rules, nonetheless. It follows that putting normality and disease side by side in relation to specific individuals seems to be a wrong criterion. The relativity of such a criterion can be seen, for example, in the theory of Sigmund Freud or Melanie Klein, where the former considers a neurotic to be normal, and the latter considers a psychotic as such.[14]

[14] G. Zuanazzi notes: "Per Freud l'individuo normale (sano) è potenzialmente un nevrotico; per Melanie Klein, è potenzialmente uno psicotico. In un modo di funzionamento psichico

The appropriate criterion for defining mental health is to relate the individual to his or her ability to function socially, including the capability of establishing interpersonal relationships. This criterion makes it possible to define a disorder within the framework of its consequences, and therefore describe a person as capable or incapable of establishing certain relationships and undertaking certain life and social tasks and functions.[15] The causes of the grave defect of discretion of judgement are diverse. As Paździor notes, these are typically psychoses, neuroses, or personality disorders or pathologies [Paździor 2004, 25-26]. Psychoses are groups of psychological conditions that are considered more profound and severe. The following are the proposed criteria for identification of those conditions: a significant reduction or loss of the ability to critically assess reality due to cognitive impairment, a proven or hypothetical somatic background, and particularly a profound or total disorganization of mental and social functioning.[16]

Mental disorders are divided into psychotic and non-psychotic syndromes. The criterion of division is the occurrence of specific psychopathological symptoms, which include delusions, hallucinations, disturbed thinking and behaviour, mood swings, and significant thought deficits. In these cases, for medical reasons, there is a pronounced disturbance of the sense of reality, a limitation or inability to critically, realistically evaluate oneself, the environment, or the relationships between these. Non-psychotic syndromes are ones that do not meet the criterion of belonging to psychotic syndromes [Bilikiewicz 2002, 404-405].

The core aspect of psychosis is a lack of criticism of one's own incorrect perceptions and judgements. The term 'psychosis' thus refers to the inability to analyse reality, which is usually accompanied by hallucinations, delusions and other thinking disorders. Psychotic syndromes are considered

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dominato da processi emotivi non c'è spazio per la distinzione tra normale e patologico, distinzione che si rende possibile solo se si amette anche un funzionamento governato da processi razionali e volitivi" [Zuanazzi 2006, 66].

[15] Minkowski writes: "Siamo di fronte ad un essere radicalmente diverso, e con il termine *radicalmente* esprimiamo il fatto che non si tratta certo di semplici differenze individuali, quali ne incontriamo in ogni momento nella vita quotidiana, né di di quelle gradazioni che sul piano empirico possono portare insensibilmente dal normale al patologico. Ci si rivela un modo di esistenza particolare che si basa su una differenza di natura" [Minkowski 1973, 66].

[16] Sent. c. Funghini of 19 May 1993, RRD 75 (1993), p. 404.

to be mental disorders in which the sense of reality is clearly disturbed for medical reasons, i.e. a noticeable reduction or inability to perform a critical and realistic assessment of reality, including of oneself, one's environment and the relationships between them [Grzywa 2005, 16]. It should be noted, however, that the cause of a serious defect of discretion of judgement can be not only psychoses, although by far in their purest form they are such causes, but also other mental disorders that are not psychoses, but in a lighter form constitute personality disorders, mood disorders or simply the so-called psycho-emotional immaturity, but also all kinds of addictions to the mother or father, insofar as, of course, they deprive the subject of the necessary ability to discern or the proper functioning of practical reason, and inner freedom necessary for a valid marital decision. Therefore, one speaks of severe disorders that are not a typical difficulty, but indeed a cause of incapacity, as mentioned in Canon 1095. That is why the role of forensic experts, whose job it is to assess, among other things, the severity of the disorder, is so important.

Indeed, at this point attention should be drawn to an important term used by the legislator in Canon 1095, 2º with respect to lack of discretion of judgement. The term is *gravis*, meaning 'serious, grave.' Although the 1983 Code does not elaborate on the term *gravis*, the opinions of various authors and justifications written by ponenses widely indicate that only a profound mental abnormality, including emotional immaturity, can be regarded as a cause of marriage nullity. It should also be noted, very importantly, that the canonical concept of consensual incapacity does not completely coincide with the so-called psychological concept. This means that a person considered emotionally immature from the psychological point of view is not necessarily regarded as such under canon law, in the proper interpretation of Canon 1095 [Leszczyński 2004, 241].

5. Essential marital duties

In defining consensual incapacity in Canon 1095, 2º, the legislator relates it to the so-called essential marital rights and obligations. The object of discretion of judgement is the essential marital rights and obligations, mutually transferred and assumed [Burke 1991, 147-48]. This term is also to imply goals and attributes of marriage. The incapacity in question does not apply to non-essential duties, but only to those which, if not assumed,

may seriously impede the establishment of marriage, which is a community of life and love. A detailed specification of essential duties of marriage is not easy, and various authors interpret them differently. Some of them, discussing the scope of essential marital duties at large, distinguish between duties that chiefly serve to ensure the well-being of the spouses. In this regard, duties related to giving birth and rearing offspring are mentioned. They include in this group, for example, the duties of marital fidelity and living intimately with one's spouse, and the duty of indissolubility, i.e. preserving the life-long nature of marriage.[17]

It can be assumed, then, that essential marital duties should be primarily related to the purposes and attributes of marriage, mentioned in Canons 1055 § 1 and 1056[18] or, as we read in the sentence c. Colagiovanni of 23 January 1990, to *consortium totus vitae*.[19] Duties of an ethical, customary or social nature certainly play an important role in the lives of two people united by the matrimonial bond, but it is difficult to consider them as those which the CIC/83 defines as *essentiales*. Instead, it seems that the primary marital duty is the full integration of the spouses, based on mutual devotion and acceptance of each other, in soul and body, and the creation of a mutual bond. All other dimensions of the marital relationship, such as fatherhood, motherhood, mutual fidelity, indissolubility originate in this exclusive

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[17] Sent. c. Burke of 19 January 1995, RRD 87 (1995), p. 53; Sent. c. Stankiewicz of 23 June 1988, RRD 80 (1988), p. 417. It reads: "Inter obligationes matrimonii essentiales, quas contrahentes tempore celebrationis nuptiarum foedere irrevocabili assumunt, quaedam sunt, quae in tribus traditionalibus coniugii bonis continentur, sicut obligatio servandi fidelitatem seu exclusivitatem (bonum fidei) ac perpetuitatem seu indissolubilitatem consortii matrimonialis (bonum sacramenti) nec non obligatio acceptandi procreationem ex altero coniuge, per copulam modo naturali peractam, prolemque natam educandi (bonum prolis); quaedam autem habentur, quae ad bonum coniugum, ad quod sua natura ordinatur foedus coniugale (can. 1055, § 1), spectant."

[18] Sent. c. Giannecchini of 26 June 1984, RRD 76 (1984), p. 391; Sent. c. Stankiewicz of 23 June 1988, RRD 80 (1988), p. 417.

[19] Sent. c. Colagiovanni of 23 January 1990, RRD 82 (1990), p. 12. It reads: "Inter onera matrimonialia essentialia… profecto includi debet consortium seu communitas vitae coniugalis. Iam age verbum ac conceptus 'vitae' adeo primigenium est, et latum, et ab ipsa natura sponte oblatum atque expressum, ut vix innumeras species admittat nec plane saepe erit discernere utrum vita hic sit, an vero ibi desit. Quo in negotio extricando, certo non procedere possumus, sic agentes de proprietatibus matrimonii essentialibus – puta indissolubilitatem et exclusivitatem quarum notio secumfert determinatos fines et rationes perspectos."

integration of the spouses. For obvious reasons, an obligation for one party is a right for the other, so that is why the title refers to marital rights and obligations.

Conclusion

Answering the questions formulated in the introduction, we can say that a grave defect of discretion of judgement involves two criteria that are necessary in the evaluation of lack of discretion as a title for rendering marriage invalid. It is therefore important to determine whether there is a mental disorder, which is up to an expert in the matrimonial process, and relate it to specific marital rights and obligations, which the subject is unable to discern and freely assess. As the above-cited ponens Caberletti rightly points out, the expert's task is to determine the mental anomaly, its severity, and the historical circumstances regarding its onset,[20] meaning that we are not dealing with a grave defect of discretion of judgement within the meaning of Canon 1095 of the 1983 Code if no such mental anomaly exists. Nevertheless, this grave defect should refer to specific duties and rights that the subject is unable to discern (by reason of his or her anomaly) and undertake in an internally free manner. Therefore, we cannot speak of a profound lack of discretion as a reason for marriage nullity, when only one of the above-mentioned conditions is met, since both doctrine and case law clearly indicate the need for the existence of both.

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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 *Pascite 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.

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podczas ostatniej nowelizacji kanonicznego prawa karnego na mocy konstytucji apostolskiej *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 Law[3] 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

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[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 Faílde 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

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[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 rescripts, 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, 4º 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 always[14]) 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/decree 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 ordered[16]). 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, 2º 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 [Cabreros 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 accused[18] 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

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[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 appeal[20] 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,

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[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 is 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

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[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 culpable[25] 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

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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, 2º), 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 judgement 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, 3º), 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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BAPTISM OF A CHILD WITH ONE OF THE SPOUSES (PARENTS) OBJECTING

PROBLEM CHRZTU DZIECKA W SYTUACJI, GDY JEDNO Z MAŁŻONKÓW (RODZICÓW) WYRAŻA SPRZECIW

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Abstract

The opposition of one of the parents to the child's baptism is a specific situation in which the conflict within the family concerns the space characteristic of the Church's mission. Therefore, this requires a deeper analysis of the Church's teaching and a combination of several issues.

The Author presents some legal norms regarding baptism from the perspective of the Church's concern for conditions favouring the growth of sacramental grace in the life of the baptised. Baptism, as the gate to the sacraments, includes man in Christ's salvific work gives him access to the fullness of the means of salvation in the Church. Performing baptism means accepting its purpose, consenting to direct the baptised toward the fullness of life of faith. This approach justifies the necessity of pastoral involvement and the requirements for candidates for baptism who have reached the age of seven, as well as for parents asking for baptism for their children.

In connection with the dispute concerning the beliefs of the parents, the Author refers to the regulations for the Catholic upbringing of offspring in mixed marriages. These norms, specifying the duties of the Catholic party, leave room for dialogue with the spouse. The author also presents the condition of a person who, although not baptised, can open herself to God's saving action.

Finally, the topic is approached from the perspective of a child. Her relationship with the parents is reflected in the way she builds a relationship with God. Disruptions in these references can affect both the child's psychological condition and the maturity of her faith in later years. Therefore, in the case of a serious conflict

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arising from world view differences, it seems reasonable to suggest to the believing party to postpone baptism until the situation improves or the child is enrolled in catechumenate around the age of discretion. It is also necessary to offer appropriate pastoral assistance. Deepening the parent's faith also has a beneficial effect on the child's attitude.

Keywords: catechumenate, licit, minor, religious maturity

Abstrakt

Sprzeciw jednego z rodziców wobec chrztu dziecka to specyficzna sytuacja, w której konflikt wewnątrz rodziny dotyczy przestrzeni charakterystycznej dla misji Kościoła. Wymaga zatem głębszej analizy nauczania Kościoła i powiązania ze sobą kilku zagadnień.

Autorka przedstawia normy prawne dotyczące udzielenia chrztu z perspektywy troski Kościoła o warunki korzystne dla wzrostu sakramentalnej łaski w życiu ochrzczonego. Chrzest jako brama sakramentów włącza człowieka w zbawcze dzieło Chrystusa i daje mu w Kościele dostęp do pełni środków zbawienia. Sprawowanie chrztu oznacza akceptację jego celowości, przyzwolenie na ukierunkowanie ochrzczonego ku pełni życia wiarą. Takie podejście uzasadnia konieczność zaangażowania duszpasterzy oraz wymagania stawiane kandydatom do chrztu, którzy ukończyli siódmy rok życia, a także rodzicom proszącym o chrzest dla swoich dzieci.

W związku z sytuacją sporu dotyczącego przekonań rodziców autorka nawiązuje do przepisów dotyczących katolickiego wychowania potomstwa w małżeństwach mieszanych. Normy te określając obowiązki strony katolickiej pozostawiają miejsce na dialog ze współmałżonkiem. Prezentuje również kondycję człowieka, który – choć nie jest ochrzczony – może otworzyć się na zbawcze działanie Boga.

Wreszcie podejmuje się ujęcia tematu z perspektywy dziecka. Jego relacje z rodzicami odzwierciedlają się w sposobie budowania więzi z Bogiem. Zakłócenia w tych odniesieniach mogą mieć wpływ zarówno na psychiczną kondycję dziecka, jak i na dojrzałość jego wiary w dalszych latach. Dlatego w przypadku poważnego konfliktu wypływającego z różnic światopoglądowych zasadnym wydaje się zasugerowanie stronie wierzącej odłożenia chrztu do czasu poprawy sytuacji lub zapisania dziecka do katechumenatu około wieku rozeznania. Konieczne jest także zaproponowanie jej odpowiedniej pomocy duszpasterskiej. Pogłębienie wiary rodzica wpływa korzystnie także na postawę dziecka.

Słowa kluczowe: katechumenat, godziwy, małoletni, dojrzałość religijna

Introduction

The specific situation when one spouse objects to the baptism of his or her child, constituting a conflict within the family, is associated with matters related to the mission of the Church. As such, it calls for a great deal of sensitivity on the part of the pastor and his knowledge of the Church's teaching on this sacrament. His proper attitude usually helps to rectify the parents' misconceptions about the role of baptism. A wrong interpretation of the relevant regulations can aggravate anxiety and the dispute between spouses.

A more thorough examination of this subject needs the legislator's message to be extracted from a broader range of documents, so it will be useful to cite some conciliar texts and some canons of the two codes, as well as putting several issues together. The first of these is baptism. Parents often focus on the celebration, downplaying the essence of baptism, or they are simply unaware of it, so baptism will be shown as a gateway to the sacraments, leading one into the dynamics of Christian life.

The second issue pertains to membership in the Church; here, too, one cannot limit oneself to formal membership only. Rather, what matters is the full exercise of the means of salvation that are available in the Church. Such a context will help us to justify the responsibility of parents and pastors of souls for the creation of proper conditions for grace to develop.

Given the dispute over parents' beliefs, we need to recall the provisions regulating the Catholic upbringing of children in mixed marriages. These norms, while defining the duties of pastors and Catholics in general, leave room for dialogue with the spouse. It is possible because the contemporary notion of the Church's salvific exclusivity has shifted the emphasis from formal membership toward Christ's way of operation, who always saves people through the mediation of the Church.

Finally, to be able to define the scope of the child's well-being one should view the parents' dispute over the religious identity of their offspring from the child's perspective. It is particularly important to understand how the child perceives her relationship with the parents and how these references influence her bond with God.

1. Requirements for the administration of the sacrament of baptism

In order to ensure that the baptised are properly assisted, the Church indicates how and under what conditions the sacraments of initiation are administered to particular groups of people. Canon 851 of the 1983 Code of Canon Law[1] briefly defines the manner in which adult candidates and parents of children who are to receive the sacrament are to be prepared. In the case of adults, these are: admission to the catechumenate and, as far as possible, guidance towards sacramental initiation through the various steps according to the rite of initiation adapted by the bishops' conference.[2] Canon 865 CIC/83 mentions the same condition regarding an attempt at Christian life in the catechumenate, as well as the necessity of expressing willingness to receive the sacrament and sufficient instruction on the truths of the faith, Christian obligations and the need to repent for one's sins.[3] The Code of Canons of the Eastern Churches has similar guidelines for baptismal formation in the catechumenate, leaving stricter regulations to particular law.[4] Regarding the criteria for the readiness of candidates to receive the sacraments of initiation, Canon 682 § 1 CCEO prescribes: "For a person who is no longer an infant to be baptized, it is required that he or she manifest a desire to receive baptism and be sufficiently instructed in the truths of the faith and be tested in the Christian life; the adult is to be exhorted to have sorrow for personal sins."

Both codes consider the age of seven as the limit between presumed incapacity to direct one's own actions and the presumption of such capacity, and a person below this age is called a minor (*infans*) (Canon 97 § 2 CIC/83, Canon 909 § 2 CCEO). Importantly, in matters related to baptising

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[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].

[2] *Ordo initiationis christianae adultorum* (editio typica), Typis Polyglottis Vaticanis, Città del Vaticano 1972; Polish edition: *Obrzędy chrześcijańskiego wtajemniczenia dorosłych dostosowane do zwyczajów diecezji polskich*, Księgarnia św. Jacka, Katowice 2020 [henceforth: OICA].

[3] More detailed guidelines for the various stages of pre-baptismal formation can be found in the rite referred to in Canon 851 CIC/83.

[4] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045-363; English text available at: https://www.intratext.com/IXT/ENG1199/_PLX.HTM [henceforth: CCEO], Canon 587.

minors who have reached the age of seven, both codes generally apply provisions pertaining to adults. At the same time, the CIC/83 explicitly states this in Canon 852, while in the CCEO it can be inferred from the provisions on age and the use of the designation *filius* in the canons on baptism to refer to minors of different age groups[5] and the term *infans* in the canons on baptism of children. Both codes distinguish between minors who have not completed the fourteenth year of age and those who have reached that age. A minor in the younger age group, through baptism, acquires membership in the Church *sui iuris* of that who is responsible for raising him in the faith.[6]

Initiation of minors involving various steps and rites, lasting up to several years if need be, is recommended by the *Order of Christian Initiation for Children* (OCIC 306-369) recommend. As mentioned above, the rules for adults apply to minors who are over seven, which primarily implies the need for comprehensive preparation for the sacrament and the willingness to receive it. This is in keeping with the condition of candidates who are predisposed by their age to exploring the world. Since the needs of minors are generally taken into account in other, even everyday matters, it is even more necessary in a space where disagreement can invalidate the sacrament. It is worth noting that Canons 98 § 2 CIC/83 and 910 § 2 CCEO declare the possibility of excluding minors from the authority of their guardians by the power of divine law. It seems that the precedence of the minor's religious freedom (as long as he or she has an actual awareness of it) over the parents' right to raise them in keeping with their own world view may exemplify such a situation.

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[5] Canons 29 and 30 CCEO speak of acquisition of membership in the Church *sui iuris* by a minor who has not turned fourteen, whereas Canons 29 and 689 refer to the offspring of parents in different situations. Canon 34 specifies the conditions for changing the church affiliation of a parent with offspring under 14.

[6] Detailed regulations on this can be found in Canons 29 and 30 CCEO, as well as in Canons 111 and 112 CIC/83. The age of fourteen appears in the context of baptism also in Canon 863 CIC/83. It provides that the baptism of adults, or at least persons over the age of 14, should be notified to the diocesan bishop so that, if he considers it appropriate, he will administer the baptism himself. On the one hand, this canon confirms the applicability of the provisions on adult baptism to minors as well; on the other hand, it recognizes that the baptism of a minor under this age does not bear testimony to the faith so seriously as a conversion of an older person.

In the case of infants and children who have not come to the use of reason, the preparation of parents and godparents for baptism should take place in accordance with Canons 851, 2º and 867 § 1 CIC/83 and 686 CCEO. Conditions for the licit administration of baptism are specified in Canons 868 CIC/83 and 681 CCEO.

Both codes indicate that it is the parents' task to make sure that their child is baptised as soon as possible after birth (Canons 867 § 1 CIC/83 and 686 § 1 CCEO). The CCEO highlights the necessity of preserving the legal custom. In contrast, the CIC/83 refers specifically to the first weeks after the child's birth. It follows that the parents are to visit the pastor to request the sacrament and to be properly prepared for it. They can do this before the child is born or shortly after the birth.

Instruction and preparation of the parents and sponsors is entrusted to the pastor (Canons 851, 2º CIC/83 and 686 § 2 CCEO), the CIC/83 allowing him to do it in person or through others. The instruction should focus on the significance of the sacrament and "the obligations attached to it." According to the CCEO, the instruction also applies to the celebration of the sacrament itself. The 1983 Code of Canon Law provides that the formation of parents and sponsors should also include prayer in a community of several families and, when possible, also visitation.

Should the parents reduce their involvement to merely consenting to their child's baptism – thus revealing a motivation contrary to the purpose of the sacrament – and should they categorically refuse to participate in the instruction and prayers or challenge the Church's teaching, the pastor is to consider whether granting baptism under such circumstances would actually be beneficial for the child. This issue becomes even more important when either parent objects to the sacrament because he or she declares that they want to take an active role in formation of their child's world view in accordance with a model other than the Church's. In case of doubt, attention should be paid to provisions regulating licit administration of the sacrament of baptism, which specify the minimum requirements that parents must meet so that the pastor will be allowed to administer baptism.

In order to administer baptism licitly to a child, the CIC/83 requires the consent of the parents or at least one of them, or a person who lawfully substitutes for the parents. The requirement that the legal guardians

give consent is mentioned in identical by the CCEO in identical words.[7] In principle, then, it is sufficient when one person who has the legal custody of the child consents. There is also no mention of a situation where the other parent or guardian objects. It is worth remembering, though, that these canons do not order the pastor to baptise in a controversial situation. This opinion is also shared by other commentators of Canon 868 CIC/83, such as Dario Composta [Composta 2001, 540] and Eloy Tejero [Tejero 2011, 665-69]. It is to be supposed, then, that the requirement to consider the objection of either parent to the baptism of the child is necessary for a child who is not in danger of death to be licitly baptised. This requirement also stems from the natural right of each parent to raise his or her child in accordance with their own beliefs, and because baptising a child against the firm will of either parent will incur the risk of exposing the child to losing her faith once she reaches independence in the use of reason as a result of being raised in the family home.[8]

Invoking the principle of *favor fidei* in the case of baptism of children[9] dates back to a time when salvation was closely associated with membership in the Church, which was able to impose Catholic upbringing on its faithful. This provision, despite alluding to an older law, should nonetheless be construed in light of theology of today, which shifted the emphasis from formal membership in the Church – as indispensable in salvation – to the way of Christ, who always saves man through the community which He founded [Ratzinger 2016, 297]. Another provision regarding a similar situation can be found in Canons 1125 CIC/83 and 814 CCEO. They determine the conditions for mixed marriages. Not resolving the issue of infant baptism in an arbitrary manner, it leaves room for dialogue, which

[7] The differences between the two Codes concerning the will of the parents can be seen regarding the situation when the child's is in danger of death.

[8] It should be added that similar arguments are used in analysis of the provisions on baptism administered in danger of the child's death. They were commented on by, e.g., Bronisław Zubert [Zubert 1996, 57-63], as well as Aleksandra Brzemia-Bonarek and Szymon Drzyżdżyk [Brzemia-Bonarek and Drzyżdżyk 2015, 183-95] and the canonists they cite.

[9] The Pauline privilege with respect to baptising children against the will of their parents was very widely applied by Benedict XIV. Both earlier and later documents of popes and congregations restricted the possibility of baptising children of unbaptised parents when it was apparent that they would be raised outside the Church [Mucha 2019, 61-75].

fosters a better atmosphere in the family and provides a greater opportunity for the child's religious upbringing without needless tensions.

Canon 681 § 1 CCEO mentions a legitimate hope of raising the child in the faith of the Catholic Church as the primary condition for licit baptism of a child.[10] Canon 868 § 1 CIC/83 mentions "a founded hope" that the child will be raised in the Catholic religion in the second place[11] as a condition for baptism to be administered licitly. For this criterion, the legislator specifies the scope as well as additional rules for dealing with failure to respect it. According to the CIC/83, only the complete (*prorsus*) lack of a founded hope for Catholic upbringing makes baptism illicit. In this situation, baptism should be postponed, as prescribed by particular law, and explain the reason for this decision to the parents.

It is worthy of note that this canon has been aligned in recent years with respective canons of the Eastern Churches in matters pertaining to the children of baptised acatholics. The discrepancy regarding the lack of hope of Catholic upbringing was left unchanged. Unless the proper law of a given Church *sui iuris* further specifies a provision of the Code, a pastor may refuse baptism when he considers that the situation of the child does not leave room for a reasonable hope for his upbringing in the faith of the Catholic Church. He can also take measures to support the family in its efforts to raise the child effectively. Alternatively, he can postpone the baptism if he believes that the circumstances will improve over time.

In the Roman Catholic Church, the Church's proper law can specify in greater detail both the interpretation of the grave lack of a reasonable hope of Catholic upbringing of a child and the course of action to be taken by a pastor who considers that the administration of baptism should be put off. The prescript, however, does not allow the denial or postponement of the sacrament when the lack of reasonable hope is not complete, or leaving both parents, one of them or a legal guardian without an explanation.

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[10] This condition does not apply to children of acatholic Christians, baptised pursuant to Canon 681 § 5 CCEO. These children become members in the Church of their parents on the assumption that they will be raised in their faith. A similar proviso is found in Canon 869 § 1 CIC/83, and paragraph 3 sets forth the specific conditions the validity of baptism.

[11] For baptism to be licit, it is necessary to fulfil both requirements: parental consent and a hope that the child will be brought up in the faith. For this reason, the subject of their different ordering in the two codes will not be discussed more extensively here.

So, norms of particular law must take into account everything that the Code specifies.

A literal construal of this prescript would therefore define as licit the administration of baptism practically whenever at least one of the guardians (even if contrary to the other) consents to it – not necessarily the will. As the law prescribes, any gaps in Catholic upbringing are to be filled by the child's godparents. It follows, then, that in theory the absence of a legitimate hope is never complete, especially if one considers the grace springing from the sacrament, the responsibilities of pastors and the parish community, and, in Polish reality, school catechesis.

This provision, nevertheless, should be interpreted in the broader context of the legislator's intent. As we read in the Apostolic Constitution *Sacrae disciplinae leges* promulgating the CIC/83 and the introduction to it, its provisions reflect the teaching of the last Council, and must therefore be interpreted and assimilated in accordance with them. The prescript must be interpreted in keeping with other canons that express the legislator's concern for the child's welfare, growth in faith and grace, and salvation. Legal protection also stems from the sacrament of baptism, through which man is personally involved in the saving work of Christ. The licit administration of the sacrament involves acceptance of its effects, purposefulness, consent to the guiding of the baptised person toward the fullness of Christian life. In the case of a child, this implies the hope of an upbringing that will allow the grace received to develop. Now, let us revise the conciliar reflections and conclusions concerning the human condition, his salvation, and the Church, as well as some later documents clarifying them.

2. A non-baptised person opening to grace

The possibility of saving those who dwell beyond the visible boundaries of the Church is not a theological problem in the world of today. The saving exclusivity of the Church springs, rather, from its mediation.[12]

[12] It is worth noting that the declaration *Dominus Iesus* – in response to some interpretations of the conciliar teachings that extended the understanding of Christ's salvific action – highlighted the truth that the Church (even if its intermediary role would not be endorsed by some) is the only path to attain salvation, not one of many equivalent ways. Congregatio pro Doctrina Fidei, Declaratio de Iesu Christi atque Ecclesiae unicitate et universalitate salvifica *Dominus Iesus* (06.08.2000), AAS 92 (2000), p. 742-65; English text available at:

It is no longer closely associated with full membership.[13] That said, in some cases, the way God and the Church operate can be difficult to define in the language of the law. The pastoral constitution *Gaudium et spes* even describes it as known only to God: "For, since Christ died for all men, and since the ultimate vocation of man is in fact one, and divine, we ought to believe that the Holy Spirit in a manner known only to God offers to every man the possibility of being associated with this paschal mystery."[14]

Vatican II also points out that it was already in the incarnation and preservation of human nature that the Son of God raised in ourselves to a high dignity and somehow united Himself with every human being (GS 22). No one, then, is banished from the salvific work of Christ so as to be denied the possibility of benefiting from it. Having the nature assumed by the Son of God, one is not merely His creation.

The Constitution *Lumen gentium* interprets the words of Jesus, who calls his disciples *the salt of the earth and the light of the world*, as the obligation of God's people *vis-à-vis* all humanity. "So it is that that messianic people, although it does not actually include all men, and at times may look like a small flock, is nonetheless a lasting and sure seed of unity, hope and salvation for the whole human race. Established by Christ as a communion of life, charity and truth, it is also used by Him as an instrument

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https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20000806_dominus-iesus_en.html [henceforth: DI], no. 21. Reading conciliar texts, one must keep in mind the clarification made by the Congregation.

[13] "In the past, the question of membership was typically closely associated with the issue of salvation. This was correct as long as the teaching on the Church's salvific exclusivity was understood in a strict, literal sense. As it has been understood that this teaching is not so much about the saved people but rather about the forces that are effective in saving every person, such a close connection can now be dispensed with, as it put an unnecessary burden on the question of membership. As regards the salvation of many, it appears that there has been a slight shift in this area. That not only Catholic Christians save themselves is no longer a problem for us today. Rather, the question is: If the paths to salvation exist also beyond the border posts of the visible Church, then where to find a justification for the, after all, unchangeable necessity and inalienability of the ministry of Catholic Christians?" [Ratzinger 2016, 297].

[14] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), AAS 58 (1966), p. 1025-115; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html [henceforth: GS], no. 22.

for the redemption of all, and is sent forth into the whole world as the light of the world and the salt of the earth."[15] These words demonstrate that the Church's mission *vis-à-vis* those who remain outside of it: to bear witness to God by persevering in communion and fully opening up to unity, hope and salvation, as well as to transmit these gifts to people who do not know the Gospel.

In his encyclical *Redemptoris missio*, John Paul II described the situation of those who, owing to their upbringing in other religious and cultural traditions, are not able to embrace the teaching of Christ. "For such people salvation in Christ is accessible by virtue of a grace which, while having a mysterious relationship to the Church, does not make them formally part of the Church but enlightens them in a way which is accommodated to their spiritual and material situation. This grace comes from Christ; it is the result of his Sacrifice and is communicated by the Holy Spirit. It enables each person to attain salvation through his or her free cooperation."[16] The rectitude of man, whether baptised or not, is not in itself the cause of his salvation; rather, it demonstrates his openness to grace and compliance with it. Christ, who is present in His Church is "the one Mediator and the unique way of salvation" (LG 14).

Although unbaptised people can receive grace, the declaration *Dominus Iesus* considers their situation to be objectively very disadvantageous in relation to those who are fully equipped with the means of attaining salvation in the Church and draw from them, living in unity with God and the community. And those baptised who do not use the means given to them, are reminded by the Council's words on a more severe judgement (DI 22). Also, the constitution *Lumen Gentium* also warns against an overly frivolous treatment of the salvific mediation of the Church. It says: "Whosoever, therefore, knowing that the Catholic Church was made necessary by Christ, would refuse to enter or to remain in it, could not be saved" (LG 14).

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[15] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-75; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html [henceforth: LG], no. 9.

[16] Ioannes Paulus PP. II, Litterae Encyclicae *Redemptoris missio* de perenni vi mandati missionalis (07.12.1990), AAS 83 (1991), p. 249-340; English text at: https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_07121990_redemptoris-missio.html, no. 10.

The universal idea of salvation is related to both the Church's mediation and its mission to proclaim the truth about God to all people. The Church's missionary nature springs from the universal plan of salvation, which involves an urge to invite every person to strive for the fullness to which he or she has been called. The Church shows the dignity of every human being from the perspective of the incarnation, redemption and salvific mediation of the community of believers. The Church's mission is to transmit to man the truth that he was created in love and invited to participate in the glory of God, Who uses various means to help all people foster a relationship with Himself. The Church unites believers in a community which it has entrusted with all the means of salvation and the capability of empowering other people to reach salvation.

3. Living in the grace that flows from baptism

The Church's real presence subsists in the presence of the incarnate Son of God. It is His body, and Christ is its Head: "just as the head and members of a living body, though not identical, are inseparable, so too Christ and the Church can neither be confused nor separated, and constitute a single 'whole Christ'" (DI 16). The Church is therefore the "visible sign of the hidden reality of salvation."[17] The visible aspect is expressed in the Church's institutional character, wherein the work of salvation is made manifest in the Church and given to people. Being fully a member entails union in the two realms – visible and invisible – and the use of "the fullness of the *means of salvation*" (emphasis mine). These are: correct and complete confession of faith, full sacramental life, and ordained ministry in apostolic succession (CCC 830). The fact that those "moved by the Holy Spirit," living in the grace they received through baptism, accept their bond with the faith, the sacraments and ecclesiastical authority, provides them with the fullness of ecclesiastical communion (cf. LG 14).[18]

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[17] *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997; English text available at: https://www.vatican.va/archive/ENG0015/_INDEX.HTM [henceforth: CCC], nos. 774-76.

[18] As Coccopalmerio reminds us, Canons 205 CIC/83 and 8 CCEO, despite omit the phrase *Spiritum Sanctum habentes*, is to be interpreted in keeping with conciliar ecclesiology, particularly with the conciliar text to which they refer [Coccopalmerio 2011, 91-100]. The definition of the Church as founded on the bonds of faith, sacraments and ecclesiastical

Sacraments received with faith actualise unity with God in the Church. They build and renew the intimate relationship between God and man, which cannot be described in the language of law; this language, however, can be used to describe external acts and the legal effects of the various sacraments. The first is baptism, which constitutes a person in the Church as the subject of rights and duties subordinate to pastoral authority. Through baptism people are cleansed of sins and reborn for a new life as children of God (Canons 849 CIC/83 and 675 CCEO). Thanks to this sacrament, a person becomes similar to Christ not only by the fact of having the same nature but also by his or her ability to imitate the Lord and live the mysteries of His life in their daily life. This is why the Catechism states: "The Church does not know of any means other than Baptism that assures entry into eternal beatitude" (CCC 1257).

While giving us an assurance that the sacrament brings grace, the CCC also avers that "God has bound salvation to the sacrament of Baptism, but he himself is not bound by his sacraments" (ibid.). God can therefore save people using other than ordinary means, but always through the Church, even if this mediation is invisible.

It should also be remembered that baptism – which since ancient times has been likened to a gate – introduces the dynamism of grace, leaving us the freedom of other choices and development in the realms into which it has led us. The Code lists the obligations of the baptised, the first of which is to always maintain communion with the Church (Canons 209 CIC/83 and 12 § 1 CCEO), followed by concern for leading a holy life, "the growth of the Church and its continual sanctification" (Canons 210 CIC/83 and 13 CCEO).

Since full membership in the Church is fulfilled by persevering and growing in its both domains – spiritual and institutional – incomplete membership can be linked to a deficiency in one of these spheres.[19] If a person stays outside the institutional domain through no fault of hers but waits for the grace of baptism, having her will involved and acting to keep up her

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authority listed in the canons at hand was proposed by Robert Bellarmin. They refer to the qualities of a person who can be called a Catholic, rather than defining the fullness of ecclesiastical communion.

[19] Gänswein noted that the term *plene in communione* points to the gradability of ecclesiastical communion [Gänswein 1997, 71].

relationship with God in the Church, does not diminish the saving grace.[20] It follows that the attitude of a Catholic who is closed to God's saving action is defined merely by his or her formal affiliation. It is worth mentioning an excerpt from the constitution *Lumen Gentium* that describes the situation of people who, having been baptised, did not choose to build inner unity with God: "He is not saved, however, who, though part of the body of the Church, does not persevere in charity. He remains indeed in the bosom of the Church, but, as it were, only in a 'bodily' manner and not 'in his heart'" (LG 14).

Therefore, when deciding whether to baptise a child or not, it is necessary to take into account both the grace she will receive in this sacrament and the commitment to cooperate with it throughout her life. Baptism opens a person to the development of God's life, so it should be understood and administered in this very perspective. For this purpose, the Church takes various measures to secure the Catholic upbringing of baptised children.

4. Baptism of children in mixed marriages

Experience teaches that the effectiveness and permanence of the transmission of faith is linked to the parents' religiousness. It follows that children who find themselves in the unique situation of their parents being of different confessions require special pastoral care. Under Canons 1128 CIC/83 and 816 CCEO, both the local ordinary (or hierarch) and other pastors of souls are obliged to take care that the Catholic spouse and children do not lack spiritual assistance in fulfilling their duties.[21] Pastors of souls are also obliged by this prescript to support spouses in their development of conjugal and family life. Indeed, differences of confession can manifest in various areas of life and hinder dialogue.

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[20] "God wills the salvation of everyone through the knowledge of the truth. Salvation is found in the truth. Those who obey the promptings of the Spirit of truth are already on the way of salvation. But the Church, to whom this truth has been entrusted, must go out to meet their desire, so as to bring them the truth. Because she believes in God's universal plan of salvation, the Church must be missionary" (DI 22).

[21] Duties of conscience, as specified by the CCEO. For the topic at hand, differences between the respective canons seem insignificant, so these provisions can be discussed in tandem.

A parent's objection to the child's baptism can be seen as a signal that he or she wants to pass on a world view other than Catholic. Such conditions require no less concern from both the pastor and the bishop, who can make sure that extra religious care is provided for communities of families struggling with differences in religion or values that build wall between spouses, even if they formally belong to the same church.

Although Catholic parents are expected to raise their offspring in the faith, no such assumption is made for mixed marriages. The provisions regulating prenuptial obligations of prospective spouses with different attitudes to faith reflect the Church's position in a situation where several important rights are at conflict: the right/duty to profess one's faith, to raise one's children in it, and the broadly understood freedom to choose one's way of life. The postconciliar regulations drawing on the Decree on Ecumenism and the Declaration on Religious Freedom fully respect the religious freedom of both.[22] They address their desire to marry but also respect the right of both parents to make decisions regarding the religious upbringing of their offspring – for the Catholic spouse, this right entails an obligation.

The Catholic party may be permitted to contract a mixed marriage or granted a dispensation from the impediment of disparity of cult (Canons 1129 CIC/83 and 803 § 3 CCEO), if, in consultation with the future spouse, the party decides to meet the conditions set out in Canons 1125 CIC/83 and 814 CCEO, respectively.

According to the norm stated in these, the Catholic party is obliged to make a sincere promise (*promissio*) to "do all in his or her power so that all offspring are baptised and brought up in the Catholic Church." The other party must be informed at an appropriate time about the promises that the Catholic party makes, so as to have a full comprehension of the content of the promise and obligation of the Catholic party. The Catholic party undertakes to be fully committed to dialogue regarding the Catholic

[22] The novelty of the declaration is notable. While in 1963, in his encyclical *Pacem in terris*, John XXIII wrote about the right to act in accordance with a *rightful conscience*, the Council reasoned that the underpinnings of religious freedom lie in the very nature of the person. The subjective disposition of the *rectitude of conscience* does not matter any more. Freedom, therefore, is pertinent to the consciences of all people, also those who do not even seek the truth. The right not to choose any religion should now be considered as one way of realizing *freedom in religious matters* [Jaworski 2002, 409; Mistò 2011, 18-19].

upbringing of offspring, knowing that the future spouse is aware of this commitment. The prescript does not remove the Catholic party's obligation but points to its non-absolute character – it does not require a guarantee of effectiveness or the approval of the other party.[23]

As has been mentioned, in keeping with Canons 1128 CIC/83 and 816 CCEO, the pastor of souls is obliged to assist spouses in their maintenance of marital unity and the education of their offspring. It follows that a norm developed by the Church does not solve the problem but transfers the associated tensions to people who love each other and are personally affected by the rift dividing Churches or by differences of religion. This task is so difficult and destructive for spiritual life that many religions forbid such marriages or establish norms that do not respect the rights of the other party. What is more, spouses striving to raise their offspring in the faith stand in opposition to the beliefs of the other party. While wishing to remain in agreement about their children's upbringing, they risk a conflict of conscience. An inconsistent message regarding such crucial matters also affects the children, who have to cope with a loyalty conflict.

5. Impact of difference in parents' religion on children's psyche

Childhood is a time of increasing independence. This process is enabled by both competences formed over time and the proper milieu that stimulates development. The role that the parents play is the most important, since they give their children a sense of security and introduce them to the world in a way that is adequate to their abilities. Children imitate the attitudes of their mothers and fathers, eventually adopting their hierarchy of values. This period of life is characterised by a strong need for a positive identification with parents. That said, the ability to view a person ambivalently emerges rather late in human development. Therefore, younger children often blame themselves for their caregiver's anger – not necessarily directed at them – while experiencing feelings of guilt and shame [Lewicka 2010, 137].

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[23] Paul VI's motu proprio *Matrimonia mixta* amended the earlier norms that required the non-Catholic party to waive the right to commit to raising children according to their conscience. Paulus PP. VI, Litterae apostolicae motu proprio datae Normae de matrimoniis mixtis statuuntur *Matrimonia mixta* (21.03.1970), AAS 62 (1970), p. 257-63. The Catholic party's commitment to the faith was expressed in a different form.

Apart from imitating parents, another important characteristic of a child is her motivation to identify with them. Proper identification occurs based on a positive emotional relationship. Owing to this process, the values adopted in the family are consolidated in the child's aspirations. Serious conflicts between parents hinder the process of identification, bring about stress in the child and adversely affect her development [Lewicka 2010, 134-35]. In general, parental differences concerning children – as illustrated by arguments over baptism and religious upbringing – upset children's emotional balance [Petts and Knoester 2007, 376].

The family shapes the way faith is lived and teaches how to live values; the parents' religiousness and its maturity largely influence the way children live out their relationship with God [Podczasik 2014, 168]. According to the theory of symbolisation, the images of parents and their symbolism in the culture associated with a particular parenting style become the basis upon which children build their image of God. The theory of projection, on the other hand, posits that children associate God with projections of significant ones, with their specific traits or their opposites [Molenda 2017, 209-10]. Interestingly, this happens not only in environments where faith is discussed. For children younger than 6 this is natural, just as they accept the concepts of omniscience, creation or immortality. This is why some psychologists call children *intuitive theists* [Kiessling and Perner 2014, 1601; Richert and Barrett 2005, 285]. Seeing God anthropomorphically is characteristic of preschool children. At younger age, the schoolchild learns inductive reasoning, refines her understanding of concrete and abstract concepts (e.g., causality, space, time, speed), and her thinking becomes logical [Trempała 2011, 236]. New skills resulting from cognitive development alter the image of God, unless it is consolidated through the use of inappropriate educational methods.[24]

Social research shows a connection between parents' religiousness and the way their children practice their faith. It demonstrates the presence

[24] Childish religiousness may, later in life, develop into immature forms of religiousness involving an image of a threatening God, a sense of guilt and fear of punishment in the absence of positive religious experiences. Such religiousness does not play a sense-making role in life, it does not help overcome difficulties, but reinforces internal conflicts and stress. It is perceived as a duty or even a burden. The negative impact of immature religiousness can also be manifested in the consolidation of neurotic, immature defence mechanisms [Molenda 2017, 211-12].

of specific factors related to religiousness that improve the well-being of young people[25] and adults, help to stabilise marital relationships and improve contact with children. Religious adults persist in a personal relationship with God and have a greater sense of social integration and cohesion in life. Spouses who share common beliefs are closer to each other and have easier access to conflict-coping mechanisms. Satisfied parents are more likely to support their children and spend more time with them. Religious families form broader communities and help one another [Petts and Knoester 2007, 374-75].

A lack of religious affiliation or confessing a different religion makes this process more complex. Research conducted in Western countries has shown that greater differences between the religions professed by parents negatively affect the family atmosphere and the children's psyche, leading to parenting problems, particularly drug use [ibid., 382]. Various studies also show that children raised by parents who do not share a religion are more likely not to adopt any religion than children raised in religiously homogeneous families [ibid., 375].

Central to the child's well-being, and thus to her maturity and permanence of faith, are a sense of security and stability, as well as her parents' unanimity on issues of importance to the child. If, as a result of serious world view differences, the spouses cannot reach a consensus on the question of baptism, the best solution may be to put it off until the situation improves, or the child reaches the age of discretion.

Summary

The analysis of the norms concerning preparation for the sacrament of baptism shows the legislator's deep concern to ensure favourable conditions for the growth of sacramental grace in the later life of the baptised person. This is evident both in the requirements for proper adult formation and for the assurance of Catholic upbringing to children. Significantly, the legislator recommends that priests take special care of minors brought up in mixed marriages, as they may take religion to be an issue that

[25] Smith mentions moral instructions, spiritual experiences, role models, social and leadership skills, coping skills, cultural capital, social capital, relationships within and outside a closed circle [Smith 2003, 19].

separates their parents. It is even more difficult for children if their parents disagree about baptising them – thus determining their religious identity – even if the parents do not realize the importance of this sacrament.

At the same time, it should be noted that the very atmosphere of disagreement can negatively affect the child's development, and her attitude to faith in particular. Therefore, if a parent objects on the grounds of his or her stable beliefs in a way that violates the relationship between close persons, it seems the most reasonable to suggest to the believing party to postpone the celebration of the sacrament and make sure that the family receives appropriate pastoral care. This will help the believing party to practise and grow their faith, which will help the child to develop appropriate attitudes. Baptism should be suggested when the conflict ceases or when the minor person around the age of discretion shows willingness to receive the sacraments of initiation with faith, having undergone preparation that is in keeping with his or her personal situation. This form of individual catechesis should also be addressed to minors baptised in infancy at the request of their parents, who nonetheless did not bring them up in the faith of the Church. In the case of children of parents who believe and practise regularly, catechesis and parish pastoral care are sufficient to make the transmission of faith within the family complete.

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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

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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

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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.

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RECUSAL AS A GUARANTEE FOR THE IMPARTIALITY OF THE ECCLESIASTICAL COURT

INSTYTUCJA WYŁĄCZENIA SĘDZIEGO GWARANTEM BEZSTRONNOŚCI SĄDU KOŚCIELNEGO

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Abstract

The article examines the mechanism of recusing a judge based on the principle of judicial independence in impartial administration of justice. First, attention is drawn to the reasons for recusal, followed by the conclusion that it involves a judge who is the object of a justified suspicion of bias. Next, the author presents the procedure of excluding a judge from adjudicating in a trial, with a special emphasis on the authority competent to conduct incidental proceedings for recusing a judge. Last, the consequences of accepting a request to recuse a judge are presented: the change of a judge, not of the degree of the trial, and the validity of procedural acts performed before and after an application for recusal has been filed. The author raises a number of questions and offers some clarification for the legislator on the mechanism of recusal. The institution of judicial recusal is a pillar and guarantee of a fair and impartial ecclesiastical process.

Keywords: procedural canon law, canon law process, impartiality of the court, judicial independence, recusal

Abstrakt

Artykuł porusza problematykę instytucji wyłączenia sędziego związanej z zasadą niezawisłości sędziego kościelnego w sprawowaniu bezstronnego wymiaru sprawiedliwości. W pierwszym punkcie zwrócono uwagę na przyczyny wyłączenia sędziego, dochodząc do wniosku, że wyłączeniu podlega sędzia, wobec którego zachodzi uzasadnione podejrzenie stronniczości. W kolejnym punkcie omówiono procedurę wyłączenia sędziego od orzekania w procesie, ze szczególnym uwzględnieniem organu kompetentnego do rozstrzygnięcia sprawy wpadkowej o wyłączenie sędziego.

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W ostatnim punkcie zostały przywołane skutki uwzględnienia wniosku o wyłączenie sędziego, którymi są: po pierwsze, zmiana osoby sędziego, a nie stopnia postępowania; po drugie, ważność czynności procesowych dokonanych przed i po złożeniu wniosku o wyłączenie. Autor w kilku miejscach opracowania stawia pytania oraz proponuje doprecyzowanie przez ustawodawcę niektórych kwestii w przedmiocie instytucji wyłączenia sędziego. W konkluzji należy stwierdzić, że instytucja wyłączenia sędziego stanowi fundament i gwarancję rzetelnego oraz bezstronnego procesu kościelnego.

Słowa kluczowe: prawo kanoniczne procesowe, proces kanoniczny, bezstronność sądu, niezawisłość sędziowska, wyłączenie sędziego

Introduction

One of the main tasks of an ecclesiastical judge is to seek the objective truth concerning the case he is examining in a process. The trial, led by a judge, is aimed at achieving moral certitude, referred to by the 1983 Code of Canon Law (Canon 1608 § 1), and passing a judgement. This essential role of the judge plus the Church's concern to ensure an impartial and objective administration of justice supports the institution of recusal in the ecclesiastical judiciary. It has received interest from both the legislature and canonist doctrine, as well as the jurisprudence of the Holy See Tribunals, as will be discussed in what follows. My aim is to present as comprehensively as possible the institution of recusal and its impact on the impartiality of the court and, at the same time, the independence of the ecclesiastical judge. The reasons, procedure and effects of recusal on the entire process conducted before the ecclesiastical court will be presented, too. Such a presentation of the issue will contribute to a better understanding of the functioning of justice in the Roman Catholic Church.

1. Reasons for recusal

Impartiality (or lack of bias) or objectivity [Szymczak 1988a, 150] is firmly entrenched in canon law; it is one of the fundamental principles underlying the exercise of authority in the Church. It obliges the competent authority to make decisions not on the basis of personal beliefs or prejudice, but on objective criteria. Canon law invokes this principle by prescribing the rejection of any "favouritism," which the opposite of impartiality (Canons 524, 626, 830 § 2, 1181). Consideration for a person

(*acceptio personarum*), or partiality, was referred to by St Augustine of Hippo as being guided in one's decisions not so much by the factual state of affairs but by favouring one party due to some personal considerations, such as sympathy or appreciation. This kind of bias is opposed to distributive justice, as highlighted by St Thomas Aquinas [Majer 2019, 262]. Such partiality was also condemned by God, who "does not show favouritism" (Romans 2:11) or "there is not favouritism with him" (Ephesians 6:9). Any subject that has ecclesiastical power of governance must show consideration for the entire community of the Church, without favouring anyone, always rising above personal interests. Impartiality stems from both the principle of justice and specific norms regulating the exercise of power. This is apparent, in particular, at court: an ecclesiastical judge, when passing a judgement, must be free from any kind of external pressure [ibid., 263]. Judicial independence is a statutory principle of ecclesiastical justice, which posits a judge issues decisions independently, and they are made within the limits of the law and on the basis of his own conviction [Pikus 2002, 277].

The impartiality of the judge is guaranteed, for example, by recusal, which can be requested by a litigant. This institution was already codified in Canons 1613-1616 of the 1917 Code of Canon Law. Today, it is regulated in Canons 1448-1451 CIC/83. Regarding nullity cases, recusal is provided for in Articles 67-70 of the 2005 instruction *Dignitas connubii*, nos. 67-70. In Canon 1613 § 1 CIC/17, the legislator prescribed that a judge may not hear a case in several cases: by reason of consanguinity or affinity in any degree of the direct line and up to the second degree of the collateral line, guardianship (*tutela*) or curatorship, close intimacy or great aversion, expected benefit or the avoidance of harm; also by virtue of having served as a advocate or attorney in the case. If, on the other hand, he accepted a case involving one of the above circumstances, he could be recused at the request of either party in accordance with Canon 1614 § 1 CIC/17. In the CIC/83, Canon 1448 § 1 provides that a judge is not to accept a case for adjudication in eight cases: consanguinity or affinity in any degree of the direct line and up to the fourth degree of the collateral line; guardianship; curatorship; close acquaintance; great animosity; making a profit; the avoidance of a loss. Thus, it can be seen that this provision was only modified in terms of the degree of consanguinity and affinity in the lateral line (from the second to the fourth degree). The issue of recusing a judge who, in an earlier instance, acted as an advocate or attorney

for at least one of the litigants, is now regulated by Canon 1447 CIC/83. Moreover, this provision further adds to the catalogue of persons excluded *ipso iure* from adjudication in the trial a judge, the promoter of justice, the defender of the bond, a witness, and an expert who were previously involved in the case at hand. A violation of the above prohibition would result in the defect of irremediable nullity (Canon 1620, 1º) and constitute a suspicion of the judge's partiality, and thus would also be a legitimate reason for his recusing him at the request of a party – both the complainant and the defendant – in keeping with Canon 1449 § 1.

1.1. Consanguinity or affinity

Consanguinity is a relationship that occurs between people connected by blood ties and descended from a common ancestor [Szymczak 1988b, 774]. In contrast, affinity is defined as a family relationship holding between one spouse and relatives of the other spouse [ibid., 870]. In canon law, consanguinity is computed through lines and degrees. In the direct line, there are as many degrees as there are people born, excluding the ancestor. On the other hand, there are as many degrees in the lateral line as there are people in the two lines together, excluding the ancestor (Canon 108 CIC/83. In contrast, affinity arises by virtue of a valid marriage – even if not consummated – and exists between the husband and his wife's relatives and between the wife and her husband's relatives. It is calculated in such a way that the husband's relatives are in the same line and in the same degree in-laws (affines) of the wife, and vice versa (Canon 109). The figure below can be used to better understand how consanguinity and affinity are computed.

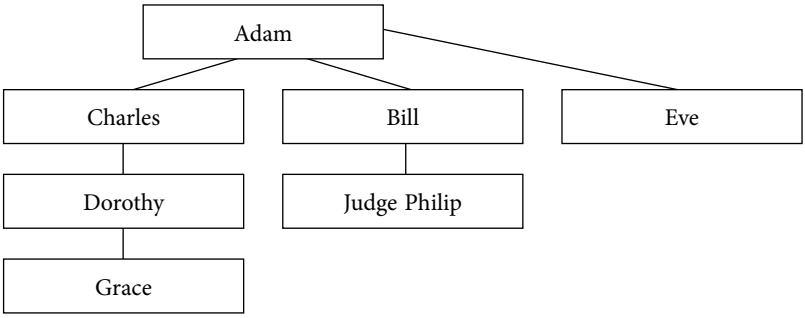

Figure 1. Computing consanguinity in canon law

Under Canon 1448 § 1 CIC/83, a judge who is a relative or an in-law of any of the litigants in all degrees of the direct line and up to the fourth degree of the collateral line is to be barred from adjudication on the grounds of consanguinity or affinity. It follows from the illustration above that Judge Philip is related to: Bill (first degree of the straight line), Adam (second degree of the lateral line), Eve (third degree of the lateral line), Charles (third degree of the lateral line), Dorothy (fourth degree of the lateral line), and Grace (fifth degree of the lateral line). Thus, Judge Philip is subject to recusal (unless he himself has previously abstained from adjudication) if at least one of the litigants were: Bill, Adam, Eve, Charles, or Dorothy. He is allowed to hear the case of Grace only, who is related to him only in the fifth degree of the lateral line.

1.2. Guardianship or curatorship

In exercising her powers, a minor person – that is, one under the age of 18 (Canon 97 § 1) – is subject to the authority of the parents or a legal guardian. The exceptions are those cases in which minors are exempted from the parents' or the legal guardian's authority under divine law or canon law (e.g., with regard to canon procedural law – Canon 1478). The ecclesiastical legislator provides a clause referring to state law regarding the appointment of a legal guardian and his or her exercise of authority over the minor – this is a case of canonising a civil law. The exceptions are those cases in which canon law stipulates otherwise, or the diocesan bishop has validly recognized in certain cases that care should be taken to appoint a guardian other than the one established by state law (Canons 98 § 2 and 1479). Guardianship in canon law is granted to minors. Its exercise is entrusted to the legal representative of a minor who does not have parents or whose legal interest is at variance with the legal interest of the parents. In addition, the Polish Civil Code[1] regulates in Article 13 § 2 that a guardianship is established – in accordance with Polish law – for a fully incapacitated person, unless he or she remains under parental authority. On the other hand, guardianship, as a rule, is granted to adults who need

[1] Act of 23 April 1964 – The Civil Code, Journal of Laws No. 2022, item 1360, as amended [hereinafter: CC]. The Civil Code distinguishes three types of legal capacity: full capacity (Articles 10 and 11), limited capacity (Articles 15-16) with its effects (Articles 17-21), lack of capacity (Articles 12-13) and the associated effects (Article 14).

special representation or assistance. Its exercise is entrusted to the statutory representative of an adult without capacity for legal act. A minor can also be placed in the care of a curator (Canon 105 § 2); the legal situation of the minor is not protected by the parents or a legal guardian, or there occurs a conflict of interest between the minor and the parents or the legal guardian. Additionally, Article 16 § 2 CC provides that a curator is appointed for a person who is partially legally incapacitated in accordance with Polish law. Under Polish law, guardianship and curatorship are regulated also by the Family and Guardianship Code,[2] Articles 145-184. They are among the institutions serving to protect legally incapacitated individuals. Should a potential conflict of interest arise, a judge who has guardianship or care of one of the parties is recused by virtue of having such guardianship or care.

1.3. Close intimacy or aversion

Intimacy is defined as a close, familiar relationship [Szymczak 1989c, 980]. Aversion, on the other hand, is an inimical feeling, or a dislike of someone or a prejudice against someone [Szymczak 1988b, 323]. Recusal applies to a judge who is related to one of the litigants by close intimacy (*intimae vitae consuetudinis*) resulting from, for example, cohabitation, running a business together or having a very close friendship with one of the parties. Similarly, a judge who has a dislike for any of the parties (*magnae simultatis*), which may be due to things like intense aversion leading to antipathy or intransigent hatred toward any of the parties [Del Amo 2023, 895]. At no point does the ecclesiastical legislator enumerate situations involving close intimacy or aversion. Therefore, based on the doctrine of canon law and life experience, it should be judged prudently in each particular case whether the situation meets the criteria of *intimae vitae consuetudinis* or *magnae simultatis*.

1.4. Expected advantage or avoidance of damage

Finally, recusal applies to a judge who expects a material or spiritual advantage (*lucri faciendi*) or wants to avoid a damage (*damni vitandi*), including material or spiritual. This is because, typically, a judge who expects

[2] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 2020, item 1359.

some kind of advantage from either of the litigants or wants to avoid a damage has strong ties with one of the parties. His judgement might result from a biased decision influenced by an expectance of a specific outcome (e.g., by virtue of being appointed for a specific position) [Pawluk 2016, 209]. The notion of expected advantage also informs the ban on accepting any gifts by reason of his handling the case, provided for in Canon 1456 and Article 74 DC. Such reprehensible conduct could arouse reasonable suspicion that the judge's impartiality is impaired.

1.5. Other causes

We can ask this: Apart from the cases mentioned above, can an ecclesiastical judge be recused under other circumstances? I believe so for at least two reasons. Canon 1448 § 1 mentions only the cases where a judge is not allowed to undertake a case in which he has a stake of any kind. However, there is a fundamental difference between a judge's withdrawal from hearing a case and his recusal at the request of any of the litigants. A judge's withdrawal (*iudex inhabilis*) from adjudication in a given case is his sovereign decision, made in compliance with canon law and his own conscience. In contrast, the recusal of a judge (*iudex suspectus*) occurs at the request of a litigant, so in this case the initiative lies with the litigant, not the judge. That a judge can be recused for some other reasons was also advocated by the rotal jurisprudence[3] when the CIC/17 was in force, and by some canonists. Thus, it seems valid to state that also in the current state of the law, a judge can be recused whenever any of the litigants harbours a legitimate suspicion that the judge is guided by a preference for some of the litigants (Article 67 § 1 DC). In other words, a judge can be recused in any case in which there is a reasonable suspicion of impartiality.

When creating, applying and interpreting canon law, it is also necessary to take into account its specific aspects, e.g., the *forum internum*.[4] Therefore, we can ask: Does the fact that a judge happens to be a confessor of any of the litigants constitute sufficient grounds for his recusal? This question may initiate further discussion.

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[3] Dec. c. De Jorio of 15 February 1964, RRD 56 (1964), p. 143, n. 8, as cited in: Del Amo 2023, 895.

[4] For more on this, see Erdö 2006, 11-35.

In nullity cases, DC provides a kind of interpretive boundary for recusal, which in Article 68 § 5 regulates that procedural acts, when lawfully performed by a judge, cannot substantiate a request for his recusal, except in cases described in Canon 1448 § 1. Therefore, in nullity cases, a judge's autonomous procedural decision that is disadvantageous to either party will never be reason enough for recusing the judge. At the same time, this provision narrows down too broad an interpretation of the reasons for recusal, as it could turn out harmful for the trial. It seems logical that this principle can also be applied in other processes conducted by ecclesiastical tribunals.

The impartiality of judges is also addressed by a number of other provisions on the functioning of ecclesiastical courts: requirements for the office of judge (Canons 1420 § 4 and 1421 § 3), the stability of his office (Canons 1420 § 5 and 1422), the independence of the judicial vicar from the diocesan bishop in adjudication (Canon 1420 § 2), the possibility for a single judge to appoint assessors (Canons 1424 and 1425 § 4), the stability of the adjudicating panel (Canon 1425 § 5), handling cases in an established order (Canon 1425 § 3), handling cases in the order in which they are filed (Canon 1458), openness of proceedings (Canon 1598 § 1). What is more, judicial impartiality is supported by all other norms aimed at guaranteeing the equality of litigants (e.g., Canons 1434, 1508 § 1-2, 1514, 1523, 1533, 1544, 1554, 1615, 1637 § 1, 1659 § 1, 1660).

The guarantee of objective and impartial administration of justice is also the duty to strictly adhere to material and procedural norms, from which the diocesan bishop cannot grant dispensation (Canon 87 § 1). A violation of the norms of judicial process would undermine the authentic Magisterium of the Church and the canonical legal order [Rozkrut 2003, 701]. Similarly, the principle of impartiality would be offended if one, in deciding court cases, were guided by emotions, feigned sympathy, misconceptions or a pseudo-pastoral desire to assist in difficulties.[5] Offending the principle of impartiality can also, under specific circumstances, tantamount to abuse of power (Canon 1378 § 1), simony (Canon 1380) or bribery (Canon 1377 § 1).

[5] See also Ioannes Paulus PP. II, *Ad Romanae Rotae auditores, oficiales et advocatos coram admissos* (29.01.2005), AAS 97 (2005), p. 164-66; XVI, *Ad sodales Tribunalis Romanae Rotae* (29.01.2010), AAS 102 (2010), p. 110-14.

2. The recusal procedure

A recusal procedure commences when a judge himself does not withdraw from handling a case, and a party to it requests recusal. Such an exclusion is a legal instrument, whereby the litigants can demand that the court officially consider their application for recusal [Krukowski 2007, 75]. In the 1917 Code of Canon Law, the legislator provided for a recusal procedure – Canons 1614 § 1-2,[6] 1615 § 3[7] and 1616.[8] In the current Code, the legislator regulates this procedure in Canon 1449 § 1 and grants a procedural entitlement to recuse a judge to both the petitioner and the defendant. It seems logical that such power is also vested in the defender of the bond and the promoter of justice, if they are involved in the process. Should circumstances be revealed to suggest that the principle of impartiality might have been breached by the court, and at the same time the procedural guarantees of independence of the ecclesiastical judge be impaired, it is necessary to grant the party's request and recuse the judge suspected of being biased. The filing of a request for recusal puts the court under the obligation to consider the incidental case in accordance with the provisions of Canons 1587-1591 CIC/83. The request must be made, in writing or orally, through the judge presiding over the principal case (Canon 1588).

When the objection relates to a judge who is not a judicial vicar or a deputy judicial vicar, it is considered by a judicial vicar (called an official) or his deputy (Canon 1449 § 2). It seems that in the case where the objection involves a judge who is a member (not the presiding judge) of the collegial panel – either clerical or secular – the most practical solution would be for the incidental case to be dealt with by the presiding judge, who, as a matter of principle, should be a judicial vicar or an adjutant judicial vicar (Canon 1426 § 2). If, in turn, the objection involves a judicial vicar or an adjutant judicial vicar, such a request must be considered by the diocesan

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[6] Canon 1614 § 2: "Si ipsemet Ordinarius sit iudex et contra ipsum exceptio suspicionis opponatur, vel abstineat a iudicando vel quaestionem suspicionis definiendam committat iudici immediate superiori."

[7] Canon 1615 § 3: "Quod si ipsemet Ordinarius declaratus fuerit suspectus, idem peragat iuder immediate superior."

[8] Canon 1616: "Exceptio suspicionis expeditissime definienda est, auditis partibus, promotore iustitiae vel vinculi defensore, si intersint, nec in ipsos suspicio cadat."

bishop (Canon 1449 § 2) or the bishop moderator of the court (Article 24 § 2 DC), who by law presides over the tribunal (Canon 1419 § 1).

The instruction *Dignitas Connubi* uses the concept of bishop moderator. Typically, he is the diocesan bishop who presides over his tribunal. In an interdiocesan tribunal, the role of judicial moderator is performed by a bishop appointed by the diocesan bishops who constitute the tribunal. In a tribunal of second instance, constituted by the conference of bishops (Article 25, 3º-4º DC), the moderator of the tribunal is a bishop designated for that function by the conference. However, bishops can decide for themselves whether they will make decisions regarding the operation of the interdiocesan tribunal collegially, and consequently no bishop moderator of the court needs will be needed, or whether they will delegate the presidency of the interdiocesan tribunal to a bishop moderator designated by them. The legislator does not explicitly require that the bishop moderator be the bishop of the diocese where the interdiocesan tribunal is located; nor does it require that it be one of the bishops who constitute this tribunal. However, it would be the most advantageous if the bishop moderator were one of the diocesan bishops constituting the tribunal (Article 26 DC). In special cases, it is also possible for bishops to designate as the moderator a bishop from another area, for example, a retired bishop who was trained as a canonist, or one of their auxiliary bishops [Sztychmiler 2007, 61].

If an application were lodged to recuse a judge who were a bishop, the legislator obliges him to refrain from adjudicating 1449 § 3). Now, the question arises: If the objection involved a bishop who is not an ordinary, such as an auxiliary bishop who serves as a diocesan judge, would such a bishop also – by operation of law – abstain from adjudicating? It seems that in the current state of the law, any bishop, including an auxiliary one who is a diocesan judge, is obliged to refrain from participating in the process if a request for recusal has been filed against him. It follows that the legislator, in Canon 1449 § 3, uses the term *episcopus* 'bishop,' and not *episcopus diocesianis*, as in Canon 1419 § 1 [Lewandowski 112-14]. In my opinion, however, this regulation seems unfounded. If the diocesan judge is an auxiliary bishop who does not, in principle, preside over the tribunal, why should he be treated differently from other diocesan judges? Should the mere fact of episcopal ordination play such a significant role in recusation (leaving aside, of course, the regulations involving the diocesan bishop or the bishop moderator of the tribunal)? I believe

that the following wording of Canon 1449 § 3 would afford more precision and relevance: *Si Episcopus dioecesanus sit iudex et contra eum recusatio opponatur, ipse abstineat a iudicando*. Clarifying this provision would thus not lead to unnecessary doubts of interpretation. The logical consequence of such a solution would be to have a judicial vicar consider an application to recuse a judge who is a bishop but not a diocesan bishop or bishop moderator. If, on the other hand, the auxiliary bishop were also a judicial vicar (which is unlikely), then the request for his recusal would have to be considered by his superior – either the diocesan bishop or the moderator of the tribunal.

Also, a note should be taken of recusal that can be applied in the process *coram Episcopo*, the former instituted by the motu proprio *Mitis Iudex Dominus Iesus*.[9] In a briefer process (*processus brevior coram Episcopo*), a request for recusal lodged by a party to the case, in this case the diocesan bishop, makes it necessary to examine a marriage annulment case in the ordinary process [Majer 2015, 179]. This follows from the disposition of the previously discussed Canon 1449 § 3, pursuant to which a judge who is a diocesan bishop against whom an allegation of bias has been levelled is required to abstain from adjudication. It seems that even in a situation where such a request were not sufficiently motivated, the diocesan bishop, by the very fact that a request for his recusal has been filed, is obliged to refrain from further participation in the process. There is a legitimate concern, it seems, that a diocesan bishop, who as a rule is actively involved in the life of the local Church, will more often than other diocesan judges be liable to recusal with respect to cases involving people with whom he has some kind of relationship (friendly or otherwise), such as politicians or persons involved in the life of the Church. This is because a legitimate suspicion may arise that his motivation is personal. Therefore, it is recommended that the bishop not meet with the parties before they petition for marriage annulment, since any form of assistance on his part would later exclude him as a judge in a possible trial [Majer 2017, 146].

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[9] Franciscus PP., Litterae apostolicae motu proprio *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 958-67; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html.

To continue our deliberations on authorities competent to consider a request for recusal, let us now move on to discuss cases in which the judges are members of the Holy See tribunals. When the trial is conducted before the Tribunal of the Roman Rota in the second and further instances (Canon 1444), a party to the case also has the option of requesting the recusal of the judge if he is an auditor of the Roman Rota. In such a situation, the request is examined by the Supreme Tribunal of the Apostolic Signatura (STAS) (Canon 1445 § 1, 3º; Article 196, 3º of the Apostolic Constitution *Praedicate Evangelium*[10]).

If the case is handled by the STAS, in keeping with Canon 1445, the parties also have the option to request recusal. In the situation where the recusal request does not involve a cardinal, provisions of the CIC/83 are applied by analogy, and therefore the case is decided by the prefect of the STAS [Malecha 2009, 575]. When an *exceptio suspicionis* is brought against the prefect or a cardinal of the STAS, the case is handled by the Roman Pontiff in accordance with Articles 23 and 24 of the motu proprio *Antiqua ordinatione*.[11]

Typically, a recusal request is lodged by a party or parties before the joinder of the issue (after the parties have been served the decree appointing the adjudicating panel). However, it can also be submitted at any other stage of the process if the allegation of bias emerged "after the issue was already joined" (Canon 1459 § 2). After the application is filed, a dispute arises with the following parties: the person or persons requesting recusal

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[10] Franciscus PP, Costituzione apostolica *Praedicate Evangelium* sulla Curia Romana e il suo servizio alla Chiesa e al Mondo (19.03.2022); English text available at: https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html.

[11] Benedictus PP. XVI, Litterae apostolicae motu proprio datae *Antiqua ordinatione* Quibus Supremi Tribunalis Signaturae Apostolicae lex propria promulgatur (21.06.2008), AAS 100 (2008), p. 513-38; English text available at: https://www.vatican.va/content/benedict-xvi/en/apost_letters/documents/hf_ben-xvi_apl_20080621_antiqua-ordinatione.html. See Pontificia Commissio Decretis Concilii Vaticani II Interpretandis, *Responsa ad proposita dubia* (01.07.1976), AAS 68 (1976), p. 635. The following was asked: "1. *Utrum proponi possit exceptio suspicionis adversus singulos S. R. E.* Cardinales Signaturae Apostolicae, et quatenus affirmative; 2. Quaenam via et ratio sit sequenda ad exceptionem suspicionis definiendam." The Commission's reply of 1 July 1976 was: *Affirmative ad primum, seu exceptionem suspicionis adversus singulos S. R. E. Cardinales Signaturae Apostolicae moveri posse; ad secundum, res deferatur Summo Pontifici.*

and the judge against whom the objection has been made. However, this dispute also indirectly involves the parties to the main dispute and, if they participate in the process, the defender of the bond and the promoter of justice. The participation of the promoter of justice is mandatory in penal processes. In addition, he may take part in contentious trials in which, as deemed by the bishop, the public good may be jeopardised. The legislator also makes obligatory the participation of the promoter of justice in cases in which he has appeared in previous instances (Canons 1430-1431). On the other hand, the participation of the defender of the bond is mandatory in cases of nullity of sacred ordination or nullity or dissolution of marriage (Canons 1432-1433).

A judge who is competent to consider a request for recusal is obliged by the legislator to hear the parties before making his decision. Additionally, he is also to consult the promoter of justice and the defender of the bond, if they are participating in the trial and no objections have been made against them. A request for recusal is to be decided as promptly as possible (*expeditissime*), that is, in the shortest possible time (Canon 1451 § 1).

The filing of an application for recusal results in the resolution of an incidental case and the issuance of a legally and factually motivated decree by the authority competent to consider this request. No appeal is possible against this decree (Canon 1629, 4º-5º). If, however, there were grounds for that, such a decree can be contested by filing an action for its invalidity or restoration of the previous state, depending on the type of defect this decision entails.[12]

3. Effects of recusal

The 1917 Code of Canon Law provided for a recusal procedure in Canon 1615 § 1-2.[13] Currently, one of the effects of granting a recusal request is the replacement of the recused judge with another judge. The legislator provides that in such a case the person, not the grade of the trial, is to be

[12] Dec. c. Sabattani of 25 May 1962, RRD 54 (1962), p. 284, nos. 42-43, as cited in: Del Amo 2023, 896.

[13] Canon 1615 § 1 would afford more precision and relevance: "Si iudex unicus aut aliquis vel etiam omnes iudices qui tribunal collegiale constituunt suspecti declarentur, personae mutari debent, non vero iudicii gradus." § 2: "Ordinarii autem est in locum iudicum qui suspecti declarati sunt, alios a suspicione immunes subrogare."

changed (Canon 1450). This means that a new judge must be appointed, but within the court conducting the trial. This general rule means that a case conducted by a court of first instance is not handed over to a court of appeal if a judge is recused. This is because recusal is personal at all times – that is, it always applies to a single person or persons, and not the court as an institution. Were it impossible to appoint another judge in place of the excluded judge, for example, on account of staffing shortages in the court in question or the lack of a judicial candidate who, after a possible nomination, could be appointed to replace the recused judge, the main trial should be entrusted to another competent court. In this case, the grade of the court (the instance of the dispute) does not change. In nullity cases the jurisdiction of the court is regulated in Canon 1672. If there is no other competent court to handle the main trial (in this case, for the annulment of a marriage), then, in accordance with Article 69 § 2 DC, a request is to be lodged with the STAS, detailing the situation and requesting the appointment of a competent court to hear the case for the annulment of the marriage.

Other consequences of granting a request for recusal relate to the validity of procedural acts taken before the request was filed; namely acts performed both before the issue was joined (e.g., accepting a petition in marriage nullity cases) and acts placed taken after the joinder of the issue, that is, after the issuance of the decree establishing the litigation formula, which specifies, among other things, the grounds for marriage nullity based on which the process will develop. The law provides that, in principle, procedural acts placed before the filing of a recusal application are valid (Canon 1451 § 2, *pars prima*). Procedural acts performed after the request has been filed are to be rescinded if a party (the law does not specify which, so it should be assumed that it is both the petitioner and the defendant) requests that these acts be rescinded within ten days of granting the recusal (Canon 1451 § 2, *pars secunda*). This time limit is to be computed as per Canon 203. It seems reasonable, therefore, that the decree excluding the judge should contain information on this entitlement of the litigants.

The law provides for acts taken after the filing of a request for the recusal of any judge, not just the one whose impartiality has been questioned. In a situation where an application is filed to recuse a judge who is a member (not the presiding judge) of the adjudicating panel, subsequent decrees

issued by the presiding judge can be voided if either litigant lodges a request to that effect.

Summary

Summing up our deliberations on the institution of recusal in the canonical process, we clearly notice the ecclesiastical legislator's intent to prevent situations where the judge could be biased with regard to the sentence being handed down. This reflects the Church's concern to guarantee its faithful access to impartial and objective justice. The ecclesiastical legislator does not regulate the reasons for recusal enumeratively, while listing only some cases, mentioned in the first part of the paper. The conclusion can be drawn, however, that any situation involving a legitimate suspicion of bias on the part of the judge or judges can be a sufficient reason for recusal. The requirements for candidates for the office of ecclesiastical judge also seem justifiable, because in deciding to recuse a judge one will need to demonstrate life and judicial experience necessary for a prudent assessment whether the impartiality of a judge of some judges can indeed be questioned. The legislator also regulates the procedure for excluding a judge from adjudication. In the course of our reflections, questions emerged of our analysis of ecclesiastical legislation, canonist doctrine and judicial practice, which are not always possible to answer unequivocally. Ultimately, the effects of a decision on recusal will be decisive for the development of the main process, in which an allegation of judicial bias has been submitted and a respective request has been granted. The effects include the unchanged degree of the trial (as a rule) and the validity of acts placed before the lodging of a recusal request. After analysing the institution of recusal, we become convinced that this institution lays the foundation for and guarantees a fair and impartial ecclesiastical trial.

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DECLARATION OF INTENT TO LIVE IN MARRIAGE IN THE POST-MODERN ERA

OŚWIADCZENIE WOLI W CELU WSPÓLNEGO POŻYCIA W MAŁŻEŃSTWIE W EPOCE PONOWOCZESNEJ

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Abstract

The Author points out that modern times, the so-called postmodern era, is characterized by a significant increase in the uncertainty of the behaviour model, a sense of vacillation between right and wrong, a sense of futility when trying to control chaos. A person increasingly entangled in a complex system of social connections will find herself exposed more and more to the situation where here autonomy will always have some impact on other participants. The network of power holds sway over people by influencing their minds, mainly but not exclusively through multimedia mass communication networks. The presented concepts, properly selected and hierarchical, not only provide an indispensable means of expression, but a pre-condition underlying the so-called worldview. Being hooked on the Web blurs the clarity of thought, judgements, opinions, preventing information gained online from being verified. Therefore, technology aims to increase control of people's thoughts, views, attitudes, judgements by influencing their realization, creating a model of the new human being. They shape the private worldviews of individual people. Thus, the source of power is the construction of meanings in people's minds. The way individuals think determines the fate of institutions, norms and values around which societies are organized. It should be noted that emotions dominate even the intellect. The networked society can no longer make a conscious and free declaration of intent, because individuals are subject to the viewing world that is presented online. Thus, they make a flawed declaration of intent because of the erroneous perception of the reality. In social life, an atrophy of the will is evident, along with responsibility for oneself, for others, which can be seen as an offshoot of the socialization of post-modern society, including narcissism, the pursuit of constant stimulation, consumption, the cult of youthful

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immaturity, hedonism, the prolonged period of children's dependence on overprotective parents, which consequently leads to the formation in them of personalities incapable of effort, concentration, labour and sacrifice, in order to realize acts of will. Moral rules have lost their original impact, goodness is equated with benefit and moral norms are put on a par with rules of conduct that bring gains. A serious crisis of interpersonal relationships emerges, relationships are often devoid of positive emotions, emotional relationships, bonds, consequences and responsibility. This trend must be stopped, but first it must be well understood.

Keywords: declaration of intent, marriage, post-modern era, world view, values

Abstrakt

Autor wskazuje, że czasy współczesne, czyli tak zwana era ponowoczesna charakteryzuje się wyraźnym wzrostem niepewności wzoru zachowania, poczuciem chwiejności między dobrem i złem, poczuciem daremności wysiłków w opanowaniu chaosu. Osoba uwikłana coraz silniej w skomplikowany układ powiązań społecznych, coraz silniej od tych powiązań uzależniona, coraz częściej będzie narażona na to, że jej jakiekolwiek przejawy autonomii z jej strony będą zawsze miały pewien refleks na sytuację innych uczestników. W sieci władzy jakiej się poddała sprawuje nad nią władzę wpływając na jej umysł przede wszystkim, choć nie wyłącznie, za pomocą multimedialnych sieci komunikacji masowej. To prezentowane pojęcia odpowiednio dobrane i zhierarchizowane nie tylko stanowią niezbędny środek wyrazu, lecz warunkują wstępnie, stojący u podstaw światopoglądu tak zwany obraz świata. Uzależnienie od sieci wyklucza swobodę myśli, ocen, opinii, nie pozwalając na weryfikację informacji uzyskanych w sieci. Technologia zmierza więc do coraz większego kontrolowania ludzkich myśli, poglądów, postaw, ocen wpływając na ich urzeczywistnianie, tworząc model nowego człowieka. To one kształtują prywatne światopoglądy poszczególnych ludzi. Tak więc źródłem władzy jest konstruowanie znaczeń w ludzkich umysłach. Sposób myślenia jednostkowych osób decyduje o losie instytucji, norm i wartości wokół których zorganizowane są społeczeństwa. Zauważyć należy, iż emocje zdominowały rozum a nawet intelekt. Społeczeństwo usieciowione w tym jednostkowe osoby nie potrafią już składać świadomego i swobodnego oświadczenia woli, bowiem podlegają i ulegają wpływom świata oglądu, który prezentowany jest przez sieć. Składa więc oświadczenie woli pod wpływem błędu co do otaczającej go rzeczywistości. W życiu społecznym widoczna jest atrofia woli, a wraz z nią odpowiedzialność za siebie, za innych, która może być ujmowana jako pochodna socjalizacji społeczeństwa ponowoczesnego, m.in. narcyzm, pogoń za ciągłą stymulacją, konsumpcja, kult młodzieńczej niedojrzałości, hedonizm, wydłużający się okres zależności dzieci od nadopiekuńczych rodziców, która w konsekwencji prowadzi do kształtowania u nich osobowości niezdolnych do wysiłku, skupienia, trudów i wyrzeczeń, w celu realizacji aktów

woli. Reguły moralne utraciły właściwy swój smak i sens, dobro utożsamiane jest z korzyścią a normy moralne z zasadami działania, których przestrzeganie przynosi jakiś pożytek. Ujawnia się poważny kryzys relacji międzyludzkich, relacje często są pozbawione pozytywnych emocji, związków uczuciowych, więzi, konsekwencji i odpowiedzialności. Temu zjawisku należy położyć kres, ale najpierw trzeba je dobrze zrozumieć.

Słowa kluczowe: oświadczenie woli, małżeństwo, epoka ponowoczesna, światopogląd, wartości

Introduction

Over the past few years, a number of important research topics have been addressed, which are also becoming useful for the modern science of family law as syntheses derived from empirical studies. Of note is the fact that in family law the personal, as well as moral socioeconomic and political elements play an important part. Diverse political and ideological trends, scientific and cultural theories are seeking to redefine marriage. Notably, contemporary societies are diversified culturally and ethically, but it should always be remembered that marriage is a legal union between a man and a woman, arising from their will which they manifest as equals for the purpose of a community of life, their mutual good, and for achieving goals of their family. It represents "social capital" grounded in mutual trust and reliability, solidarity, subjectivity, dialogue and responsibility, being there for some purpose. The issue of free will entails tangible consequences for our insight into ourselves, our relationships with others, and for our moral and legal practices. The assumption that we have free will informs many of our attitudes and judgements that we make on a daily basis. Contemporary theories of free will can be said to fall into two broad categories: those supporting the claim that humans possess free will and those who are sceptical about that. We might say that free will, as it is usually understood by modern philosophers, serves to control human action, which a special kind of moral responsibility entails. More specifically, it is power or an ability proper to subjects of action, which validly subjects them to reprimand and praise, punishment and reward. Such an understanding of free will as related to moral responsibility brings the philosophical and the legal dispute close to issues that are relatively concrete and undoubtedly relevant to our daily lives. To be sure, the celebration of marriage is the outcome of an agreement, the will of both prospective spouses,

expressed in the prescribed form and creating the legal relationship of marriage. In this article, I present some reflections outlined in the title. The text is the outcome of research that employs methods of analysis and critique of the literature using the process of mental cognition. The fundamental thing in the post-modern era is the declaration of intent.

I.

The world is changing right before our eyes. A genuine mental revolution is in progress, and human frivolity regarding words is appalling. It is generally accepted that a declaration of intent communicates to another person (or persons) a desire to establish, abolish or change a certain relationship. According to the Civil Code,[1] the will of a person performing a legal act may be expressed by any behaviour of that person revealing her will sufficiently – even if this will is expressed in electronic form. A declaration of intent to be communicated to another person is considered made if the manner in which it is articulated allows that person to be acquainted with its content. A declaration of intent should be interpreted given the circumstances in which it was made, the rules of social intercourse and established customs, as well as the regulations contained in the legal norms of the code, for example the Family and Guardianship Code.[2] It should be examined what the consensual intention of the parties was and their purpose and perception of reality rather than relying on its literal meaning. The basic prerequisite for the successful conclusion of any marriage, regardless of its secular or religious form, is the unequivocally expressed and consensual intent of the prospective spouses to be bound by the nuptial knot. According to the legislator, if the secular procedure is applied, they should submit declarations that they are entering into marriage with each other, but if the religious form is followed, they should declare their intent to concurrently enter into a marriage governed by Polish law, Article 1 § 1-2 FGC. What matters is the content of the statements, not how they are expressed.

As the legal act of marriage is governed by personal law, the validity – or, perhaps, avoidance – of the legal effects triggered by a defective

[1] Act of 23 April 1964 – The Civil Code, Journal of Laws No. 16, item 93 as amended [hereinafter: CC].

[2] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 9, item 59 as amended [hereinafter: FGC].

declaration of intent of the prospective spouses is normalized differently than in the Civil Code. Article 17 FGC excludes the application of CC provisions on defects in declarations of intent. It is stipulated that a marriage can be annulled only for the reasons specified in the FGC. The conclusion of marriage is a legal act relating to the family. In the doctrine, the fact that Article 1 FGC uses the term "declaration," not "declaration of intent," was interpreted that this provision utilises a qualitatively different type of declaration, but it goes without saying that what is meant here is a declaration of intent. It is clear from the wording of Article 1 § 2 FGC that the legislator allows only simultaneous marriage celebration in both forms. Marriage is among the elements of a person's civil status, and one of the civil status rights is the right to be considered the spouse of a specific person. The most prevalent opinion says that the conclusion of marriage belongs to the category of so-called family-law actions – that is, a special type of legal acts that produce effects under family law. Marriage celebration hinges on the submission of relevant declarations of intent by both prospective spouses, so it falls into the category of bilateral acts. In view of the obligatory participation of another subject – the head of the registry office or the clergyman[3] before whom appropriate declarations are made – it can be reasoned that we are dealing here with specific civil-law events. The constituents of marriage are declarations of the prospective spouses and the participation of the head of the registry office or a cleric. A human being is the subject of free and conscious actions, the subject of deeds through which he fulfils himself – as the object of self-determination, which is a manifestation of human dignity. The fact that a human being is a person is also manifested in his ability to cooperate with others towards the common good. A declaration on entering into marriage can be made (a) typically in person, by virtue of Article 1 § 1-3 FGC; (b) exceptionally, by a proxy of one prospective spouse and in person by the other party, as stipulated in Article 6 FGC.

Through a declaration of intent, prospective spouses are joined by a personal community. The willingness to take responsibility for the marriage thus created is an inalienable challenge facing the persons entering into

[3] Announcement of the Speaker of the Sejm of the Republic of Poland of 9 November 2018 on the promulgation of the uniform text of the Act – The Law on Civil Status Records, Journal of Laws item 2224 as amended.

marriage. Founding a marriage on emotions – and often emotions – is not sufficient, because they are ephemeral. Love should be learnt and lived in freedom and responsibility. Only with their declaration of intent (the celebration of marriage) will the spouses embark on a common path, difficult but joyful – to preserve that first "yes" forever, making life together a beautiful adventure. The process of building interpersonal references is still a current challenge, and its success depends on respect for the rights of all people. As Agnieszka Belcer and Anna Wojnarowska note, the priority domain where this postulate is realised is marriage and the family founded on it, being the primary and natural environment for life and development [Belcer and Wojnarowska 2014, 76]. Human nature is relational and enables people to build personal bonds. In regard to the personal dimension, we should highlight that family life should be a source of personal (human) growth, both spiritually, mentally and physically. This "yes" comes true in culture, in an ordinary relationship, in the everyday effort of living together through shared responsibilities, mutual care for each other, mutual responsibility, solidarity, direct communication, dialogue and love. Opportunities to realize "yes" are within easy reach as they present themselves every day – all one needs is sensitivity, empathy, concern, dialogue. "Yes" is born in the face-to-face encounter. In this dialogue, three elements must come together: coexistence, competence, and commitment. Marriage cannot be seen through the prism of social bonds; it rests on attachment, togetherness and responsibility. This bond cannot become a contractual form of relationship, stemming from competitive and conflict anthropology of Thomas Hobbes, where contract presents an element that neutralizes the ever-dormant conflict. The sum of individual benefits alone cannot make up a good marriage, nor can it provide a protective cover against all misfortunes, worries or problems. Radical individualism is a germ that is the most difficult to defeat. In the age of fluid modernity, a declaration on entering into marriage is subject to various influences, not known before. Formal conditions of the effective conclusion of marriage do not protect against the failure to realise the declaration of intent. Information society, being post-modern, creates an illusory realm in which a virtual world is substituted for reality. Ubiquitous digital technology often brings the threat of addiction, isolation and increasing loss of touch with reality, impeding the development of authentic human relationships and responsibility. A person has no conception of being manipulated. Negative phenomena of mass culture

create a virtual community of beliefs and opinions, where legal opinions are shared among various participants in the process of understanding law. The content of these assessments largely depends on the nature of a particular person, especially her psychological needs and third parties construing law. In so doing, a person involved in interpreting the law is under the influence of power understood not only in ideological but also political terms. Rather often, discussions of autonomy inspire the conclusion that modern man, who understands the importance of autonomy as a particularly precious value in a technological and globalised world, is increasingly torn by contradictory, if not opposing, aspirations. While striving to secure a niche for himself, an information enclave, the maximum secrecy of his personal data, his privacy, man is at the same time more of an absorber, a consumer of knowledge and information about others. Everything becomes a kind of spectacle that can be followed, watched – life is under constant surveillance. If we were to talk about a person's declaration of intent, we would have to penetrate and understand the nature of contemporary man and his characteristics – to this end, we can avail ourselves of the results of research carried out by various specialists, such as behaviourists, psychoanalysts, humanists, or anthropologists.

II.

He who does not notice changes in the modern world has lost touch with reality – there is a genuine mental revolution under way. "This time is not just an era of change, but a time of changing eras," says Pope Francis. The present iGEN generation is growing up with a smartphone in hand, surfing the Internet, hooked up to mobile devices and completely unprepared for adulthood. And what does this mean for all of us? The percentage of young people attending religious instruction is falling. In 2010, 93% of 17–19-year-olds declared attendance, but now the figure is down to 54%. Figures for religious practices among young people are dramatic. The number of respondents who declare belief in God has fallen from 94% to 84%, and the percentage of regular practitioners has shrunk from 70% to under 42% (data from the latest CBOS report). Religiousness is no longer inherited, and growing secularisation is affecting girls and young women the most heavily, a group that has hitherto passed on the faith to the next generation. Today's interest in spirituality is undermined by the lure of a consumerist

and shallow life and the attempts to turn meditation into an addition to an enjoyable and fun lifestyle.

We must be mindful of the situation where young people, who have been moulded by the post-modern era, often view the world through IT and mass media, especially the Internet. One speaks today of a fourth industrial revolution, which is essentially digital. Most importantly, it is characterised by the ubiquity of the Internet, ever smaller and more efficient sensors, artificial intelligence and machine learning. We live in the age of knowledge and information – the sources of new forms of power, which is very often anonymous. The changes in social and political life have been profoundly influenced by the ideology of postmodernism, especially the so-called Frankfurt School (Max Horkheimer, Theodor W. Adorno, Herbert Marcuse, Jürgen Habermas), which on the basis of the thought of Karl Marx, Antonio Gramsci and Leon Trotsky founded neo-Marxism, otherwise known as the New Left [Kiereś 2000; Bartyzel and Dominiak 2006, 36ff.; Sareło 1998]. Also, worth considering is the philosophy and theory advanced by the "prophet of the 21st century", Yuval Noah Harari, who is considered the Friedrich Nietzsche of the present times. He preaches a new philosophy, which constitutes a big reset grounded in eugenics and transhumanism as a religion. He contends that free will is nonsense because our will is to be transformed into algorithms with a view to controlling and monitoring other people. Fierce attacks have been launched at the new generation, involving the washing of children's and young people's brains. All values should be curtailed. Our goal, therefore, is to relinquish our consciousness and free will in order to destroy our civilization. The Bible should be dismissed. Young people, fascinated by technological innovations, such as AI, fall into the traps of which Harari says. He accords a divine dimension to humanity, saying that nanotechnology is the future.

In 2 Tim 3,4 we read: "But mark this: There will be terrible times in the last days. People will be lovers of themselves, lovers of money, boastful, proud, abusive, disobedient to their parents, ungrateful, unholy, without love, unforgiving, slanderous, without self-control, brutal, not lovers of the good, treacherous, rash, conceited, lovers of pleasure rather than lovers of God – having a form of godliness but denying its power. Have nothing to do with such people. They are the kind who worm their way into homes and gain control over gullible women, who are loaded down with sins and are swayed by all kinds of evil desires, always learning but never

able to come to a knowledge of the truth. […] For the time will come when people will not put up with sound doctrine. Instead, to suit their own desires, they will gather around them a great number of teachers to say what their itching ears want to hear. They will turn their ears away from the truth and turn aside to myths. But you, keep your head in all situations, endure hardship, do the work of an evangelist, discharge all the duties of your ministry."[4]

A new society has emerged, which Peter Hahne describes as a pleasure society characterized by a widespread decline in authority and family life, a crisis of national and patriotic values, disregard for one's own country, appallingly low standard of education, career pursuit, idleness and extreme consumerism [Hahne 2007].[5] The existence of the so-called fun society (*Spassgesellschaft*) has led to a very dangerous consequence – the loss of seriousness. The culture of pleasure stands in the way of thinking about what is truly important in the life of every individual and society. The emergence of the Spassgesellschaft was due to the cultural revolution, which questioned the traditional system of values [Peeters 2010, 43ff.].

A new idea of the post-human has emerged, which is associated, among other things, with post-genderism, which is a social, political and cultural movement promoting the voluntary elimination of the social sexes. The idea of gender forms a unique philosophy of life, the embodiment of which is to be sought in the use of advanced biotechnology and assisted reproductive techniques. An increasingly common belief among modern people is the awareness that there exists a situation of insecurity – *insecuritas humana*. The risk society lives in fear of dangers: technological failures, disasters and accidents caused by the defectiveness of many devices and systems. Risk is understood as the opposite of chance, it is a measure of failure and its probability; it is also the taking of an action while the outcome cannot be predicted. Another form of risk is androgenic risk, which determines psychological, social or cultural factors. It is due to the abolition of traditional cultural models, the negation of previously learnt and adopted values, or the dilemma of will in regard to the sense of the decision being made [Wust 1995, 10ff.; Kiepas 1993; Habermas 2003; Fukuyama 2004]. The fact is that not only the coronavirus plagues our world. Hateful

[4] Holy Bible, New International Version (Biblica, 2011). Available at www.biblegateway.com.
[5] See Wielomski 2018; Harari 2020.

ideologies feeding on fear are spreading too: populism, nationalism, religious fundamentalism, fake news, conspiracy theories, and fears about the future. The contemporary crisis has rid us of the notion that we are in full control of the world, life, nature, and history. Today, we know how fragile our world is and the fact that this disaster can and probably will be followed by others. Yet we must learn to live in a world like this.

The impact of individualism as a personal life orientation value on national bonds is pointed out by Mattei Dogan. He believes that traditional values are being supplanted by new ones, with one dominating over the others – individualism. In doing so, he highlights that in today's society of anonymous crowds, a growing number of people place the individual at the top of the hierarchy of values – above the masses, classes, churches and nations. He goes on to say that individuals are increasingly inclined to believe that their own development and prosperity need not be achieved within the national community, but in spite of it or even openly against it [Dogan 1993, 191, as cited in Bokszański 2006, 172-73]. Most of these changes are ambivalent as they can involve both positive and negative elements: increased prosperity and productivity, but also growing inequality, exclusion and corruption; continuing appeals for work towards the common good, but also turning away from ethics; encouragement of global security, but also mounting aggression and violence. We are also seeing cultural, social and political changes, as well as religious ones showing up in fundamentalism and individualism, attacks on religious freedom, secularization, indifference, relativism, disillusionment, a relapse into totalitarianism, and cultural imperialism. No wonder we feel oppressed by it all. The post-modern era of the twenty-first century has transformed the criteria of good and evil. Only progress and emancipation are good [Delsol 2007, 25ff.]. Individuals make choices all the time, they change political and cultural orientations, and redefine their moral attitudes. Leszek Koczanowicz stresses that nowadays people define themselves relative to moral horizons; they can also move from one reference system to another, but they nonetheless need a system of categories that would enable them to describe and evaluate the world in which they live. On the other hand, total individualization is a threat that can manifest itself both through the immoderate strife for self-creation and the homogenization of society, where concepts of individual identity differentiation are lost due to membership in different communities [Koczanowicz 2005, 193]. As Mieczysław Plopa notes,

"in recent years family life has been undergoing certain changes of varying intensity in different countries: the fashion of family life is changing, the number of working women is increasing, the frequency of divorce and re-entry into new relationships (not necessarily marriage) is higher. Commitment to parenting is changing, the authority of elders in the family is diminishing […], being a family member can therefore be understood differently" [Plopa 2015, 10ff.]. A declaration of intent made at the nuptials can be related to values, goals and life plans, a specific world view, which can often be unstable, insistent, or very radical. When making a decision, the person who is calculating the probability of achieving the goal and its value is subject to constructed cultural standards. The resultant obligations must be grounded in the power of will, which is ready to make this obligation put into practice, and in the good that will be safeguarded or even multiplied if this happens.

In the era of civilizational growth, the image of modern man has been disturbed, and as such causes problems. Today, distrust, apprehension, anxiety and even fear in contact with another person is due to uncertainty about the values the partner subscribes to – this stems from the relativistic differentiation of attitudes, leading to uncertainty. Now, individualism as a new form of the self-determination principle prevails; it is an element of the search for identity, since the creation of identity has the nature of will. In particular, the self-determination principle posits that the individual should have the right to the personal determination of his or her citizenship, transnational membership, autonomous choice of the name, to follow (or not) a religion, pursue a freely chosen career, and to choose gender [Bach-Golecka 2006, 56].

The era in which we live – postmodernity – is today characterized by a constant and strong emphasis on breaking any limitations that the community can force on individuals; for example, the influence of postmodernist concepts is apparent in Thomas M. Franck's individualistic concept of the "empowered self" [Franck 1999].

Postmodern hybridization is not merely an intellectual interpretation of the modern state of the world, but a political and cultural concept and construct; more than that, it is also a technological, psychological, and perhaps a philosophical concept. Postmodernist hybridization should be viewed as a political demand of postmodern intellectuals [Rewers 2007, 8-9]. Culture and its evolution are understood today in an anti-fundamentalist

way – as a creative game rather than a project based on absolute points of reference. The human being immersed in this sort of culture is a seeker of truth, of the so-called better world. He does not own knowledge about the world and himself. There has emerged of a new make-up of social life, which is referred to as open society. It adopts a pluralism of beliefs, attitudes, religions, or sexual orientation. It does not accept any hierarchy of values but a set of core values. It should be noted that the postmodernist subject is void. It does not actualize or express itself, because there is nothing inside it to be manifested. It inherently has no nature, reason, essence, norms or values, but it calls for more external freedoms, which oppose its random actions. Postmodernism proclaims the transgression of the existing boundaries, circumscribed for the freedom of action by the state, morals, and law. The freedom of the fringe and social outcasts is a topical issue. Ihab Hassan distinguishes between the term 'postmodernism,' which applies to artistic and literary phenomena, from 'postmodernity,' which refers to social and political phenomena [Hassan 1982]. Postmodernism reaches for play forms expressing wishes, disintegrating, displaced or indeterminate – for fragmentation, rupture, and the will to destroy. It can be clearly seen, as Jean-François Lyotard notes, that Hassan's methodology addresses themes such as: planetisation, transhumanisation, technological augmentation of the conscious, the centrality of media, history as a happening, immanence of discussion, distinctness from the historical avant-garde, play, disintegration, displacement, self-destruction, fragmentation, or epistemological alteration. They have been absorbed by philosophical postmodernism, but also by its more recent varieties, from the sociology of media to the sociology of globalization and cyberpunk philosophy [Lyotard 2014]. Ultimately, this methodology is embraced by official proponents of fictions and new fashionable behaviours; it is codified in three simplified dogmas of relativism: "it seems to me," "I like it," "It suits me." Postmodernism is figurative and constructs reality as post-Kantian fictions. What we call reality is something that belongs to our conceptual schemata, is pure interpretation, hence an opinion. Nicola Abbagnano pointed out that the postmodern paradigm delegitimizes knowledge and negates the objectivity of knowledge and truth in the name of the right to selfish will. In his view, postmodernism stems from the division of many disparate disciplines such as: Strauss's cultural anthropology, pansexualism and Kinsey's reports, Marxism, evolutionism, nihilism, Freud's psychology, Lyotard's reflections, Comte's

humanist-religious ideology, constructivism, Derrida's and Deleuze's deconstructionism, Marxist feminism, and last but not least, Anglo-Americanism, French poststructuralism and Foucault's pansexualism. For postmodernism, the scientific and technological knowledge that takes form in the computer culture clearly manifests itself in language, lifestyle, and mentality. Knowledge ceases to be an end in itself; it is produced to be sold, exchanged, consumed as a means of power for the mastery of information [Abbagnano 1998, 7-8].

Postmodernism aims to undermine the Christian claim to the truth. Therefore, we need to gain the ability and competences to receive, discern the signs of the times and engage in dialogue with their times and, at the same time, be able to speak the language of today's people to understand and reach out to them. The strong link between ethos and religion has been severed. Natural law has been relegated to the subculture of Christian circles, so that outside them discussing it makes no sense. Christians who defend certain values because of their faith, however, often become marginalized and ignored. This general trend towards *a priori* dismissal of Christians' words as inappropriate discriminates against religious people and also, in a sense, cripples social dialogue. Many analysts of modern civilization speak of two attempts at possessing people. The first is despotism associated with totalitarian ideologies – communism and fascism. The other subjugates man to radical versions of biotechnology based on materialism – genetic engineering, cloning, neuroscience, and eugenics. The latter tries to reduce the human person to a transitory element of cosmic evolution, conjuring up fantastic visions of the future. Young people, in particular, are consumed by this vision. Attempts to forcefully implant science and technology in the human sphere of intentionality, morality, cognition, and decision-making, as well as the prospect of better control over oneself in self-determination, leads to the undermining of human freedom. When applying an organic-naturalistic reduction of man [Possenti 2017, 63-65], Zygmunt Bauman writes: "Here we are: inhabitants of an era of confusion and discord, an era in which anything – almost anything – can happen, while at the same time nothing – or nearly nothing – can be undertaken with the conviction and certainty that it can be carried through; an era whose effects chase their causes, causes try to follow their effects, and the effect of those is minimal and shrinking more and more in this regard; an era, apparently, of proven measures, whose utility is being squandered or

exhausted at an increasingly fast pace, while the search for something that could replace them can rarely be taken beyond the planning and presentation stages – which brings achievements that are equally impressive" [Bauman 2018, 259]. It is an era of persistent crises and, more recently, a COVID-19 pandemics, when war narrative was introduced. Modern has a slightly different notion of freedom. The concept of freedom has become a peculiar incantation – it is the only value that is universally relevant, as emphasised by Bauman. But it is worth noting that freedom today has become mired in paradoxes that we do not seem to notice at first. The subject of freedom, especially if interpreted internally, is brought up too rarely. The number of unreflecting people is rising. Bauman says that for people involved in the local reality by a twist of fate rather than by choice the loosening and disintegration of community ties and the forced individualization of people's lives predict a completely different situation and suggests very different strategies of conduct [Idem 2000, 119]. The former seriousness and modernist forms no longer have a place in the currently prevailing consumerist and information-focused world view. In particular, there is no place for the old bourgeois virtues such as diligence, reliability, economy, discipline and self-restraint. Along with the growing fragmentation of life and culture, the constantly emphasised sense of stability and security is waning. It is argued that postmodern times are full of risks. The social and economic transformations are not accepted without reflection. At the same time, postmodernism entails a strong dissent against technologisation, unification, rationalisation, civilisational totalisation, the metropolitan lifestyle and consumer mentality [Żardecka 2006, 354]. Leszek Nowak notes that postmodernism finds a space for the human being, but it forms part of a hierarchy, the superior places occupied by structures [Nowak 1993, 45], and the interpersonal is ontologically primary in relation to the human. Therefore, firstly, our attention is captured by postmodernist philosophers' interest in the interpersonal, what exists not in man, but what he produces in contact with the surroundings, and therefore with other people. Secondly, it can be argued that in postmodernism fully endorses the idea of abolishing the concept of subject in its traditional interpretation, which is the cornerstone of anthropocentric philosophy to date. An individual observed from a postmodernist perspective becomes unique, with individual traits, terms, and characteristics. Postmodernity accords the highest status to the person, but this person is the self, not anyone else.

Man has duties, first and foremost, in respect of himself, not others – he owes allegiance to himself, not to something or someone. Submission to external standards of behaviour is false, and restraining one's emotions and controlling one's reactions is hypocrisy. Modern times, or the so-called postmodern era, are characterized by a significant increase in the uncertainty of the behavioural model, the wavering difference between right and wrong, a sense of futility of efforts to control chaos. The connection between our actions and their long-term results is becoming blurred [Wiśniewski 1996, 78]. Postmodernism calls for stripping moral life of ethics and all authority figures. At the same time, one of its fundamental claims concerns the possibility of knowing the truth in general, and therefore about man and the essence of his moral life [Sareło 1996, 63]. Postmodernist philosophers proclaim that the gap between the inner and external morality be removed. Plopa contends that "the changeable nature of contemporary families and the recognition of the need for family systems to employ strategies for coping with stress engendered also by cultural and economic transformations make it necessary to present knowledge demonstrating certain regularities concerning the creation of functional and dysfunctional family systems and subsystems […]. All family systems, irrespective of their size, must establish both their identity, as a whole, and the identity of each family member; they must clearly define the borderline between the family and the outside world and between individual members within the limits of the family. They must define strategies for managing the home, material resources, including financial ones, stress management strategies, and methods of conflict resolution. They must establish an emotional atmosphere that promotes the well-being of each family member. Of importance are the patterns of interaction that the family establishes in order to constructively manage the basic tasks in the face of the inevitable changes it is experiencing" [Plopa 2015, 11ff.]. Facts, phenomena, as well as sociocultural, economic, scientific and religious processes, all present a great unknown. We live in a dynamically changing reality, afflicted by various conflicts and wars. Axiologically, the following are alarming: insensitivity to values, ignorance of their nature and the part they play in individual and social life, a move away from them, undermining their significance, and failure to realize one's own but proper hierarchy of values resulting from their objective order. This reference to values leaves people lost, especially young ones, in the world of values. Axiological disorientation and social exclusion

bring about a diminished sense of self-worth and identity, jeopardising social life and civic activity of the younger generation in particular. As Joanna Wyleżałek notes, axiological confusion is due to the factors that constitute postmodern society. She points out that the features of postmodern society are: the key importance of information, the privileged status of intellectual technologies, the development of computer and communication technologies, the informatization of social life, the dynamic development of the fourth (finance and insurance) and the fifth (education) sector of the economy, the parallel existence of the real and virtual worlds [Wyleżałek 2010].

Bauman wrote that the entry of digital technology into the daily life of the major and rapidly expanding sector of the human population seems to be just another new chapter in the history of technology; and yet its virtually universal availability and completely "de-territorialized" mobility, without the need to synchronize with our body movements (which has become for most of us, as a result, an integral and fixed extension of the body – a feature that has never been possible or even contemplated with other technological devices) has resulted in a complete redefinition of the range of options available to us and the emergence of a plethora of new ways of responding to old types of stimuli, previously impracticable but now viable – together with gaining the ability to generate numerous, entirely new stimuli to which we have never been exposed, and creating an outlet for impulses and actions not tried and tested before. According to the inverted logic of instrumental rationality – "I want to know what this device can be used for" and "I will do it because this device can do it" – new opportunities, possibilities and prospects lead to changes in the assessment of how relatively attractive specific patterns of behaviour on offer are, which in turn leads to revolutionary changes in the assessment of the likelihood of choosing specific patterns of behaviour that might be favoured over others. Bauman notes that the new media facilitate and thus promote choosing an attitude of cultural omnivorousness to the same extent that they facilitate an attitude of rigorous but whimsical selectivity in gathering information, building networks, and communication – and these three functions are the most popular applications of these media [Bauman 2018, 145-46].

Krzysztof Zanussi notices that the civilisation of today is threatened by a spiritual void in which there is nothing to die for (die for a smartphone?) [Zanussi 2021]. No doubt there is a difference between a traditional

society and a modern one. It has already been specified that modernity is a transition from a society of fate to a society of choice [Piwowarski 2000, 176]. Michel Foucault presents a position associated with the transgression of the subject, stating that modernity, or rather the attitude of modernity, is an attempt at a novel treatment of the present. The present must be subjected to constant criticism. Permanent criticism is to elicit an answer to the essential and central questions always found in its centre: who am I? Who am I at any given time, under specific circumstances? It is a continually practised ontology of the present and analytics of truth. This is the emerging problem of truth, the subject of truth and inventing oneself as a newly constituted moral subject [Foucault 1990, 46].

When answering the question who we are, Charles Taylor observes that, first, we need to determine our choices, commitments, identification; then, we have to abide by them faithfully; also, in our reflection on orientations and actions, we have to specify what is and what is not important to us. Identity is not determined by an ordinary aggregate of facts but by highly evaluative choices. Reflection enables us to build our world and the autonomy of the subject – "the constant effort to understand ourselves also concerns our future, whether we are going in the right direction. The answer 'yes' or 'no,' although given at different times in our lives and from different vantage points (the story of our own lives – how we became who we are – also includes a notion of the future and the question of absolute good. We cannot do without orientation toward good, although our notions of good change over time; it informs our entire understanding of ourselves" [Taylor 2012, 93]. Undoubtedly, some periods and situations may be conducive to the development of moral sensitivity and others may hinder it. It is worse if we are dealing with an unreflective person. As Robert Piłat notes, "the object of reflection is here not so much the content, form or the way our mental processes happen, but the fact that they take place and that they are mine – this sort of reflection captures a characteristic of the person thinking or experiencing, who reveals himself in this" [Piłat 2013]. Reflection makes it possible to discern the difference between a thing, others and oneself. It also lies at the root of our speaking of people [Spaemann 2001, 20].

III.

Young people are more and more present in a networked society. It creates "a new model of social functioning, where reference groups become participatory groups via a computer network. This situation, which is completely new in social life and associated with the rapid information flow and the possibility of moving fast in space, has both positive and negative ramifications" [Wyleżałek 2010, 71]. The author highlights a very important aspect of the negative influence exerted by postmodern society, which is social susceptibility to influences. Now, literature is familiar with the concept of "IT world view," first used in a book by Witold Marciszewski and Paweł Stacewicz [Marciszewski and Stacewicz 2011].[6] As they put it, if a particular person identifies certain values (e.g., Christian ones) as his own and strongly believes in a certain vision of the world (e.g., that the world was created by God and remains dependent on Him), then he undoubtedly nurtures a certain world view. The key role is played by the word 'nurtures'. A world view is nurtured because the views it comprises have an extremely strong impact on one's life. They act like a signpost or compass, showing the right course of action [ibid., 223], but they also affect the subject's inner freedom and will in making choices. Each world view requires a specific method, a set of concepts and some language to express its views. These concepts, properly selected and prioritised, not only constitute an essential means of expression, but they condition the so-called picture of the world underlying the world view. As the authors note, the conceptual apparatus that is proper to the information world view (enabling one to have a "world picture") would not be sufficiently persuasive and influential if there were no highly developed IT consciousness in the modern world. This awareness has a technological dimension related to knowledge of IT and the ability to use its products, but also an extra-technological dimension related to the awareness that IT concepts and models can be used effectively to describe non-technical phenomena (e.g. the development of organisms, human mental activity or economic processes). It is precisely this second dimension that favours the creation of an information world view [ibid., 211-15]. In the information society of today there is a trend towards describing more and more phenomena in IT categories. The human mind is

[6] See also Stacewicz 2015, 11-24; Idem 2016.

likened to an information-processing system (e.g. by cognitive scientists), the abilities and development of living organisms are explained by the properties of the DNA code (which is a physical form of data storage) and sometimes the entire universe is likened to a giant computer (as physicists do, among others). Things like this are increasingly helping the information world picture become ingrained in our culture – a picture of the world grounded in information. Its constituent parts are such concepts as information and data, algorithm and program, computability, and incalculability [ibid., 220]. Based on literature review, the validity of an optimistic or pessimistic version of the information world view remains an open-ended question. At this stage, nevertheless, the impact on humans on the picture of the world presented in this medium and the decisions they make cannot be underestimated.

We are aware that the decision-making process consists of experience, comprehension of reality, practical sense of grasping things, critical reflection and evaluative judgement, all related to decision-making. New concepts have become widespread, paradigms, norms, values, lifestyles, educational methods, governing methods, all being various manifestations of a new ethic that has won the hearts of the general population. Social media platforms and algorithms shape consciousness, mentality, attitudes in people of the 21st century. The global cultural revolution is the spread of a new ethics worldwide based on myths and the deteologisation, depersonalisation, despiritualisation, deformation and pansexualisation. The case is extremely complicated as we are dealing with a serious social disease: the crisis of reality. It is when we discover that the concepts used so far no longer properly describe the world, because it is evolving faster than the language we use every day. Many ask how to live in an era when the distinction between truth and lie for ever larger numbers of people has less and less significance. This weighs on their political, social, and life choices and their meaning of life. Prolonged fear makes it possible to manipulate man, and fear is triggered by negative emotions. Emotions have dominated reason and even intellect – when intellect does not go hand in hand with reason, it enters into an alliance with emotions and passions that blind the eyes and engender various ideologies. Ideologies, in turn, are blind – we experience this in dealing with others, other experience, other life perspectives and other cultures. It seems that the emerging crisis of the present times lies primarily in the fact that moral rules have lost

their proper meaning, good is equated with benefit, and moral norms with rules of conduct, which bring a benefit of some kind when obeyed. Modernity is informed by a devalued understanding of the human person and the value of life, which is associated with the general crisis of existential values of the earthly existence of man. One observes the atrophy of will, and with it comes responsibility for oneself, for others – it can be interpreted as secondary to the socialization of postmodern society. It is characterized, among other things, by narcissism, the cult of youthful immaturity, hedonism, the pursuit of constant stimulation, consumption, children's prolonged dependence on their overprotective parents, which leads to the formation of personalities that are unable to concentrate, make an effort, bear hardship and make sacrifice, pursue goals, and do acts of will. We are confirmed in the belief that contemporary civilisational and cultural changes bring alarming, destructive forms of understanding and valuing marriage and the family. The world driven by progress, with its threats and fallen authorities has a bearing on family and social life. The present calls for a new mindset, compelling us to discern challenges and threats and create new regulations, social relations that are based on the personal understanding of man, a new reading of responsibility. The rationality and freedom of man is now turning into cognitive relativism and rash freedom of conduct leading to dangerous outcomes. There has been a profound crisis in interpersonal relationships, which are often purged of positive emotions, emotional links, bonds, consequences and responsibility. This must stop, but first we must understand this phenomenon well.

The principle of autonomy of will and freedom of contract in modern law is now becoming a less adequate instrument, that is, a criterion for legal evaluation and description of reality and trends. A defective picture of the world determines the object of inner will; in this way, inner will accepts the object as the apparent good. As early as 2001, Marc Prensky stated that today's school students are no longer the people for whom the current educational system was created, because they are the first generation ever to grow up surrounded by modern technology. Computers, game consoles, mobile phones have no secrets for them and are an integral part of their lives, and thus have completely changed the way their minds process information. Prensky emphasises that our students' brains most likely differ physically from ours, which is due precisely to the subordination of their lives to modern technology, through which (or perhaps thanks to which)

their thought processes have changed [Prensky 2001]. Unlike us, the older generation (digital immigrants), who had to learn how to use computers in everyday life, 21st-century students are digital natives who treat the world of computers, smartphones and the Internet as their natural habitat. Differences among digital immigrants – and among digital natives, too – can be seen very clearly: digital natives have no problem working with text displayed even on a small screen; they look for information on the Internet, preferring image and sound to text; they expect quick results, they process information in parallel, they prefer learning by experimenting and *ad hoc* education; they do not read instructions, using trial and error instead; they are very attached to the mobile devices they own, they cannot imagine living without them; they use all available functions of the Internet, their computers, smartphones, etc. They use multiple functions in parallel creatively and imaginatively (so-called media convergence); they use modern language, they communicate without obligations thanks to technology, they show a preference for small talk about non-essential things [Hojnacki 2006, 23-27; Prensky 2001]. Computational thinking, mass and electronic media are highlighted to play a hugely important role in our everyday life. A dynamically developing society, professional and social life based on the ability to understand and process information are forcing us to master, at least at a basic level, the ability to use communication technologies and expand our media literacy. School has put special emphasis on the use of diversified methods of teaching, coding, related to content that is of interest to children and young people (microcomputer robots, popular game and cartoon characters, etc.). Seeing such far-reaching changes, we cannot pretend that focus on learning to program is merely a fad. The era of innocence, romance, tenderness, and responsibility for the partner is over. The 21st-century generation functions in a radically different way than digital immigrants. Having an information-driven picture of the world, many young people have trouble making prudent and responsible decisions, as they manifest a reduced ability to think logically, a unique and inappropriate assessment and interpretation of reality, elevated egocentrism, selfishness, inability to make decisions in the face of constantly accumulated doubts, and, more often than not, lower moral standards. In fact, the issue of factors contributing to the lowering or suppression of evaluative discernment is an open problem. It seems that the title of marriage nullity has not been sufficiently diagnosed in this post-modern time. Many authors [Góralski 1989, 69-75;

Góralski and Dzierżon 2001, 147; Góralski 2013, 55-81; Idem 2018; Idem 2019, 49-67; Żurowski 1985, 3-14] introduce the concept of evaluative discernment and discuss its constitutive elements (sufficient intellectual cognition, critical-evaluative capacity, inner freedom). Wojciech Góralski states that theology and canon law should therefore respond to the challenges of methodological and content renewal, emphatically prescribed by the conciliar and post-conciliar events, and necessitated by the conflict with contemporary culture. Cardinal G. Müller, the prefect of the Congregation for the Doctrine of the Faith, advances a noteworthy opinion – namely, that the mentality of modern people of the post-modern era is rather in contrast to the Christian notion of marriage, especially when respect for indissolubility and openness to life are in question. He also pointed out that many Christians remain influenced by such a cultural system and touted values, which is why marriages in modern times are probably much more likely to be invalid than they were in the past, as the will to marry in conformity with the Catholic doctrine of marriage is lacking; besides, adherence to the life context of the faith is very limited [Müller 2013]. It appears that this process is on the rise, unfortunately; it is due to the immaturity of post-modern people and their relativism, who are unreflecting and hedonistic. It is because there is social anomie and trends towards individualisation and atrophy of the will. Being receptive to all cultural influences can make one extremely vulnerable to manipulative techniques and advertising. A person who has not stable system of values, norms and behavioural patterns is likely to accept whatever can grasp his attention. The operation of the strategy of mutual adaptation of codes, the coherence between action and a broader justification of a specific action can be shattered (so-called lifestyle disintegration). Actions of the person, although indicative of individual traits, do not spring from a consciously lived purpose of action, motives, and a plan. Such a person does not have a permanent self-identity; she has traits that characterise an unreflecting personality [Burszta 1998, 158]. In reality, an attempt to align new codes with old ones may end up in an internal contradiction, an identity fissure, for, as Ralph Linton noted, the adoption of the cultural component is superficial and external [Linton 1975, 261ff.].

Granted, information society is bound to develop further, but does it guarantee the holistic, integral development of the person? Man has a better insight into the laws of nature but understands less of laws governing

human life. As a result, it becomes possible that the most popular media promote lifestyles that lead to a crisis of social ties and values, betrayal and violence, suffering and despair, but at the same time these very media report indignantly that now there are more events provoking certain phenomena [ibid., 71-72]. At this point, it is worth recalling the thought of the Pontifical Council for Justice and Peace, which notes that the preponderance of acting and having over being (cf. 360) gives rise to serious forms of human alienation. This sort of attitude does not stem from scientific and technological research, but from the scientistic and technocratic ideology (462), whose rein on people is tightening.[7] Thus, many members of postmodern society are yielding to the impact of IT. Many of us are not sufficiently aware of the influence of this technology on the health, psychology and social functioning of entire families, especially children and adolescents. Web algorithms are unrelenting, with customised information appearing on smartphone screens. TikTok, in particular, is leading the way with short, fast-changing information. A recent NASK[8] study shows that one in five school students reports being exposed to online violence. Its most widespread forms are name-calling, ridicule, or humiliation. The phenomenon of intimidation and blackmail is encountered by about 13% of them. In contrast, nearly 11% of teenagers reported someone trying to impersonate them in the virtual world. Depression is also on the rise among children and particularly high school girls, who are especially exposed to the destructive influences of the cyberworld. Children and young people's involvement in drugs initially fills emotional void, offers a deceptive substitute for unsatisfied parental love, as well as relationships and the building of social autonomy – which until 30 years ago were fostered in mutual contacts. Paradoxically, social network administrators are more likely to track and block content that provides food for thought and teaches free choices than content that destroys morality, sensitivity, and free will. Addiction follows from avoiding a difficult reality and it springs from craving for valuable relationships, for being oneself – for the possibility of conduct that agrees with

[7] Pontifical Council for Iustitia et Pax, *Compendium of the Social Doctrine of the Church*, https://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html [accessed: 24.09.2023].

[8] Naukowa i Akademicka Sieć Komputerowa – Państwowy Instytut Badawczy in Warsaw – supervised by the Chancellery of the Prime Minister.

oneself. Addiction is a substitute for the good life. In the case of children and adolescents, the reason for addiction is the absence of parents.

Statistics say that one in three marriages falls apart. Psychologists who are involved in helping young people at school, but also in individual therapy, emphasize that the problem of technology addiction is often very complex, and solving it often requires changing the lives of the entire family. The world we live in is referred to as post-modern or as an information society, a risk society with specific conceptual apparatus. Its application allows one to determine and explore the picture of the world. Negative phenomena of mass culture shape the virtual community of beliefs and opinions. Social theories and social movements give rise to new values and goals that transform social institutions in a way that they can represent these values by creating new norms governing social life. Programmers wield power in the web community; they can program every major network on which human life depends (government, parliament, military and security structures, finance, media, scientific and technological institutions, religious life, and the like). Networked society, Internet society, risk society, mass individualized communication all provide a technological platform. The Internet and wireless communications are central to contemporary networked social movements [Castells 2007; Idem 2013, 153-60].

Most modern political ideologies, underlying systems like liberalism, socialism, and communism descend from utopia. The power of utopia lies in the fact that it takes real shape in people's minds, inspires their dreams, galvanizes them into action, and elicits their reactions. Through their practices, networked social movements are promoting a new utopia in the midst of the network society culture: the utopia of autonomy of subjects vis-à-vis social institutions. Digital social networks provide an opportunity for open discussion and coordination of activities aimed at influencing one another. By getting involved in the cultural production of mass media and the construction of autonomous, horizontal communication networks, people of the information age are building a new life programme out of their suffering, fears, dreams and hopes. They build their projects, sharing their own experiences with others – by undermining the well-ingrained communication practices, breaking into the media and conveying their own message. The Internet, like all technologies, embodies material culture; it is a privileged platform for the social construction of autonomy. Unceasing changes in communication technology in the digital age extend the reach

of communication media to all areas of social life in a network that is both global and local, both general and customised according to ever-changing models. In our society, which we call a network society, power is multidimensional and is organized around networks, programmed for every area of human life in a way that suits the interests and values of powerful actors [Piekutowski and Zybertowicz 2022, 177]. Power networks exercise their authority by influencing people's minds primarily (though not exclusively) through multimedia networks of mass communication. Communication networks are thus the primary sources of power in society. A networked society can no longer make a conscious and free declaration of intent, for it is subject to and influenced by the picture of the world presented online. It makes a declaration of intent in error as to the surrounding reality. Network addiction precludes freedom of thought, judgement or opinion, without verifying information obtained online. Technology is heading towards greater control of people's thoughts, views, judgements by influencing their realisation, creating a model of the new man and shaping the private world views of individual people. Knowledge stems from the creation of meanings in the human mind. The way people think determines the fate of the institutions, norms and values around which societies are organized. The syndrome of the ill-mannered person emerges, as technological growth is not paralleled by personal development, and responsible conduct, values and a well-formed conscience are becoming rarer. No wonder, then, that the lives of many Christians differ little from those of non-believers. It happens nowadays that the baptism of converted persons is not as spectacular as the conversion of the baptised. The concept of marriage is most often characterized by wishful and imaginative elements, and the whole situation is evaluated from the present perspective, not the future. Also, there comes the problem of maturity for marriage; the issue is even more complicated because growing mature is not a fully integrated process. If we assume that an external measure of maturity can be achievements in a specific field, this need not imply maturity in others. Indeed, inherent in mature decision-making is the ability to make choices and evaluation of the object of choice. The essence of responsibility is keeping one's obligations that come with the role one fulfils. Today, nearly everyone speaks of values. There is a plethora of references to values in UN documents, EU treaties or government declarations. However, behind the declared values there is actually a counteractualist ethic, which renders the substance of these values relative

– depending on conditions, place, and time. Declarations of human dignity go hand in hand with permissive legislation that endorses abortion, euthanasia, ethically questionable biomedical practices and genetic experiments, privileging same-sex unions, transhumanism. If we accept that the only source of the moral norm is human will, both individual and collective, then any obligation becomes meaningless. Why would a responsible person respect the freedom of another if her freedom is as important as the latter's? A different matter is a positive vision of state secularism accompanied by the observable tendency towards eliminating religion from the public forum and the danger of vertical and horizontal inflation of human rights.

Conclusion

There has been a transition from modernity to postmodernity. No institution has resisted the new paradigms. The cultural tsunami has shaken man's thinking, lifestyle and behaviour not only in Europe and America, but also in other parts of the world. This complex and complicated picture of the world has serious ramifications. We are seeing a collision of man with cybertechnology, which heavily impacts his life and functioning in the real world. The modern world appears as a constantly changing reality, since the proliferation of technology has contributed to the emergence of a culture of immediacy, based on chronocentrism, where time is a compelling and essential quantity, relevant to the perceived utility of a particular technology. Whatever is slow and requires patience should be accelerated or eliminated, because it is a waste of time. Many people have lost the ability for autonomous cognitive reflection.

The goal of digital communication is to show everything, and everyone becomes a target for watchful eyes that assess, lay bare and make widely known, often anonymously. Respect for others is crumbling down completely. The reduction of the distance in human relations, when wrongly interpreted, often leads to diminished or no respect for the inalienable value of human dignity and as a result to the instrumental treatment of a person. The human person, when divested of privacy, is viewed by more powerful, toxic people as a tool for achieving their own goals. Individualism has become a form of self-determination in the search for identity. Modern man understands freedom differently by avoiding responsibility. The tight link between ethos and religion has been broken, and natural law has been

relegated to the subculture of Christian circles. Postmodernism encourages the purging of moral life of ethics and any authority figures by negating truth, creating diverse meanings of concepts. There happens a redefinition of previously used concepts that allow the articulation of constituent elements of postmodernism, creating an IT consciousness, which in turn favours an information-based world view by creating a particular picture of the world. The latter, it follows, influences our attitudes, will, relationships, actions, ties, and values. Thus, a new model of man is being built by shaping the personal worldviews of individual people. This is the so-called networked mind. Nurturing one's own concept of the family, which puts the person and her dignity at the centre (this dignity is never reduced to a thing or technological product), does not depersonalise the person; it is the challenge of our time. Prospective spouses have to be guided by an integral vision of the human being that accommodates all dimensions of a person's existence, subordinating the material and instinctive dimensions to the internal and spiritual ones, seeking a fuller humanity for all members of the community. Marriage then becomes the beginning of common responsibility, community activities, and the formation of interpersonal relationships in the family. Through a declaration of intent, prospective spouses are joined by a personal communion. The willingness to take responsibility for the marriage thus created is a remarkable challenge facing the persons entering into marriage. Founding a marriage on feelings – and often emotions – does not suffice, because they are ephemeral. Love should be learnt and lived in freedom and responsibility, best if within the bosom of one's family. Only then the declaration of intent – the marriage – will be the beginning of a common yet difficult path – to keep that first "yes" forever, making life together a beautiful adventure. The process of building interpersonal references still poses a challenge, and its success depends on respect for the rights of all people.

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ECONOMIC ACTIVITY IN THE CHURCH – THE PENAL DIMENSION. COMMENTS ON THE AMENDMENT TO CANON 1376 CIC

DZIAŁALNOŚĆ GOSPODARCZA W KOŚCIELE – ASPEKT KARNY. UWAGI NA TLE NOWELIZACJI KAN. 1376 KPK

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Abstract

The 1983 Code of Canon Law does not contain any norms regulating the economic activity of ecclesiastical juridic persons. This does not mean, however, that canon law has no regard for that. The ecclesiastical legislator's concern for the supervision of economic activity is expressed in the regulation of rather complex ways of managing church property, including the special act of its alienation, and determination of penal sanctions for violating the relevant rules.

The penal norm of Canon 1377 that was previously in force, penalizing the alienation of church property without the requisite permission, has now been significantly extended. Pope Francis, reforming Book VI of the Code of Canon Law, expanded the scope and principles of penal liability for economic abuses by redacting Canon 1376 anew. The norm of this provision penalises the offence of misappropriating or preventing the gaining of benefits from church goods (which was previously absent from the Code) and the offence of performing unlawful acts in the administration of church goods (which has been significantly extended). Reflecting on the penal aspect of administration of church property, the article attempts to answer the following questions: What are these offences? What was the legislator's intention? What is the essence of the penal law reform in the area at hand?

Keywords: economic activity, church property, penal law, acts of administration, alienation

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Abstrakt

Kodeks Prawa Kanonicznego z 1983 r. nie zawiera żadnych norm, które by działalność gospodarczą kościelnych osób prawnych regulowały. Nie oznacza to jednak, że prawo kanoniczne w tej kwestii pozostaje obojętne. Troska ustawodawcy kościelnego o nadzór działalności gospodarczej wyraża się bowiem regulacją dość rozbudowanego sposobu zarządu dobrami kościelnymi, w tym jej szczególnym aktem – alienacją majątku, a także określeniem sankcji karnych za naruszenie obowiązujących w tej materii reguł.

Obowiązująca do tej pory norma karna kanonu 1377, penalizująca alienację dóbr kościelnych bez przepisanego prawem zezwolenia, została znacząco rozbudowana. Papież Franciszek reformując Księgę VI Kodeksu Prawa Kanonicznego poszerzył zakres i zasady odpowiedzialności karnej za nadużycia gospodarcze redagując na nowo kan. 1376. Norma tego przepisu penalizuje przestępstwo sprzeniewierzenia lub utrudnienia osiągnięcia korzyści z dóbr kościelnych (którego nie było w dotychczasowym kodeksie) oraz przestępstwo bezprawnych czynności w zarządzie dobrami kościelnymi (które zostało znacząco rozbudowane). Artykuł podejmując refleksję nad aspektem karnym zarządu dobrami kościelnymi jest więc próbą odpowiedzi na pytania: Na czym polegają te przestępstwa? Jaki był zamysł ustawodawcy? Co jest istotą reformy prawa karnego dokonanej w omawianym zakresie?

Słowa kluczowe: działalność gospodarcza, majątek kościelny, prawo karne, akty zarządu, alienacja

Introduction

From the very beginning, the Church has used temporal goods in carrying out its mission of human salvation, not profitably and commercially, but to attain its proper goals. These essentially are: 1) organisation of divine worship; 2) provision of decent maintenance for clergy and other workers of the Church; 3) conducting works of the apostolate and charity, especially for the sake of the needy [Wojcik 1987, 48].

The pursuance of these goals can vary greatly. In fact, ecclesiastical juridic persons may not only erect temples, manage cemeteries, run retreat houses, educational-welfare and childcare establishments, or hospitals, pharmacies, soup kitchens or night shelters, or engage in the manufacture and sale of devotional items, but may also conduct, for example, broadly-defined publishing and media activity, including the production of audiovisuals, rent and lease real estate.

Without delving into this issue, for the reasons of order we should only mention that under Polish law ecclesiastical entities can have the status of entrepreneurs and conduct business activity.[1] Indeed, neither the Polish Constitution[2] nor the Concordat, the latter regulating relations between the Polish state and the Catholic Church in Poland,[3] nor the Act of 17 May 1989 On Guarantees of Freedom of Conscience and Religion,[4] nor any other of the laws in force, including specific "denominational laws" regulating the relationship between the Polish state and individual churches and other religious organisations, prohibits legal persons in the Church from conducting business. These normative acts not only do not impose such restrictions, but it can be seen that these acts contain regulations directly relevant to the economic activity of churches and religious organisations.

To illustrate, Article 22(1) of the Concordat and (respectively) Article 21a of the Act of 2 July 2004 On Freedom of Economic Activity (superseded by the Act of 6 March 2018 – The Entrepreneurs Act[5]), clearly stipulates that activities serving humanitarian, charitable and welfare, scientific and educational-care purposes pursued by legal entities of churches and other religious organisations are legally equal to activities serving similar purposes and carried out by state institutions, with a number of acts containing norms regulating issues such as taxation of income from business operation of ecclesiastical legal persons. Next, Article 55(2) of the Act of 17 May 1989 On the Relations between the State and the Catholic Church in the Republic of Poland[6] provides that ecclesiastical legal persons are exempt from taxation on income from their non-economic activities, and in paragraph 3, the law stipulates that income from the business operation of ecclesiastical legal persons and companies whose shareholders are exclusively such persons is exempt from taxation in the part in which it was allocated in the tax year or in the following year for worship, educational, scientific, cultural, charitable and welfare activities, catechetical facilities,

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1 For more on this, see Świto 2022, 5-22.

2 Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 1997, item 483 as amended.

3 Concordat between the Holy See and the Republic of Poland of 28 July 1993, Journal of Laws No. 1998, No. 51, item 318 [henceforth: Concordat].

4 Journal of Laws No. 1989, No. 29, item 155 as amended.

5 Journal of Laws No. 2018, item 646.

6 Journal of Laws No. 1989, No. 29, item 154 as amended.

conservation of historical monuments, and for religious investments referred to in Article 41(2), and those church investments referred to in Article 41(3) involving catechetical facilities, charitable and welfare institutions, and repairs of them.

Thus, as illustrated by the practice of, for example, the Catholic Church in Poland, church legal persons actively participate in civil law transactions, can have the status of entrepreneurs and conduct business. This activity, on the one hand, is governed by the norms of civil law, which, according to the rule expressed in Canon 1290 of the 1983 Code of Canon Law,[7] are canonised by the ecclesiastical legislator. On the other hand, the activity of ecclesiastical entities – since it is pursued not within private and personal property, but within church property, that is, belonging to the entire community of the People of God – should be carefully supervised by ecclesiastical authority (Canon 1276).

The CIC/83 does not contain any norms governing the economic activity of church legal entities, which is not to say that canon law disregards this issue. It follows that the ecclesiastical legislator's concern for the supervision of economic activity is manifested in the regulation of a rather elaborate system for managing church property, including the special act of alienation of property, and in the definition of penal sanctions for violations of the rules in force in this matter.[8]

The previously operative penal norm of Canon 1377, penalising the alienation of ecclesiastical goods without a requisite permission,[9] has been significantly extended. In his reform of VI of the 1983 Code, Pope Francis broadened the scope and principles of criminal liability for economic misconduct by redrafting Canon 1376.

Accordingly, the following are to be punished with the penalties mentioned in Canon 1336 § 2-4, subject to the obligation of redressing the harm: "1° a person who steals ecclesiastical goods or prevents their proceeds from

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[7] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317; English text available at: https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html [henceforth: CIC/83]; legal state as of 18 May 2022.

[8] For more on this, see Świto 2010; Tomkiewicz 2013; Świto 2014, 595-609; Świto and Tomkiewicz 2014, 415-34; Świto and Tomkiewicz 2017, 393-408.

[9] Canon 1377: "A person who alienates ecclesiastical goods without the prescribed permission is to be punished with a just penalty."

being received; 2° a person who without the prescribed consultation, consent, or permission, or without another requirement imposed by law for validity or for lawfulness, alienates ecclesiastical goods or carries out an act of administration over them." The second paragraph provides that the following are to be punished justly, including by being removed from office, subject to the obligation of redressing the harm: 1° a person who through grave personal culpability commits the offence mentioned in § 1, n. 2; 2° a person who is found to have been otherwise gravely negligent in administering ecclesiastical goods."

Thus, the norm of this provision penalises misappropriation or preventing the gaining of benefits from church property (which was not featured in the 1983 Code) and unlawful acts in the administration of ecclesiastical goods (which has been significantly expanded).

What are these offences? What was the legislator's intention? What is the essence of the penal law reform executed in the area in question? Let us reflect on this, looking at the penal aspect of church property management.

1. The offence of misappropriation (embezzlement) of ecclesiastical goods or preventing the gaining of benefits from them

The offence of "misappropriation," known otherwise as embezzlement, is a qualified form of "appropriation," which is found in many legislations [Sośnicka 2013, 80-83]. This crime differs from theft because the perpetrator does not take a thing unlawfully, but it is entrusted to his care in good faith in a stable manner.[10] The person who entrusts (in canon law this is the competent ecclesiastical authority, e.g., a bishop or higher superior) expects that the thing will be returned to him, will not be destroyed and will be used for its intended purpose. So, when committing embezzlement, the perpetrator abuses the trust of the entrusting person. He appropriates the thing – in other words, he handles it as if he owned it.[11]

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[10] It seems that the interpretation of the norm of Canon 1376 in *Komentarz do Kodeksu Prawa Kanonicznego*, Vol. 4/2: *Księga VI. Sankcje karne w kościele* is flawed since the legislative term 'misappropriate' (*substraho*) is assigned the meaning of the term 'theft' (*furo*) [Kaleta 2022, 241-42]. This is because the legislator does not speak of the unlawful taking of things, that is theft, but precisely about misappropriation, which is a different thing.

[11] This is sometimes said of a pastor who treats his parish as his own ranch or a private farm.

Misappropriation is thus a new offence that Pope Francis introduced into the CIC/83. This penal norm is addressed to all those who have been entrusted with the administration of material goods by the ecclesiastical authority: diocesan bishops with regard to the diocesan property, finance officers with regard to the property of religious institutes and provinces or dioceses, pastors with regard to parish property, seminary rectors with regard to seminary property, etc. This is because church property, as mentioned above, is not private property, but the property of the entire People of God, and therefore it should not only be managed in such a way that it does not suffer any damage, but, according to the Parable of the Talents, should be multiplied. This principle and wish were expressed by the ecclesiastical legislator in the norm of Canon 1284, which mentions the qualities of a good host who administers ecclesiastical property.[12] The criminal norm introduced by Pope Francis is thus a penalisation of failure to deliver on these duties. Not only activities involving a wilful depletion of church property (e.g. through unfavourable and undervalued sale, exchange or lease) are penalised, but also acts involving the omission or, put differently, failing to exercise due care (e.g., non-collection of due proceeds from the property owned or lack of care necessary for the protection of premises).

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[12] Canon 1284: "§ 1. All administrators are bound to fulfil their function with the diligence of a good householder. §2. Consequently they must: 1) exercise vigilance so that the goods entrusted to their care are in no way lost or damaged, taking out insurance policies for this purpose insofar as necessary; 2) take care that the ownership of ecclesiastical goods is protected by civilly valid methods; 3) observe the prescripts of both canon and civil law or those imposed by a founder, a donor, or legitimate authority, and especially be on guard so that no damage comes to the Church from the non-observance of civil laws; 4) collect the return of goods and the income accurately and on time, protect what is collected, and use them according to the intention of the founder or legitimate norms; 5) pay at the stated time the interest due on a loan or mortgage and take care that the capital debt itself is repaid in a timely manner; 6) with the consent of the ordinary, invest the money which is left over after expenses and can be usefully set aside for the purposes of the juridic person; 7) keep well organized books of receipts and expenditures; 8) draw up a report of the administration at the end of each year; 9) organize correctly and protect in a suitable and proper archive the documents and records on which the property rights of the Church or the institute are based, and deposit authentic copies of them in the archive of the curia when it can be done conveniently. § 3. It is strongly recommended that administrators prepare budgets of incomes and expenditures each year; it is left to particular law, however, to require them and to determine more precisely the ways in which they are to be presented."

In addition, the norm of Canon 1376, 1º also penalises the conduct of the church property administrator, which is intended to impede the gaining of benefits from that property. This can occur, for example, when the previous administrator refuses to give his successor the documentation to enable the handling of the assets, or when, despite requesting an appropriate approval, there is a significant delay in making a (any) decision or in calling a meeting of the body that is competent to grant such approval.

2. The offence of performing unlawful acts in the administration of ecclesiastical property

Another proscribed act penalised by the norm of Canon 1376, 2º is the offence of committing unlawful acts in the administration of church property. Thus, here we speak of an act that does not involve ordinary administration of church property, or an alienating act that is a special form of it, while lacking the legally required consultation, consent or permissions, or fulfilling any other requirement mandated by law for validity or legitimacy.

2.1. The lack of prescribed consultations, consent or permissions in the performance of acts that do not involve ordinary administration of ecclesiastical property

According to the CIC/83, acts not involving ordinary administration are: "major acts of administration" (*actus maioris momenti*) and "acts of extraordinary administration" (*actus extraordinariae administrationis*), as well as "acts that exceed the limits and manner of ordinary administration" [Świto 2015, 105-16].

The first two terms appear in Canon 1277 and refer to acts of administration placed by the diocesan bishop with respect to diocesan goods. The third term occurs in Canon 1281 and refers to administrators of ecclesiastical legal persons subordinate to the diocesan bishop. According to the norm in question contained in Canon 1376 § 1, 2º, these administrators violate the law if they place such acts unless they requested consultation or permission from entities prescribed by law.

The situation of administrators of ecclesiastical juridic persons subject to the diocesan bishop, the situation – in principle – appears simple. These administrators (e.g., pastor, rector of a seminary) must obtain written consent from their ordinary before placing acts that go beyond the limits and manner of ordinary administration. Now, which acts exceed the limit and manner of ordinary administration, according to Canon 1281 § 2, should be determined by the statutes of these ecclesiastical legal entities. If, however, statutes do not specify that, this is the role of the diocesan bishop, who, having heard the opinion of the finance council, should make a list of such acts for persons under his authority. It is a separate issue how such lists function in individual dioceses, and whether and how aware administrators are of the need to obtain written permission from their ordinary.

However, acts of administration placed by the diocesan bishop with respect to diocesan goods pose a greater problem. Indeed, the difference between "major acts of administration with respect to the material condition of the diocese" (*actus maioris momenti*) and "acts of extraordinary administration" (*actus extraordinariae administrationis*) remains an open issue in legal science, raising fundamental questions. It happens that this distinction has a great deal of practical importance. For acts of administration of greater importance, the diocesan bishop should only hear the opinion of the finance council and the college of consultors, while for acts of extraordinary administration, the diocesan bishop should obtain the consent of these bodies for validity. Both failing to obtain the consent of the indicated persons for acts of extraordinary administration and failing to consult them when placing acts of greater importance will cause the invalidity of the act of administration taken by the diocesan bishop and consequently his penal liability. Under Canon 1277, the Polish Bishops' Conference should determine which acts should be classified as acts of extraordinary administration, but to date such a list has not been made.[13]

In other countries, for comparison, the bishops' conferences of Panama, Argentina, Canada or Colombia have developed a concrete list of acts considered as those of extraordinary administration, and the Bishops' Conference

[13] The Council of Diocesan Bishops, on 26 August 2012, adopted indications – in the form an instruction – on the management of ecclesiastical material goods. However, they are not binding within the meaning of Canon 1277 – see the Message of the Bishops of Jasna Góra dated 26 August 2012.

of Italy has additionally set specific amounts. Others, such as the bishops' conferences of San Domingo, Luxembourg, Brazil, and the Philippines took as their point of reference the material or monetary value of the undertaking, regardless of its nature, setting a maximum amount or a so-called the amount relative to the annual budget of the diocese or to some other criterion (Austria, Germany). Other conferences of bishops, for example, in Peru, Honduras, Mexico, Puerto Rico, and Portugal, considered acts of extraordinary governance to be those that exceed the ordinary budget, while the Bishops' Conference of the Netherlands adopted a mixed system [Dubiel 2007, 54-55].

2.2. The lack of prescribed consultations, consent or permissions in the performance of acts of alienation of church property, which are a special form of extraordinary administration

The obligation to obtain consultations, consent or permissions required by law, or to meet any other prescribed requirement law for validity or legitimacy, also requires acts of alienation, which are a special form of acts of extraordinary administration. Before we move on to specify entities to be consulted or give consent to alienation, and define, then, who is the addressee of the penal norm of Canon 1376 § 1, 2º, we need to recall briefly the structure of alienation itself and its object.

The term 'alienation' is used by the CIC/83 in two senses: *sensu stricto* and *sensu largo*. Alienation in the strict sense is any legal act that results in the transfer of ownership of the ecclesiastical property of a given public ecclesiastical juridic person to another ecclesiastical or secular entity through sale, exchange or donation. On the other hand, alienation in the broad sense is any other legal action as a result of which the property of a public ecclesiastical juridic person, albeit not disposed of, is at risk of deterioration as a result of the actions taken (e.g., mortgage, lease or rental). The regime required for acts of alienation – which when not observed gives rise to criminal liability under Canon 1376, 2º – is common to alienation: in the strict and broad senses [Świto 2010, 89-92].

This legal regime involving the obligation to obtain appropriate permissions to alienate does not apply to every asset of a church legal entity, but only to assets of a certain value or type. The object of alienation will thus be as follows: the so-called *patrimonium stabile*, things donated

to the Church by virtue of a vow, things of high artistic or historical value, relics, paintings serving as objects of veneration, and desacralised churches.

This principle is further specified in Canon 1292, which provides that if the value of the property intended to be alienated falls between the lowest and highest amounts determined for its own region by the episcopal conference (in Poland, the limits are now €100,000 and €1.7 million, respectively),[14] the competent authority in the case of legal persons not answering to the diocesan bishop is determined by their own statutes, while for other entities this entitlement is determined by the diocesan bishop with the consent of the finance council and the college of consultors and those concerned (§ 1). If, however, the value of the alienated goods exceeds the maximum amount (which in Poland is now €1.7 million), or if the case concerns things donated to the Church by virtue of a vow (*donaria votiva*), as well as things of high artistic or historical value, for the validity of the alienation, the permission of the Holy See is additionally required (§2). As regards things donated to the Church by reason of a vow, and things that are precious for artistic or historical reasons, the Holy See's consent to alienation is required regardless of the value of these things.

It should be mentioned here that a request for the consent of the Holy See should include a reasoned request from the diocesan bishop and a certified excerpt from the minutes of the meeting of the college of consultors and the meeting of the finance council, in which these bodies consented to the alienation (the minutes should indicate the existence of a *quorum*), and a valuation of the alienated item.

With regard to the subject of alienation, in turn, it should be highlighted that the regulation of alienation activities involves only ecclesiastical goods, i.e., property owned by public juridic persons in the Church (*personae iuridicae publice*).

Canon 116 § 1 provides that public juridic persons are groups of persons or things, established by the competent ecclesiastical authority to perform on behalf of the Church, within the scope designated

[14] Polish Bishops' Conference, *Dekret ogólny z dnia 11 marca 2021 r. w sprawie podwyższenia sumy maksymalnej alienacji* [General Decree of 11 March 2021 on Increasing the Sum of Maximum Alienation], https://episkopat.pl/dekret-ogolny-konferencji-episkopatu-polski-z-dnia-11-marca-2021-r-w-sprawie-podwyzszenia-sumy-maksymalnej-alienacji [accessed: 01.08.2022].

for them and in accordance with the law, their own tasks assigned to them for the public good; other legal entities are private persons.

Within the meaning of CIC/83, the subject of alienation will not be private ecclesiastical juridic persons or such church organizational units that do not have their own legal personality and operate only within the church legal entity that established them. The latter category includes unincorporated manufacturing, service and commercial establishments, charitable and welfare institutions, schools and other educational facilities. For the alienation of property held by these entities, the alienating entity will be the church legal person within which a particular organisational unit operates.

Each alienation must be a legitimate and valid act. The conditions of a legitimate alienation are specified in Canon 1293, which in § 1 stipulates that for an alienation whose value exceeds the lowest specified sum, the following are required: a just cause, valuation of the alienated thing, and also, as per § 2 of this prescript, the observance of other precautions prescribed by the legitimate authority.

The just causes (*iusta causa*) mentioned in Canon 1293 § 1, 1º include but are not limited to "urgent necessity, evident advantage, piety, charity, or some other grave pastoral reason."

The requirement for valuation of the alienated item is connected with the content of Canon 1294 § 1, which stipulates that "an asset ordinarily must not be alienated for a price less than that indicated in the appraisal." The valuation referred to in this prescript must be carried out by at least two experts, who are proficient in the field relevant to the studied object. The requirement of valuation of the alienated thing applies not only to alienation in the form of a sale of property, but also to acts of alienation taking the form of an exchange of goods. This is because only the knowledge of the real value of the alienated thing enables one to fully and judiciously assess whether the intended exchange will be adequate and whether its performance will not harm any of the parties.

With regard to the "precautions" mentioned in 1293 § 2, it should be noted that the said provision does not specify what precautions are to be taken, leaving this to the competent authority – that is, one competent to give consent to alienation – to adapt the regulation in question to local conditions and the current economic and social situation. Such a precaution

could be, for example, ordering a public auction or announcement, requiring that transactions be carried out based on the parity of the convertible currency, or requiring alienation only to a certain category of entities.

It is also worth mentioning that according to Canon 1998, "unless an asset is of little value, ecclesiastical goods are not to be sold or leased to the administrators of these goods or to their relatives up to the fourth degree of consanguinity or affinity without the special written permission of competent authority."

Among other conditions for the legitimacy of alienation is also the ban on incurring debts that cannot be repaid in "a period that is not too long" and on which interest cannot be paid from ordinary income (Canon 639 § 5). This guarantee norm is addressed only to religious and religious institutes.

As for alienation, it is subject to three basic conditions for its validity: 1) observing the requirements of state law, 2) consent granted by competent bodies, and 3) the specification of parts previously alienated.

The norm of Canon 1290 provides: "The general and particular provisions which the civil law in a territory has established for contracts and their disposition are to be observed with the same effects in canon law insofar as the matters are subject to the power of governance of the Church unless the provisions are contrary to divine law or canon law provides otherwise, and without prejudice to the prescript of can. 1547." It follows clearly from the wording of this prescript that for alienations taking place in the territory of the Republic of Poland, canon law has adopted as own the rules provided by civil law regarding the object, form, clauses, conditions, fees, etc., as well as the rules relating to the validity of obligations and legal actions. The requirement to observe state regulation is therefore a manifestation of the so-called canonisation of civil law.

If the alienated thing is divisible, the parts previously alienated must be listed in the application for alienation. This is intended to prevent the gradual alienation of a divisible thing and thus omit the requirement of obtaining the prescribed consent stipulated in the alienation procedure. Non-compliance, as per Canon 1292 § 3, results in the invalidity of consent.

A corresponding principle should be applied to cases of simultaneous alienation of multiple goods. Although this rule is not explicitly provided by Canon 1293 § 3, the directives in this regard are laid out

in the interpretation of the Pontifical Commission for the Authentic Interpretation of the Canons of the Code of 20 July 1929. Thus, in the case of simultaneous alienations of different goods held by one entity, the individual values of alienation should be summed, and on the basis of their aggregate value the body competent to grant consent should be determined. This rule is intended to exclude possible attempts to diminish the real sum of alienation and thus disregard the competence of the Holy See.

Now, turning to the specification of the addressee of the analysed penal norm of Canon 1376 § 1, 2º in the context of acts of alienation that involve the obligation to obtain requisite consultations, consent or permissions, or to meet any other requirements prescribed by law for validity or legitimacy, administrators of church property should be mentioned first. It follows that when undertaking actions related to alienation performed on behalf of legal entities (as their constituent bodies), they are directly obligated to obtain the permissions. On the other hand, those who are indirectly involved in the alienation process cannot be excluded from criminal liability either: the diocesan bishop, the members of the finance council and the college of consultors. Alienation, indeed, is a mechanism that requires the participation of not only of the administrators themselves, but also other subjects who supervise alienation by issuing appropriate permissions. This interpretation of the penal norm under analysis is not, therefore, extensive, but it takes into account its context – its *ratio legis* is to enhance protective measures and increase vigilance in the administration of church property, indirectly involving all participants.

3. Penal sanction

The penal sanction for misappropriation of church property or preventing the gaining of respective benefits, as well as the offence of performing unlawful acts in the administration of church goods, are – in addition to the duty to repair harm – the expiatory penalties enumerated in Canon 1336 § 2-4, affecting the offender either permanently or "for a determined or an indeterminate period": 1) an order to or prohibition against residing in a specific place or territory; 2) an order to pay a fine or a sum of money for ecclesiastical purposes, at rates established by an episcopal conference; 3) a ban on exercising in all places or in a specified place or territory or outside of them all or some offices, duties, ministries or functions,

or "only certain tasks attaching to offices or duties"; 4) a prohibition against "performing all or some acts of the power of order"; 5) a prohibition against "performing all or some acts of the power of governance"; 6) a ban on "exercising any right or privilege or using insignia or titles"; 7) a prohibition against "enjoying an active or passive voice in canonical elections or taking part with a right to vote in ecclesial councils or colleges"; 8) a ban on "wearing ecclesiastical or religious dress"; 9) a deprivation "of all or some offices, duties, ministries or functions, or only of certain functions attaching to offices or duties"; 10) a deprivation of "the faculty of hearing confessions or of preaching"; 11) a deprivation of "a delegated power of governance"; 12) a deprivation of "some right or privilege or insignia or title"; 13) a deprivation of "all ecclesiastical remuneration or part of it, in accordance with the guidelines established by the episcopal conference, without prejudice to the provision of can. 1350 1350 § 1"; 14) dismissal from the clerical state.

In addition, a just penalty, including deprivation of office, is provided for the offences of conducting unlawful acts in the management of ecclesiastical goods, if committed unintentionally but in a gravely culpable manner, as well as through grave negligence (Canon 1376 § 2).

Conclusions

In our attempt to answer the question posed earlier about the essence of the reform in question, we can say that our analysis of the regulation considered in the reality of the Church today affords two conclusions.

First, the amendment no doubt enhances the control of asset management in the Church. The previous norm of Canon 1377, which penalised the alienation of church property without a prescribed permission, did not seem to take into account either other forms of administration or the responsibility of administrators in the context of all abuses that were possible with regard to such management. In such a state of affairs, this penalization was, shall we say, significantly "watered down". Therefore, it can hardly be acknowledged that the Church's temporal goods are protected in a way that is consistent and adequate to the role these goods are supposed to play in the Church's activities.

The amendment discussed here both expanded the subjective scope of the aforementioned regulation, adapting it to the phenomena that are taking place *vis-a-vis* the circulation of property today (both ecclesiastical

and secular), and expanded – rightly so – the circle of entities bearing such responsibility. Thus, it has increased the relevance of the relationship between the powers associated with asset management and the liability resulting from it.

Second – and this is apparently a general reflection – the amendment is clearly part of the discourse taking place in the Catholic Church's contemporary doctrine of penal law. This discourse revolves around the thesis that the promulgation of the CIC/83 was followed by the announcement of the end of "true and proper criminal law" [Gerosa 1999, 226]. The thesis also implies – given the evolution of the philosophy of punishment in the canonical order that occurred in the late 20th century plus the associated exaggeration of pastoral considerations – that punishment has become a kind of last resort, and not always necessary.

The norm of Canon 1376, as it is today, is a powerful indication that penal law is an important instrument of pastoral influence. Its application serves both the good of the offender – his punishment serves to evoke repentance in him – and the good of the entire ecclesiastical community, which in this case is the basis of its economic functioning. For in some cases, as life shows, merely "appealing" will not suffice.

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