

# THE ESTABLISHMENT AND ADMINISTRATION OF RELIGIOUS COMMUNITIES IN THE AUSTRIAN PARTITION AFTER 1855. ANALYSIS OF CERTAIN CANONICAL AND CIVIL LAWS

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**Abstract.** The Concordat of 1855 was preceded by several events that indicated that the situation of religious orders in the Austrian Partition had begun to change gradually. The aforementioned Concordat already stated in its first article that the Church was governed by divine and ecclesiastical (canonical) law and Article XXVIII of the Concordat guaranteed religious orders and congregations full freedom, their own administration in accordance with the monastic constitutions, communal life in accordance with the rule, dependence on the Roman generals and the possibility of establishing new monasteries in dioceses, but with the consent of the bishop after agreement with the civil authorities. This paper will present canonical and civil provisions relating to the formation and administration of religious communities from 1855 onwards. In particular, issues concerning the conditions for admission to a religious order, the effects of the vows taken as well as the rights and duties of religious superiors, the decision to leave a religious order and the provisions concerning the suppression of religious orders will be addressed. Canon law is essentially the provisions of the Council of Trent and the decrees of certain Roman dicasteries, while civil law will be based during the period under discussion on the Concordat, the Austrian Civil Code of 1811 and the Pennal Code of 1852, as amended in 1867.

**Keywords:** Concordat of 1855; religious law; Austrian Partition; religious orders

## INTRODUCTION

From the beginning of the 19th century, the situation of religious orders in the Austrian Partition began to change gradually. Emperor Franz I, in his will of 28th February 1835, addressed to his successor, Archduke Ferdinand, enclosed a request that he should “fulfil his wish and continue and bring to a happy end the work he had begun of repairing and amending the law on the foundations and conduct in respect of ecclesiastical rights” [Maass 1951-1961, 441]. Therefore, already in 1837, the diocesan clergy and members of religious orders were allowed to study in Rome, and on 24th February 1842, Apostolic Nuncio Altieri forwarded to Emperor Ferdinand I a request

of seven superiors general to restore direct jurisdictional ties between them and the monasteries and religious provinces in Austria. This request was fulfilled on 4th May of the same year. In turn, the patent of Emperor Franz Joseph I of 26th April 1850 rejected all Josephine legislation, including legislation referring to religious orders [ibid., 742-43]. The Concordat of 1855 already stated in its first article that the Church is governed by divine and ecclesiastical (canonical) law. Article XXVIII of the Concordat guaranteed religious orders and congregations full freedom, their own administration in accordance with the monastic constitutions, common life in accordance with the rules, dependence on Roman generals as well as the possibility of establishing new monasteries in dioceses, but with the bishop's consent after consultation with the civil authorities [Schmidlin 1934, 138; Kumor 1985, 611; Bruździński 2014, 141-58].

Taking into account the aforementioned facts indicating a gradual revival of monastic life in the Austrian Partition, this paper will present canonical and civil laws on the establishment and administration of monastic communities starting from 1855, i.e. the conclusion of the Concordat, until the end of the 19th century. In particular, the issues concerning the conditions of admission to the order, the effects of taken vows, the rights and duties of religious superiors, decision to leave the order and the regulations concerning the dissolution of orders will be discussed. In the analysed period, the canon law is essentially the provisions of the Council of Trent and the regulations of certain Roman dicasteries, while civil law at that time was based on the Concordat, the Austrian Civil Code of 1811 and the Penal Code of 1852, as amended in 1867.

## 1. THE CONCORDAT OF 18TH AUGUST 1855 ON RELIGIOUS MATTERS

On 18th August 1855, *ad certum stabilem que ordinem rerum rationum que Ecclesiae Catholicae in Imperio* Concordat was concluded between the Holy See and Emperor Franz Joseph. The Catholic Church in the whole monarchy retained all the rights to which it is entitled according to divine establishment and the provisions of sacred canons. All matters not governed by the concordat were to be decided with respect for the doctrine of the Church and according to the ecclesiastical discipline approved by the Holy See. The Emperor retained the right to appoint bishoprics and most canopies in cathedral chapters, although it was emphasised that the appointment of bishops belonged to pope's powers. Moreover, the Concordat ensured the bishops' freedom of correspondence with Rome and the pope's jurisdictional primacy, based on divine law, was also underlined. This meant that the Church was guaranteed influence over public schools where the upbringing

of Catholic children was to be entirely in accordance with its teachings. All matrimonial matters were left to the jurisdiction of ecclesiastical courts. The state authorities undertook to condemn views contrary to the teaching of the Church. The essence of the Concordat was very well explained by Prof. Feliks Słotwiński three years after its conclusion in a scientific lecture published in 1858. He paid special attention to the first article of the Concordat, which states that the civil and ecclesiastical community consists of the same members and that the ruler has a duty to care for the Catholic Church and should defend it and obey its rules.<sup>1</sup>

<sup>1</sup> See: "Społeczność cywilna i kościelna z jednych i tychże samych członków złożona zostają, ze sobą w najściślejszym związku; bo działania członków Kościoła wpływają na cel społeczności cywilnej, a działania tychże, jako członków społeczności cywilnej wpływają na osiągnięcie lub utrudnienie dostąpienia celu Kościoła chrześcijańskiego. Zachodzi jedynie między temi dwoma społecznościami różnica: co do ich początku, głównego i najbliższego celu, tudzież właściwych środków, jakimi ich cele popierane i osiągnięte być mogą. I tak: co do ich początku, Kościół założony jest bezpośrednio przez Chrystusa, prawa jego opierają się na Słowie Bożem i Tradycji, społeczność zaś cywilna uformowana jest przez ludzi - jej byt prawny opiera się na tak zwanej umowie cywilnej (zjednoczenia, postanowienia co do formy rządu i poddania) wyraźnej lub dorozumianej] bo z tej jedynie zasady, prawa najwyższej władzy rządzącej i obowiązki poddanych rozwinięte być mogą. Różnią się obydwie społeczności co do swego głównego i najbliższego celu - najbliższym bowiem celem Kościoła jest zbawienie prawowiernych, już zaś celem najbliższym społeczności cywilnej jest zabezpieczenie praw pierwotnych i nabytych Ogółu i każdego członka społeczności. Zachodzi zaś najważniejsza różnica co do środków przez każdą z tych społeczności do osiągnięcia przeznaczonego jej celu użyć się mogących; zbawienie bowiem prawowiernych nie zależy od prawości samych tylko działań zewnętrznych, ale także i od prawości działań wewnętrznych, które wymusić się nie dadzą, lecz jedynie przez nauczanie i ćwiczenia pobożne zaszczerpionemi i ugruntowanemi, a wykraczający przeciw postanowieniom Kościoła nie przez kary doczesne, lecz w razie uchybienia i zaciętego uporu jedynie tylko przez zagrożenie wykluczenia z społeczeństwa kościelnego spowodowanemi być mogą. Przeciwnie cel społeczności cywilnej, to jest bezpieczeństwo wszelkich praw pierwotnych i nabytych wprost i bezpośrednio nie da się osiągnąć przez same środki działające jedynie na ulepszenie umysłu i woli - lecz tylko przez przymuszenie do legalności, to jest do zastosowania działań zewnętrznych do ustaw i wszelkich przepisów, jakich cel i dobro społeczności cywilnej wymagają. Wszakże z owego najściślejszego związku między Kościołem i społecznością cywilną zachodzącego wypływa, że ich cele i środki nie tylko sobie nie są przeciwne, ale owszem jedne wspierają drugie - bo gdzie jest bezpieczeństwo praw pierwotnych i nabytych każdemu człowiekowi służących i stosowne środki do osiągnięcia tegoż celu, tam ułatwiona jest także droga do wykształcenia umysłowe go i moralnego, a następnie i środki nie tylko do osiągnięcia doczesnej ale i wiecznej szczęśliwości - a gdzie są podawane takie środki, tam nie tylko poszanowania wszelkich praw wrodzonych i nabytych, ale i wykonywania wszelkich cnot chrześcijańskich spodziewać się należy. Mianowicie zaś spodziewać się należy tych dobroczynnych skutków od Kościoła chrześcijańskiego. Tego oczywistym dowodem jest cała jego nauka nawyrażnem Słowie Bożem i Tradycji od czasów apostołskich zagruntowana, a przez Kościół S. katolicko-apostołsko-rzymski w całości i nieskazitelności zachowana. Ona przekonywa o bytności Boga i jego najdoskonalszych przymiotach, o nieśmiertelności duszy, o nagrodach i karach w przyszłym życiu ona podaje najdzielniejsze pobudki do wszystkich cnot

The Concordat devotes only one whole article XXVIII to religious orders, while religious issues are partially addressed in articles: XXIX, XXX, XXXIV, XXXV. Thus, Article XXVIII states that the monks are subject to the authority of their Superiors General, who were also guaranteed freedom of communication with the Holy See. The monks were to observe, without hindrance, the rules of their institute, congregation and, according to the regulations of the Holy See, candidates could be admitted to the novitiate and take religious vows. The provisions of the above mentioned article of the Concordat were to apply also to women's orders. In Article XXVIII, we read:

“The monks who, by the laws of their order, are subject to superiors general residing at the Holy See, are subject to their administration according to those laws, without, however, offending the authority of the bishop, based on canon law and in particular on the decisions of the Council of Trent. The said superiors general shall communicate freely with their subordinates in all matters pertaining to their office and shall be free to make visits to them. Further, the monks shall observe the rules of their order, institute or congregation without any hindrance and admit candidates to the novitiate and

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chrześcijańskich i do wstrętu od występków i zbrodni; ona ostrzega, że zbrodnia największą tajemnicą pokryta przed Majestatem Boskim ukrytą być nie może, że więc nawet przez samobójstwo nie może być zerwanym węzeł łączący człowieka z Wszechmocnym, Wszechwładnym i Najsprawiedliwszym Stwórcą jego. Religia nie zna rozpacy, łagodzi wszelkie cierpienia fizyczne i moralne, pociesza w zasmuceniu, dodaje hartu duszy we wszystkich dolegliwościach. Człowiek tarczą Religii uzbrojony nie upada bynajmniej na duchu wśród najcięższego prześladowania, nie lęka się wcale śmierci, która tylko dla zbrodniarza straszną być może lecz dla tego, co wykonywa przepisy Religii chrześcijańskiej jest tylko słodkiemuśnieniem, jest przejściem z kłopotów i starań doczesnych do wiecznego pokoju i nowego życia. Człowiek mający Religią jest wyższym nad potężnychostaje na szczycie najwyższej godności moralnej, przed którą nawet przemoc uginać się musi; życie jego jest wiecznem, bo miłem wspomnieniem w potomności i szczęściem dla jego pokolenia, które nie może być porównanem z żadnym gatunkiem szczęścia ziemskiego, kończącym się z tem życiem, wedle Nauki Kościoła vanitasvanitatum et omnia in mundovanitas.” Mianowicie zaś zlewa Religia chrześcijański błogie swe skutki w społeczności cywilnej, zalecając posłuszeństwo nie tylko Władzy duchownej ale zarazem i Świeckiej, nakazując oddawać Cesarzowi, co jest Cesarzkiego, a to co jest Boskiego, Bogu; ona nakazuje cześć należną Panującym ziemskim w stopniu najwyższym w słowach wyręczonych przez Pawła Apostoła do naczelnego rządcy w Jerozolimie: “Ad tribunalCaesaris sto, ibi me oportetjudicari” – “Caesaremappello” ona łączy wszystkich ludzi bez różnicy ich wyznania węzłem braterskiej chrześcijańskiej miłości i wzajemnej pomocy, ona więc jest kamieniem węgielnym bezpieczeństwa, spokojności i pomyślności Narodów. A tak widocznie pokazuje się, że takiej instytucji żadna władza ludzka; lecz jedynie Kościół chrześcijański na opoce Piotra S. przez Chrystusa oparty zastąpić może. Możnaż przeto powątpiewać o tej prawdzie, że każdemu Panującemu służy prawo nie tylko najwyższej nad Kościołem chrześcijańskim widzialnym opieki, ale nawet obrony przez odpowiednie i stosowne środki, zniewalające każdego do zachowania w całości najświętszych Kościoła katolicko-apostolsko-rzymskiego postanowień” [Słotwiński 1858, 1-4].

to take religious vows according to the prescriptions of the Holy See. The same shall also apply to women's orders insofar as it is applicable to them. Archbishops and bishops shall be allowed to establish religious orders or congregations of both sexes in their own dioceses, according to the sacred canonical regulations, but they shall consult with the Imperial Government on this matter"<sup>2</sup>.

The remaining – mentioned above – four articles of the Concordat indirectly concern religious matters:

- a) Article XXIX: "The Church shall be entitled by law to acquire freely new estates and its property shall remain solemnly inviolable in all that it now possesses and shall for the future acquire;"<sup>3</sup>
- b) Article XXX: "The administration of ecclesiastical property shall be carried out by those who are called to do so according to canon law;"<sup>4</sup>
- c) Article XXXIV: "Other matters concerning ecclesiastical persons and property, which are not mentioned in these articles, shall be governed and administered in conformity with Church doctrine and discipline approved by the Holy See;"<sup>5</sup>
- d) Article XXXV: "All laws, regulations and decrees hitherto enacted in the Austrian Empire and in the individual districts of which it is composed shall be deemed to have been repealed by this solemn agreement insofar as they are contrary to it and the agreement itself shall henceforth have

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<sup>2</sup> See: "Jene Ordenspersonen, welche laut den Satzungen ihres Ordens General obern, die bei dem hl. Stuhl ihren Wohnsitz haben, unterstehen, werden von den selben Gemässheit der gedachten Satzungen geleitet werden, jedoch ohne Beeinträchtigung der Rechte, welche nach Bestimmung der Kirchengesetze und insbesondere des Concils von Trient den Bischöfen zukommen. Daher werden vorbenannte Generalobern mit ihren Untergebenen in allen zu ihrem Amt gehörigen Dingen freiverkehrter und die Visitation der selben frei vornehmen. Ferner werden alle Ordenspersonen ohne Hinderniss die Regel des Ordens, des Instituts, der Congregation, welcher sie angehören, beobachten und in Gemässheit der Vorschriften des hl. Stuhls die darum Ansuchenden in's Noviciat und zur Gelübde ablegung zu lassen. Dieses Alles hat auch von den weiblichen Orden in so weitzugelten, als es auf dieselben Anwendung leidet. Den Erzbischöfen wird es frei stehen in ihren Diöcesengeistliche Orden und Congregationen bei der Geschlechts nach den heil Kirchengesetzen einzuführen. Doch werden sie sich hierübermit der kaiserlichen Regierung in's Ein vernehmen setzen" – Article XXVIII [Buss 1862, 306-308].

<sup>3</sup> "Die Kirche wird berechtigt sein, neue Besitzungen auf jede gesetzliche Weise freizuerwerben und ihr Eigenthum wird hinsichtlich alles dessen, was sie gegenwärtig besitzen oder in Zukunft erwirbt, um verletzlich bleiben" [Buss 1862, 318-19].

<sup>4</sup> "Die Verwaltung der Kirchen güter wird von denjenigen geführt werden, welchen sie nach den Kirchengesetzen obliegt" [Buss 1862, 319].

<sup>5</sup> "Das übrige die kirchlichen Personen und Sachen Betreffende, wo von in diesen Artikeln keine Meldung gemacht ist, wird sämmtlich nach der Lehre der Kirche und ihrer in Kraft stehenden von dem hl. Stuhl gut geheissenen Disciplin geleitet und verwaltet werden" [Buss 1862, 326-27].

the force of state law in all districts for all time. Both contracting parties therefore promise that they and their successors shall retain everything in general and everything in particular that has been agreed upon. Should any difficulty arise later on, His Holiness and His Imperial Majesty shall confer in order to settle the matter amicably.”<sup>6</sup>

On 13th June 1858, in order to implement the provisions of the Concordat, the Ministry of Religious Denominations and Public Enlightenment issued the following norms: a) before founding a new monastery, the episcopal ordinariate must inform the Governorate and obtain the means of support for the monks. If a given religious order did not yet exist in Austria, the matter was to be submitted to the Ministry of Religious Denominations and Public Enlightenment, together with a copy of the document of the Holy See approving the order, its rules and religious constitutions; b) in case the order already existed in Austria, the Governorate itself could settle the matter and inform the Ministry of Religious Denominations and Public Enlightenment about the new monastery; c) in cases where the order was not recognised by the Austrian government, the appropriate decision had to be sought from the Ministry of Religious Denominations and Public Enlightenment through the Governorate; d) all monasteries that existed before the conclusion of the Concordat were recognised as legally existing; e) orders recognised by the government had full legal personality [Korzeniowski 1900, 196-97].

The above provisions were actually in force until 1918.

## 2. CONDITIONS FOR ADMISSION TO THE ORDER

The legal establishment of an order required, according to canon law, the approval of the pope for the rules and the consent of the bishops of the dioceses in which such orders were to be established. The establishment of an order could not take place without good reason. In particular, the bishop, before giving his permission, had to hear the opinion of the parish priest

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<sup>6</sup> “Alle im Kaiserthum Österreich und den einzelnen Ländern, aus welchen das selbst besteht, bis gegenwärtig in was immer für einer Weise und Gestalt erlassenen Gesetze, Anordnungen und Verfügungen sind, in soweit diesem feierlichen Vertrag widerstehen, für durch denselben aufgehoben anzusehen. Dieser Vertrag selbst wird in denselben Ländern von nun an immer der die Geltung eines Staatsgesetzes haben. Deshalb verheissen beide vertragschliessenden Theil, dass Sie und Ihre Nachfolger Alles und Jedes worüber man sich vereinbart hat, gewissenhaft beobachten werden, wofern sich aber in Zukunft eine Schwierigkeit geben sollte, werden Seine Heiligkeit und Seine kaiserliche Majestät sich zur freundschaftlicher Beilegung der Sache in's Einvernehmen setzen” [Buss 1862, 327-29].

and all concerned.<sup>7</sup> Women's convents could only be established in larger towns.<sup>8</sup>

The first condition for admission to the order was to come from a "worthy family". The age of the candidate was also important. According to the resolutions of the Council of Trent, women wishing to join a religious order had to be at least 12 years old. As far as men were concerned, the Council of Trent had set 16 as the minimum age for joining an order, but "this provision was changed by the breve of Pius IX *Ad Universalis Ecclesiae Reginem* of 7th February 1862, to allow men to take the simple vows (*vota simplicia*) at the age of 16, and three years later, i.e. at the age of 19, to take the solemn vows (*professio*) at the earliest" [Bartoszewski 1893, 58]. According to Articles 148 and 216 of the Civil Code, and also according to the Decree of the Court Chancellery of 26th January 1844, minors were obliged to obtain the consent of their father or guardian in order to join the order" [ibid.].

Another important element of admission to the order was the free will of the entrant. The Council of Trent (Sess 25 de reg. c. 17) instructed the bishops not to allow girls who wished to enter the order, and were already 12 years old, to wear a religious robe, and not to allow them to take the vows, until they ascertained the girl's will that she wished to enter the order of her own free will, without any compulsion, and that she knew what she was doing. To this end, the superiors of the order were also instructed to inform the bishop of any intention to take vows one month in advance, under penalty of removal from their office. Contrary to the above regulations, women in general, virgins, married women and widows, "who force others to join or violently draw others away from the order, whether lay or clerical, shall be cursed."<sup>9</sup>

According to the Decretals of Gregory, spouses were not allowed to join a religious order without the permission of the other party, unless the marriage was not *consumatum* or the other party had become guilty of adultery.<sup>10</sup> If the marriage was not *consumatum*, each spouse was allowed to join a monastery, even against the will of the other, "and whoever claims that a marriage is not dissolved by solemn vows, let him be accursed."<sup>11</sup>

<sup>7</sup> Council of Trent, X, Sess. 25, de reg. c. 3.

<sup>8</sup> Council of Trent, X, Sess. 25, de reg. c. 5.

<sup>9</sup> Council of Trent, Sess. 25, X, de reg. c. 17-18.

<sup>10</sup> "Maritus factus monachus a conjuge adulterata revocari non potest". Ibid., c. 15. [Pozostała na świecie małżonka, jeżeli nie jest bardzo wiekową, winna złożyć ślub czystości, gdyż inaczej „conjugatus ad sacrosordines non estordinandus”]. C. 5, c. 18.

<sup>11</sup> Council of Trent, Sess. 24, X, de sacr. matrimonii, c. 6.

According to Austrian law, even solemn religious vows did not dissolve a marriage.<sup>12</sup> If parents offered their children to the order, the monastery acquired the right to care for and supervise them, but on reaching maturity, they could leave the monastery.<sup>13</sup>

According to canon law, a candidate for the order had to have the same education as required for minor orders. The Austrian court decree of 1st September 1814 required candidates to prove that they had completed lower philosophical studies, while the patent of 19th August 1784 demanded that they had completed a catechism preparation course [Jaksch 1828, 207]. Furthermore, only candidates of Austrian nationality could be admitted to religious orders.

### 3. THE EFFECTS OF TAKING RELIGIOUS VOWS

Taking solemn vows in the light of the canon law of that time had the following effects: it conferred privileges of the clerical state; it dissolved any previous *votum simplex*; it dissolved betrothal and marriage *ratum sed non consumatum*; it gave rise to incapacity to contract a valid marriage; it removed *irregularitatem ex defectu natalium*; it gave rise to the incapacity to obtain *beneficium saeculare* with the exception of the papacy, the cardinalate and the episcopate; it conferred on the monk the right to demand from the order a lifelong provision of food and sustenance; it rendered the monk incapable of owning or acquiring property for himself. The last effect of taking religious vows, namely the limitation of monk's property, was applied depending on whether the monk was bound by a vow of poverty or a solemn vow.<sup>14</sup>

According to the norms of the Council of Trent, the monks were obliged by their rules not to go outside the monastery walls. The superior could grant permission to go outside only for important reasons and always in the company of another monk. The entrance of strangers into the order could only take place with the permission of the superior, which permission the

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<sup>12</sup> Cf. Civil Code, Article 111.

<sup>13</sup> Council of Trent, Sess. 25. X, de reg, c. 14.

<sup>14</sup> A single vow of poverty – *votum paupertatissimplex* – in particular, it does not take away neither the ability to acquire nor the ability to possess property, it only imposes, in accordance with the rules of the congregation, the obligation to hand over this property to be administered by third party. In the event of death or leaving the order by such monk, the congregation is to be given only a dowry that is specified in the constitution, the rest will be returned to such monk who also regains the unlimited freedom of administration and disposal of such remaining part of his property. These principles were clearly stated in Congregatio super statu of 25 April 1860 [Bartoszewski 1893, 63].



superior could rarely grant.<sup>15</sup> In women's orders, no nun who had taken solemn vows was allowed to go outside the monastery walls without the permission of the superior or bishop, while lay persons, on pain of a curse, needed a written permission from the bishop to enter the interior of the order.<sup>16</sup>

As far as the provisions of civil law were concerned, the effects of taking religious vows governing *foro civili* were mostly based on the provisions of canon law. In particular, a religious vow in general had some effects *pro foro civili* only if it was a solemn vow. "The Austrian Civil Code is not concerned with the vow of obedience [religious vow] and does not assign any *pro foro civili* effects to it. The superiors of the order are allowed to demand obedience from subordinate monks and to determine its extent, but only within the limits defined by secular legislation [Bartoszewski 1893, 65]. The vow of chastity also created, according to Austrian law, the incapacity to enter into a valid marriage and the nullity of the marriage contracted. According to § 63 of the Civil Code, "Religious persons who have solemnly professed celibacy cannot enter into a valid marriage and according to § 94 of the Civil Code, this is an impediment to the nullity of marriage that should be enforced *ex officio*. On the other hand, a religious vow taken after the conclusion of a valid marriage does not, according to Austrian civil law, dissolve the marriage" [ibid., 66].

As far as the vow of poverty is concerned, the effects of this vow were not settled by Austrian civil law. Property that a monk had not disposed of before taking the vows remained under the administration of a court-appointed guardian until the monk's death (or his release from the vows), "after which the so-called non-testamentary succession took place, and testamentary or counter-testamentary succession only if the will had been made before the vows or according to the provisions of the second item of § 573 of the Civil Code. The monk, therefore, did not lose the property he possessed before taking his vows, nor did this property pass to the monastery, and as long as the monk lived, this property could be considered as heirless inheritance – the monk only lost any administration of this property, which was entrusted by the court to a guardian. This was stated in particular in § 182 of the Imperial Patent of 9th August 1854" [ibid.].

Article 356 of the Civil Code referred to the military service of monks. Novices who had been conscripted into the army could be conscripted into the reserve and in time of peace as well as war they were free from any active service, periodical military exercises and inspection assemblies. After

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<sup>15</sup> Council of Trent, Sess. 25, X, de reg. c. 4. Cf. also: Piusa V, *Motu proprio* "Romanum", 16 Julii 1570, as cited in Bartoszewski 1893, 65.

<sup>16</sup> Council of Trent, Sess. 25, X, de reg. c. 16.

priestly ordination, they were transferred from the reserve to the registry post, and in case of mobilisation they could only be used for pastoral service until the end of their military obligation [ibid., 70].

#### 4. THE RIGHTS AND DUTIES OF RELIGIOUS SUPERIORS

According to the resolutions of the Council of Trent, the election of religious order superiors should take place *per vota secreta, sine nulla fraude*.<sup>17</sup> The superiors of male religious orders were entitled to the rights of a parish priest in relation to the monks under their charge. Each monastery created parishes for itself. Priestly ordained abbots were entitled to grant tonsure and minor orders to members of their order. According to canon law, outside monks were not to interfere in pastoral work without the bishop's permission. According to Austrian state law, on the other hand, monks were obliged to provide pastoral assistance to the lay clergy.<sup>18</sup>

As regards the rights and duties of religious superiors regarding the disciplinary power over their subordinates, the principle of canon law was that the superiors were obliged and entitled to see to it that everything was done according to the rule, statutes and canonical laws, and that those who transgressed these provisions were subject to the provisions of canonical penal law.<sup>19</sup>

Austrian law stipulated that complaints by religious clergy against superiors, with the exception of those concerning the transgression of state laws, were to be lodged directly with the competent consistory. The superiors could transfer monks from one monastery to another by way of disciplinary measures, "provided that such measures do not burden the religious fund" [Bartoszewski 1893, 73].<sup>20</sup>

<sup>17</sup> Council of Trent, Sess. 25, X, de reg. c. 6.

<sup>18</sup> Cf. Court decree of 15 October 1803, in: Jaksch 1828, 339.

<sup>19</sup> Council of Trent, Sess. X, de jud. c. 53.

<sup>20</sup> See "Żadna osoba należąca do jakiego zakonnego towarzystwa, któraby z jakiegokolwiek powodu z zarządzenia odnośnego przełożonego trzymaną była w więzieniu, wbrew swej woli nie może być tamże zatrzymaną. Ponieważ jednak także co do tych osób z świeckiego i zakonnego duchowieństwa, które się poddają dobrowolnie wyznaczonemu sobie przez przełożonych uwięzieniu, nie wolno spuszczać z oka względów ludzkości i zachowania zdrowia, przeto należy ministrowi wyznań i oświaty przedkładać wykazy księży świeckich i osób zakonnych, faktycznie znajdujących się w dobrowolnem uwięzieniu, z podaniem nazwiska, czasu, odkąd więzienie trwa, na jak długo kara uwięzienia jest wyznaczoną, opisu lokalu więziennego pod względem wielkości, światła, powietrza i urządzenia, tudzież zaopatrzenia; przy. nowo zdarzających się zaś wypadkach uzupełniać takie wykazy. Gdyby biskupi nie chcieli się podjąć układania takich wykazów co do świeckiego i zakonnego kleru swych dycecyj i z dostateczną gwarancją za zupełność tychże i prawdziwość wszystkich tamże

## 5. DECISION TO LEAVE THE ORDER

The decision to leave the religious community could be taken according to canon law in several cases: 1) by the death of a monk; 2) by annulment of vows. A request for annulment of vows should be submitted to the competent superior of the order and the bishop. The annulment could be pronounced only after a process of annulment, to which all interested parties, including the appointed defender of the order, were summoned. The defender of the order was obliged to appeal to the higher ecclesiastical authority against a decision favourable to the monk. There was no ordinary legal remedy against two unanimous decisions. The annulment of vows could be legally requested 5 years after taking the vows at the latest; 3) as a result of papal suspension, which either freed the monk from all his vows, after which he was transferred to the secular state (the so-called laicisation), or freed him only from the solemnity of his vows, after which he obtained only the right to stay in the world with the obligation to keep his vows (the so-called secularisation); 4) by transfer to an order of a stricter rule. The transfer from an order of a lighter rule to an order of a stricter rule required, unless the statutes provided otherwise, the permission of the superior of an order. The transfer from an order of a stricter rule to an order of a lighter rule required a papal permission.<sup>21</sup> Nuns needed papal permission for each change of religious order. Canon law also required a papal permission for the abolition of the rules by the entire order; 5) by appointing a monk as bishop. The monk who became the bishop was freed from the vow of poverty and monastic obedience for the duration of his bishopric, but instead of a bishop's robe, he was obliged to wear a monastic habit, or at least a bishop's robe in the colour of a monastic robe; 6) by total dissolution of a religious order, permitted by canon law only on the basis of a papal permission; 7) by expulsion from the order. Such expulsion could take place only in the case of completely incorrigible monks, after the unsuccessful application of the penalties of the order and proper proceedings. Even if the order was not under the bishop's supervision, the decision expelling a monk from the religious community had to be brought to the bishop's attention. The superior of the order was obliged to learn annually about the condition and behaviour

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zawartych dat szefom krajowym przedkładać, natenczas starostowie powiatowi mają sami sporządzić wspomniane spisy, o ile takowe dotyczą księży świeckich; co się zaś tyczy zakonników, mają starostowie żądać takowych wykazów bezpośrednio ód przełożonych pojedynczych konwentów i kongregacyj, zbadać je dokładnie, sprawdzić i jak najwcześniej przedłożyć. Rozporządzenie to należy udzielić każdemu nowo wstępującemu członkowi jakiego religijnego zakonu lub jakiej kongregacyj przed złożeniem ślubów, a dowód na to w każdym pojedynczym przypadku przedłożyć naczelnikowi rządu krajowego” [Bartoszewski 1893, 74].

<sup>21</sup> Council of Trent, Sess. 25, X. de reg. c. 19.

of those excluded, to admit those who had improved their condition to the monastic community, and to censure those who had erred. In case of return, there was no need to take vows again. Nuns, due to the greater fear of public outrage, should not be expelled from the order in general, but only punished by monastic disciplinary measures.<sup>22</sup> Only in the case of a complete and explicit annulment of monastic vows, the monk would return to the full rights of his former state, in other cases his vows would remain in force. In the case of secularisation (*indultum saecularisationis*), the monk was obliged to observe the duties that his solemn vows had imposed on him, but only his reciprocal rights and duties towards the order and vice versa were not binding upon him. If he was expelled from the religious community, he was obliged to keep his *votivitas*. The vows were not dissolved by absconding or arbitrary abandonment of the order. As for those who fled (*fugitivos*), the canon law, in presuming their intention to return, imposed on them the penalties provided for in the monastic rules [Bartoszewski 1893, 87].

## 6. SUPPRESSION OF RELIGIOUS ORDERS

The suppression of a religious order, or even of one legally existing monastery, according to canon law could only take place with the permission of the Holy See. The bishop only had the right to expel incorrigible monks from the monastery and to replace them with others, if possible of the same rules, and if there were none, of different rules. In the event of sudden suppression of an order or monastery by a secular authority, the order continued to exist in the face of canon law. Nor were the privileges of monks extinguished, with the exception of those that were inseparably connected with communal life, and the rights of the order and monks were considered by canon law to be merely suspended in their exercise.<sup>23</sup>

In the event of suppression of an order by a competent ecclesiastical authority, the property of the suppressed order could only be allocated for other ecclesiastical purposes. The detailed allocation of the remaining property, in the absence of the relevant reservations of the rules, was left to the exclusive decision of the pope. It was not permissible to suppress a religious community either by the consent of the members of the order or by their

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<sup>22</sup> “Mulier autem propter vitandum ordinis scandalum, ne detur illicenti avagandi in saeculo, decernimus ut in domunculo infra curtem Monialium longe a caeteris habitaculis posita, maneat inclusanunquam inde exitura; sed et ibi jejuniis et orationibus et caeteris gravis poenitentiae remediis antireatus maculas diluturas secundum provisionem Prioris omnem per fenestram tantum vitae accipiat administrationem”. *Konstytucja Dominikanek*, as cited in Bartoszewski 1893, 87.

<sup>23</sup> *Responsa Sanctae Penitentiariae* 12 September 1872, ASS (1872), VII, p. 147.

extinction. An order was considered to legally exist, even if only one member of that community remained [Bartoszewski 1893, 87].

In addition to these provisions of canon law concerning the suppression of religious orders, state legislations, on their part, also set conditions for the valid establishment of religious communities, and if these conditions were not met, they had the right to suppress such orders. Thus, according to Austrian legislation, specifically according to Article 26 of the Civil Code, communities “which are expressly forbidden by political statutes, are opposed to public order or good morals” were not allowed.<sup>24</sup> By contrast, according to the Penal Code: “Any formation of secret associations with whatsoever intention and under whatsoever form is prohibited,<sup>25</sup> and according to Article 286 of the same Code “any real association of several persons shall be considered a secret association: a) if its existence is intentionally concealed from the authorities, b) if, although its existence is known, its organisation or statutes are concealed, or a different organisation, different statutes or different purpose, but not the real ones, were given to the authorities.”<sup>26</sup>

## CONCLUSIONS

The presented analysis of the canonical legislation shows that the ecclesiastical legislation in matters related to religious life has been stable since the Council of Trent. Changes in this area would only come with the reform of canon law, the result of which would be the 1917 Code of Canon Law. Unfortunately, the same cannot be said of the civil legislation in Austria after 1855. On the one hand, we have the Concordat, but on the other hand, there are many provisions (patents) from the Josephine era still in force. The act of 7 May 1874 formally abolished the Concordat, but in its place no new regulations relating to religious life were established. In this situation, a great deal of chaos and confusion ensued. This legal mess is aptly described by Witold Bartoszewski: “with the current state of the legislation and the Tribunal’s rulings, even a craftsman selling even the smallest movable property to a monk cannot be sure that the order will not apply for the annulment of this purchase, as by a person incapable of acquiring things” [Bartoszewski 1893, 112].

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<sup>24</sup> Civil Code, Article 26.

<sup>25</sup> Penal Code of 1852, as amended in 1867, Article 295.

<sup>26</sup> Penal Code, Article 286.

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