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clergyman is guilty of a crime then, in the name of love and truth, it is necessary to apply canonical penalties. The important part of solving a problem is to apply formation rules consistently: a proper recognition of vocation and human formation in an emotional and sexual space. Finally, clergymen have to interpret the universal call to holiness more intensively.

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Theology of Canon Law from the perspective of Remigiusz Sobański

Before the theory of canon law became the subject taught at the departments of canon law, it had appeared in publications for approximately 50 years¹. The incentive to introduce this new name, which was supposed to comprise basic issues of canon law concerning its ontological and epistemological foundations, was, on the one hand, the theology of law which came into existence in Protestantism as early as before the Second World War, and on the other hand, in Catholicism, K. Mörsdorfs opposition to the theses proposed by R. Sohm. Initially, it developed as the polemics with Sohm`s ideas. Next the polemical elements were replaced by the necessity of a positive lecture on the rudiments of canon law. The lecture on theological rudiments of Church law began to be called the theology of canon law.

From the beginning of his research prof. R. Sobański also used this term. The third anniversary of his death was celebrated in December last year. On this occasion, an academic conference dedicated to his achievements and contribution to the development of canonical legal science was held at the Faculty of Canon Law of Card. St. Wyszyński University. In this article it is worth referring to the professor`s ideas and presenting what he understood by the theology of canon law as well as what this branch of research was supposed to deal with. Ultimately, in his solutions the professor did not regard theology of canon law as a field of learning but treated it as a branch of academic study called canonical legal science. However, one can notice a significant evolution of views concerning the theology of canon law.

Presentation of R. Sobański`s ideas is one of the suggestions emerging in connection with the dilemma of the present-day definition of the identity and

¹ For the first time the name «theology of Canon law» appeared in the encyclopedic publication thanks to E. Corecco, who wrote the entry «Teologia del diritto canonico», in: G. Barbaglio, S. Dianich (red.), *Nuovo Dizionario di Teologia*, Roma 1977.

epistemological status of the theology of law². I will restrict myself only to the academic achievements of R. Sobański presented in publications in the Polish language. They are not widely known in the world of canonical legal science despite the professor's numerous publications in European periodicals and translations of some of his articles earlier published in Polish³.

Although it had not appeared as a field of learning at the faculties of canon law until the Decree of the Congregation for Catholic Education was issued in 2004⁴, the theology of canon law was taught at these faculties much earlier. Yet, because of the legal validity of the Decree. It became a branch of academic research with its own specificity and autonomy. It was not officially stated though precisely what this specificity is connected with. It remains to be defined by those who deal with it and lecture on it. It is, as P. Gherri⁵ writes, the fundamental problem of the theology of canon law, prior to the definition of its epistemological status.

1. Theology of canon law as an introduction to the theology of law

R. Sobański dealt with the problem of defining theology of canon law, long before it appeared at the faculties of Canon law, thus joining the post-council trend of describing the fundamental issues of canon law with this name. The unquestionable incentive for shaping the name of the theology of canon law was the speech of Paul VI to the participants of the II International Congress of Canon Law in 1973, in which the Pope used a general phrasing theology of law⁶. He indicated by it the necessity of existence of such a theology of law which would assume, as a point of departure, everything that Revelation says about Church and would reflect on the ways in which the activity of the Holy Spirit influences different aspects of articulation of a person and legal order in Church.

² Cfr. P. Gherri, *Teologia del diritto: il nome di una crisi?*, „Ius Canonicum” 43 (2003) 85, pp. 249-299; *Teologia del diritto canonico: note per individuare la nuova disciplina canonica*, „Ius Canonicum” 45 (2005) 90, pp. 693-754; *Teologia del Diritto canonico: identità, missione e statuto epistemologico*, „Apollinaris” 80 (2007) 1-2, pp. 333-380.

³ R. Sobański published many articles in European languages. Yet, most titles came out in Polish. A collection of articles translated from Polish is the book entitled *La Chiesa e il suo diritto. Realtà teologica e giuridica del diritto ecclesiale*, Collana di studi di diritto canonico ed ecclesiastico. 13-Sezione canonistica, Torino 1993.

⁴ Cfr. Congregatio de Institutione Catholica, *Decretum quo ordo studiorum in Facultatibus Iuris Canonici innovantur*, Novo Codice 2/9/2002, AAS 95 (2003), pp. 281-285.

⁵ Cfr. P. Gherri, *Teologia del diritto canonico: note per individuare la nuova disciplina canonica*, p. 694.

⁶ Paulus VI, *Allocutio. Ad participantes Congressus internationalis Iuris Canonici pones Universitatem Catholicam a S. Corde Mediolani habiti*, „Communicationes” 5 (1973), pp. 130-131.

In the same period, R. Sobański published two research titles dedicated to the theology of law. In 1973, a textbook entitled «An outline of the theology of Church law» which was published as a product of his lectures delivered on this subject at the Faculty of Canon Law of the Academy of Catholic Theology in Warsaw. Although published earlier, another work is his article entitled «Theology of law as a field of study on the ontological foundations of canon law». Following R. Sobański`s line of thought one can notice a significant evolution of opinions concerning the issues of the theology of Church law over a period of a few months.

The starting point for defining the issues of the theology of law is theology of the worldly realities, including law. Hence the subject of theology of law is theological cognition of law, which constitutes one of the elements of a person`s situation in life. Belonging to the dimension of human existence, it is also affected by the redemptive activity of God. In this context, theology of law should aim to answer the question of the specific meaning that Divine Revelation contributes to law, since undoubtedly law is a distinctive notion for the language of Revelation which serves to define the redemptive activity of God. Law appears in various theological fields and it is discussed from different points of view. What it comes down to is creating the Catholic field of knowledge showing its specific elements resulting from Revelation. Contrary to a theological approach to law which focuses on its application (e.g. moral theology), the theology of law is a fundamental treatise on law in the light of Revelation, the purpose of which is to reveal its redemptive function.

The point of reference for deliberations about law in the light of Revelation is Church law as a symbol and tool of Salvation. Becoming acquainted with the law of the Church which exists as a salutary organism, helps to bring out the redemptive meaning of law. Therefore, the theology of Church law exists as an introduction to theology of law in general. Yet it should not be treated as the theology of some legal institutions of the Church. The consequence of such an approach would be a situation in which theology of law would deal with the analysis of theological sentences included in the legal system of the Church, this would mean revolving around theology and not law. If it did not make law the subject of its cognition, it would not be at the same time theology of law. For the point of theology of law is not to draw theological conclusions from theological structures of Church but to reveal the theological aspect of its legal structures. The role of theology of Church law is contributing to the development of theology of law, separate from legal studies and

philosophy of law, bringing together all the elements appearing in various theological treatises which make law the subject of its cognition. The legal analysis, carried out as part of theology of Church law, will make it possible to point out new categories for law, which in turn will help to present its redemptive role.

R. Sobański`s first attempts to define the theology of Church law placed it in the role of an introduction to the theology of law in general. It revolves around Church law in the light of Revelation and thus points to the theological aspects of legal structures of the Church as well as the involvement of law and its role in the redemptive mission of the Church.

2. Theology of Church law

According to the date of its publication, in his first article dedicated to the theology of canon law as a field of learning about ontological rudiments of canon law and written before the aforementioned speech by Paul VI, R. Sobański, similarly to the Pope, uses the general term theology of law⁷. Nevertheless, it seems clear from the article that what he means is the theology of Church law. In this article he justifies using the phrasing „theology of law” referring to the contemporary situation of negation of law in the Church and the method of conducting research on it so far. He considered it appropriate to use the wording theology of law for several reasons: 1) antijuridic trends in the Church which contributed to the negation of law in Church putting «Church of law» in opposition to «Church of love» and referring, to a great extent, to an aversion towards law, as such, after the experience of the Second World War in general; 2) the necessity of presenting Church law as performing its proper role towards the attitudes of the faithful both the laity ones and the clergy, who express their objections to the binding norms in the Church which is also considered to be some kind of denial of the faith itself; 3) the necessity to restore law to its proper place in the Church by the canonists with regard to its positive understanding, which, at the time of the council resulted in juxtaposing the pastoral and canonical aspect; 4) it was necessary to restore canon law to its proper place among legal studies, which required revealing the legal character of canon law; 5) after having dealt with the legal character of canon law it was vital to emphasise its theological character.

⁷ R. Sobański, *Teologia prawa kanonicznego jako nauka o ontologicznych podstawach prawa kościelnego*, „Śląskie Studia Historyczno-Teologiczne” 5 (1972), pp. 59-70.

The above reasons gave rise to a discussion about basic issues of canon law which concerned the necessity of showing that the existence of not only canon law but above all Church law was fully justified. Canonists faced the task of presenting convincing reasons for the existence of Church law, first for the law itself and then for interpreting and applying it.⁸ R. Sobański regarded presenting Church law which stems from the nature of Church itself as a necessity which, in turn, justified introducing the theology of Church law as a subject which should be taught not only at the faculties of Canon law but also as part of theological education as an introduction to Canon law⁹.

The branch of research which dealt with fundamental issues of canon law began to be called theology of Church law and as such was lectured on by R. Sobański from the academic year 1971/72 at the Faculty of Canon Law at the former Academy of Catholic Theology¹⁰. What R. Sobański counted among basic problems of canon law were the answers to the following questions: Why is there law in the Church?, is it necessary?, what purpose does it serve?, How does it work?¹¹ Using this term to describe fundamental issues of canon law was based on an assumption that highlighting these problems required research on the Church itself, that is, entering the territory of theology. Using this name was at the same time an expression of opposition to those environments (e.g. secular Italian canonical legal science) which considered basic problems of canon law as part of the general theory of law understood in a positivist way.

R. Sobański does not specify though what this new discipline is, does not name its identity but first of all emphasises that this definition has significance for the methodological orientation presented at Vatican Council II (*OT 16*). Moreover, using the name of the theology of canon law indicates an important aspect of Church law itself. It is not only a legal phenomenon but, first and foremost, a religious phenomenon constituting an integral aspect of Church law itself which is the subject of theological cognition. Placing research on canon law within theological cognition allows us to reach the most essential feature of law which is its quality of being part of the Church. That is why, striving to answer the question what Church law is, one should begin

⁸ *Ibidem*, p. 61.

⁹ Cfr. R. Sobański, *Zarys teologii prawa kościelnego*, Warszawa 1973, p. 6.

¹⁰ As an academic subject theology of canon law appeared at the Academy of Catholic Theology in 1968. The first textbook written for students was entitled: *Zarys teologii prawa kościelnego*, Warszawa 1973.

¹¹ R. Sobański, *Kościół – prawo – zbawienie*, Katowice 1979, p. 10.

with defining Church itself. This was the direction that R. Sobański followed. First of all, in the theology of law that he practiced, he searched for Church in Church law in order to next pose a question about law itself in Church law. The methods he applied for finding the answer to the above mentioned question need to be taken into consideration when we inquire about law in the Church, since it is one of the elements of its structure. Therefore, R. Sobański anticipated questions about Church law raising a question about the Church itself because his point was to show the Church in Church law. It wasn't the Church enclosed in a priori concepts and particular images, (which was expressed in the statements «Church as...»), but the Church which is a holy mystery. That is why one gets to know Church law through becoming familiar with Church itself. All other points of view from which Church law is studied are secondary to the theological aspect. In such an approach, the theology of Church law first of all revolved around presenting Church in Church law, which should next lead to fundamental questions about law in Church law.

According to R. Sobański, getting to know the church one should refer to what it says about itself, including its law. Church as a symbol and tool of salvation is present in many dimensions and expresses itself in many forms of activity. It is also expressed through what is regarded in it as law. That is why, theology can answer the questions concerning the expressions used by the Church only when it presents itself as a subject of objectives with which it is entrusted and shows itself bearing in mind its legal subjectivity. Theology should give a still deeper answer, namely with reference to the query whether this way of presentation corresponds to the legal awareness of Church and whether this legal awareness, expressed in terms used by the Church, remains in harmony with the meaning of faith in the Church¹².

The revealed way of getting to know about Canon law contributed to the fact that the professor initiated and began to practise legal ecclesiology. He understood it not so much as a field of knowledge dealing with the legal aspects of the Church but about the Church under its legal aspect. The subject of this branch of learning is the mystery of the Church whose legal aspects exist not outside but inside it. Hence, one can find them only in the area of study on Church. The Church as a subject of law in its own awareness is the fundamental subject of the theologically-oriented discipline described as the legal theory of Church. One should bear in mind though that Church

¹² Cfr. R. Sobański, *Kościół jako podmiot prawa. Elementy eklezjologii prawnej*, Warszawa 1983, p. 9.

which is the subject of legal statements is the Church of faith, a divine-human community¹³.

Discussing Church in the legal aspect is not the job of a theologian. It is not a theologian but a canonist who deals with Church, but, in doing that, he should bear in mind the mystery of the the Church. It is a canonist`s job, not a theologian`s, to justify the legal structure of the Church¹⁴. A canonist, explaining and lecturing on the legal institutions of Church, has to place them in the theological-ecclesial context, remembering that the whole Church and everything that exists in it serves a person on his way to salvation and in its entirety one should look for the foundations of legal structure. In his research he uses a morphological method, which is not based on a selective treatment of different aspects of Church but captures it in its divine-human mystery, trying to get through to the basic legal structures of Church by means of the analysis of the redemptive event occurring in history «in» and «through» Church and consequently to describe a completely new and different-from- secular communities` social situation which is created by those who believed and were baptized. Therefore, the issues connected with the rudiments of law should be considered within theological thinking. The point of departure chosen in this way and methodologically justified set the direction followed by R. Sobański in his deliberations on the rudiments of Church law. His point of view on the reality of ecclesiastical law falls within the limits of salutary orientation of practising canonical legal science, in which law is expressed as a dimension of salvation order.

As opposed to the first period of perceiving theology of canon law as having an ancillary role towards theology of law, in the later period R. Sobański emphasises that theology of Church law discusses fundamental issues of ecclesiastical law. In his view, one of them is represented by ontology which treats Church law as a «being», asking about its driving and determining factor, its essence and attitude to other beings and epistemological issues dealing with the ways of getting to know canon law in accordance with its essence¹⁵.

¹³ *Ibidem*, pp. 9-10.

¹⁴ Cfr. R. Sobański, *Zagadnienia wstępu do nauki prawa kanonicznego* [Uwagi na marginesie Dekretu OPTATAM TOTIUS nr 16.4], „Prawo Kanoniczne” 17 (1974) 1-2, pp. 27-28.

¹⁵ Cfr. R. Sobański, *Nauki podstawowe prawa kanonicznego*. 2. Teologia prawa kościelnego, Warszawa 2001, p. 12.

3. Theory- theology of canon law

Theology of canon law has become a privileged name for describing a discipline revolving around basic problems of Church law. From the very beginning of its existence it has not been a uniform system. Yet, despite conceptual differences one could notice certain unanimity in approach to this discipline. A starting point for deliberations concerning fundamental issues of ecclesiastical law was the mystery of Church. According to R. Sobański it was the main reason why this discipline was described as theology of Church law, since its major subject - Church as a holy mystery constitutes the subject of theological cognition. The same refers to its law, which is an element of Church reality¹⁶.

An additional motive for using the name theology of law was the opposition to those directions of research which wanted to present fundamental issues of canon law basing on the theory of law understood in a positivist way.

R. Sobański in his next study dedicated to the basic issues of canon law entitled «Church law–salvation» indicates that the problems raised in it belong to the so-called theology of law¹⁷. Contrary to earlier presentations, this time he does not speak firmly about theology of Church law. His deliberations move towards replacing theology of ecclesiastical law with theory of canon law. What contributed to this situation was achieving canonists` aim, which was placing fundamental issues of canon law within the limits of theological cognition. It was theology of Canon law that strengthened the belief that Church law is an original and authentic Church reality expressing interpersonal relations of people believing in Christ, constituting the source of obligations and presented in canonist norms.

Another motive for which he resigns from the term theology of canon law in reference to fundamental problems of ecclesiastical law is canonical legal science itself as a field of study. Since for the whole canonical legal science a departure point is the revealed truth about Church. Emphasising, not removing or obscuring all methodological differences, canonical legal science, on the way to theological cognition of Church, thereby aims to find out about its law. Isolating from canonical legal science a separate theological discipline revolving around fundamental issues of canon law would come down to only interpreting and applying law and dealing with

¹⁶ Cfr. R. Sobański, *Teoria prawa kościelnego*, „Prawo Kanoniczne” 31 (1988) 1-2, pp. 9-10.

¹⁷ Cfr., R. Sobański, *Kościół – prawo – zbawienie*, p. 10.

the binding positive law. For this reason, R. Sobański suggests eliminating the term theology of law. If it was left to be understood in the same way as previously, it could provoke thinking that, among ecclesiastical fields of knowledge dealing with canon law, there exists a theological branch of learning (theology of Church law) and a legal one (canonical legal science). In fact, the binding law cannot be separated from its basis and- consequently-the whole legal order of Church constitutes the subject of one field of study, from ultimate rudiments to the most detailed regulation. Distinguishing canon law from theology of law is unjustified¹⁸.

In place of theology of Canon law as a discipline dealing with fundamental issues of ecclesiastical law, R. Sobański suggests the expression «theory of canon law». The theology of Canon law performed its function by underlining the methodological orientation of studies on Church law, and the theory no more implies its similarity to the theory of law as part of secular legal studies, as was the case in Italian secular canonical legal science. The concept of the theory of canon law expresses more precisely what its aim is than does the theological concept. Its aim is to create a theory integrating and systematizing the results of research which is supposed to bring one closer to understanding what is called law in the Church¹⁹.

R. Sobański did not give up completely using the term theology of Church law and he conducted classes with this title apart from the theory of law at the Faculty of Canon Law, though he did not practise these two disciplines alternatively. The difference was brought about by didactic requirements and by the fact that in academic research one has to define the formal subject precisely. Both theology and theory aim to answer the question of what ecclesiastical law is and what is its meaning. The revealed truth about the Church must remain a starting point, but the way to the answer leads to more detailed questions concerning the phenomenal aspect of law (its forms, attributes, functioning), perceived, in turn, in the light of the mystery of Church²⁰. Dealing with theory and theology within one field of learning which is canonical legal science, depends on the assumed methodological orientation. Theory concerns Church law under the legal aspect and theology under the theological aspect. The first one, as a departure point, assumes a lawyers` way of

¹⁸ *Ibidem*, p. 10.

¹⁹ Cfr. R. Sobański, *Teoria prawa kościelnego wśród nauk teologicznych i prawnych*, in: *Rozważania o państwie i prawie*. Księga jubileuszowa ofiarowana Profesorowi Józefowi Nowackiemu, Katowice 1993, p. 181.

²⁰ R. Sobański, *Nauki podstawowe prawa kanonicznego*. 1. Teoria prawa kanonicznego, Warszawa 2001, p. 17.

thinking, while the latter aims to answer the question of how the analysed object (Church law) compares to salvation. Research requires a clearly determined formal subject and thus it leads to distinguishing two academic disciplines within canonical legal science. According to R. Sobański canonical legal science, on account of the fact that its point of reference is the dogma of Church, belongs to theological studies. It does not erase its affiliation with legal studies. Ecclesiastical law is an original and authentic Church phenomenon. Discussing Church law, we discuss the Church. Thanks to the theology of canon law the belief that canonical legal science is a theological discipline was established, although it is still disputable. The division into the theory and the theology of Canon law raises the question of which has the priority when it comes to discussing them. What should be lectured on first: the theory or theology of law? It would be logical to start with theology, explaining first what Canon law is, what is the reason for its existence and its nature. That is to say, what Church law is and what is its meaning. Then, as a point of departure, one should refer to ecclesiastical studies. Church law is also a social and cultural phenomenon. This comes about because it is a legal phenomenon. But one should bear in mind that it is a legal phenomenon as a Church phenomenon. Hence, the first and most important starting point for deliberations about law is the Church itself in the mystery of its existence, and not the Church in one of its possible definitions. Here one should refer to theology or suggest a lecture based on the assimilated main concepts and theses of theology.

A lecture on the fundamental issues of Canon law may start with theory as long as these disciplines are not treated as alternatives but as complementary. There are at least two reasons for beginning a lecture on the theory of law as follows: 1) historical: in this way theoretical and systematic knowledge of law started to develop beginning with secular Italian canonists who showed that canon law is also a kind of law in the same way as the law of the secular (state) legal orders; 2) if the mystery of Church itself is supposed to be a starting point for deliberations about ecclesiastical law, then the way to answering the question about law in Church leads, through the answers, to more detailed questions, concerning the phenomenal nature of law (its forms, attributes, functioning). On the basis of theoretical and legal issues we become familiar with the specificity of canon law in comparison to secular law and we next make inquiry about the nature of this specificity within the limits of theological cognition. We justify what we describe.

While in giving a lecture it is difficult to separate theological problems from theoretical ones in reference to Church law, this does not mean that in research these two aspects cannot be distinguished. The conducted research has influence on bringing together its results within one lecture.

Canonical legal science comprises both theological and legal issues. R. Sobański regards theology and theory of Church law as two academic disciplines within the limits of one field of learning which, in his view, despite methodological differences, belongs to theological studies. However, this does not mean that it cannot be counted among the legal sciences. Therefore, the theory of Church law falls into the category of theological fields of study since its subject is a part of the Church and, as a subject of faith, it constitutes the subject of theology. It has its place among legal sciences because its subject is a part of the reality called law.

Distinguishing between theology and theory of Canon law as two fields of canonical legal science, and, using one name of theory of Canon law for a branch of learning about its fundamental issues, is a solution suggested by R. Sobański which deserves to be taken into consideration in the present-day discussion on the identity of the theology of Canon law.

Title

Theology of Canon Law from the perspective of Remigiusz Sobański

Summary

Remigiusz Sobański was a canonist whose name was associated, both in Polish and world canonical legal science, with practising theology of canon law. The article presents the evolution of the professor's views in reference to understanding this academic discipline. Initially, he considered it to be the introduction to the theology of law, just as it was developed in the protestantism. Next, he perceived it as a field of learning revolving around ontological rudiments of Church law. Finally, he introduced the term theory of canon law to describe the area of study dealing with fundamental problems of canon law, since it is more specific about its aim. Its purpose is to create a theory integrating and systematising the results of research which is supposed to bring one closer to understanding what is called law in the Church.

Key words: Remigiusz Sobański; theology of canon law; theory of canon law.

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Is Dialog a Useful Tool for the Church Legislator? Deliberations on the so-called „Pope Francis’ Questionnaire”

1. Law in the church community

Law in the Church community is a visible phenomenon. Its foundation is in the nature of the Church – „ius canonicum e natura Ecclesiae manare”¹. The church legal regulations fully accord with the nature of the Church and reflect it.² Law in an unavoidable way belongs to the life of the Church³.

The main task of the legal rules is to lead the faithful of the Church to salvation. The aim is expressed by the canonical principle – *salus animarum suprema lex* (cf. can. 1752). It means that all ecclesial norms must be concentrated on salvific action of the Church⁴.

Due to the fact that church law is of special importance, the church lawgiver has a very demanding work to do. On the one hand, he is the head of people, that is, he has power over the faithful and yet, at the same time, he is a servant of the people for whose sake he drafts law. „You know that those who are recognized as rulers over the Gentiles lord it over them, and their great ones make their authority over them felt. But it shall not be so among you. Rather, whoever wishes to be great among you will be your servant; whoever wishes to be first among you will be the slave of all. For the Son of Man did not come to be served but to serve and to give his life as a ransom for many” (Mk 10, 42–45). These verses well convey the situation of the legislator. His position in the church society can be justly described as „a paradox of the

¹ Prefatio, *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, „Acta Apostolicae Sedis” (hereinafter: AAS) 75 (1983), part II, p. XX.

² Joannes Paulus PP. II, *Constitutio Apostolica Sacrae disciplinae leges Codex Iuris Canonici promulgatur*, 25.01.1983, AAS 75 (1983), part II, p. XI.

³ R. Sobański, *Grundlagenproblematik des katholischen Kirchenrechts*, Wien-Köln 1987, Böhlau Verlag, p. 141.

⁴ Ivo Carnotensis, *Epistola 60, Patrologiae cursus completus*, Series Latina, J.-P. Migne (ed.), vol. 162, Paris 1878, col. 74: „Cum ergo omnis institutio ecclesiasticarum legum ad salutem referenda sit animarum”.

legislator”⁵.

Both, the specificity of the church law, and the unique position of the legislator create the situation in which the Roman law principle „Quod principi placuit legis habet vigorem”⁶ is not the case. The church legislator cannot limit himself to expressing his will in a law. It is of course true and valid, as in case of any law, that the legislator creates law that must be obeyed and realized by the faithful. But he must also respect the addressees of law, recognize their dignity, and have a deeper look at the community as the people who are joined voluntarily by faith. They are, all in all, „the People of God” (LG⁷ 11, LG 12, LG 13), „the Temple of the Holy Spirit” (LG 17), „the Christ’s Body” (LG 32, LG 33).

It means that one-way communication model of drafting law in the Church should be rejected, and replaced by a model that involves actively two sides: the legislator and the addressees of law. The model in question is to be based on a dialog, that is, on an exchange of thoughts and views⁸. Of course, ultimately, the legislator gives the law, but the process of preparing it must not be authoritarian. It means that the faithful must be more involved in the process of legislation.

The aim of the paper is to answer the question from the title: is a dialog a useful tool for the church legislator? To answer these questions and to give some directions to the church legislator, it would be expedient to analyze the *Preparatory Document* of the Third Extraordinary General Assembly of the Synod of Bishops, paying special attention to its one part, namely, to the so-called „Pope Francis’ questionnaire”⁹.

2. So-called „Pope Francis’ questionnaire”

The Holy See Press Office on 8 October 2013 announced that Pope Francis had

⁵ P. Kroczeck, *The Theological Foundations of the Reception of Canon Law*, „Annales Canonici” 5 (2009), p. 169–171.

⁶ Iustiniani digesta, in: *Corpus Iuris Civilis*, editio stereotypa quinta, Th. Mommsen (ed.), vol. 1, Berololini 1889, p. 1–873, here: 1, 4, 1.

⁷ LG = Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio dogmatica *Lumen gentium de Ecclesia*, 21.11.1964, AAS 57 (1965), p. 5–75; English translation: *Documents of Vatican II*, in a new and definitive translation, with commentaries and notes by Catholic, Protestant, and Orthodox authorities, W. M. Abbott (gen. ed.), New York 1966, Herder and Herder, p. 14–96.

⁸ H. Skorowski, *Entry: Dialog*, in: *Słownik społeczny*, B. Szlachta (ed.), Kraków 2012, WAM, p. 133.

⁹ Synod of Bishops, III Extraordinary General Assembly, Pastoral Challenges to the Family in the Context of Evangelization, Preparatory Document, Vatican City 2013, in: http://www.vatican.va/holy_father/john_paul_ii/homilies/1997/documents/hf_jp-ii_hom_19970106_en.html; (14.02.2014), hereinafter: Preparatory Document.

convened the Third Extraordinary General Assembly of the Synod of Bishops, to be held in the Vatican from 5 to 19 October 2014¹⁰. *Nota bene* this will be the third extraordinary synod since Pope Paul VI reinstated the legal institution by Apostolic letter *Apostolica sollicitudo* of 15 September 1965¹¹.

The theme of this assembly is „The pastoral challenges of the family in the context of evangelization”. Its main aim is to „define the *status quaestionis* and to collect the bishops’ experiences and proposals in proclaiming and living the Gospel of the Family in a credible manner”¹². The director of the Holy See Press Office, Fr. Federico Lombardi commenting on the idea of the assembly said that „this is the way in which the Pope intends to promote reflection and to guide the path of the community of the Church, with the responsible participation of the episcopate from different parts of the world”¹³. It is important to notice that the extraordinary synod in 2014 is the first stage of a two-staged itinerary to an Ordinary General Assembly in 2015, which is „to seek working guidelines in the pastoral care of the person and the family”¹⁴.

Trying to clarify the significance of the announcement, some norms from *the Code of Canon Law 1983* must be mentioned. Generally speaking, „the synod of Bishops is a group of Bishops selected from different parts of the world, who meet together at specified times to promote the close relationship between the Roman Pontiff and the Bishops” (can. 342). Pope Paul VI gave the wider definition of the Synod of Bishops: “It is an ecclesiastic institution, which, on interrogating the signs of the times and as well as trying to provide a deeper interpretation of divine designs and the constitution of the Catholic Church, we set up after Vatican Council II in order to foster the unity and cooperation of bishops around the world with the Holy See. It does this by means of a common study concerning the conditions of the Church and a joint solution on matters concerning Her mission. It is neither a Council nor a Parliament but a special type of Synod”.¹⁵ The synod is „directly under the authority of

¹⁰ <http://www.news.va/en/news/francis-convenes-extraordinary-synod-on-the-family> (14.02.2014).

¹¹ Paulus VI PP., *Litterae Apostolicae motu proprio datae Apostolica Sollicitudo synodus Episcoporum pro universa Ecclesia constituitur*, AAS 57 (1965), p. 775–780. The first Extraordinary General Assembly of the Synod of Bishops was in 1969 – Cooperation between the Holy See and the Episcopal Conferences, and the next was in 1985 – The Twentieth Anniversary of the Conclusion of the Second Vatican Council. See a book on historical and legal aspects of the synod: T. Rozkrut, *Instytucja Synodu Biskupów w Kościele posoborowym*, Tarnów 2010. Biblios.

¹² Preparatory Document, part I.

¹³ <http://www.news.va/en/news/francis-convenes-extraordinary-synod-on-the-family> (14.02.2014).

¹⁴ Preparatory Document, part I.

¹⁵ Paul VI, Sunday Angelus of 22 September 1974, translation from:

the Roman Pontiff”, who has full prerogatives over the synod (can. 344).

The synod in question can work in two main forms. Bishops can meet in 1) general assembly, in which matters are dealt with which directly concern the good of the universal Church, and in 2) special assembly, to deal with matters directly affecting a determined region or regions. The Synod’s general assembly is either a) ordinary, or b) extraordinary (can. 345).

Although, it is not the function of the synod of Bishops to settle matters or to draw up decrees, but rather to discuss the matters proposed to it and set forth recommendations, the Roman Pontiff gives deliberative power to the Synod in certain exceptional cases. In this event, it rests with the Roman Pontiff to ratify the decisions of the synod (can. 343). It means that the synod of bishops can be counted among the bearers of legislative Power in the Church, only in case when the Pope delegates the legislative power to the body in question.

On 5 November 2013 the *Preparatory Document* for the Third Extraordinary General Assembly of the Synod of Bishops was presented. The document consists of three parts. The first is titled “Synod: Family and Evangelization” and presents the challenges for the mission of the Church to preach the Gospel to all creation in the modern world when „the social and spiritual crisis, so evident in today’s world, is becoming a pastoral challenge in the Church’s evangelizing mission concerning the family”¹⁶.

„The Church and the Gospel on the Family” is the heading of the second part of the document in question. It proclaims the church teachings on marriage in two subchapters: „The Plan of God, Creator and Redeemer”, and „The Church’s Teaching on the Family”. It contains only the absolutely hard core of the Church teaching. „The citation of biblical sources on marriage and family in this document are essential references only. The same is true for documentation from the Magisterium which is limited to that of a universal character, including some texts from the Pontifical Council for the Family”¹⁷. One can come to conclusion that this fundamental teaching creates the milieu for the most important part of the document, that is, the so-called „Pope Francis’ questionnaire”.

This questionnaire constitutes the third part of the *Preparatory Document*.

[http://www.vatican.va/news_services/press/documentazione/documents/sinodo_indice_en.html#9%20%20II%20ASSEMBLEA%20GENERALE%20STRAORDINARIA%20\(25%20NOVEMBRE-8%20DICEMBRE%201985\) \(22.02.2104\).](http://www.vatican.va/news_services/press/documentazione/documents/sinodo_indice_en.html#9%20%20II%20ASSEMBLEA%20GENERALE%20STRAORDINARIA%20(25%20NOVEMBRE-8%20DICEMBRE%201985) (22.02.2104).)

¹⁶ Preparatory Document, part. I.

¹⁷ Preparatory Document, part. II.

The questionnaire contains the consultation questions asking about the promotion and acceptance of Catholic teachings on marriage and family, as well as, modern challenges to Magisterium's teaching on that matter. The questions are grouped under the following ten sections:

1. The Diffusion of the Teachings on the Family in Sacred Scripture and the Church's Magisterium.
2. Marriage according to the Natural Law.
3. The Pastoral Care of the Family in Evangelization.
4. Pastoral Care in Certain Difficult Marital Situations.
5. On Unions of Persons of the Same Sex.
6. The Education of Children in Irregular Marriages.
7. The Openness of the Married Couple to Life.
8. The Relationship Between the Family and the Person.
9. Other Challenges and Proposals.

Already *prima facie* the sections cover a very wide range of themes important for pastoral work, not excluding the challenges of the modern world like, co called, „same sex marriages”. It is worth underlying that point 9 keeps the discussion open to new topics considered by the addressees of the questionnaire as urgent and useful to treat.

The cited points are extended by 3–7 questions. For instance number 5 contains queries as follows: a) „Is there a law in your country recognizing civil unions for people of the same-sex and equating it in some way to marriage? b) What is the attitude of the local and particular Churches towards both the State as the promoter of civil unions between persons of the same sex and the people involved in this type of union? c) What pastoral attention can be given to people who have chosen to live in these types of union? d) In the case of unions of persons of the same sex who have adopted children, what can be done pastorally in light of transmitting the faith?”¹⁸. It is important to notice that the questions are stated in the perspective of pastoral care. It means that all the difficulties and problems that appeared in the life of societies in modern times seem to be treated as the challenge for the Church.

The idea is that the views and experiences of Catholics expressed in form of the answers to the questions are to be reported to their pastors, and in turn to diocesan bishops, and through national bishops' conferences for ultimate consideration by the

¹⁸ Preparatory Document, part. III.

synod in question. Also, individual Catholics are welcome to communicate their views directly to the synod. Collected and worked out answers for the questions, are to be the synod's working document, *instrumentum laboris*, which should be published in May 2014¹⁹.

One thing must be said clearly here. The survey, as Cardinal Peter Erdő, general relator of the synod, noticed, „is not a question of public opinion, (...) certainly the doctrine of the magisterium must be the basis of the common reasoning of the synod”²⁰. The questionnaire is does not regard the doctrinal position of the Church. It rather „allows the particular Churches to participate actively in the preparation of the Extraordinary Synod, whose purpose is to proclaim the Gospel in the context of the pastoral challenges facing the family today”²¹.

Archbishop Bruno Forte, special secretary of the synod, said that „it is not, therefore, a matter of debating doctrinal questions, which have in any case been clarified by the Magisterium recently (...) the invitation deriving from this for all the Church is to listen to the problems and expectations of many families today, manifesting her closeness and credibly proposing God's mercy and the beauty of responding to His call”²². The assembly of bishops, as Archbishop Lorenzo Baldisseri, Secretary General of the Synod of Bishops, said, „begins with a consultation between the various entities to be surveyed on the theme in question. In this case, however, the process develops according to particular methods, both because the synodal methodology is under general revision at present, and because it is an Extraordinary Assembly”²³. He also mentioned, that „the idea is that of transforming the synodal Institution into a real and effective tool for communion”²⁴.

¹⁹ It is the opinion of Archbishop Lorenzo Baldisseri, Secretary General of the Synod of Bishops, http://www.catholicnews.com/data/stories/cns/1304653.htm?utm_source=twitterfeed&utm_medium=twitter (14.02.2014).

²⁰ http://www.catholicnews.com/data/stories/cns/1304653.htm?utm_source=twitterfeed&utm_medium=twitter (14.02.2014).

²¹ Preparatory Document, part. III.

²² <http://www.news.va/en/news/presentation-of-the-preparatory-document-for-the-e> (14.02.2014).

²³ <http://www.news.va/en/news/presentation-of-the-preparatory-document-for-the-e> (14.02.2014).

²⁴ <http://www.news.va/en/news/presentation-of-the-preparatory-document-for-the-e> (14.02.2014).

3. Dialog in the process of drafting law

It seems that dialogical way of drafting law is somehow present in church law²⁵. For instance, one of the principles of *Regule iuris*²⁶ – „Quod omnes tangit debet ab omnibus approbari” is presented in can. 119 § 3 of the 1983 code. Going further, can. 212 § 2 and § 3 states that Christ’s faithful are at liberty to make known their needs, especially their spiritual needs, and their wishes to the Pastors of the Church. They have the right, indeed at times the duty, in keeping with their knowledge, competence and position, to manifest to the sacred Pastors their views on matters, which concern the good of the Church. They also have the right to make their views known to others from among the Christ’s faithful. The code requires some conditions to be fulfilled. To act, for instance, the faithful must always respect the integrity of faith and morals, and show due reverence to the Pastors and take into account both the common good and the dignity of individuals. Of course, as it is in case of any right of the faithful, in exercising the right, Christ’s faithful must consider the common good of the Church, as well as the rights of others and their own duties to others (can. 223 § 1)²⁷.

On the other side is the legislator. He has the obligations, which are compatible with the rights of the other side, that is the addressees of law. It means that he is to listen to the faithful, and take into consideration their opinions. For instance, according to the code, such a dialogical attitude ought to mark the relationship between the Bishop and the priests. He is to have a special concern for the priests, to „whom he is to listen as his helpers and counselors” (can. 384).

As it was shown, there are two sides. When the two parties are aware of the fact that they „participate in their own way in the priestly, prophetic and kingly office of Christ” (can. 204), and „they are called, each according to his or her particular condition, to exercise the mission which God entrusted to the Church to fulfill in the world” (can. 204) there is a place for dialog between them.

Reading the *Preparatory Document* and listening to the statements of the

²⁵ All remarks about a dialog in process of legislation can be mutatis mutandis applied to administrative procedure in the Church, see, e.g., can. 320 § 3, or to the process of making other decisions, see, e.g., can. 353 § 1, can. 372 § 2. For instance consultation is sometimes required by law for validity of acting (see can. 127) or for prudent action.

²⁶ Bonifatio PP. VIII, *De regule iuris, Liber sextus decretalium*, 3.03.1298, in: *Corpus Iuris Canonici*, Ae. L. Richter, Ae. Friedberg (eds.), vol. 2, Lipsiae 1881, ex officina Bernhardi Tauchnitz, col. 1122–1124, here regula no. 29.

²⁷ Cf. J. H. Provost, *Response to Hevré Legrand*, „The Jurist” 57 (1997), p. 435–436.

church officials during presentation of the document at the press conference, one can say that one of the ways of carrying out the dialog is consultation.

One can say that consultations do not match the cited definition of dialog, as a way of exchanging ideas. But it must be remembered that the Magisterium always proclaims church teaching to the faithful in many different forms. The outcome of the process of consultation is the answer to the teaching.

It can be mentioned here that the state legislative bodies also use consultation as the form of communication with the people²⁸. It is expedient to present the method in context of the church legislation.

First, in the context of the Church, it is useful to notice that the church legislator, due to the fact that he holds an important place in the community and that he was not democratically elected, can forget about the real state of things, and not see how things are in the community. In consequence, he can draft new law in the abstract²⁹.

To avoid such a danger, it should be quite a common practice that the church legislator, before issuing a new law, consults those who are to be bound by the law. Consultation is considered as one of the stages of legislative drafting process³⁰. Especially in case of an important law, consultations are wide and sometimes long lasting. The legislator asks for opinions about the proposed legal solutions cardinals, bishops, scholars, and the faithful. The wide consultations took place before *the Code of Canon Law* 1983 was issued. Quite recently, it was in case of revision of book VI of the current code. The same aim was connected to the questionnaire included in *Preparatory Document* presented above.

It must be mentioned here that canon law regulates many forms of consultation bodies, e.g., the Council of Priests (can. 495–502); the diocesan Pastoral Council (can. 511–514), the diocesan Finance Council (can. 492–494), the Parish Council (can. 536), the Parish Finance Council (can. 537). The consultations with the bodies can be of great help for the legislator in obtaining knowledge necessary to

²⁸ For instance, in case of the Republic of Poland there are many form of caring dialog between the state authorities and the people. One the them is referendum (art. 125 of the Constitution of the Republic of Poland (1997) in: „Dziennik Ustaw Rzeczypospolitej Polskiej” of 1997, No. 78, *item*. 483 as amended); the other form is consultation, which is necessary the introducing a bill to the Sejm – the lower chamber of the parliament of Poland (art. 34 *item*. 3 of regulation of the Sejm (1992) in: „Monitor Polski” of 2012, *item* 32).

²⁹ Cf. L. Örsy, *The Dynamic Spirit of Common Law and the Renewal of Canon Law*, in: *Law for Liberty: the Role of Law in the Church Today*, J. E. Biechler (ed.), Baltimore 1967, Helicon, p. 179.

³⁰ P. Kroczyk, *The Art of Legislation...*, p. 176–186, especially p. 179–180.

draft law.

It also seems that consultation of the faithful in doctrinal matters is valid for legislation as well. It is because „the entire body of the faithful, anointed as they are by the Holy One, cannot err in matters of belief. They manifest this special property by means of the whole peoples supernatural discernment in matters of faith when ‘from the Bishops down to the last of the lay faithful they show universal agreement in matters of faith and morals’ (LG 12). *Sensus fidei* refers to all the faithful and works powerfully in doctrinal matters. The faithful can use it also in making practical decisions that are connected with the practice of faith³¹. The faithful have the capacity to understand and judge the doctrinal and moral values contained in law.

The main aim of putting the questions to the people in process of consultation is to discover the level of concern of the members of the community regarding the substance of law. The legislator has the opportunity to see the matter from their perspective and to take into account the outlook of addressees of law regarding the matter to be regulated.

But it must be underlined that the legislator is not obliged to make his decisions depend upon the will of addressees of law, as it is in a democracy. The outcome of the consultation is only one of many factors taken in by the church legislator in making decision.

It is different when it comes to public opinion, which is an opinion of a group whose membership is defined by a shared concern for the subject of the opinion(s)³². The opinion poll can be seen more than one of the methods of carrying out dialog, because public opinion simply governs only democracy. Other forms of government that do not recognize democratic principles and do not use democratic methods, like elected offices, may pay attention to public opinion, but are not bound by the will of the people³³. It is true that public opinion poll, which aims at finding out how people define their needs, interests, values, or aims,³⁴ plays a big role in a life of modern democratic societies, especially in politics. In modern democratic states opinion polls

³¹ L. Örsy, *Reception and Non-Reception of Law a Canonical and Theological Consideration*, in: „CLSA Proceedings” 46 (1984), p. 69.

³² D. C. Watt, *Entry: Public Opinion*, in: *A Dictionary of The Social Science*, J. Gould (ed.), New York 1967, Free Press, p. 563.

³³ A. Weale, *Public Opinion*, in: *Encyclopedia of Democratic Thought*, P.B. Clarke, J. Foweraker (eds.), London/New York 2005, Routledge, p. 709.

³⁴ Cf. *Entry: Public Opinion*, in: A. G. Johnson, *The Blackwell Dictionary of Sociology. A User’s Guide to Sociological Language*, Malden-Oxford 2000, p. 245–246.

are used to create and direct legal policy³⁵. But in case of the Church, the public opinion poll can be, of course, used but public opinion must be treated differently as it is in modern states. It should be adapted, and the legislator must be aware of the limits of the tools³⁶.

First of all, the Church itself, of course, has a hierarchical structure and it is not the object of man's will or opinion. The democracy in the Church is used in a very limited way³⁷. There are many theological arguments for this and canon law respects the theological finds. Still, in the code one can find some elements of the democracy. For instance can. 497 no. 1 states that „as far as the designation of the members of the council of priests is concerned: about half are to be freely elected by the priests themselves in accordance with the canons which follow and with the statutes”.

Secondly, the hard core of the doctrinal matters, which are *nota bene* a part of law (see, e.g., can. 749 § 1; can. 849; can. 897), is the matter that cannot be established according to the people's opinion or will. What is more, even the legislator cannot take any other action, but only to confirm, protect, and defend the *status quo* of the Magisterium teaching by the regulations of positive law, as it was done by introducing can. 750 § 2 to the code³⁸.

As it was noticed, the limit of usage of the opinion poll is the subject of the survey. But in case of the other matters, like procedural, administrative, or other kind of regulated areas, it seems to be quite reasonable to ask the users of law about how they will the matter to be ordered so that the law would be a really useful tool in making life of the society better organized. The opinion of the faithful, known through the opinion poll, would be in this case more than just a suggestion for the legislator.

Without doubt, the legislator in the Church must also try to study the opinions of the faithful. He must also be aware that public opinion rooted in individuals is sometimes very changeable. There are many fluctuating movements of public opinion. One can easily steer the people's will and cause the danger of populism.

³⁵ A. Pieniążek, M. Stefaniuk, *Socjologia prawa. Zarys wykładu*, Kraków 2003, Zakamycze, p. 263–265.

³⁶ H. Legrand, *Reception, sensus fidelium, and Synodal Life: an Effort at Articulation*, transl. T. J. Green, „The Jurist” 57 (1997), p. 420–421.

³⁷ J. Rartzinger, H. Maier, *Demokracja w Kościele. Możliwości i ograniczenia*, Salvador, Kraków 2000, p. 7.

³⁸ Joannes Paulus PP. II, *Litterae apostolicae motu proprio datae Ad tuendam fidem quibus normae quaedam inseruntur in Codice Iuris Canonici et in Codice Canonum Ecclesiarum Orientalium*, 18.05.1998, AAS 90 (1998), p. 459–460.

4. The guidelines for the legislator

In the light of the arguments of the paper, it is clear that dialog is not only a useful tool, but it must be regarded as an absolutely necessary instrument for the church legislator to draft law for the community. The presence of dialog shows that the bearer of legislative power is aware of his role in the community, and he wants to accomplish his mission duly. There is no threat to the legislator's authority or power³⁹. As it was noticed, conducting a dialog does not determine his final decision.

Knowing the expectations of people and taking them into consideration in process of drafting law could guarantee that reception of the new law would be wide⁴⁰. Also the users of law would be pleased with the authorities who gave such a law. The authority of the lawgiver would be higher, because he will be regarded as the one who does not ignore the faithful's will or opinion, but who shows his consideration for them, and who admits that people, even in the Church, can in some measure and in some matters govern themselves⁴¹.

Dialog also indicates that the community is vivid and aware of their duties and rights that arise from participation through baptism in the *communio*. In this sense, it is a theological imperative based on the implications of membership in the Church and the active sharing of all members in its mission⁴². The outcome of dialog can be not only a better law, but also the proper relationship between the faithful and the legislator.

From the practical point of view, it must be noticed that the dialog can be carried out in many different ways. It can be carried out as: observation, debate, questionnaire, interview or even the opinion poll. Dialog can be limited to certain selectively chosen people or groups that are widespread and common. It is possible to use social communication means or individual meetings. The method and way is to be chosen by the legislator to foster the spirit of dialogue, cooperation, and understanding for the sake of the good of the Church.

„Pope Francis' questionnaire” must be seen as one of the ways of carrying out such a dialog between the Hierarchy and the laity. It was meant to assess the

³⁹ P. KroczeK, *The Art of Legislation...* p. 179.

⁴⁰ More about reception and non-reception of church law, see, P. KroczeK, *The Art of Legislation: the Principles of Lawgiving in the Church*, Kraków 2012², p. 215–231.

⁴¹ P. KroczeK, *Authority of Bishop as Lawgiver*, „*Angelicum*” 87 (2010) fasc. 4, p. 911–922.

⁴² J. A. Coriden J. A., *Canon Law as Ministry: Freedom and Good Order for the Church*, New York-Mahwah 2000, Paulist Press, p. 172.

attitudes of the Catholics toward relevant church teachings on the marriage and family, but it is not an opinion poll known from the democratic states. It is a form of the church consultation carried out hopefully for the sake of introducing a new law in which Magisterium teaching will be presented to the faithful „in an articulate and efficacious manner”⁴³.

Title

Is a Dialog a Useful Tool for the Church Legislator? Deliberations on the so-called „Pope Francis’ questionnaire”

Summary

Drafting law for the Church, due to specificity of canon law, is a very complicated task. To accomplish his mission duly the legislator can resort to dialogue. Dialog can be used in many ways. One of them is consultation. The paper offers some deliberations on the method in question in the so-called „Pope Francis’ questionnaire”.

Key words: Church, canon law, drafting law, Pope Frances.

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Consuetudo est optima legum interpres.

La storia e la spiegazione del can. 27.

Introduzione

Consuetudo est optima legum interpres. Tale breve canone si trova nel primo libro del Codice di Diritto Canonico. Dato che questa frase fu trasmessa dal *Corpus Iuris Civilis* al *Corpus Iuris Canonici* e in seguito riportata senza cambiamenti nei due codici del diritto canonico del XX secolo, essa sembra assai importante. Quale è il valore di questo antico adagio? Qual è il senso di queste cinque parole? Quale il contributo per l'interpretazione della legge?

Per rispondere almeno parzialmente alle domande espresse sopra, cominceremo da un rapido percorso delle fonti storiche, dal diritto romano fino alla fine dell'ottocento. In seguito svolgeremo un'analisi più approfondita del canone 29 nel Codice del 1917, con riferimento alla storia della sua redazione, ricavata nell'Archivio Segreto Vaticano. Poi vedremo il senso dell'attuale canone 27 alla luce di alcuni commentatori. Alla fine si cercherà di mostrare il significato di tale norma per la retta interpretazione della legge e per la vita della Chiesa.

1. La consuetudine interpretativa prima del 1917

Il diritto romano è la prima fonte della normativa attuale, perché nel *Corpus Iuris Civilis* troviamo una frase identica alla formulazione dei due codici di diritto canonico del XX secolo. Ecco il testo nel suo contesto prossimo: „Si interpretatione legis quaeratur; in primis inspiciendum est, quo iure civitas retro in eiusmodi casibus usa fuisset: optima enim est legum interpres consuetudo”¹.

¹ D. 1,3,37.

La consuetudine ha una grande importanza nell'ordinamento del *Ius Civilis* romano perché „tutto il diritto è consuetudinario e l'origine degli istituti giuridici risiede nella consuetudine”². In questo adagio va sottolineato che la consuetudine ha una forza interpretativa molto importante: *in primis inspicendum est*. Infatti, come sottolinea uno degli autori, i giuristi imperiali erano favorevoli alla consuetudine, specialmente questa locale³. Nel dubbio circa l'interpretazione del diritto per primo va seguita l'usanza che la società mette in pratica⁴.

La frase sul valore della consuetudine per l'interpretazione della legge è entrata nell'ordinamento canonico dopo che fu ripresa nel *Corpus Iuris Canonici*. Possiamo trovare una citazione dell'antico diritto romano nei *Decretales* di Gregorio IX. Leggiamo della „consuetudinem approbatam, quae optima est legum interpret”⁵. Va notato che il testo del *Liber Extra* parla della consuetudine approvata, senza spiegare il modo di tale approvazione⁶.

La fonte seguente dell'attuale canone 27 nel *Corpus Iuris Canonici* non è una citazione esatta del diritto romano, ma un'altra frase che concerne la stessa questione. Alla fine del *Liber Sextus* di Bonifacio VIII, tra le *Regulae Iuris* troviamo una regola interessante: „Inspicimus in obscuris quod est verisimilius, vel quod plerumque fieri consuevit”⁷.

Va notato, che l'adagio sopracitato si applica soprattutto nel momento dell'incertezza della legge: *in obscuris* potremmo tradurre „nel dubbio”⁸. In tale situazione va preso in considerazione *quod plerumque fieri consuevit*. L'avverbio *plerumque* significa „generalmente” o „di solito”⁹, viene quindi sottolineato che il ricorso alla consuetudine sarebbe da applicare come regola quando la legge risulta dubbia oppure oscura.

² B. Biondi, *Istituzioni di Diritto Romano*, Milano 1965⁴, Dott. A. Giuffrè editore, p. 37.

³ Cf. L. Bove, *La consuetudine in diritto romano. I. Dalla repubblica all'età dei Severi*, Napoli 1971, Casa editrice dott. Eugenio Jovene, pp. 136-138.

⁴ Cf. W. Dajczak – T. Giaro – F. Longschamps de Bérier, *Warsztaty prawnicze. Prawo rzymskie*, Bielsko-Biała 2013, Od.Nowa, p. 17.

⁵ X. 1,4,8.

⁶ Per conoscere i dettagli delle fattispecie per le quali la regola della consuetudine interpretatrice delle leggi viene applicata nei decretali del Gregorio IX cf. G. Saraceni, *Consuetudo est optima legum interpret* (Contributo all'interpretazione del can. 29 del C.J.C), „Ephemerides Iuris Canonici” 4 (1948), pp. 81-83.

⁷ R. J. 45 in VI°.

⁸ Cf. Campanini – Carboni, *Il nuovo dizionario della lingua e della civiltà latina*, Torino – Trento 2007, Paravia – Bruno – Mondadori Editori, p. 1136.

⁹ Cf. *Ibidem*, p. 1287; J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2005², Universitas, p. 755.

Oltre al diritto dei decretali, troviamo due fonti del canone sulla consuetudine interpretativa provenienti dal secolo XIX. Per primo va menzionata un'istruzione della Congregazione per la Dottrina della Fede dal 23 giugno 1830. In essa viene sottolineata l'importanza della prassi consuetudinaria circa un'eventuale battesimo sotto condizione, specialmente dei bambini battezzati dai scismatici ed eretici¹⁰. In seguito va citata la lettera apostolica del papa Leone XIII del 13 settembre 1896 intitolata *Apostolicae curae*. Il Pontefice racchiuse in essa la dichiarazione circa la nullità del sacramento dell'ordine conferito nella comunità ecclesiale anglicana, dopo l'introduzione del cosiddetto rituale edouardiano¹¹. In questo importante documento la massima *Consuetudo optima legum interpret* viene riportata nel contesto di una prassi consuetudinaria nella Chiesa Cattolica di ripetere le ordinazioni degli anglicani. Tale usanza secolare diventa uno degli argomenti per la dichiarazione della nullità delle ordinazioni anglicane, perché la Chiesa non chiede mai di ripetere le ordinazioni valide¹². Di conseguenza in modo implicito viene sottolineata l'importanza della regola dell'interpretazione del diritto attraverso il modo consuetudinario dell'agire, dato che in questo caso è stata applicata a una materia di grande rilievo.

2. Il can. 29 del codice del 1917 e la sua redazione

Nel Archivio Segreto Vaticano si trovano interessanti documenti del periodo della redazione Codice di 1917¹³. Tra le scatole e le buste riguardanti le diverse parti del Codice, si ritrovano anche quelle concernenti la consuetudine e in particolare il futuro canone 29 del Codice Pio-Benedettino. Nella scatola 7 del Fondo della Commissione per la Codificazione del Codice di Diritto Canonico troviamo due *vota* circa la consuetudine, di padre Wernz e di padre Palmieri.

Il primo autore attribuisce alla consuetudine la forza di confermare, promulgare e di interpretare la legge. La consuetudine interpretativa diventa così il

¹⁰ Cf. Congregazione per la Propaganda della Fede, istruzione (ad Vic. Ap. Siam), 23 giugno 1830, in: CIC Fontes, VII, I. Serédi (ed.), Romae 1935, Typis polyglottis vaticanis, n. 4748, pp. 269-275.

¹¹ Cf. Leone XIII, lett. ap. *Apostolicae Curae*, 13 sett. 1896 in: CIC Fontes, III, P. Gasparri (ed.), Romae 1933, n. 631, Typis polyglottis vaticanis, pp. 494-502.

¹² *Ibidem*, p. 498.

¹³ Cf. C. Fantappiè, *Chiesa romana e modernità giuridica. Il Codex iuris canonici (1917)*, Milano 2008, Giuffrè Editore, pp. 691-804.

segno e il teste del vero senso della legge¹⁴. Questa asserzione si potrebbe riassumere con la proposta dello stesso Wernz conservata in altro luogo dello stesso Archivio: „*Consuetudo est optima legum interpres, ita ut sensus legis ille sit quem consuetudo probavit*”¹⁵.

Inoltre l'autore sottolinea il valore della consuetudine nell'interpretare la legge dubbia e oscura. In tale situazione la interpretazione consuetudinaria avrebbe la forza uguale alla interpretazione autentica della legge¹⁶.

Alla fine Wernz suggerisce di mettere la massima *Consuetudo est optima legum interpres* tra le regole del diritto. La stessa idea fu condivisa da alcuni altri membri della sottocommissione¹⁷.

Domenico Palmieri esprime una simile convinzione nel suggerire un paragrafo del canone circa la consuetudine: „*Consuetudini tamen vis reliqua maneat interpretandi leges*”¹⁸. Più avanti propone un'altra versione del canone circa la consuetudine interpretativa: „*Consuetudo, praesertim longi temporis, optima est legum interpres, ut sensus legis ille sit, quem consuetudo probavit. Quodcirca in ambiguitatibus, quae ex legibus proficiscuntur, consuetudo longo tempore usurpata vim legis obtinere debet*”¹⁹.

Infine la proposta preparata per la discussione era più semplice: *Consuetudo est quoque optima legum interpres*²⁰. Questo canone, accettato dalla Commissione dopo una breve discussione²¹, fu mandato alle alte istanze senza ulteriori cambiamenti. Tra il 1909 e il 1912 fu eliminata la parola *quoque*, e nello schema del 1912 ritroviamo il canone nella forma conosciuta fino ad oggi: *Consuetudo est optima legum interpres*²².

¹⁴ Cf. Archivio Segreto Vaticano [in poi: ASV], Fondo della Commissione per la Codificazione del Diritto Canonico [in poi: Commissione Cod. Diritto Canonico], scatola 7: „*Consuetudo secundum ius, quae consistit in facto sive actuali observantia, legem scriptam vel traditam magis firmat et promulgat et interpretatur, unde habetur celeberrima iuris regula: Consuetudo est optima legum interpres i.e. ad instar testis vel signi de vero legis sensu*”.

¹⁵ ASV, Commissione Cod. Diritto Canonico, scatola 13.

¹⁶ Cf. ASV, Commissione Cod. Diritto Canonico, scatola 7: „*Quodsi consuetudo ista eum gradum attingat, ut legem dubiam vel indeterminatam vel diversos sensus admittentem iuxta unum sensum certum et definitum obligatorio modo observandam esse statuat, interpretationem vere authenticam continet*”.

¹⁷ ASV, Commissione Cod. Diritto Canonico, scatola 13.

¹⁸ ASV, Commissione Cod. Diritto Canonico, scatola 7.

¹⁹ *Ibidem*.

²⁰ ASV, Commissione Cod. Diritto Canonico, scatola 13.

²¹ Cf. *Ibidem*: „Latini: dice che bisogna modificarlo o sopprimerlo. Lombardi: aggiungerebbe: Consuetudo, sive iudicialis sive extraiudicialis. Inoltre sostituirebbe la parola iuris a legum. P. Kaiser: dice superflua la parola quoque. Pillet: aggiungerebbe in fine: et firmat legem. P. Benedetti si associa a Latini”.

²² *Ibidem*.

In tale modo viene sottolineata l'importanza dell'antico adagio, con il quale il legislatore vuole „definire il valore dell'interpretazione usuale”²³. La Chiesa dimostra allora il rispetto per la consuetudine interpretativa, benché la formula sembra vaga²⁴, almeno senza un'analisi più approfondita.

3. Il testo attuale del can. 27 e il suo significato

La storia del testo tra il Codice del 1917 e quello del 1983 risulta abbastanza semplice. Nei *Communicationes* pubblicati prima della promulgazione del nuovo Codice ritroviamo una semplice asserzione: „Canones 29 et 30 Codicis I. C. Immutati remanent”²⁵. C'è soltanto un cambiamento del numero, dal canone 29 al 27, il quale già si può trovare nel *Schema Codicis Iuris Canonici* del 1980²⁶. Tuttavia questa modificazione non cambia sostanzialmente la posizione del canone nel Codice e neppure il suo significato.

Va notato che gli altri canoni riguardanti l'interpretazione della legge si trovano nel titolo primo del libro I del Codice del Diritto Canonico (can. 16 – 21). Il canone 27 invece, benché parli dell'interpretazione della legge, è posto nel secondo titolo e deve quindi essere considerato insieme con gli altri canoni che trattano della consuetudine. Sotto il titolo 2° del libro I, intestato „De consuetudine” si trovano solo sei canoni. Dopo aver constatato nel canone 23 quale consuetudine può ottenere la forza di legge, il legislatore menziona le condizioni che delimitano tale possibilità. Una consuetudine non può essere contraria al diritto divino, deve essere razionale (can. 24) e introdotta per una comunità capace almeno di ricevere una legge (can. 25). In seguito, dopo aver descritto le fattispecie di una consuetudine contro la legge o fuori di essa (can. 26), ritroviamo anche il canone 28, il quale sottolinea la forza della consuetudine centenaria e immemorabile e garantisce una certa autonomia della consuetudine particolare, che non può essere revocata da una legge universale senza una espressa menzione. Tra questi due norme viene inserito un breve ma importante canone 27: *Consuetudo est optima legum interpres*.

²³ A. Van Hove, Coutume, in: R. Naz (ed.), Dictionnaire de Droit canonique, vol. IV, Paris 1949, Librairie Letouzey et Ané, p. 751. Traduzione propria. La frase originale suona: „Le code entend définir la valeur de l'interprétation usuelle”.

²⁴ Cf. *Ibidem*.

²⁵ Pontificia Commissione per la revisione del Codice di Diritto Canonico, „Communicationes”, 3(1971)/1, p. 87.

²⁶ Pontificia Commissione per la revisione del Codice di Diritto Canonico, *Schema codicis iuris canonici*, Città del Vaticano 1980, Typis Polyglottis vaticanis, p. 7.

Secondo una definizione di Gianfranco Ghirlanda per consuetudine „s'intende il fatto o il modo costante di agire della comunità, con carattere giuridico, e quindi con la forza di obbligare ad tale modo di agire, se non c'è opposizione da parte dell'autorità"²⁷.

Nel testo del Codice di Giovanni Paolo II non si trova una definizione della *lex*. Va ricordato che tale definizione, basata su quella di San Tommaso, fu presente nello Schema del Codice pubblicato nel 1980: „*Lex, norma scilicet generalis ad bonum commune alicui comunicata a competenti auctoritate data, instituitur cum promulgatur*”²⁸. Va citata anche la definizione proveniente di Suarez: „*Commune praeceptum, iustum et stabile, sufficienter promulgatur*”²⁹. Risulta inoltre importante che tale *lex* deve essere promulgata da „un'autorità che ha la potestà legislativa”³⁰.

Proseguendo con l'analisi del canone, si dovrebbe analizzare il senso della consuetudine come *optima interpretis* della legge. In questo momento va solo sottolineato che il canone non parla della *optima interpretatio* ma della *optima interpretis*. La consuetudine è una interprete, perché svolge ruolo attivo e concreto nell'approvazione della legge da parte della comunità e nella sua realizzazione. Forse proprio questo inserimento nella vita reale della comunità fa sì, che tale interprete risulta la migliore. Si potrebbero infatti trovare molti esempi d'applicazione di questo canone nella vita quotidiana della Chiesa. Vale la pena scegliere uno per dimostrare il legame del canone commentato con la realtà pastorale.

Nei canoni riguardanti i compiti del parroco troviamo tale indicazione: „*Officium pastoris sedulo ut adimpleat, parochus fideles suae curae commissos cognoscere satagat; ideo familias visitet, fidelium sollicitudines, angores et luctus praesertim participans [...]*”³¹. Questo obbligo di visitare le famiglie da parte del parroco, in Polonia viene compiuto soprattutto durante la cosiddetta „visita pastorale di Natale”. Questa consuetudine immemorabile (che risale probabilmente al medioevo) risulta pienamente in vigore ed è accettata in tutta la Polonia sia dai pastori sia dai fedeli. Durante il tempo di Natale (computato nel modo tradizionale

²⁷ G. Ghirlanda, *Il diritto nella chiesa mistero di comunione. Compendio di Diritto Ecclesiale*, Roma 2000³, Edizioni San Paolo – Editrice Pontificia Università Gregoriana, p. 479.

²⁸ Pontificia Commissione per la revisione del Codice di Diritto Canonico, *Schema...*, p. 4.

²⁹ Cf. L. Vela, *Legge ecclesiastica*, in: C. Salvador – V. De Paolis – G. Ghirlanda (ed.), *Nuovo Dizionario di Diritto Canonico*, Milano 1996², Edizioni San Paolo, p. 626.

³⁰ G. Ghirlanda, *Il diritto...*, p. 471.

³¹ CIC 1983, can. 529 § 1: „Per adempiere diligentemente l'ufficio di pastore, il parroco cerchi di conoscere i fedeli affidati alle sue cure; perciò visiti le famiglie, partecipando alle sollecitudini dei fedeli, soprattutto alle loro angosce e ai loro lutti [...]

(traduzione italiana in: Codice di Diritto Canonico Commentato, Milano 2009³, Ancora editrice, p. 477).

fino al 2 febbraio) il parroco (con l'aiuto dei vice-parroci nelle parrocchie più grandi) visita tutte le famiglie cristiane della parrocchia. Durante questa visita il parroco benedice le case e le famiglie, prega con gli abitanti e parla con tutti i presenti „confortandoli nel Signore e, se hanno mancato in qualche cosa, correggendoli con prudenza”³². Questa consuetudine viene percepita come un obbligo per il parroco, il quale dovrebbe visitare il suo gregge ogni anno. Anche i fedeli si sentono vincolati ad accogliere il prete. Tale prassi pastorale diventa quindi una realizzazione consuetudinaria dell'obbligo di visitare i fedeli da parte del parroco³³.

4. Il significato della consuetudine interpretatrice

La consuetudine non solo conferma la legge e la mette in pratica, ma in alcuni casi sembra di poter restringere o estendere l'interpretazione di una legge. Infatti, A. Van Hove nel commento del can. 29 del Codice di 1917 parla di quattro tipi dell'interpretazione consuetudinaria: la consuetudine aiuta a mettere una legge chiara in pratica, può dimostrare il vero senso di una legge dubbia, ma anche la prassi della comunità potrebbe indurre all'interpretazione restrittiva o estensiva della legge per una consuetudine³⁴. Anche R. Sobański scrive che la consuetudine può ampliare oppure restringere il senso della legge³⁵.

In sintesi si potrebbe individuare due tipi delle interpretazioni consuetudinarie della legge. La prima avviene, quando la consuetudine aiuta ad adempiere fedelmente nella vita della comunità norme date dal legislatore. Possiamo parlare quindi di una interpretazione esecutiva della legge per mezzo della consuetudine.

Ma una consuetudine può anche donare la forza obbligante a una legge dubbiosa o incerta oppure può indicare una interpretazione estensiva o restrittiva,

³² *Ibidem*.

³³ I normi tradizionali per l'impenio di visita pastorale, possiamo trovare nel documento della diocesi di Varsavia: *Instrukcja w sprawie wizytacji duszpasterskiej parafii przez proboszcza*, in: *Prawodawstwo Kościoła w Polsce 1961-1970*, T. Pieronek (ed.), vol. II/4, Warszawa 1974, Akademia Teologii Katolickiej, pp. 90.

³⁴ Cf. A. Van Hove, *De Consuetudine. De temporis Supputatione*, Mechlinae – Romae, Dessain, 1933, p. 209. Cf. *Idem*, *Coutume...*, p. 751.

³⁵ Cf. J. Krukowski – R. Sobański, *Komentarz do Kodeksu Prawa Kanonicznego*, vol. I, Księga I. Normy ogólne, Poznań 2003, Pallotinum, p. 85.

fino al creare una legge consuetudinaria, che obbliga la comunità secondo i canoni 24-26 del codice³⁶.

Rimane un'altra questione importante, concernente il valore dell'interpretazione per mezzo di una consuetudine. Mentre qualche autore attribuisce a tale interpretazione solo la forza di pura esecuzione della legge³⁷, altri canonisti di rilievo ammettono che il suo peso potrebbe essere uguale a quello di una interpretazione autentica³⁸. Va comunque notato che il canone 16 § 1 del CIC riserva quest'ultimo tipo dell'interpretazione solo al legislatore stesso. Per questo risulta forse più appropriato parlare di una interpretazione consuetudinaria, differente dalle interpretazioni autentiche, giuridiche e dottrinali³⁹. Questa ultima soluzione prende infatti in considerazione il ruolo attivo della consuetudine, che precisamente non offre una interpretazione teorica della legge, ma la mette in pratica e la traduce in una forma reale della vita della Chiesa⁴⁰. La consuetudine è *optima interpres*, perché concretizza la legge e la interpreta in modo tale che „succede una comprensione concorde del testo della legge da parte del legislatore e dei destinatari della legge”⁴¹. Sembra che in tale senso l'interpretazione consuetudinaria è proprio quella migliore⁴².

Inoltre, la forza e il valore della consuetudine interpretatrice viene dall'importante portata ecclesiologica del canone 27 del Codice di Diritto Canonico. L'adagio antico si armonizza qui con il magistero del Concilio Vaticano II sulla Chiesa

³⁶ In questa sintesi, mi sono ispirato soprattutto di A. Van Hove, *Coutume...*, p. 751; J. Krukowski – R. Sobański, *Komentarz...*, p. 85. Cf. anche J. Gaudemet, *La coutume en droit canonique*, „Revue de droit canonique” 38 (1988), p. 238.

³⁷ Cf. P. V. Pinto (ed.), *Commento al Codice di Diritto canonico*, Vaticano 2001², Libreria Editrice Vaticana, p. 27.

³⁸ Cf. B. Ojetti, *Commentarium in codicem iuris canonici, I. Codicem Iuris Canonici. Liber Primus Normae generales (can. 1-86)*, Romae 1927, Apud aedes Universitatis Gregoriana, p. 181. F. X. Wernz – P. Vidal, *Ius canonicum, decretalium ad usum praelectionum in scholis textus iuris canonici sive iuris decretalium. vol. I. Normae generales*, Romae 1938, Typographia polyglotta S.C. de Propaganda Fide, p. 288; J. Krukowski – R. Sobański, *Komentarz...*, p. 85. G. Saraceni espone gli equivoci e le difficoltà legate con tale posizione cf. G. Saraceni, *Consuetudo...*, pp. 71-73.

³⁹ Cf. L. Orly, *Canon 27*, in: J. A. Coriden – T. J. Green – D. E. Heintschel (ed.), *The code of the Canon Law. A text and a commentary*, New York/Mahwah 1985, Paulist Press, p. 40; G. Ghirlanda, *Il diritto...*, p. 479.

⁴⁰ Cf. J. Otaduy, *C. 27. Comentario*, in: A. Marzoa – J. Miras – R. Rodríguez-Ocaña (ed.), *Comentario Exegético al Código de derecho canónico, vol. I*, Pamplona 2002³, Ediciones universidad de Navarra, pp. 462.

⁴¹ J. Krukowski – R. Sobański, *Komentarz...*, p. 85. Traduzione dell'autore del presente articolo. Il testo originale suona: „zachodzi zgodne rozumienie słów ustawy przez ustawodawcę i jej adresatów”.

⁴² Cf. *Ibidem*.

come Popolo di Dio e sul *sensus fidei*⁴³. Tale dimensione fu sottolineata da F. J. Urrutia nel suo progetto dei canoni sulla consuetudine, dove il primo canone della sezione proposta suona: „*Consuetudo communitatis fidelium, quatenus actuositati Spiritus Sancti respondet, optima legum interpret est*”⁴⁴.

Il canone 27 mostra, quindi, un ruolo attivo e importante della comunità ecclesiale nella realizzazione delle leggi. Come si è potuto osservare nell’esempio riportato della visita pastorale del parroco, una legge generale deve essere applicata alla vita concreta di una particolare comunità⁴⁵. In quel ruolo della consuetudine, si ritrova anche il rispetto per le Chiese particolari, nei quali alcuni leggi sono osservate nel modo proprio di ciascuna comunità⁴⁶.

Il Codice dei Canoni delle Chiese Orientali, nel canone 1508 riporta alla lettera il canone 27 del Codice latino. In tale modo viene sottolineata l’importanza universale della regola *Consuetudo est optima legum interpret*. Nello stesso tempo la teologia della consuetudine risulta più elaborata nel codice per i cattolici orientali che nel codice latino e in questo contesto va messa in evidenza la dimensione ecclesiologica dell’antico adagio. Infatti, quando qualcuno voleva sopprimere questo canone dal progetto della normativa per la Chiese orientali, la Commissione respinse la richiesta con la motivazione di salvaguardare le consuetudini importanti per le Chiese particolari⁴⁷.

La consuetudine garantisce in tale modo una quasi „inculturazione” della legge⁴⁸. L. Vela ha ben descritto il valore teologico della consuetudine, soprattutto di quella interpretativa: „Lungo la sua storia, la Chiesa mostrò sempre una particolare considerazione per il diritto consuetudinario. Certo, si poteva vedere in questo diritto non scritto il molteplice germinare dei diversi carismi l’influsso continuo dello Spirito Santo. [...] La consuetudine continua ad essere riconosciuta come migliore interprete della legge (can. 27)”⁴⁹.

⁴³ Cf. L. Gerosa, *Interpretacja prawa w Kościele. Zasady, wzorce, perspektywy*, Kraków 2003, WAM, pp. 154s.

⁴⁴ F. J. Urrutia, *De consuetudine canonica novi canones*, „Periodica” 70 (1981), p. 78.

⁴⁵ Cf. L. Orly, *Canon 27...*, p. 40.

⁴⁶ Cf. P. A. Bonnet, *Annotazioni su la consuetudine canonica*, Torino 2003, Giappichelli editore, pp. 82-85.

⁴⁷ Cf. Pontificia Commissione per la revisione del codice di diritto canonico orientale, „Nuntia” 18 (1984), p. 83: „Un organo orientale di grande pondus sociologicum porpone di omettere il canone. Non si accetta la proposta, data l’importanza speciale di chiarire le leggi alla luce delle genuine tradizioni orientali”.

⁴⁸ Cf. J. Krukowski – R. Sobański, *Komentarz...*, p. 85.

⁴⁹ L. Vela, Consuetudine, in: C. Salvador – V. De Paolis – G. Ghirlanda (ed.), *Nuovo Dizionario...*, p. 309.

Conclusione

La consuetudine svolge, quindi, un ruolo importante ed attivo nell'interpretazione della legge. La legge stabilita per il legislatore nella consuetudine incontra la vita e la fede del Popolo di Dio. La consuetudine diventa, in tal modo, la traduttrice della legge alla realtà vicina e concreta.

Dopo aver analizzato le fonti, i testi e i commenti, resta ancora una riflessione pratica e pastorale sul grande valore delle consuetudini, ogni tanto sottovalutate e disprezzate. Dove, invece, le consuetudini sono accettate e promosse, di solito viene osservata anche la legge. Le consuetudini legate alla preghiera, alla liturgia, alla pratica della misericordia sono per molti un vero cammino di santità, che deve essere custodito con diligenza e discernimento adeguato.

Title

Consuetudo optima legum interpres. The history and the meaning of can. 27

Summary

The article is an attempt to indicate the role of the rule of law "Custom is the best interpreter of laws" in the interpretation and application of Canon Law. In order to discover a full meaning of this statement passed on throughout centuries the history of its appearance has been traced back to the period from the Roman Law, with a special emphasis put on the documentation found in the Vatican Secret Archives (Archivio Segreto Vaticano, ASV) concerning the redaction of the Code of Canon Law of 1917. The author goes on to quote opinions of contemporary commentators regarding can.27 in the current Code of Canon Law. The last part of the article aims to overview appropriate understanding of customary interpretation of law and to show in which sense the custom is its best interpreter.

Key words: custom, interpretation, history of Canon Law.

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Sexual Abuse of Minors by Clerics: Current Canonical Issues

Introduction

Entering to the priesthood means accepting certain rights and obligations associated with this condition. One of them is the obligation of perfect and perpetual continence¹. It is not only the case a life in celibacy. Clerics are called to holiness by a special virtue², so therefore they should direct their lives in a way that a perfect continence and adhering to God's commandments were distinctions in aiming to holiness.

There are several threats to aiming to holiness by clerics, that is: deeds, behaviours and sexual attitudes contrary to God's commandments, especially when dealing with minors. Cases of sexual harassment and the minors abuse, which are publicized by mass media, bring the question of how the Catholic Church solves that problem, also through its own legal standards.

This paper will attempt to answer the question of how canon law standards oppose to sexual abuse of minors committed by priests. Universal law included in The 1983 Code of Canon Law will be depicted in the first place. Then the documents which present the issue in a greater detail, i.e. *Sacramentorum sanctitatis tutela* and *Normae de gravioribus delictis*, will be put forward. There will also be quoted selected teachings of recent Popes.

¹ Cf. *Kodeks Prawa Kanonicznego*. Przekład polski zatwierdzony przez Konferencję Episkopatu, Poznań 1984, Pallotinum, (further KPK 1983), cann. 277 § 1.

² Cf. *ibid.*, cann. 276 § 1. Cf. Dekret o posłudze i życiu kapłanów Presbyterorum ordinis, 07.12.1965, in: Sobór Watykański II, Konstytucje, Dekrety, Deklaracje, tekst polski, Poznań 2002, Pallotinum, no. 12-14; Jan Paweł II, Adhortacja apostolska *Pastores dabo vobis*, 25.03.1992, Wrocław 1992, Wydawnictwo Wrocławskiej Księgarni Archidiecezjalnej, no. 19-20. Also in a general theological perspective, there should be a reference to the universal call to holiness, cf. Konstytucja dogmatyczna o Kościele *Lumen Gentium*, 21.11.1965, in: Sobór Watykański II, *Konstytucje, Dekrety, Deklaracje...*, no. 39.

1. The 1983 Code of Canon Law

To be admitted to the priesthood you have to take a deaconate on; clericals are deacons, presbyters and bishops³. As it has been mentioned in the introduction, this condition leads to perfect continence and living in celibacy. „Clerics are obliged to observe perfect and perpetual continence for the sake of the Kingdom of heaven, and are therefore bound to celibacy. Celibacy is a special gift of God by which sacred ministers can more easily remain close to Christ with an undivided heart, and can dedicate themselves more freely to the service of God and their neighbour. Clerics are to behave with due prudence in relation to persons whose company can be a danger to their obligation of preserving continence or can lead to scandal of the faithful”⁴.

Continence and life in celibacy opens the minister to more fervent service the God’s Kingdom, to spiritual paternity in Christ, and being a living sign of the future world⁵. The source of the obligation is undertaking a voluntary and public obligation of holy orders, which leads to obligation to live in celibacy⁶.

Sexual abuse of minors by clerics correspond with other offenses and crimes. Therefore, at the beginning there should be referred such offenses as: cohabitation, single intercourses against chastity, harassment, propagating pornography, attempted absolution of a partner in sin against the sixth commandment of God, or so – called solicitation.

Criminal Law of the Catholic Church protects people and their rights. In the first place there will be referred crimes related to performing the sacrament of penance, which regard sexual dimension. Furthermore there will be discussed church crimes which directly concern the sexual abuse committed by clerics.

1.1. Offences connected with holding the sacrament of penance

Acting as a priest is the mission of salvation. Church reviles those performances of the sacraments, which diverge with that fundamental mission, in the

³ Cf. KPK 1983, cann. 266 § 1, 1009 § 1.

⁴ Cf. *ibid.*, cann. 277 § 1-2. It should be added, that permanent deacons, who are married can be ordained. Historic and legal outline of the celibacy of priests, cf. *Komentarz do Kodeksu Prawa Kanonicznego*, vol. II/1, ed. J. Krukowski, Poznań 2005, Pallotinum, p. 98-99.

⁵ Cf. *Presbyterorum ordinis*, no. 16; *Pastores dabo vobis*, no. 44; Kongregacja ds. Duchowieństwa, *Dyrektorium o posłudze i życiu kapłanów*, 31.01.1994, Vatican 1994, no. 57-60.

⁶ Cf. KPK 1983, cann. 1037; When it comes to clerics, they take perpetual vows in a religious congregation, cf. *ibid.* Seminary, in a human dimension, prepares to life in celibacy, cf. *ibid.*, cann. 244, 247 § 1-2.

most severe penalties, such as *latae sententiae*. The crime which is particularly stigmatized is an absolution of a partner in sin against the sixth commandment of God.

„A priest who acts against the prescription of Canon 977 incurs a *latae sententiae* excommunication reserved to the Apostolic See”⁷. Apart from the danger of death, the confessor cannot validly absolve a partner in sin against the sixth commandment, which is expressed in the can. 977th. In this case the priest cannot say the formula of absolution with the intention of forgiveness of sin. As a partner there can be any person (male or female), who committed the sin against the sixth commandment with the priest – it may also apply to the minor. The participation in a sin against the sixth commandment requires that each person has committed a sin intentionally and voluntarily; in this instance sin is an external and heavy deed⁸. Confessor’s guilt must be deliberate, i.e. he intends to absolve a partner in sin, though he is fully aware that he is committing a crime with untrammelled will to act. The priest has to have a faculty to hear confession, without which he cannot confess⁹.

The Church, which is defined by such criminal norm, is to protect the good and the sanctity of the sacrament of penance, as well as the penitent’s. There is no possibility of judging your own partner in sin. In addition, the penitent doesn’t enter the track of inner conversion. Also there is a danger of spreading moral corruption among the faithful. The penalty for that crime is an excommunication *latae sententiae* reserved to Holy See. More specifically, in this case The Congregation for the Doctrine of the Faith releases from the penalty¹⁰.

Another crime that violates the sanctity of the sacrament of penance is so-called solicitation. It means impelling to sin against chastity. „A priest who in confession, or on the occasion or under the pretext of confession, solicits a penitent to commit a sin against the sixth commandment of the Decalogue, is to be punished,

⁷ Cf. *ibid.*, cann. 1378 § 1.

⁸ The crime of absolution of a partner in sin against the sixth commandment of God, cf. *Komentarz do Kodeksu Prawa Kanonicznego*, vol. 4, ed. W. Wójcik, J. Krukowski, F. Lempa, Lublin 1987, Wydawnictwo KUL, p. 247-248; M. Pastuszko, *Sakrament pokuty i pojednania*, Kielce 1999, Jedność, p. 354-364; J. Syryjczyk, *Kanoniczne prawo karne. Część szczegółowa*, Warszawa 2003, Wydawnictwo UKSW, p. 96-102. A complicity requires awareness, freedom of taking action; lack of this elements, i.e. alcoholic intoxication, mental illness or doing something under compulsion changes the classification of an act into being not a crime, according to canon 1378 § 1, cf. *ibid.*, p. 97.

⁹ Cf. KPK 1983, cann. 966; *Kodeks Prawa Kanonicznego. Komentarz*, ed. P. Majer, Kraków 2011, Wolters Kluwer Polska, p. 1032.

¹⁰ A complaint about that crime fell under the ten-year of prescription from the date of committing it, cf. Congregatio pro Doctrina Fidei, *Epistula Normae de gravioribus delictis*, 18.05.2001, AAS 93 (2001), p. 785-788.

according to the gravity of the offence, with suspension, prohibitions and deprivations; in the more serious cases he is to be dismissed from the clerical state”¹¹.

Confessor makes a crime of solicitation, when he addresses the penitent, who can also be minor. The offense applies to sins against chastity, both external and internal. It concerns the very inducing to sin, regardless of whether the wrongdoer’s action will be effective. Penitent doesn’t have to consent to it, so that the offense is recognized as being made. Confessor’s action is expressed externally by such behaviour as talking, handing in a letter, signs and gestures¹².

Solicitation of sin might be done by priest through: a) in the act of sacramental confession, b) on the occasion of confession, c) under the pretext of confession. The first possible situation of solicitation takes place during sacramental confession. Through the second possibility: „on the occasion of confession”, it is understood the time immediately before the confession or just after it. The third situation “under the pretext of confession” takes place when the priest fakes to hear confession, and doesn’t intend to listen to the penitent. He misleads the other faithful, saying that he will confess, and in fact he wants to get rid of any witness from the confessional, or bedside.

The offense violates the sanctity of confession, causes confusion and loss of souls, especially the one being induced to sin. Furthermore it causes spreading moral corruption among the faithful and discourages them to benefit from the sacraments.

For the offense to be recognized it is necessary to prove that the solicitation really happened¹³. On the priest side it is required an intended guilt, in order to cause the penitent to make a cardinal sin against the sixth commandment of God. Criminal sanction is not specified. Ecclesiastical Judge is obliged, according to the burden of the offense, to punish the offender with the punishment of suspensions, ban on serving as a priest or to be ousted from power or office, non-residence in a particular territory, or in more serious cases even dismissal from the clerical state¹⁴.

¹¹ Cf. KPK 1983, cann. 1387. Former norms on the subject of solicitation, cf. J. P. Beal, The 1962 Instruction ‘Crimen sollicitationis’: Caught red-handed or handed a red herring?, „Studia Canonica” 41 (2007), p. 199-236.

¹² Cf. J. Syryjczyk, *Kanoniczne prawo karne*, p. 124-125.

¹³ Canon Law protects the confessors from false testimonies on the solicitation, cf. KPK 1983, cann. 1390 § 1; J. Syryjczyk, *Kanoniczne prawo karne*, p. 140-142. Penitent who falsely accuses of solicitation is obliged to withdraw his testimony and to redress wrongs, cf. KPK 1983, cann. 982; M. Pastuszko, *Sakrament pokuty i pojednania*, p. 364-377.

¹⁴ Such form of solicitation when a priest induces penitent to a sin against sixth commandment is reserved to The Congregation for the Doctrine of the Faith and it falls under a ten-year statute of prescription from the date of committing it, cf. Congregatio pro Doctrina Fidei, Epistula Normae de

1.2. Offences against chastity

Since the beginning of Christianity the offences against the sixth commandment were the heaviest ones. Those crimes were punishable by severe penalties public penances. Living in cohabiting during the 11th and 12th centuries resulted in a penalty of deposition, and the faithful were not allowed to contact cohabitees¹⁵. Consequently, the 1917 Code, Canon 2358 and 2359 contained a variety of penalties for offenses against chastity committed by clerics.

In the current, 1983 Code of Canon Law, the legislature formulates mainly three types of crimes committed by clerics. The first is an attempt by cleric to marriage. „Without prejudice to the provisions of Canon 194, §1, n. 3, a cleric who attempts marriage, even if only civilly, incurs a *latae sententiae* suspension. If, after warning, he has not reformed and continues to give scandal, he can be progressively punished by deprivations, or even by dismissal from the clerical state”¹⁶.

In the second type of crime there is a crime of concubinage and other external sins against the sixth commandment. „Apart from the case mentioned in Canon 1394, a cleric living in concubinage, and a cleric who continues in some other external sin against the sixth commandment of the Decalogue which causes scandal, is to be punished with suspension. To this, other penalties can progressively be added if after a warning he persists in the offence, until eventually he can be dismissed from the clerical state”¹⁷.

The third form of offence occurs when the priest commits an external sin against the sixth commandment and meets at least one of the following conditions: a) the deed has been made with the use of coercion or threats, b) it has been made publicly, c) it has been made with a minor under the age of sixteen¹⁸.

gravioribus delictis. Also a papal legate is entitled to accept accusation of solicitation retaining legal articles of The Congregation for the Doctrine of the Faith, cf. *Kodeks Prawa Kanonicznego. Komentarz*, ed. P. Majer, p. 1037.

¹⁵ Cf. *Komentarz do Kodeksu Prawa Kanonicznego*, vol. 4, ed. W. Wójcik, J. Krukowski, F. Lempa, p. 274; J. S. Grabowski, *Clerical sexual misconduct and early traditions regarding the sixth commandment*, „The Jurist” 55 (1995), p. 527-591.

¹⁶ Cf. KPK 1983, cann. 1394 § 1. When a religious, who is not a cleric, attempts marriage in that case he is liable to punishment of interdict, cf. *ibid.*, cann. 1394 § 2.

¹⁷ Cf. *ibid.*, cann. 1395 § 1.

¹⁸ Cf. *ibid.*, cann. 1395 § 2.

Even if the cleric attempts to get married, it is invalid because of the sacred orders barrier¹⁹. The crime occurs, when validly ordained man attempts marriage, whether it is in the canonical or civil form. In the context of this subject, there should be noted the possibility to marriage of a minor female who is at least sixteen years of age, in the Polish law, with the approval of the Family Court²⁰.

The behaviour of the priest, who betrayed established obligations, causes spreading moral corruption to the faithful and it violates the respect for the priesthood. When it is found that the priest attempts to marriage in a conscious and voluntary way, he incurs *latae sententiae* suspense and is removed from ecclesiastical offices. Further, when his obstinacy continues, he may be punished with other expiatory penalties, including dismissal from the clerical state.

In another possible scenario, the cohabitation means the permanent cohabitation of a man and a woman as if they were a marriage couple²¹. In the considered issue, one side is cohabiting priest, diocesan or religious. The other side of the bond is a woman, even if she was a minor. Cohabitation is an illegal bond and criminal responsibility of a cleric regards the situation, when the bond is public²².

Other crimes committed by cleric are described in Canon 1395 § 1, and relate to the cardinal sin, which is permanent; it is an external sin, i.e. that is known to the public, or will soon to be made public²³. A public aspect of a deed causes, in addition, spreading moral corruption to the faithful.

The crime of concubinage and long – lasting remaining in that scandalous external sin against the sixth commandment is to be punished with suspensions. If the priest after a warning (canonical warning) still persists in the offense, there may be imposed on him, gradually, other penalties, even up to dismissal from the clerical state. In the case where the cleric is a religious, he should be expelled from the religious institute²⁴.

¹⁹ Cf. *ibid.*, cann. 1087. Also the religious cannot marry validly because of the sacred orders barrier, cf. *ibid.*, cann. 1088. Discussion of the crime, cf. *Komentarz do Kodeksu Prawa Kanonicznego*, vol. 4, ed. W. Wójcik, J. Krukowski, F. Lempa, p. 273-274; J. Syryjczyk, *Kanoniczne prawo karne*, p. 158-161.

²⁰ Cf. Ustawa z dnia 25 lutego 1964 r. Kodeks rodzinny i opiekuńczy, Dz. U. z 1964 r. Nr 9, poz. 59 z późn. zm. [The Act of 25 February 1964, The Family and Guardianship Code], art. 10 § 1.

²¹ Cf. Concubinage, in: *Encyklopedia Katolicka*, vol. 9, Lublin 2002, Towarzystwo Naukowe KUL, col. 645-647.

²² Cf. J. Syryjczyk, *Kanoniczne prawo karne*, p. 162.

²³ Cf. *ibid.*, p. 162-163. A violation of the sixth commandment of God relates to heterosexual deeds, as well as to homosexual.

²⁴ Cf. KPK 1983, cann. 695 § 1.

In another group of crimes standardized in a Canon 1395 are acts committed by force or threats. Sexual violence doesn't only mean rape. It is also the case of sexual harassment. Threat, which is putting a psychological pressure, tends to make the person act contrary to chastity. The offender threatens, e.g. with such situations as: making public defaming information, making a person lose their job, depriving from promotion, or other damages²⁵.

Another form of crime is an act against chastity made public. In this case an offence is committed in front of other people or with the usage of the mass media, or in public. That crime also includes exhibitionism, which as well can be witnessed by minors.

The following offense is the violation of the sixth commandment closely – related with a minor²⁶. Codex registration, after the promulgation of this set of legal norms, concerns minors under sixteen years of age. The crime occurs no matter whether the underage consents to indecent actions or not, whether it is conscious or unconscious event. The gender of a minor doesn't change the fact that it is a criminal offense either. The offences express the intention of the perpetrator: to take advantage of a minor to obtain any stimulation or sexual gratification²⁷. The priest himself often occurs in a pastoral relationship with a minor²⁸. Criminal deeds described in Canon 1395 § 2 shall be subject to punishment, even if they were

²⁵ Cf. J. Stryjczyk, *Kanoniczne prawo karne*, p. 164.

²⁶ In Canon Law a minor is defined as a person, who is under eighteen years of age, cf. KPK 1983, cann. 97 § 1. One can find an extensive literature on the discussed subject, i.e. offences against the sixth commandment of God committed by priests including minor's participation: P. Cimbalic, *The identification and treatment of sexual disorders and the priesthood*, „The Jurist” 52 (1992) p. 598-614; J. P. Beal, *Doing what one can: canon law and clerical sexual misconduct*, *ibid.*, p. 642-683; J. Touhey, *The correct interpretation of canon 1395: the use of the sixth commandment in the moral tradition from Trent to the present day*, „The Jurist” 55 (1995), p. 592-631; J. H. Provost, *Offences against the sixth commandment: toward a canonical analysis of canon 1395*, *ibid.*, p. 632-663; R. Jenkins, *On the suitability of establishing clerical sexual abuse of minors (Cann. 1395 § 2) as an irregularity ex delicto to the reception and exercise of orders*, „Periodica” 94 (2005), p. 275-340; Z. Suchecki, *La tutela dei minori presso la Congregazione per la Dottrina della Fede riguardo ai delicta graviora*, „Appollinaris” 3-4 (2006), p. 719-732; D. Albornoz, *Norme e orientamenti della Chiesa cattolica dinanzi agli abusi sessuali di minori perpetrati da chierici*, „Salesianum” 70 (2008), p. 713-717; A. Domaszko, *Reakcja Kościoła na nadużycia seksualne wobec nieletnich ze strony duchownych*, „Seminare. Poszukiwania Naukowe”, 31 (2012), p. 69-86; The same, *Towarzystwo św. Franciszka Salezego wobec zagrożenia nadużyciami seksualnymi względem nieletnich*, „Seminare. Poszukiwania Naukowe”, 32 (2012), p. 49-56.

²⁷ A sexual abuse takes the form of: touch, a kiss on the lips, exhibiting sexual organs, and finally sexual intercourse. An abuse can have an indirect nature, i.e.: provoking conversation between cleric and minor, or when a cleric is in a possession of pornographic supplies, or photographs and films minors in pornographic aims, cf. D. Albornoz, *Norme e orientamenti...*, p. 716.

²⁸ When cleric abuses his dignity, authority or office to commit a crime, then as a consequence he deserves to be punished more severely, cf. KPK 1983, cann. 1326 § 1 nr 2.

committed only once. Sexual abuse of minors violate their human dignity and personal freedom.

The legislature provides different penalties for the priest, depending on the severity of his deeds. For the offenses in the Can. 1395 § 2, the law provides indefinite, but mandatory penalty. The judge is obliged to impose right penalty, the dismissal from the clerical state inclusive. If the priest is a religious, he should be expelled from the religious institute. However, the religious superior may abandon his intentions to expel a religious, if he is convinced that there is other way of improving the wrongdoer's life, and it is possible to right the wrong, and to redress moral corruption²⁹. A necessary subjective element beside the cleric's side is an intentional fault, i.e. the intention to commit one of the acts prohibited by Canon 1395.

In all offenses against the sixth commandment the reason for punishment is to protect the spiritual well-being, not only the priest's who commits the offence, but also the well – being of a partner of a deed. In this case also the religious violates the obligation of perfect continence. His behaviour is harmful to himself and to others. This causes the public scandal or a danger of scandal.

2. Sacramentorum sanctitatis tutela and Normae de gravioribus delictis

Although there are clear legal norms that penalize sexual abuse of clergy, on the basis of canon law, such offences have occurred. In this case, there were deep reflection and consultations that were taken, inter alia, within the Congregation for the Doctrine of the Faith. It should be noted that in the period after the promulgation of the 1983 Code, the offences committed against morals have been reserved to the Congregation for the Doctrine of the Faith in 1988³⁰. In a further development of the situation, the mentioned members of the Congregation presented to the Holy Father the results of their work, namely an outline of more serious crimes and the need for modification of the relevant procedures, which are reserved to the Congregation. The results of this study has been validated and approved in 2001 by Pope John Paul II,

²⁹ Cf. *ibid.*, cann. 695 § 1.

³⁰ Cf. Joannes Paulus pp II, *Constitutio apostolica de Romana Curia Pastor Bonus*, 28.06.1988, AAS 80 (1988), p. 841-912, art. 52.

who issued a letter *Sacramentorum sanctitatis tutela*³¹. It has to be noted that the issue of sexual abuse committed by clerics has been repeatedly discussed by the highest authorities of the Church³².

In the letter *Sacramentorum sanctitatis tutela* Pope emphasized the need to protect the sanctity of the sacrament of the Eucharist and Penance, and the preservation of the sixth commandment of the Decalogue. He indicated the existing church documents and standards that protected these sacraments and the prior authorities of the Congregation of St. Office. Currently, the Congregation for the Doctrine of the Faith is responsible for offenses and crimes against faith and morals. With his Apostolic Letter Pope John Paul II promulgated at the same time the document of the Congregation for the Doctrine of the Faith, i.e. *Normae de gravioribus delictis*³³.

The letter *Normae de gravioribus delictis* named offenses reserved to the competence of the Congregation for: protection of the Blessed Sacrament, the Sacrament of Penance, and crimes against morals. Among them are already discussed above, i.e. the absolution of a partner in sin against the sixth commandment and solicitation, inducing to sin (during confession, on the occasion of confession or under the pretext of confession) with the confessor³⁴. An offense against the morals, which is reserved to the Congregation, is a sin against the sixth commandment, when it is committed by a cleric with a minor. Here we observe a significant change in comparison to the Code of 1983, as a minor is now considered a person under eighteen years of age, and no longer under sixteen years of age³⁵. These offenses are

³¹ Joannes Paulus pp II, *Litterae apostolicae motu proprio Sacramentorum sanctitatis tutela*, 30.04.2001, AAS 93 (2001), p. 737-739.

³² It should be emphasized, that cardinal J. Ratzinger contributed greatly to changes in the Church legislation, cf. J. I. Arrieta, L'influsso del Cardinal Ratzinger nella revisione del sistema penale canonico, *La Civiltà Cattolica* 4 dicembre 2010, p. 430-440; almost the same text of the same author was published in *L'Osservatore Romano* 2 dicembre 2010, and on the website of the Vatican: http://www.vatican.va/resources/resources_arrieta-20101204_it.html (access date: 04.09.2013); F. Lombardi, *Abuso sui minori. Le prospettive di Papa Benedetto XVI*, „Orientamenti Pastoralì” (2011) 2, p. 44-55. The list of church documents and speeches, cf. also Kościół katolicki wobec nadużyć seksualnych duchowieństwa, K. Tomasik, *Wiadomości KAI* 21 (2001), p. 23-25. The website of Vatican also reveals the Church's action on that issue, cf. *Abuso sui minoris. La riposta della Chiesa*, http://www.vatican.va/resources/index_it.htm (access date: 04.09.2013).

³³ Cf. Congregatio pro Doctrina Fidei, *Epistula Normae de gravioribus delictis*.

³⁴ Cf. D. Borek, *Przestępstwa przeciwko sakramentom w Normach de delictis reservatis z 2010 r.*, „Prawo Kanoniczne” 55 (2012) no. 4, p. 134-138, 142-145.

³⁵ „(...) delictum contra sextum Decalogi praeceptum cum minore infra aetatem duodeviginti annorum a clerico commissum. Haec tantum, quae supra indicantur delicta cum sua definitione, Congregationis pro Doctrina Fidei Tribunali Apostolico reservantur”, Congregatio pro Doctrina Fidei, *Epistula Normae de gravioribus delictis*.

subject to the Congregation for the Doctrine of the Faith as the Supreme Apostolic Tribunal³⁶.

If an ordinary knew about at least probable offence, and about the preliminary investigation, he would mandatory inform the Supreme Apostolic Tribunal. He is obliged to hand over to the Tribunal the statements of witnesses, documents, statements of expert witnesses and other statutory records of the case together with the ordinary's opinion. Further proceeding leads in the hands of the Congregation, unless it orders the ordinary to hear a case, i.e. at the same time it will provide special rules for further proceedings³⁷. A plaint falls under a ten – year statute of prescription. With reference to an offense committed by a cleric with a minor, the prescription period runs from the date on which the minor reaches the age of eighteen years of age.

It should be noted that in the conclusion of the letter *Normae de gravioribus delictis* there was expressed a request referring to the spiritual aim of the Church. Pastoral ministry of ordinances expresses concern about the sanctity of priests and other faithful, even if it means inflicting the necessary punishments.

3. The Modification of: *Normae de gravioribus delictis*

After another nine years, the Holy See has modified the norms of managing the heaviest crimes. After receiving the approval of the Pope, the Congregation for the

³⁶ In tribunals established by ordinaries there have to be provided following offices: judge, the promotor of justice, notary and patron (attorney); offices are entrusted to the priests. Tribunals are guided by a Common criminal law of the Church. These types of cases are papal secret, that means that the parties of proceedings are required to maintain absolute secrecy. In the years 2001-2010 the Congregation received 3 000 cases; 60% of them were cases of homosexual acts against minors, 30% of cases were related to juvenile heterosexual abuses, and 10% of cases were committed on small children. In 20% of cases the procedures were carried out by dioceses, in 60% of cases nobody filed any law suit, mainly because of the advanced age of the accused. In 20% of the cases, the Congregation led to transfer the clerics to laity, or they were induced to requests for dispensation from duties of a priest, cf. Intervista di Gianni Cardinale a mons. Charles Scicluna sulla rigidità della Chiesa nei casi di pedofilia, http://www.vatican.va/resources/resources_mons-scicluna-2010_it.html (access date: 04.09.2013).

³⁷ Reserving crimes for the Congregation for the Doctrine of the Faith relates to the procedural field, inflicting punishment on somebody and declaring penalties. When it comes to letting somebody off it is a subject to the general rules contained in the Common Law. The defendant, his attorney or the promotor of justice can appeal; an appeal against the sentence of the first instance (ordinary) should be submitted to the Court of the Congregation for the Doctrine of the Faith. To avoid scandal the Ordinary may take precautionary means, that is to remove the accused person from the holy ministry, an order or a ban on staying in a certain place, etc., cf. KPK 1983, cann. 1722.

Doctrine of the Faith on the 21st May 2010 published new standards³⁸. There are noticeable differences in the document, taking into consideration only changes that relate to sexual abuse.

It abided a crime committed by a cleric with a person under eighteen years of age, but made that person equal to a person who habitually lacks the use of reason³⁹. An offense also registered to Congregation is: „the acquisition, possession, or distribution by a cleric of pornographic images of minors under the age of fourteen, for purposes of sexual gratification, by whatever means or using whatever technology”⁴⁰. The online viewing of pornography can be unintentional by a cleric, for example by opening an e-mail attachment, or searching the website, which name doesn't suggest any illegal content. However by installing the pornographic files (photos, videos), inter alia, with an image of minor, it requires an intentional action, often made through electronic forms of payment⁴¹. The intentional act of the priest would be a further storage or distribution of the pornographic materials. The another change in the legal norms is the extension of the period of time, when one can lodge a complaint, which now expires after twenty years⁴². In order to entitle the minor to lodge a complaint, who was a victim of a crime, the prescription period starts from the date on which he turned eighteen years of age⁴³.

To facilitate the usage of legal norms (*de gravioribus delictis*) the Congregation for the Doctrine of the Faith has turned to the various Episcopal Conferences with the Circular Letter⁴⁴. The point is that each of Conferences should develop its own guidelines, which are clear and coordinated procedures in case of

³⁸ Cf. Kongregacja Nauki Wiary, *Modyfikacje wprowadzone do tekstu Normae de gravioribus delictis (then Normae de gravioribus delictis 2010)*, „L'Osservatore Romano” 10 (2010), p. 53-56 [the Polish edition]. Cf. a commentary to the current norms, Normy Motu Proprio «Sacramentorum Sanctitatis Tutela». Wprowadzenie historyczne, *ibid.*, p. 57-59; P. F. Lombardi, Il significato della pubblicazione delle nuove „Norme sui delitti più gravi”, http://www.vatican.va/resources/resources_lombardi-nota-norme_it.html (access date: 04.09.2013).

³⁹ Cf. Normae de gravioribus delictis 2010, art. 6 § 1 nr 1.

⁴⁰ Cf. *ibid.*, art. 6 § 1 no. 2. When committing a crime against morals the cleric ought to be punished appropriately to weight of an offence, not including expelling from an office of a priest, cf. *ibid.*, art. 6 § 2. Cf. M. L. Bartchak, *Child pornography and the grave delict of an offense against the sixth commandment of the Decalogue committed by a cleric with a minor*, „Periodica” 100 (2011) 2, p. 285-380.

⁴¹ Cf. Z. Suchecki, *La tutela dei minori*, p. 723-724.

⁴² Cf. Normae de gravioribus delictis 2010, art. 7 § 1.

⁴³ Cf. *ibid.*, art. 7 § 2.

⁴⁴ Cf. Okólnik do Konferencji Episkopatów w sprawie opracowania „wytucznych” dotyczących sposobów postępowania w przypadku nadużyć seksualnych popełnionych przez duchownych wobec osób niepełnoletnich (further Circular Letter of Congregation 2011), 03.05.2011, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_abuso-minori_pl.html (access date: 04.09.2013).

sexual abuse⁴⁵. In preparation of the guidelines should attend major superiors of clerical religious institute.

In the Circular Letter from the Congregation, at first, there were pointed out general aspects: a care for the victims of sexual abuse and a support given to them, the protection of minors, the formation of future priests and religious, accompanying priests and the cooperation with the state authorities, but without prejudice to sacramental internal forum (*foro interno*)⁴⁶. The document provides a brief description of the applicable canonical legislation on sexual abuse. The means of penalty against the clerics are: restrictions concerning public ministry, ban on contacting with minors, determined penalties according to Cann. 1319 of the 1983 Code of Canon Law, as well as other penalties, including the penalty of expelling from the clerical state⁴⁷. Guidelines prepared by the Episcopal Conference constitute a supplement to the common law, and aren't any replacement of it, and demand so – called *recognitio* from the Apostolic See. In the third part of the Circular Letter Congregation gave instructions for bishops, ranging from the need for respecting the person making the accusation, psychological and spiritual support to victims, keeping peoples' good names, the right to defence for the defendant, to taking into consideration the national legislation and the obligation to notify the civil authorities⁴⁸.

4. The teachings of recent Popes'

The problem of paedophilia deeply affected the Catholic Church in the United States. John Paul II spoke with U.S. bishops on that subject in 2002⁴⁹. In his speech,

⁴⁵ Cf. 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, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20110503_levada-abuso-minori_pl.html (access date: 04.09.2013).

⁴⁶ Cf. Circular Letter of Congregation 2011, no. 1 a-e. When it comes to the candidates to priesthood or religious life, who change seminaries and formation houses, there is a need of exchanging information about between bishops and religious superiors on the candidates' subject, cf. *ibid.* Bishops are obliged to advise their priests on the subject of harms related to crimes against morals, and on the canonic and civil responsibility, cf. *ibid.*

⁴⁷ Cf. *ibid.*, no. 2. J. Ratzinger from the time he was a prefect of the Congregation for the Doctrine of the Faith, he sought integrity and consequent applying Canon Criminal Law. He put forward a proposal to begin and continue work on the reform on the Book V of Code of the Canon Law of 1983, cf. J. I. Arrieta, *L'influsso*, p. 430.

⁴⁸ Cf. Circular Letter of Congregation 2011, no. 3 a-i.

⁴⁹ Cf. Discorso di Giovanni Paolo II ai partecipanti alla riunione interdicasteriale con i cardinali degli Stati Uniti D'America, 23.04.2002,

the Pope expressed his sadness because of the scandal and suffering of the harmed young people. Sexual abuses committed by clerics are not only a cardinal sin in the eyes of God, but also it is an evil and a crime in the eyes of society. To redress wrongs it is demanded a Christian repentance and return to God. Such situations demand to draw up criteria of action, which will prevent from similar errors⁵⁰.

Sexual abuse of young people is a sign of sexual morality crisis, which afflicted the Church, as well as the entire human community. The Church's action should prove to faithful and the society that bishops and religious superiors care for the people's spiritual good. And when it comes to priesthood or religious life, there is no place in it for those who harm young people. The faithful need to know, that bishops and priests are entirely committed to revealing the truth about sexual morality, the renewal of priesthood, marriage and family life⁵¹.

Pope John Paul II returned to the subject of sexual abuse in 2004 during meetings *ad limina Apostolorum* carried out with the American bishops. At that time he confirmed the availability of these bishops to recognize and face the defects and flaws from the past. There can be drawn a conclusion that undertaken actions bring reconciliation and renewal of the Church. By solving the fundamental problem bishops are to encourage the faithful and the clerics to bear witness to the faith⁵².

The meeting with the Irish Catholic Bishops Conference, in 2006 (*ad limina Apostolorum*), was another opportunity for the Pope's speech, the Benedict's XVI. The Holy Father said that the wounds of sexual abuse are deep and there is an urgent need to repair the trust. Facing the problem, first of all, the truth about what happened should be determined. Then there should be taken necessary steps in order not to follow the same mistakes in the future, bearing in mind justice. In addition, all the effort should be put to heal the victims and others affected by these crimes. Through time of purification the Holy Spirit leads the Church to deepen the life in holiness⁵³.

http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/april/documents/hf_jp-ii_spe_20020423_usa-cardinals_it.html (access date: 04.09.2013); Polish text. Cf. L'Osservatore Romano 6 (2002), p. 18-19.

⁵⁰ Cf., *ibid.*, no. 2.

⁵¹ Cf., *ibid.*, no. 3.

⁵² Meetings with the American bishops during the visit *ad limina Apostolorum* was carried out in: 02.04.2004, 02.09.2004 and 11.09.2004, cf. http://www.vatican.va/resources/resources_adlimina-american-bishops-2004_it.html (access date: 04.09.2013).

⁵³ Cf. Discorso di Sua Santità Benedetto XVI ai vescovi della Conferenza Episcopale Di Irlanda in visita „Ad Limina Apostolorum”, 28.10.2006,

In 2008 Benedict XVI made an apostolic pilgrimage to the United States. During his stay he referred to, inter alia, sex scandals involving clerics. In a speech to the American bishops at the National Shrine of the Virgin Mary in Washington, the Pope said that the sexual abuse of children evoke deep shame. Bishops are responsible for healing such wounds and expressing compassion and support for victims is a priority. There should be taken precautionary and disciplinary measures, and safe environment for young people ought to be provided. If the resources and strategies were successful, they should be seen in broader context. It concerns proper moral education of children and youth, including a healthy understanding of sexuality. In addition, children and youth must be protected from pornography. This way every member of society contributes to the moral renewal⁵⁴. Reinforcing bounds between priests and bishops, is imitating Christ the Good Shepherd. „Indeed, a clearer focus on the imitation of Christ, in holiness of life, is what we need, if we want to move forward”⁵⁵.

In the further course of the pilgrimage to the United States, the Pope concerned the painful subject of suffering resulting from sexual abuse. In Washington, in his homily, he appealed to show pastoral care to victims and to promote healing and reconciliation. Spiritual renewal of the Church in the United States depends on the sacrament of reconciliation and on growing up in holiness⁵⁶. Pope expressed his commitment through meeting with the victims of sexual offenses, which taken place in the Chapel of the Apostolic Nunciature in Washington, on 17 April 2008.

In the same year the Holy Father went to Australia. During the Mass in Sydney, again, he expressed his shame, pain and the Church’s suffering because of the sexual abuses. „These misdeeds, which constitute so grave a betrayal of trust,

http://www.vatican.va/resources/resources_adlimina-irish-bishops-oct2006_it.html (access date: 04.09.2013).

⁵⁴ Cf. Benedykt XVI, *Przemówienie do biskupów amerykańskich*, 16.04.2008, in: Ojciec Święty Benedykt XVI, *Chrystus naszą nadzieją. Wizyta apostolska Ojca Świętego Benedykta XVI w Stanach Zjednoczonych*, Kraków 2008, Wydawnictwo AA, p. 33-36.

⁵⁵ *Ibid.*, p. 37-38.

⁵⁶ Cf. Benedykt XVI, *Homilia wygłoszona na stadionie Nationals Park w Waszyngtonie*, 17.04.2008, in: Ojciec Święty Benedykt XVI, *Chrystus naszą nadzieją...*, p. 59-62. Also during the Holy Mass in the St. Patrick’s Cathedral NYC on the 19 April Holy Father Benedict XVI referred to the issue of sexual abuses, cf. *ibid.*, p. 125.

deserve unequivocal condemnation”⁵⁷. As in the U.S., as in Australia, the Pope met with victims of crimes and expressed his sympathy.

The following year – 2009, Benedict XVI met with the bishops of Ireland. He was moved by reports of sexual abuse, and therefore expressed his regret for those who have betrayed their oath to God, and for the victims’, families’ and society’s trust. The Pope co – felt betrayal and shame of Irish Catholics, that is why he assured that the Church will continue to search for the truth about those events and will be looking for the best and the safest solutions for the future⁵⁸. In general, it should be remarked that both of the aforementioned popes several times raised the issue of sex crimes committed by clerics, during meetings with bishops around the world, with journalists and victims of abuse⁵⁹.

In 2010 the Holy Father addressed the letter to the Irish Catholics, in which he framed a plan of healing and restoration of the Church⁶⁰. This document, although

⁵⁷ Benedykt XVI, *Homilia wygłoszona w katedrze NMP w Sydney*, 19.07.2008, in: Ojciec Święty Benedykt XVI, XXIII Światowy Dzień Młodzieży. Sydney 2008, Kraków 2008, Wydawnictwo AA, p. 86. Also on the occasion of press conference during the flight do Australia Pope expressed His and the whole Church’s opposition to pedophilia, cf. http://www.vatican.va/resources/resources_visit-australia-jul2008_it.html (access date: 04.09.2013).

⁵⁸ Cf. Benedict XVI, *The Meeting of the Holy Father, Benedict XVI, with Representatives of the Irish Episcopal Conference and Senior Officials of the Roman Curia*, 11.12.2009, http://www.vatican.va/resources/resources_irish-bishops-dec2009_en.html (access date: 04.09.2013). The working meeting of the Holy Father, Benedict XVI, with the Irish Bishops, and senior officials of the Roman Curia together with the discussion on the subject of sexual abuses committed by clerics had also place on the 15-16.02.2010, http://www.vatican.va/resources/resources_irish-bishops-feb2010_en.html (access date: 04.09.2013).

⁵⁹ Cf. Benedict XVI, *Incontro del Santo Padre Benedetto XVI con i giornalisti durante il volo verso Malta*, 17.04.2010, http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/april/documents/hf_ben-xvi_spe_20100417_interview_it.html; the same, Comunicato: incontro del Santo Padre con alcune vittime di abusi sessuali, 18.04.2010, http://www.vatican.va/resources/resources_comunicato-abusi-malta_it.html; the same, Intervista concessa dal Santo Padre Benedetto XVI ai giornalisti durante il volo verso il Portogallo, 11.05.2010, http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/may/documents/hf_ben-xvi_spe_20100511_portogallo-interview_it.html; the same, Omelia, 11.06.2010, http://www.vatican.va/holy_father/benedict_xvi/homilies/2010/documents/hf_ben-xvi_hom_20100611_concl-anno-sac_it.html; the same, Risposte del Santo Padre Benedetto XVI alle domande dei giornalisti durante il volo verso il Regno Unito, 16.09.2010, http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100916_interv-regno-unito_it.html; the same, Omelia, 18.09.2010, http://www.vatican.va/holy_father/benedict_xvi/homilies/2010/documents/hf_ben-xvi_hom_20100918_westminster_it.html; the same, Incontro con i vescovi di Inghilterra, Galles e Scozia, 19.09.2010, http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/september/documents/hf_ben-xvi_spe_20100919_vescovi-inghilterra_it.html (access date: 04.09.2013).

⁶⁰ Cf., the same, Pastoral Letter of the Holy Father, Pope Benedict XVI, to the Catholics of Ireland, 19.03.2010, http://www.vatican.va/holy_father/benedict_xvi/letters/2010/documents/hf_ben-xvi_let_20100319_church-ireland_pl.html (access date: 04.09.2013).

addressed to the Irish Catholics, should be understood in broader context for the whole Church. As a matter of fact, the author itself remarks: “The problem of minors abuse is not a specific problem of Ireland, nor of the Church”⁶¹. Healing such a specific wounds requires, in the first place, recognition of a sin before God and before people. In other words admitting that the sins are committed against defenceless children. Together with the awareness goes an effort to provide children’ protection in the future. Sin often veils good achievements of the whole Church and its faithful, which is also remarked by the Pope.

To solve the problem, one has to see the cause of evil. These include, inter alia, the secularism of priests and religious and abandonment of good spiritual practices, such as frequent confession, daily prayer and annual retreats⁶². Conciliar renewal was sometimes misinterpreted. „In particular, there was a well-intentioned but misguided tendency to avoid penal approaches to canonically irregular situations”⁶³. In another Pope's speech he says: “It was believed that the Church can no longer be the Church of law, but the Church of love, therefore it shouldn’t punish. This way a view that a punishment can be an act of love was eliminated”⁶⁴. Guided by misunderstood care for the Church and the desire to avoid scandal, bishops and religious superiors didn’t applied the canonical penalties. Other causes of sex scandals include: wrong procedures of admission to the priesthood and religious life, the insufficient moral, intellectual and spiritual formation in seminaries and novitiates⁶⁵.

In a letter to Irish Catholics, the Pope once again expressed his regret and shame because of the evil caused by sexual abuse. He appealed to priests and religious, guilty of mentioned crimes, to make an examination of conscience in a special way, take responsibility for the sins and express contrition. „You betrayed the trust that was placed in you by innocent young people and their parents, and you must answer for it before Almighty God and before properly constituted tribunals. You have forfeited the esteem of the people of Ireland and brought shame and dishonour upon your confreres. Those of you who are priests violated the sanctity of the sacrament of Holy Orders in which Christ makes himself present in us and in our

⁶¹ Cf. *ibid.*, no 2.

⁶² Cf. *ibid.*, no. 4.

⁶³ *Ibid.*

⁶⁴ *Benedykt XVI w rozmowie z Peterem Seewaldem. Światłość świata. Papież, Kościół i znaki czasu*, translation P. Napiwodzki, Kraków 2011, Wydawnictwo Znak, p. 38; cf. J. I. Arrieta, *L’influsso*, p. 432.

⁶⁵ Cf. Pastoral Letter of The Holy Father, Pope Benedict XVI, To The Catholics of Ireland, no. 4.

actions. Together with the immense harm done to victims, great damage has been done to the Church and to the public perception of the priesthood and religious life”⁶⁶.

In the words addressed to all priests and religious, Benedict XVI encouraged them to become men of prayer. In turn, when addressing the bishops he reminded them that they should entirely apply not only the canon law, but also cooperate with the civil authorities⁶⁷. Finally, Benedict XVI recommended some specific initiatives. The entire period of Lent and Friday’s penitential resolutions of 2011 were a time of a request for God’s mercy. The fervent prayer in the form of Eucharistic adoration was necessary. There was also carried out a special apostolic inspection of some Irish dioceses, seminaries and religious institutes. Furthermore, special missions for bishops, priests and religious were organized⁶⁸. After completing a detailed visit of the Holy See in Ireland, there was made a report from the visit, which was published on the Vatican’s website in 2012⁶⁹.

Among the actions taken by the current Pope Francis, there also should be noted the Apostolic Letter from 11 July 2013, which concerns changes to the jurisdiction of the legal authorities of the Vatican⁷⁰. Some of the changes in criminal law that were approved by Pope, relate to the minors. In the Law of Vatican no. VIII from July 11, 2013 there were specified offenses against minors, some of which relate to a sexual context⁷¹. The decision of Pope has toughen penalties for paedophilia and

⁶⁶ Cf. *ibid.*, no. 7.

⁶⁷ Cf. *ibid.*, no. 11; Pope aimed the same recommendations to religious superiors, cf. *ibid.*

⁶⁸ Cf. *ibid.*, no. 14. In 2010 The Holy See announced to carry out an inspection of some Irish dioceses, seminaries, religious institutes and the associations of apostolic life. The following year, 2011, announcement from the first phase of the visit was issued, cf. Comunicato della Santa Sede per l’inizio della Visita Apostolica in Irlanda, 12.11.2010, http://www.vatican.va/resources/resources_irlanda-inizio-visita-2010_it.html; Comunicato della Santa Sede per la conclusione della prima fase della Visita Apostolica in Irlanda, 06.06.2011, http://www.vatican.va/resources/resources_irlanda-prima-fase-visita-2010_it.html (access date: 04.09.2013).

⁶⁹ Cf. Summary of the Findings of the Apostolic Visitation in Ireland, 20.03.2012, http://www.vatican.va/resources/resources_sintesi_20120320_en.html (access date: 04.09.2013).

⁷⁰ Cf. Franciscus pp, Lettera Apostolica in forma di «Motu Proprio» sulla giurisdizione degli organi giudiziari dello Stato della Città del Vaticano in materia penale, 11.07.2013, http://www.vatican.va/holy_father/francesco/motu_proprio/documents/papa-francesco-motu-proprio_20130711_organ-giudiziari_it.html (access date: 04.09.2013).

⁷¹ Cf. Legge dello Stato della Città del Vaticano n. VIII, del 11 luglio 2013: Norme complementari in materia penale, <http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/Legge%20n.%20VIII%20-%20Norme%20complementari%20in%20materia%20openale.pdf> (access date: 04.09.2013).

for trading pornographic material⁷². The regulations apply to employees and officers of the Vatican.

Conclusion

The clerics of the Catholic Church are called to holiness. On the road to the life's perfection of the clerics, the major obstacle is a sin. In strictly definite situations by canon law a sinful behaviour constitutes a crime. Through the norms of criminal law, the law of the Church opposes to clerical reprehensible behaviour, on the other hand protects the common welfare of the community of the Church, including the welfare of minors.

Common law norms, contained in the 1983 Code of Canon Law, protect minors. However, as the situation developed, including the revealing of sexual abuse crimes committed by the clerics, affected the further development of the legal and canonical norms in this matter. Papal letter *Sacramentorum sanctitatis tutela* and the document of the Congregation for the Doctrine of Faith from 2001 *Normae de gravioribus delictis* were a significant response of the Church to the issue of crimes on minors committed by clerics. Modification of the last – mentioned document made by the Congregation for the Doctrine of the Faith in 2010, involves wider protection of minors, for instance by adding to *gravioribus delictis* child's pornography and making equal persons who habitually lack the use of reason with the victims of the crime.

To these legal settlements there should be added a number of popes' John Paul II and Benedict XVI speeches. Pope's statements, actions taken by Congregation for the Doctrine of the Faith and the procedures undertaken by the particular Churches altogether, show a multifaceted and lively Church's response to the discussed issue. The actual state contradicts to the remarks publicized by mass media saying that the Church doesn't react properly to the sexual abuse of minors committed by the clerics.

The Church's Community is aware of the fact that in each situation, when the crime against morals is committed by clerics, there is a need to face the problem. The compassion and a help to the victims should be shown, as well as one ought to explain the whole truth about what has happened. If the priest is guilty of a crime, he should be, in the name of love and truth, punished by the canonical penalties. An

⁷² Cf. *ibid.*, art. 6-11.

important part of solving the problem is a consistent application of the rules of formation: a proper recognition of vocation and humane formation in an emotional and sexual dimension.

The crisis, which affected the Church, is at the same time an opportunity for a thorough purification of the Church and a renewed commitment to the apostolic holiness. Thanks to the preaching the truth about God and man, and also demanding a lot from the faithful, especially from the clerics, the Church leads people to holiness and salvation.

Title

Sexual Abuse of Minors by Clerics: Current Canonical Issues

Summary

Media hype about sexual abuse of minors by clerics makes an impression as if the Church didn't react to this problem. That loud and aggressive action of mass media is not true. The article, which contains an overview of different papal speeches and documents, as well as Roman Curia's commitment, especially Congregation for the Doctrine of the Faith commitment, manifest very active and multifaceted Church's response to the problem.

Common law norms, contained in the 1983 Code of Canon Law, protect minors. Papal letter *Sacramentorum sanctitatis tutela* and the document of the Congregation for the Doctrine of Faith from 2001 *Normae de gravioribus delictis* were a significant response of the Church to the issue of crimes on minors committed by clerics. Modification of the last – mentioned document made by the Congregation for the Doctrine of the Faith in 2010, involves wider protection of minors. To these legal settlements there should be added a number of popes' John Paul II and Benedict XVI speeches.

In each situation concerning the crimes against morals committed by clergy, it is essential to face the problem i.e. to show compassion and help to the victims and to explain the whole truth about what had really happened. If a clergyman is guilty of a crime then, in the name of love and truth, it is necessary to apply canonical penalties. The important part of solving a problem is to apply formation rules consistently: a proper recognition of vocation and human formation in an emotional and sexual

space. Finally, clergymen have to interpret the universal call to holiness more intensively.

Key words: The Catholic Church, the canon law, sexual abuses.

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**La liberté d'opinion: un droit fondamental
dans l'Église (c. 212 § 3)**

Les sources de ce paragraphe troisième du canon 212 du code de droit canonique latin, et de son homologue le canon 15 § 3 du code des canons des Églises orientales, comportent d'abord une invitation générale adressée aux citoyens des différents États à employer „les moyens de communication sociale pour concourir à la formation et à la diffusion de saines opinions publiques”¹. Le concile invite également au dialogue entre tous les hommes et, s'adressant cette fois-ci aux fidèles laïcs, souligne leur rôle dans l'apostolat destiné à évangéliser et sanctifier les hommes (cf. AA 6). Il est également affirmé, toujours à l'adresse des laïcs, que, „selon la science, la compétence et l'autorité dont ils jouissent, ils peuvent, et même parfois ils doivent donner leur avis en ce qui concerne le bien de l'Église. Si tel est le cas, qu'on procède par le moyen des organes institués à cette fin par l'Église et toujours dans la sincérité, le courage et la prudence, avec le respect et la charité qui sont dus à ceux qui, en raison de leurs charges sacrées, représentent le Christ” (LG 37). Les prêtres, pour leur part, „doivent écouter volontiers les laïcs, tenir compte fraternellement de leurs désirs, reconnaître leur expérience et leur compétence dans les différents domaines de l'activité humaine” (PO 9).

Pie XII avait déjà relevé la légitimité „l'opinion publique au sein même de l'Église (naturellement dans les matières laissées à la libre discussion). Il ne peut y avoir à s'en étonner que ceux qui ne connaissent pas l'Église ou qui la connaissent mal. Car, enfin, elle est un corps vivant et il manquerait quelque chose à sa vie si

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¹ Concile Vatican II, décr. *Inter mirifica*, n° 8.

l'opinion publique lui faisait défaut, défaut dont le blâme retomberait sur les fidèles”².

L'on remarquera que les titulaires des droits énumérés dans ce canon „sont indéterminés, ou plus précisément, sont déterminables, au fur et à mesure, à partir des compétences spécifiques quant à ce qu'ils suggèrent ou critiquent”³. Telles sont donc les sources de ce canon sur le droit à la liberté d'opinion dans les questions qui n'ont pas été tranchées par l'autorité ecclésiastique, nombre d'entre elles n'ayant d'ailleurs pas à l'être, car elles sont, précisément, de «libre opinion». Plutôt élémentaires, ces sources suffisent à établir les principes généraux qui règlent l'existence et l'exercice de ce droit à la liberté d'opinion, objet de notre première partie (I), puis à préciser, dans une seconde partie, les limites qui encadrent cet exercice (II). Tout ce que nous dirons s'applique pareillement aux laïcs hommes et femmes, sans distinction.

I-Les principes généraux

Nous nous référons ici à la liberté d'opinion dans les matières qui sont propres à l'Église catholique. Les affaires temporelles font l'objet d'un droit naturel de l'homme dans le contexte de la société civile dans laquelle il vit et agit. Avant d'entreprendre l'analyse du droit à la liberté d'opinion dans l'Église, il nous faut en dégager les fondements (A), ce qui permettra d'en définir l'exercice correct (B).

A) Les fondements du droit à la liberté d'opinion dans l'Église

Le droit d'opinion est un droit naturel reconnu par le magistère ecclésiastique en des termes très généraux: „Tout être humain a droit au respect de sa personne, à sa bonne réputation, à la liberté dans la recherche de la vérité, dans l'expression et la diffusion de la pensée, dans la création artistique, les exigences de l'ordre moral et du bien commun étant sauvegardées”⁴. La norme à l'étude reprend partiellement le texte de *Lumen gentium* cité plus haut. Mais il est clair qu'il s'agit d'un droit, non d'une

² Pie XII, *Allocutio participantibus Conventui internationali scriptorum ephemeridum catholicarum*, Romæ habito, die 17 novembris 1950, AAS 42 (1950) 256.

³ V. Parlato, *Il diritto alla manifestazione del proprio pensiero su ciò che riguarda il bene della Chiesa*, dans V. F. Parlato, „I diritti dei fedeli nell'ordinamento canonico”, Turin, 1998, p. 90.

⁴ Cf. Jean XXIII, enc. *Pacem in terris*, AAS 55 (1963) 263, n° 12.

simple faculté, droit non seulement envers l'autorité hiérarchique mais aussi envers les autres fidèles. Il est logique que, contrairement à l'optique retenue par les Pères conciliaires, le législateur l'ait placé parmi les droits et les devoirs fondamentaux de tous les fidèles, sans le restreindre aux seuls laïcs. En effet, le fondement premier et lointain de ce droit à l'opinion ou droit d'expression est le droit naturel de toute personne à se faire une juste opinion et à l'exprimer. Cela comporte comme préalable la „liberté de se former sa propre opinion dans toutes les matières qui n'ont pas été définies de façon authentique par le magistère ecclésiastique”⁵. C'est également un droit-devoir de tous les fidèles, car il revient également à tous les fidèles de coopérer à l'édification du Corps du Christ qu'est l'Église, selon le canon 208 (c. 11 CCEO). Le droit à la liberté d'opinion est un des premiers droits sociaux et des plus fondamentaux. Il est à la fois d'ordre naturel, découlant de la nature rationnelle et sociale de l'homme, et d'ordre surnaturel, dans la mesure où il est une conséquence de la liberté, qui est une condition „propre aux fils de Dieu” (LG 9). Le droit à la liberté d'expression et à l'opinion publique dans l'Église „part de la liberté de penser et de suivre sa propre conscience, qui est la norme prochaine de la conduite du fidèle»⁶. En effet, «l'homme est tenu de suivre la loi morale qui le presse „d'accomplir le bien et d'éviter le mal” (GS 16). Cette loi résonne dans sa conscience”⁷.

Le texte mentionné de *Lumen gentium* ajoute que pour cette intervention des fidèles, l'«on procède par le moyen des organes institués à cette fin par l'Église et toujours dans le respect de la vérité, avec courage et prudence, et avec le respect et la charité qui sont dus à ceux qui, en raison de leur fonction sacrée, représentent le Christ” (LG 37). La *Lex Ecclesiae Fundamentalis* avait repris cette disposition. Mais elle a été retirée en 1980 au motif qu'elle pourrait permettre pressions, manipulations et élitisme. La liberté d'opinion doit donc suivre des voies normales: „Études entre experts, publications spécialisées, enquêtes, colloques, etc. [...] Dans la plupart des cas, il suffira d'écrire une lettre à l'Ordinaire ou de solliciter un rendez-vous”⁸.

Suivant Vatican II, le droit canonique prévoit des organes permettant aux fidèles d'exercer ce droit de conseil ou d'opinion: conseil presbytéral, conseils

⁵ J. Hervada, *Elementos de Derecho Constitucional Canónico*, Pampelune, 2^e éd., 2001, p. 141.

⁶ A. Martínez Blanco, *Los derechos fundamentales de los fieles en la Iglesia y su proyección en los ámbitos de la familia y de la enseñanza*, Murcie, 1994, p. 80.

⁷ Catéchisme de l'Église catholique, n° 1713.

⁸ J.-P. Schoupe, *Le droit d'opinion et de liberté de recherche dans les disciplines ecclésiastiques (cc. 212 et 218): nature et portée*, „L'Année Canonique” 37 (1995) 171.

pastoraux. Mais ce ne sont que des modalités institutionnelles d'un droit, nullement des canaux limitatifs. D'ailleurs une lecture „plus traditionnelle” du terme „institution” (LG 37), laisserait penser que „si les conseils recommandés par Vatican II ne sont pas constitués, d'autres institutions pourraient être créées localement si le droit d'exprimer son opinion doit être exercé dans l'Église”⁹. Mais les fidèles peuvent tout aussi bien intervenir dans les colonnes d'un journal ou d'une revue, même non catholique, ou adresser une simple lettre à son évêque. En tout cas, plus que par la création d'organismes spécialisés, la pratique harmonieuse de ce devoir-droit passe par une formation des fidèles aux vertus intellectuelles et morales, ainsi que leur ouverture aux vertus infuses.

Après avoir précisé les sources du droit fondamental à la liberté d'opinion, venons-en aux paramètres de l'exercice de ce droit.

B) L'exercice du droit fondamental à la liberté d'opinion

La norme examinée ici établit en réalité un double devoir-droit: d'une part, celui de manifester son opinion à la hiérarchie au sujet du bien de l'Église; et, d'autre part, celui de la faire connaître aux autres fidèles tout en respectant un certain nombre de conditions. Ce deuxième aspect est vraiment créateur d'opinion publique dans l'Église, une innovation du concile. Sur le premier plan, ce droit existe entre les évêques et le Siège apostolique, c'est la *remostratio* que l'évêque diocésain peut manifester quand il estime qu'une loi universelle peut être nuisible à son diocèse, „c'est-à-dire à ce qu'il soit possible de demander à l'autorité ecclésiastique compétente de réviser les normes de droit purement ecclésiastique que l'on estime difficilement ajustables aux circonstances de lieu et de temps de leurs destinataires”¹⁰.

Le canon 212 § 3 établit le droit à l'opinion publique dans l'Église et le devoir de contribuer à la former quand le fidèle estime en conscience devoir le faire. La norme se réfère explicitement aux informations qui *ad bonum Ecclesiae pertinent*. De fait, le contenu de cette norme concerne tout ce qui affecte d'une façon ou d'une autre le bien de l'Église. Il est également en lien étroit avec le droit fondamental des fidèles

⁹ J. H. Provost, sub c. 212, „Text and Comm.”, p. 146.

¹⁰ D. Cenalmor, sub c. 212, „ComEx”, vol. I, p. 90.

à recevoir les biens spirituels de l'Église (c. 213 CIC; c. 16 CCEO)¹¹ et le devoir corrélatif des pasteurs sacrés de les leur administrer convenablement (c. 768 CIC; c. 616 CCEO). Il ne s'agit pas que chacun intervienne de façon indiscriminée. C'est pourquoi la norme précise *in limine* que les fidèles interviendront en fonction de leur savoir, de leur compétence et du prestige qui leur est reconnu dans l'Église (et pourquoi pas aussi dans la société civile). Ces personnes sont les mieux qualifiées pour intervenir de façon constructive, sans appartenir nécessairement à l'organisation ecclésiastique. Les fidèles peuvent, par exemple, intervenir par „l'acclamation approbatrice ou réprobatrice; l'opinion publique; la participation aux organes de délibération et de décision dans lesquels agissent conjointement le clergé et le peuple en tant que tel; l'intervention dans l'élection des pasteurs; la fonction subsidiaire, ou activité consistant à apporter l'aide nécessaire et opportune aux activités de la structure publique de l'Église (dons, prestations personnelles, collaboration à l'apostolat hiérarchique, etc.); la fonction de suppléance, limitée aux activités dont l'exercice ne requiert pas l'ordination sacrée (cf. c. 230 § 3)”¹². Ce droit à l'opinion se manifeste, entre autres, dans la sphère publique de l'Église en raison des fonctions ou des charges particulières qui sont confiées aux fidèles en vertu du canon 228 § 1 (c. 408 § 2 CCEO) ou d'interventions qui leur reviennent de par leur baptême, comme de participer en qualité de conseiller ou d'expert, dans le cadre d'un organisme ou non (c. 228 § 2 CIC; c. 408 § 1 CCEO). „On prend alors en considération les compétences propres aux laïcs dans des questions qui, relevant de la fonction consultative, ne requièrent nullement d'avoir reçu l'ordination sacerdotale. Qu'il s'agisse d'un conseil ou d'une expertise, cette disposition établit une connexion directe entre les droits des fidèles et le processus de la délibération ecclésiale”¹³.

Plusieurs canons font indirectement référence à ce droit à l'opinion. Par exemple pour „remplir avec zèle sa charge de pasteur”, le curé s'efforcera „de connaître les fidèles confiés à ses soins” (c. 529 CIC; c. 289 § 3 CCEO), ce qui suppose qu'il accueille leurs opinions. L'ordinaire du lieu entendra si besoin est „des hommes

¹¹ Cf. D. Le Tourneau, *Le droit aux biens spirituels*, „Religión, Matrimonio y Derecho ante el siglo XXI”. Estudios en Homenaje al Profesor Rafael Navarro-Valls, Masaguer, Martínez-Torrón, Palomino (coord.), Madrid, 2013, vol. II, p. 2959-2974.

¹² J. Hervada, *Pensamientos de un canonista en la hora presente*, Pampelune, 1989, p. 141.

¹³ J.-P. Schouppe, *Les droits des fidèles et le processus...*, *loc. cit.*, p. 221-222.

et des femmes reconnus pour leur expérience et leur compétence” dans le cadre de l’assistance aux fidèles qui se préparent au mariage (c. 1064).

La norme reconnaît aussi le droit à former une opinion publique dans l’Église et donc de sensibiliser les fidèles aux suggestions et aux critiques qui ont été faites à la hiérarchie et que celle-ci n’a pas cru bon devoir retenir. Il va de soi que „les critiques, les suggestions et les conseils ne peuvent regarder que l’*ordo agendi* de l’Église, soient qu’ils concernent l’action pastorale ou d’organisation ecclésiastique, ou qu’ils concernent des orientations de comportement en matière sociale”. Dans ce dernier cas, ils peuvent certainement émettre un jugement et une appréciation des doctrines économiques et sociales ayant une incidence sur les questions religieuses et morales, et les directives pastorales des évêques en la matière, en vertu de leur droit à porter un jugement moral sur les diverses situations sociales afin, entre autres, de faire respecter la doctrine sociale de l’Église. Les fidèles manifesteront leur opinion par des canaux variés. Ceci a à voir avec le contrôle que l’autorité ecclésiastique doit exercer sur les publications, de quelque nature qu’elles soient, en rapport avec le respect de la foi et des mœurs (cf. c. 827), contrôle qu’elle exerce par le truchement de „censeurs remarquables par leur science, la rectitude de leur doctrine et leur prudence” (c. 830 § 1; c. 664 § 1 CCEO). La fonction de ces censeurs est de rendre service aux auteurs, afin qu’ils ne publient rien qui aille à l’encontre de la foi ou de la morale chrétiennes. Le censeur écartera donc „toute acception de personnes” et „aura seulement en vue la doctrine de l’Église sur la foi et les mœurs telle qu’elle est présentée par le magistère ecclésiastique” (c. 830 § 2 CIC; c. 664 § 2 CCEO). Le service de l’*imprimatur* est, ou doit être, comme son nom l’indique, un service.

Le droit à l’opinion publique, tout comme le droit à l’information, dont il va être question plus avant, revêtent une importance particulière dans le cas des migrants qui se trouvent face à une culture nouvelle et aux coutumes de la communauté ecclésiale d’accueil.

Cet exercice du droit à la liberté d’opinion est, la norme le laisse clairement entendre, soumis à un certain nombre de conditions. C’est logique, car il doit s’inscrire avant tout dans le cadre du canon 209 et donc du droit-devoir à vivre dans la communion ecclésiale. Ce sont ces limites qu’il nous convient d’examiner maintenant.

II- Une application encadrée

Les principales limites dans le cadre desquelles le droit à la liberté d'opinion doit se situer sont déterminées par le législateur dans ce canon 212 § 3 (c. 15 § 3 CCEO). C'est sur elles que nous devons nous pencher en premier (A). Nous verrons ensuite d'autres conditions posées à l'exercice de ce droit (B).

A) Les limites normatives au droit à la liberté d'opinion

La liberté d'opinion n'est pas absolue: il ne s'agit pas que tout un chacun dise tout et son contraire ni de se laisser aller à ses goûts et à ses intérêts du moment pour „se faire plaisir», comme y incite massivement notre société contemporaine. C'est pourquoi le canon 212 § 3 contient „huit restrictions ou modalités dont il faut tenir compte avant que quelqu'un soit autorisé à parler librement dans un contexte ecclésial”¹⁴. De fait, la liberté de pensée ou d'opinion est soumise à des conditions rigoureuses: l'intégrité de la foi et des mœurs, d'une part, et, d'autre part, le respect de l'autorité des pasteurs légitimes, la science, la compétence et le prestige personnel, l'utilité commune, la dignité de la personne enfin.

a) La légitimité des critiques et des suggestions venant des fidèles, ainsi que de la constitution d'une opinion publique, ne peuvent pas porter atteinte aux principes de droit divin, naturel et positif, ni au magistère infaillible. Le champ d'application de la norme est délimité d'abord par la fidélité au dépôt de la foi et le respect des normes de moralité, lesquelles ne concernent pas les seuls catholiques, mais tous les hommes et toutes les femmes, car relevant du droit naturel inscrit dans la nature de l'homme. „La liberté d'expression est limitée par la Vérité et il est interdit de tenir une position contraire à celle-ci.¹⁵ ” C'est une exigence du devoir fondamental de communion ecclésiale que tous doivent impérativement garder (c. 209 CIC; c. 12 CCEO). Il ne s'agit donc pas d'une limitation du droit à l'opinion publique, mais de la délimitation d'un cadre ecclésial qui pose les fondements éthiques de l'intervention dans l'Église: elle est forcément conçue en fonction du bien de la communauté à laquelle le fidèle intervenant appartient.

¹⁴ R. Torfs, *Estructura eclesialica y responsabilidad...*, loc. cit., p. 673.

¹⁵ E. Boudet, *Liberté d'expression et magistère ecclésiastique*, „L'Année Canonique” 47 (2005) 171.

b) En second lieu, les fidèles doivent respecter l'autorité des pasteurs dans la façon de manifester leur opinion. Ceci dit, les pasteurs participent à la *potestas magisterii* à des degrés divers, qui ne s'imposent pas de la même façon aux fidèles et qui constituent donc une limite plus ou moins importante à leur liberté d'opinion. Il suffit de penser aux différences entre magistère infaillible et magistère non infaillible, magistère extraordinaire et magistère ordinaire. L'on saisit aisément la différence entre devoir croire „de foi catholique” du canon 750 § 1 (c. CCEO), „fermement accueillir et garder” du canon 750 § 2 (c. CCEO) et „une soumission religieuse de l'intelligence et de la volonté” du canon 752 (c. CCEO). La norme indique qu'il convient de manifester son opinion d'abord à l'autorité la plus proche du fidèle. Cela contribue à une bonne communication au sein de l'Église et permet au personnel de l'Église de mieux connaître les comportements et les expériences des uns et des autres. La manifestation de l'opinion aux pasteurs légitimes doit se faire „dans la sincérité, le courage et la prudence, avec le respect et la charité qui sont dus à ceux qui, en raison de leurs charges sacrées, représentent le Christ (LG 37). Seules les exigences de vérité, prudence et respect ont une valeur juridique, que le canon en question exprime en ces termes. D'après la rédaction de la norme, il appert que ces conditions doivent être particulièrement prises en compte quand le fidèle fait connaître son opinion, non aux Pasteurs, mais aux autres fidèles. En effet, indépendamment du fait que le respect de la foi et des mœurs ainsi que la révérence envers les Pasteurs doivent être vécus en tout état de cause, la possibilité de causer un scandale en exposant ses propres idées „doit être envisagée comme une des limites de ce droit”. Il est logique que le scandale soit „plus grand quand l'on expose des idées erronées, irrespectueuses ou imprudentes en présence de fidèles qui manquent de la formation que l'on doit présumer en principe chez les Pasteurs sacrés”¹⁶, ce qui présente un danger plus grand pour les fidèles de se laisser influencer par elles. Par suite, plus une personne est compétente, plus aussi son silence éventuel sera coupable.

Cette liberté d'expression de son opinion et le droit de la faire connaître ne supposent en aucun cas le droit, ou la faculté, de s'écarter tant soit peu de l'enseignement authentique de la foi. Invoquer un „droit au désaccord” ou au *dissent*

¹⁶ D. Cenalmor, sub c. 212, Faculté de Droit canonique, Institut Martín de Azpilcueta, A. Marzoa, J. Miras et R. Rodríguez-Ocaña (dir.), „Comentario Exegético la Código de Derecho Canónico” (cité ComEx), Pampelune, 3^e éd., 2002, vol. II/1, p. 89-90.

est dénué de tout fondement, car il s'oppose directement au devoir fondamental de communion dans la foi (c. 209 CIC; c. 12 CCEO). Or, il ne s'agit pas „d'un vague sentiment, mais d'une réalité organique qui veut s'incarner dans une structure juridique et dont l'âme est la charité” (LG, note explicative préalable n° 2). Ce „*dissentiment*, fait de contestations délibérées et de polémiques, exprimé en utilisant les moyens de communication sociale, est contraire à la communion ecclésiale et à la droite compréhension de la constitution hiérarchique du Peuple de Dieu. [...] Dans ce cas, les pasteurs ont le devoir d'agir [...] en exigeant que soit toujours respecté le droit des fidèles à recevoir la doctrine catholique dans sa pureté et son intégrité»¹⁷. Il est donc inexact d'affirmer que le droit au désaccord est „une conséquence logique des libertés d'opinion et d'expression” et que son absence reviendrait „à étouffer l'Esprit”¹⁸. Nous nous en sommes expliqués ailleurs.

L'autorité doit écouter et apprécier la suggestion ou la critique. La norme ne l'oblige pas à faire plus. Autant dire que ce droit „a un contenu vraiment très limité”¹⁹. Il s'agit toutefois pour l'autorité „d'un devoir général, fondé sur une exigence de stricte justice, d'écouter et d'évaluer l'avis avec attention, sans que cela représente en aucune façon une diminution de la responsabilité personnelle du pasteur de prendre des décisions. Ce n'est qu'une exigence du gouvernement dans la communion”²⁰. Dans l'accomplissement de sa tâche, l'évêque-nous pourrions en dire autant de tout pasteur- «fera tout son possible pour susciter le consentement de ses fidèles, mais en fin de compte il devra savoir assumer la responsabilité des décisions qui apparaîtront nécessaires à sa conscience de pasteur, préoccupé par-dessus tout par le futur jugement de Dieu”²¹. Mais dans ce cas, il semble que „l'égalité fondamentale de tous les fidèles qui est affirmée (c. 208) est ainsi pratiquement démentie ensuite lorsqu'il s'agit de traduire cette donnée en langage juridique”²².

c) La troisième exigence porte sur le fait que, pour intervenir et manifester son opinion de façon légitime, le fidèle doit posséder „savoir, compétence et prestige”.

¹⁷ Jean-Paul II, *Lettre encyclique Veritatis splendor*, 6 août 1993, n° 113.

¹⁸ A. Martínez Blanco, *Los derechos fundamentales de los fieles en la Iglesia...*, *op. cit.*, p. 81.

¹⁹ V. Parlato, *Il diritto alla manifestazione...*, *loc. cit.*, p. 91

²⁰ J. I. Arrieta, *Libertà fondamentali e libertà fondamentale. Considerazioni attorno alla diversa posizione dei fedeli nella partecipazione alla missione della Chiesa*, „I diritti fondamentali del fedele. A venti anni dalla promulgazione del Codice”, Cité du Vatican, 2004, p. 208.

²¹ Jean-Paul II, *Exhortation apostolique post-synodale Pastores gregis*, 16 octobre 2003, n° 44.

²² G. Ruggieri, *L'ecclesiologia conciliaire nelle strettoie giuridiche*, „Il Regno-Attualità”, 15 mars 1943, p. 145.

Précisément parce que tous les *christifideles* sont à cet égard égaux et solidairement responsables, il existe entre eux, à égalité de conditions-*scientia, competentia et praestentia*-une égalité de droits. Il s'ensuit que les laïcs ont les mêmes droits et les mêmes devoirs que les clercs et que les religieux de se former un jugement relatif au bien de l'Église et de l'exposer. On peut en dire autant de la *praestentia*: c'est „une position de prééminence morale, une valeur sociale, en vertu de laquelle celui qui la possède exerce une influence persuasive sur les autres membres de la communauté”²³.

Ces critères sont vagues, du fait de l'absence de jurisprudence, celle-ci découlant à son tour de la protection insuffisante des droits des fidèles par la *Sectio altera* de la Signature apostolique. C'est à la hiérarchie d'apprécier si le fidèle qui se manifeste jouit ou non du savoir, de la compétence et du prestige *ad hoc*. Mais ces conditions sont pour ainsi dire „à géométrie variable”. „Vérité en deçà des Pyrénées, erreur au-delà”, disait déjà Montaigne²⁴. L'appréciation du prestige peut varier en fonction des personnes, du temps et des circonstances... Si la *praestentia* devait faire référence à l'importance du poste occupé dans l'Église, l'on pourrait se poser des questions. Par exemple, „jusqu'où un évêque, un cardinal de curie, ou un juge, peut-il faire porter ses critiques en public”?²⁵ Sans doute s'estimeront-ils davantage tenus par un devoir de réserve que d'autres fidèles. Ceci n'a rien d'étonnant. De plus, un fidèle peut réunir ces conditions à l'échelon paroissial, mais en être dépourvu, partiellement au moins, à celui du diocèse et, a fortiori, de l'Église universelle.

Nous souvenant que „l'Esprit souffle où il veut» (Jn 3, 8), „les charismes authentiques, l'intégrité de la foi et d'autres critères de vérité, ne devraient-ils pas être pris en considération, au moins au même titre que des diplômes universitaires ou des nominations à des offices ecclésiastiques ? Voilà ce qui, en tout cas, risque de poser de sérieux problèmes de discernement”²⁶.

Cette exigence de „science, compétence et prestige” demande d'actionner le droit fondamental du canon 218 (c. 21 CCEO), à savoir la liberté de recherche et d'enseignement.

²³ A. del Portillo, *Fidèles et laïcs, op. cit.*, p. 119.

²⁴ M. de Montaigne, *Essais*, „Apologie de Raymond Sebond”, 2, 2.

²⁵ Cf. R. Torfs, *Estructura eclesiastica y responsabilidad...*, *loc. cit.*, p. 679.

²⁶ J.-P. Schouppe, *Opinion dans l'Église...*, *loc. cit.*, p. 98--99.

d) En quatrième lieu, l'intervention des fidèles doit servir „l'utilité commune” de l'Église ou d'une communauté ecclésiale déterminée. C'est une condition pour l'exercice correct de ce droit, „sauf si l'action posée tourne au délit ou enfreint un droit, cas dans lesquels les droits à la libre opinion et à la liberté d'expression n'existent pas”²⁷. Nous retrouvons une indication en ce sens au canon 223 (c. 26 CCEO) qui reconnaît à l'autorité ecclésiastique le droit de réguler l'exercice des droits des fidèles en considération du bien commun. En réalité, d'une part cette norme admet des exceptions comme pour le choix d'un état de vie, la protection judiciaire des droits et le droit à la bonne réputation, et, d'autre part, elle ne semble guère heureuse, car elle manifeste comme une méfiance de l'autorité envers les fidèles, à qui elle entend comme reprendre, partiellement au moins, les droits qu'elle leur a reconnus. Nous avons en tout cas ici un domaine dans lequel l'égalité fondamentale du canon 208 peut ne pas être respectée pleinement, à l'image de ce qui se passe dans les ordres juridiques civils, dans lesquels le traitement accordé aux personnalités publiques tels que les hommes politiques est plus exigeant quant à l'expression de leurs opinions que pour les simples particuliers. Inversement, leur réputation demande d'être davantage protégée, y compris dans la sphère privée, dans la mesure où les opinions émises à leur endroit sortent du cadre des problèmes purement politiques.

e) Enfin le respect de la dignité de personnes ou de leur bien suit les mêmes règles que pour l'utilité commune. En effet, nul n'est autorisé à porter atteinte de façon illégitime à la bonne réputation d'autrui, selon le canon 220 (c. 23 CCEO). Nous avons là „une limite générale à la liberté de manifestation de la pensée, commune à tout ordre véritablement respectueux de la personne humaine”²⁸. Il revient à l'autorité ecclésiastique d'apprécier si quelqu'un est vraiment titulaire de ce droit. C'est-à-dire que „les suggestions et les critiques seront considérées valides et devant être prises en compte uniquement si elles sont exprimées par qui réunit les qualités sus-indiquées, autrement elles seront considérées comme des critiques injustifiées, effectuées par des personnes incompétentes”²⁹.

²⁷ J. Hervada, sub c. 212, „Code de droit canonique bilingue et annoté”, sous la dir. d'E. Caparros et H. Aubé, 3^e éd. révisée, 2^e tirage révisé, 2009, p. 196.

²⁸ G. Dalla Torre, sub c. 212, „Commento la Codice di Diritto Canonico” a cura di Mons. P. V. Pinto, Cité du Vatican, 2001, p. 121.

²⁹ V. Parlato, *Il diritto alla manifestazione...*, loc. cit., p. 91.

À ces limites précisées par le canon 212 § 3 viennent s'ajouter d'autres conditions pour l'exercice ordonné du droit à la liberté d'expression dans l'Église, ordonné en ce sens que devant viser le bien commun, dont il doit toujours être tenu compte dans l'exercice de tout droit, comme l'indique le canon 223 § 1 (c. 26 CCEO). C'est ce qu'il nous reste à montrer.

B) D'autres conditions mises à l'exercice ordonné du droit à la liberté d'opinion

Chacun est libre de ses opinions dans tout ce qui est laissé à la libre discussion des hommes. Mais il se pourrait que le droit fondamental de liberté d'opinion et d'expression soit limité dans la pratique pour diverses raisons qui n'en sont pas: la „prudence de la chair” dénoncée par saint Paul (Rm 8, 6: „Ce que vous suggérez n'est pas prudent”), l'opportunité („ce n'est pas opportun, dans le contexte actuel du diocèse”), la véracité („l'opinion contraire est davantage vraie”), le bien de l'intéressé („vous allez faire mauvaise figure”), remplaçant le „qu'en dira Dieu” par le „qu'en dira-t-on”, ou encore en faisant jouer un „esprit de solidarité” qui n'est qu'un prétexte futile à l'inaction. Nul ne peut se substituer à la responsabilité du fidèle.

Tout comme les pasteurs, les fidèles doivent agir avec prudence. Le fidèle „est moralement tenu de n'exprimer publiquement que les opinions qui, à son estime, sont fondées en vérité. Il limitera la publicité donnée aux déclarations qui, auprès d'un public non initié, sont susceptibles de prêter à des malentendus ou à des interprétations erronées. À plus forte raison, il évitera la technique consistant à tester les idées et les mesures projetées en les lançant dans les médias comme un ballon d'essai, voire en vue de provoquer un courant d'opinion dans le sens contraire”³⁰. Nous avons relevé que ce droit est encadré par un certain nombre de conditions et ne revient donc pas au fidèle par le simple fait d'être fidèle. Toutefois, on ne saurait ignorer qu'il s'agit d'un droit de la *conditio libertatis*, et que, par suite, „l'autorité devra faire preuve d'une extrême prudence avant de conclure à l'inaptitude d'un fidèle déterminé à exercer ce droit”³¹. Elle devra lui accorder le bénéfice du doute par application du canon 18.

Le canon 212 § 3 parle expressément de l'existence d'un devoir des fidèles. Car il s'agit pour ceux qui réunissent les qualités requises, d'une part de contribuer à instruire et éduquer les autres fidèles en leur permettant de mieux assumer leur

³⁰ J.-P. Schouppe, *Les droits des fidèles et le processus...*, *loc. cit.*, p. 220.

³¹ J.-P. Schouppe, *Le droit d'opinion...*, *loc. cit.*, p. 172-173.

coresponsabilité dans la mission de l'Église et, d'autre part, de contribuer à réformer l'Église en cas de défaillance des pasteurs, de déficience des institutions et des techniques humaines ou de mise en œuvre des institutions divines, qui seraient éventuellement le résultat d'une concession à „l'esprit du temps», ou de de visées humaines. Contrairement au texte conciliaire, le législateur a préféré retenir le terme *ius*, afin de mettre l'accent sur le fait que «parfois le bien commun requiert que le droit soit mis en œuvre. Cela se produira en particulier quand le fait de se taire produirait un mal pour l'Église»³².

La réglementation de ce droit exige que son exercice „soit garanti, dans les conditions requises par le concile. Cette garantie se résume à l'interdiction de punir ou de désavouer, directement ou indirectement, ceux qui expriment leur opinion dans les formes voulues pour l'exercice de ce droit, formes explicitées par le concile: sincérité, courage et prudence et, à l'égard de la hiérarchie, respect et charité (cf. *LG* 37). Au for externe, seules comptent la sincérité, la prudence et la respect, de sorte que celui qui émet une opinion entachées de mensonge, d'imprudence ou d'irrévérence pourrait être puni, moins pour l'opinion en soi (cette punition ne se conçoit que lorsqu'elle est contraire à la vérité), que d'une manière indirecte pour l'imprudence ou le manque de respect. À cet égard, il faut se rappeler que la vérité doit être comprise dans le sens où elle est applicable à une opinion, c'est-à-dire ni comme certitude ni comme „bien vue”. Une opinion erronée ne supprime pas le droit de s'exprimer, tant que sa fausseté n'est pas démontrée.

Il pourrait être opportun d'établir des formes particulières de dialogue entre les fidèles et la hiérarchie permettant d'impliquer l'ensemble des intéressés dans la formation des mesures à prendre, les titulaires des charges de gouvernement pouvant ainsi connaître tous les besoins, tant publics que privés, concernés par la question à l'étude qui méritent d'être pris en considération, en même temps qu'une plus grande correspondance des décisions aux exigences de la réalité ecclésiale serait assurée. Nous avons là une façon concrète de mettre en œuvre les droits des fidèles énoncés au canon 212 § 2-3 (c. CCEO) d'exprimer aux pasteurs leurs exigences et de leur faire part de leur sentiment sur ce qui regarde le bien de l'Église. La prudence dont les fidèles doivent faire preuve à l'heure de faire connaître leurs opinions doit se manifester, entre autres, dans le choix des canaux de diffusion. Il serait inapproprié

³² J. H. Provost, sub c. 212, Text and Comment., p. 147.

d'utiliser des moyens de communication généralisée pour transmettre des opinions qui pourraient être mal interprétées par des fidèles n'ayant pas la formation suffisante pour les recevoir adéquatement. Le texte déjà cité de *Lumen gentium* parle des „organes institués à cette fin par l'Église". Il faut éviter cependant que ce droit soit enfermé dans un carcan étroit. „La régulation de l'exercice de ce droit doit être ouverte à un régime d'expression aussi bien public que privé"³³, c'est-à-dire qu'elle doit permettre le recours aux moyens de communication sociale et aux divers conseils prévus par le droit.

Ce canon 212 § 3 trouve une application dans le droit à la liberté de recherche en sciences religieuses du canon 218 (c. 21 CCEO). L'on pourrait s'attendre à ce qu'il y soit fait référence ailleurs dans le code, notamment à propos de la participation des fidèles aux divers conseils. Il n'en est question qu'à propos du conseil pastoral diocésain, dont les membres se voient reconnaître le pouvoir, sous l'autorité de l'évêque, d'étudier ce qui concerne l'activité pastorale, de l'évaluer et de proposer des conclusions pratiques (c. 511 CIC; c. 272 CCEO) et, dans une moindre mesure, à propos du conseil presbytéral, chargé d'aider selon le droit dans le gouvernement du diocèse (c. 495 § 1 CIC; c. 264 CCEO). Quant aux membres de la vie consacrée, ils peuvent tous librement adresser leurs souhaits et leurs suggestions au chapitre général de leur institut (c. 631 § 3 CIC; c. 512 § 2, 557 CCEO). Mais il va de soi que les fonctions consultatives sont un lieu privilégié pour l'exercice du droit à manifester son opinion. Notamment, en outre, dans le cadre du conseil pastoral diocésain (c. 512 § 1 CIC; c. 273 § 1 CCEO) et du conseil pastoral paroissial (c. 536 § 1 CIC; c. 295 CCEO).

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Nous ne pouvons pas achever notre étude sans aborder un droit qui ne figure pas expressément dans le code, mais dont l'existence ne saurait être niée, car il est essentiel pour le bon exercice du droit fondamental à la liberté d'opinion. Il s'agit du droit fondamental à l'information relevé par le professeur Hervada³⁴. En réalité, le pape Jean XXIII l'avait mentionné quand il affirmait que tout être humain „a droit

³³D. Cenalmor, sub c. 212, „ComEx", p. 90.

³⁴Cf. J. Hervada, *Elementos de Derecho Constitucional Canónico*, op. cit., p. 142.

également à une information objective”³⁵. Ce droit, au fondement naturel, est nécessaire pour participer correctement à la vie de l’Église et pour se former sa propre opinion (cf. c. 212 § 3). Sans information, il est impossible de se forger une opinion sur les événements et la marche de l’Église et de participer à ses activités. Bien que non expressément codifié, ce droit découle ou fait partie des droits reconnus dont l’exercice serait rendu difficile, voire impossible, sans ce droit à l’information. Il comprend trois éléments: „La faculté de recherche d’idées, de faits et d’opinions, afin d’obtenir directement des informations et de vérifier celle reçue de façon médiate; la faculté de diffuser l’information; et la faculté de recevoir ou de ne pas recevoir telle ou telle information, ou aucune”³⁶.

Ce droit à l’information se fonderait sur la participation active des fidèles à la vie de l’Église. „Chaque membre du Peuple de Dieu a droit à l’information complète qui lui est nécessaire pour jouer un rôle actif dans la vie de l’Église”³⁷. „Il aurait pour objet „les matières relatives à des activités externes et sociales, à l’exclusion des activités privées et personnelles et de celles qui *natura sua* relèvent du for interne”³⁸. Le devoir d’informer incomberait à la hiérarchie et, dans le cas où le bien commun serait concerné, aux institutions ecclésiastiques et aux fidèles eux-mêmes. Ce droit serait limité par l’intérêt réel du fidèle à être informé, compte tenu de son degré de participation à la vie du Peuple de Dieu, et par le bien commun de l’Église. Il doit éviter le scandale, ne pas manquer de respect envers l’autorité, ne pas créer de troubles publics ni donner lieu à la diffusion de pamphlets. Les fidèles ont droit „à une correcte information ecclésiale pour pouvoir prendre part à l’édification de l’Église. L’information due en justice concerne tous les aspects de la vie de l’Église: pastoral, sacramentel, liturgique, biblique, catéchétique, etc. Cet effort d’information n’omettra pas non plus la communication des données propres aux secteurs juridique et administratif”³⁹. C’est à la hiérarchie qu’il revient d’informer comme il convient, devoir qui, dans la mesure où le bien commun est concerné, est également l’affaire des institutions ecclésiales et des fidèles eux-mêmes.

³⁵ Jean XXIII, enc. *Pacem in terris*, 11 avril 1963, AAS 55 (1963) 263, n° 12.

³⁶ C. Soria, *Libertad y coherencia de los cristianos en le ejercicio de la información*, „La misión del laico en la Iglesia y en le mundo”, Pampelune, 1987, p. 774.

³⁷ Instr. pastorale *Communione et progrès sur les moyens de communication sociale*, 23 mai 1971, n° 119.

³⁸ J. Hervada-P. Lombardía, „El Derecho del Pueblo de Dios. Hacia un sistema de Derecho canónico. I. Introducción. La Constitución de la Iglesia”, Pampelune, 1970, p. 307.

³⁹ J.-P. Schoupe, *Les droits des fidèles et le processus...*, *loc. cit.*, p. 223-224.

À ce devoir de la hiérarchie d'informer les fidèles correspond également un devoir des fidèles d'informer l'autorité ecclésiale compétente de par leur coresponsabilité dans la poursuite du salut des âmes et du bien commun. Par suite, „l'obligation leur incombe de fournir aux pasteurs les données qu'ils jugent utiles, de dénoncer des situations dommageables avec charité et justice, de suggérer des solutions ou des opportunités pastorales ou apostoliques, afin qu'ils soient en mesure d'intervenir en connaissance de cause et en temps utile”⁴⁰. En ce sens, les fidèles ont „le droit de dénoncer à l'autorité compétente les injustices commises contre le bien commun ecclésial, surtout les atteintes à la Parole et aux sacrements, et donc le droit à obtenir la protection des droits propres concrètement foulés aux pieds ou menacés”⁴¹. Le droit à l'information et le droit à la liberté religieuse (c. 227 CIC; c. 402 CCEO) „se réclament mutuellement. Non seulement de par leur nature et leur structure intrinsèques. Mais aussi parce que la foi et la morale sont en elles-mêmes communication”⁴², transmission du dépôt reçu de Dieu. La formalisation d'un droit-devoir à l'information devrait se retrouver dans les deux codes, „quitte à renvoyer la détermination de ses modalités d'exercice au droit particulier ou complémentaire”, ce qui serait effectivement sage et prudent⁴³.

Title

The freedom of opinion: a fundamental right in the Church (can. 212 § 3)

Summary

After highlighting the sources of can. 212 § 3, the article deals with the general principles which regulates the exercise of the fundamental right to have one's own views in the Church. This means developing the legal basis of such a right before pointing out the fields in which this right is to be exercised.

The second part of the article sent the limits of the exercise of freedom of opinion, such as they are determined by the norm subject to examination. Five are the limits: 1) the exercise doesn't affect nor the principles of divine right, natural as

⁴⁰ J.-P. Schouppe, *Ibid.*, p. 224.

⁴¹ C. J. Errázuriz M., „Corso fondamentale sul diritto nella Chiesa. I. Introduzione. I soggetti ecclesiali di diritto”, Milan, 2009, p. 225.

⁴² C. Soria, *Libertad y coherencia de los cristianos en el ejercicio de la información*, *loc. cit.*, p. 782.

⁴³ J.-P. Schouppe, *Les droits des fidèles et le processus...*, *loc. cit.*, p. 223

well as positive, neither the infallible Magisterium; 2) the faithful must have due reverence to the authority for the sacred Pastors; 3) they must possess knowledge, competence and position; 4) their action must concern the good of the Church; and 5) the consideration of the dignity of the persons or of their goods must follow the same rules as for common good. Finally, the author address other conditions to the organized exercise of the right for free opinion.

In the conclusion, he underlines the fact that there should not be any right to free opinion without a fundamental right to information.

Key words: Fundamental rights, right to free opinion, right to information.

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**The Concordat between
the Holy See and the Republic of Poland (1993-1998).
Main Questions of the Normalization of the Relations between the
Catholic Church and the Polish State after the Collapse of Communism**

The historical events are a good opportunity for the taking this subject into account. The last year (2013) twenty anniversary have passed since the signing of the Concordat between the Holy See and the Republic of Poland and fifteen years since its ratification¹. A few days ago we experienced the canonization by the Pope Francis the two of his predecessors: John XXIII and John Paul II, who contributed to the process of the socio-political transformation in Europe aimed at the peace in dialogue and concluding new agreements in the relations between the states and the Church.

I. Historical Remarks

1. The question of the relations between Poland and the Holy See has the very deep and historical roots. The relations between these Sides have existed since the beginning of the Christianity of Poland and its incorporation to the family of Christian nations. At the begging I would like to do some remarks.

Firstly, there is most important that the first historical Polish prince Mieszko I after the admission of Baptism in 966 – as indicates the oldest document on the

¹ The conclusion of the Concordat between the Holy See and the Republic of Poland resulted from successively proceeding steps necessary to ensure that the Concordat will be a law in force in domestic legal order. These are: signing of the Concordat in Warsaw on 26 July 1993 by the representatives of the two Sides – the Apostolic Nuncio in Poland, archbishop Józef Kowalczyk and Minister for Foreign Affairs, Krzysztof Skubiszewski; the ratification on 23 February 1998 and signed by the President of the Republic of Poland Aleksander Kwaśniewski in Warsaw and the Pope, John Paul II in Vatican on the basis of the law passed by the Parliament granting consent for its ratification; the exchange of the ratification's documents between the Prime Minister, J. Buzek and the Secretary of State, the Cardinal A. Sodano. The entry into force of the Concordat took place on 25 April 1998 (Dz. U. 1998, Nr 51, poz. 318).

Polish State „*Dagome iudex*”² – gave his State under the protection of the Bishop of Rome. Thereby, he wanted to build the peaceful relations with the neighbors as members of *Sacrum Imperium Romanum Germanorum* (who organized the invasion on Poland under the pretext of converting pagans to Christianity).

Secondly, there is well-known fact that most popular manual of Canon Law in medieval Poland was „*Collectio Tripartita*” (1093-1094), drawn up by famous French archbishop Ivo of Chartres³. Very significant is an insert in it an adagium „*Cum regnum et sacerdotium inter se conveniunt, bene regitur mundus, floret et fructificat Ecclesia*”⁴. It was the peaceful interpretation of the „religious-political dualism”, based on the teaching of Jesus Christ: „Render therefore unto Caesar the things which are Caesar’s, and unto God the things that are God’s” (Mt 22:21). This dualism denotes a distinction of two sovereign powers – spiritual and temporal (*sacerdotium et imperium*) – and the convention between them is very useful to the both Sides.

Thirdly, the transformation of that paradigm into the diplomatic practice in the peaceful dissolving conflicts between two sovereign entities (*sacerdotium et imperium*) was the bilateral agreement, known as „concordat”. From the Concordat of Warm (1122), called *Pax Wormatiensis*, concordats are a peaceful way of cooperation between the state and the Church fulfilling its mission on the state’s territory in the global society⁵.

2. In the long period of the history of the Polish State – the First Polish Republic, since the Baptism to the Third Partition of Poland (966-1795) – were concluded three concordats. These were typical partial concordats concerning the beneficiary matters.

In the XX century were concluded two concordats between Poland and the Holy See. The first one was concluded in 1925 after regaining the independence of Poland during the First World War. The second one – actually in force – was concluded after the collapse of the communist regime (1993-1998). I suggest the reflection on its genesis, meaning and consequences.

² „*Dagome Iudex*” - the oldest document respecting Poland, completed 990-992 in Latin, inserted in *Collectio Canonum Card. Deusdedit*. A. Witkowska, *Dagome Iudex*, „*Encyklopedia Katolicka*”, vol. III, col. 970-971.

³ W. Sawicki, *Zbiór prawa dla ludzi świeckich w krakowskim rękopisie „Zbioru Troistego” (Collectio Tripartita)*, „*Annales Universitatis Marie-Curie Skłodowska (G)*”, 7 (1960), p. 295-352.

⁴ Ep. 328 (*Patrologia Latina* 162, 246 B).

⁵ J. Krukowski, *Kościelne prawo publiczne. Prawo konkordatowe*, Lublin 2014, p. 15-20; 218-222.

In order to explain the genesis of the Polish Concordat of 1993 we need to take into account the historical context. First of all, the practice of concluding concordat agreements has been established in the middle ages and exists in contemporary world. It is based on the paradigm of religious and political dualism which is original for European culture. The source of it is the teaching of Jesus Christ: „Render therefore unto Caesar the things which are Caesar’s, and unto God the things that are God’s” (Mt 22:21). It has been controverted to the religious and political monism that was common in the pagan antiquity and is present in the ideological and political monism of modern times. This dualism denotes a distinction between two sovereign entities of power – political and religious – and conflict resolution between them in the form of bilateral agreement it is concordat.

In modern times concordats are mostly concluded in important moments in the history of the given nation, towards which the Church fulfills its mission. Such situation came into existence in Poland and neighboring countries at the end of the 20th century in the context of socio-political transformation from the communist regime to the liberal democracy and restoration of cultural and political sovereignty by enslaved nations of the East-Central Europe. An indispensable part of this transformation is the change of the relations between the Church and the state from the totalitarian atheistic regime with hostile separation to the democratic state with friendly separation or coordinated, owing to the application of an instrument called concordat.

However, these transformations had the nature of socio-political revolutions, they differed from the earlier great European revolutions (the French Revolution from the end of 17th century and the Russian Revolution from the early 20th century) because of positive attitude towards religion, particularly Church. The contribution of the Catholic Church to the collapse of the communist regime was significant to such events. Bishops of the Catholic Church supported the efforts being made by the nations in preserving cultural identity and restoring political sovereignty lost after the Second World War. The Catholic Church in Poland under the leadership of the Primate of Poland – Stefan Wyszyński and his successor Józef Glemp – included in the mission of the Church protection of human rights and the rights of nation to self-determination and also function as a mediator between the communist government

and the political opposition under the name „Solidarity”⁶. Appeals of the Pope John Paul II to all the nations and political leaders turned out to be most important. The Pope encouraged them to resolve political confrontations – aimed at changing of communist regime – in a non-violent way using dialogue and respect the principles of justice, the common good and solidarity⁷.

Therefore, at the time of the collapse of the communist regime, there was a need to establish relations between the State and the Church in Poland in the form of concordat. In this context, the following questions arise: What is concordat and why it has turned out to be an effective instrument in such kind of situations? In order to explain these questions I propose to consider the following issues: 1) the notion and classification of concordat agreements; 2) the stabilization function of the concordat in the legal order; 3) constitutional principles of the effectiveness of concordat; 4) the object of concordat’s regulations; 5) forms of drafting provisions of concordat and obey them in Polish legal order.

II. The Notion and Classification of Concordat Agreements

I. The Notion

The term „concordat” (Lat. *concordatum*) in a juridical meaning is generally used to designate an international agreement concluded between the Holy See and the supreme authorities of the given state based on the partnership. In order to regulate mutual relations between the Church and the state – two communities of different types – to which belong the same people (as faithful and citizens). In the practice of diplomacy as well other terms are used in different languages concerning this kind of agreement as: *convention, tractatus, accordo, acuerdo, vörtrag, modus vivendi, basic agreement*⁸.

Concordat as an international agreement has original features for two reasons. The first one is that one of the two Sides of this agreement is not the State, but the

⁶ J. Krukowski, *Uprawnienia nadzwyczajne Stefana Wyszyńskiego, Prymasa Polski, wobec zagrożenia ze strony reżimu komunistycznego*, „Studia Prymasowskie” 5 (2011), p. 29-42.

⁷ J.-L. Tauran, *De l’ „Ostpolitik” à la nouvelle Europe de l’OSCE*, in: *La diplomatie de Jean Paul II*, ed. J.-B d’Onorio, Paris 2000, p. 43-55; J. Krukowski, *Wskazania dla polityków w nauczaniu Jana Pawła II*, „Biuletyn Stowarzyszenia Absolwentów i Przyjaciół Wydziału Prawa Katolickiego Uniwersytetu Lubelskiego”, nr 7, VI (2011), s. 28-41.

⁸ J. Krukowski, *Konkordaty współczesne. Doktryna – teksty (1964-1994)*, Warszawa 1995, p. 22-25; J. Martin de Agar, *Raccolta di concordati 1950-1999*, Città del Vaticano 2000, p. 10-11; D. Němec, *Concordat Agreements between the Holy See and Post-Communist Countries (1990-2010)*, Leuven 2011, p. 27.

Holy See as representation of the Catholic Church – universal religious community which part is located on the state's territory. The Holy See is endowed with the public international juridical personality. The international juridical personality contains the ability to maintain diplomatic relations and conclude international agreements. The Holy See may conclude international agreements due to having its own state (the Vatican City State), however concordats are concluded by the Holy See as the supreme authority of the Catholic Church⁹. The second reason for originality of concordat is its object, which are mutual rights and duties of its Sides – the Holy See and the State – concerning the people who at the same time belong to the Church and to the State.

II. Classification of Concordat Agreements

Concordat agreements can be divided using several criteria¹⁰.

With respect to the historical criteria, it has to be distinguished: 1) **classic concordats** – concluded in the times since the Concordat of Worms to the Second Vatican Council; the object of these concordats was exchange of the privileges and concessions between the supreme authorities of the Church and the state; 2) **contemporary concordats** – concluded after the Second Vatican Council; their object **are guarantees of freedom of conscience and religion in private and public life**. Polish Concordat of 1993 is a contemporary one.

With respect to the **scope of issues regulated**, we distinguish: 1) **agreement overall comprehensive totality** or a large part of issues concerning legal situation of the Church on the given state's territory; 2) **partial agreements** which regulate only selected issues, e.g. financial matters of the Church, religious education in public schools, pastoral military service. Polish Concordat of 1993 is an overall agreement.

With respect to the **procedure** concordat may be concluded in the following forms: 1) in the **solemn form** (*conventio sollemnis*) if all the formal elements required for concluding international agreements are fulfilled (negotiations; signing by negotiators; ratification with the consent of Parliament by the Head of the given State and by the Pope, as the Head of the Church; exchange of ratification notes; publication); 2) in the **simply form** (*conventio simplex*) like *modus vivendi*. The

⁹ I. Cardinale, *The Holy See and the International Order*, Gerrards Cross 1976.

¹⁰ J. Krukowski, *Kościelne prawo publiczne, op. cit.*, p. 236-239.

procedure of its concluding does not comprise all the above formal elements, particularly ratification with the consent of Parliament. Polish Concordat of 1993 was concluded in a solemn form.

With respect to the **method (form of drafting juridic norms)**, we distinguish:

1) concordat including **completely new norms** compared to the laws that were in force prior to the its ratification, e.g. concordats with Spain concluded in 1976-1979;

2) concordat „**mixed**” that has different kinds of norms, namely:

a) **completely new norms** to the laws in force prior to the ratification of concordat;

b) and norms having nature of the **reference (clauses)** to the norms included in acts that were in force before the ratification of concordat and some new norms e.g. agreement between the Holy See and Italy of 1984 which remained in force norms from the Lateran Treaty of 1929 and included completely new regulations, in particular “Norms” concerning economic situation of the Church;

c) norms having nature of the **reference to the laws that were in force at the time of ratification of concordat** which had been unilaterally established earlier by the given state or by the Church authorities. With such types of clauses the transformation of legal norms to international ones is fulfilled. Thus, in that way the law has obtained higher rank in the hierarchy of the source of law;

d) **incomplete norms which are not proper for direct application. These are reference to the future legal regulations.** Among them we distinguish:

– **reference to the new law**, which could be unilaterally established by the state authorities in the future;

– **reference to the future bilateral agreement**, which will be concluded within one of the two hierarchical levels. These are:

– **reference to the future partial concordat** – new agreement between the Holy See and the state’s supreme authorities in a particular case, e.g. in the Fundamental Agreement between the Holy See and the State of Israel (December 30, 1993) was included the reference clause to the future particular agreement concerning the legal personality issues, economic and financial issues of the Church organizational units (Art. 3,3; 10);

– **reference to the future agreement which will be concluded within lower hierarchical level; it is between bishops conference and the government of the given state**, e.g. in the agreement between the Holy See and Spain (January 3, 1979) was included the reference to the future agreement between the Government and the Bishops Conference concerning the economic situation of religion teachers (Art. 7). It should be noticed that such kind of reference does not guarantee the same stabilization of relations between the state and the Church like the complete norms.

III. The Legitimism of Concordat

The regulations of the mutual relations between the State and the Church in Poland in the form of Concordat have two dimensions: axiological and formal (positivistic aspect).

1. An Axiological Dimension

Firstly, the conclusion of the agreement between two Sides – the State and the Holy See as the representant of the Catholic Church – has an axiological dimension. It has been directed to the achievement certain moral and political values.

During the debate over the ratification of the Concordat in the Polish Parliament (1993-1997) political opponents of its ratification made the allegations aimed at gaining voters by misleading the public opinion. In particular, they claimed that the ratification of the Concordat will result in acknowledgment of Catholic character of the State¹¹. This kind of argumentation was completely wrong because opponents did not understand the differences between the classic concordats concluded before the Vatican Council II and the contemporary ones. The object of the concordats concluded before the Vatican Council II was the exchange of the privileges between the supreme authorities of the Catholic Church and the given state, causative discrimination of other religious communities. However, the object of the concordats concluded after the Vatican Council II are the guarantees of freedom of conscience and religion in private and public life, which source is the inherent dignity of every human person.

¹¹ See also J. Wiślocki, *Konkordat polski 1993. Tak czy nie?* Poznań 1993. A. Zoll, *Trudna droga do ratyfikacji Konkordatu*, in: *Konkordat 1993. Dar i zadanie dla Kościoła i Polski*, ed. J. Dyduch, Kraków 1998.

Therefore, concordats were concluded before the Vatican Council II with the Catholic states (e.g. Spain, Italy) after this were revised. Also the Holy See has concluded completely new concordats with the secular states or with the confessional non catholic states¹². While, the objection of opponents of the ratification of Polish concordat Polish of 1993 was absolutely wrong. The main object of Polish Concordat of 1993 are the guarantees of freedom of religion in public life adjusted to the needs of the contemporary Polish society. The privileges that might have been granted the Catholic Church are not the object of it. Therefore, Poland has not become the Catholic state. But the Church has become its ally in a building civil democratic society respecting the fundamental human values founded in the Christian culture of Polish nation.

2. A Formal Dimension

The formal dimension of the conclusion of the Concordat (1993-1998) depends primarily on the fact legal loophole (*lacuna iuris*) occurred in 1944 in juridical order of the Polish State after the breaking of the Concordat of 1925 has been closed¹³.

The communist government – according to the presumption of marxist ideological and political monism – declared that the situation of the Church in Poland will be regulated in form of unilateral acts. But, the government was aware of the regulation of the relations between the State and the Catholic Church should be in the bilateral agreement. Therefore, for the tactical (not strategical) purposes in 1950 and 1956 the Government signed „the Agreement” with the Polish Episcopacy¹⁴ but from the beginning it had been violated. Primate of Poland Card. Stefan Wyszyński, who had the extraordinary competences (*facultates speciales*) from the Holy See – had the hopes on that agreement as a „Modus Vivendi” could stop the persecution of the Church. But, soon without any reason he was arrested and imprisoned (1953-1956). Only in the seventies years of the XX century the communist government of Poland established the provisional diplomatic relations with the Holy See in order to negotiate the convention.

¹² R. Minnerath, *L'Eglise et les Etats concordataires 1846-1981. La souveraineté spirituelle*, Paris 1983, in particular p. 83-155.

¹³ J. Kowalczyk, *Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską 1993/1998*, Płock 2013, particularly p. 19, 188-189.

¹⁴ J. Krukowski, *Porozumienia między przedstawicielami Rządu i Episkopatu Polski z 1950 1956 r. Znaczenie i realizacja*, in: *Prawo i polityka w Polsce Ludowej*, Lublin 1995, ed. A. Mezglewski, P. Stanisławski, M. Ordon, p. 33-70.

In fact, the communist authorities did not have the goodwill to fulfill the agreements with the Episcopate of Poland as well to conclude the convention with the Holy See, because of marxist-leninist presumptions as well as its dependence from Moscow.

These kinds of difficulties disappeared only after signing the compromise called „the Round Table Agreement” (April 5, 1989) between the representatives of two Sides – the communist government and political opposition under the banner of „Solidarity” – with the attendance of observers of the Episcopacy of Poland.

The first stage of the normalization of the legal situation of the Church in Poland was the resolution of package of „Church Laws” (May 17, 1989)¹⁵ negotiated between the Government and the representatives of the Conference of Polish Episcopacy. The second stage of its should had been possible after the establishing permanent diplomatic relations between the Holy See and the Polish State and signing the Concordat (July 28, 1993). However, soon after the parliamentary elections in which the post-communist parties had majority (September 1993), the proposal of the Government for the ratification of the Concordat encountered the political obstacles. The Concordat was ratified in 1998 just after the political parties which referred to the ideals of the „Solidarity” obtained the majority in the parliamentary elections.

IV. Concordat’s Compliance with the Constitution of Poland

In order to be an efficient instrument in achieving those values for which the Concordat was concluded, it should be comply with the principles of the constitutional and international law.

1. Basic Principles of the State-Church Relations

The fact of signing the Concordat before passing the new Constitution of the Republic of Poland had a significant impact on the debate concerning the establishment of the constitutional principles of the state-Church relations. That debate took place at the same time as the debate concerning the ratification of the

¹⁵ Ustawa z 17 maja 1989 r. o wolności sumienia i wyznania (Dz. U. 2000, Nr 26, poz. 319 ze zm.); Ustawa z 17 maja 1989 r. o stosunku Państwa do Kościoła katolickiego w Rzeczypospolitej Polskiej (Dz. U. 2000, Nr 29, poz. 154 ze zm.); Ustawa o ubezpieczeniu społecznym duchownych (Dz. U. 2000, Nr 29, poz. 156 ze zm.).

concordat. The proposal submitted in the Parliament encountered the ideological and political obstacles.

The opponents of the stabilization of the state-Church relations claimed that the Concordat is inconsistent with the „Small Constitution” that contained the same principles on that subject of the communist Constitution of 1950. The Concordat in Art. 1 constitutes: „The State and the Catholic Church are – each in its own domain – independent and autonomous, and they are fully committed to respecting this principle in all their mutual relations and in cooperation for the promotion of the man and the common good”. The opponents of the ratification of the Concordat maintained that Art. 1 of the Concordat was inconsistent with the principle of „separation of Church and state”. That principle was interpreted within the meaning specified by the communist ideology. The principles of the relations between the state and the Catholic Church and other religious communities became a part of the final version of the Constitution as a result of several years’ debate in the Constitutional Commission of the National Assembly. Those principles do not constitute the basis for an inconsistent charge¹⁶.

There are the principles of the friendly separation between the State and the Church. These are: 1) the principle of the respect of the autonomy and mutual independence of the state and the churches in their own fields; 2) the principle of cooperation between the state and the Church for the welfare of human being and the common good; 3) the principle of regulations of the relations between the State and the Catholic Church in a form of partnership agreement with the Holy See and laws but with other churches and religious communities in a form of law passed on the basis of agreement negotiated between the Government and their representatives (art. 25 sec. 4-5)¹⁷.

In order to specify the term of the secular state, the Polish legislator in Art. 25 of the Constitution stipulates: 1) the principle of equality of the churches and other religious communities; 2) the principle of impartiality of public authorities in matters of personal religious or philosophical conviction and ensuring their freedom of expression within public life. It means that Poland is a democratic state and its

¹⁶ P. Sobczyk, *Udział przedstawiciela Episkopatu Polski w pracach Komisji Konstytucyjnej Zgromadzenia Narodowego nad artykułem 25 Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1992 r.*, in: *Ecclesia et Status. Księga Jubileuszowa z okazji pracy naukowej Profesora Józefa Krukowskiego*, ed. A. Dębiński, K. Orzeszyna, M. Sitarz, Lublin 2004, p. 887-888.

¹⁷ J. Krukowski, *Polskie prawo wyznaniowe*, ed. 4, Warszawa 2008, p. 61-88; P. Sobczyk, *Konstytucyjna zasada konsensualnego określenia stosunków między Rzeczpospolitą Polską a Kościołem Katolickim*, Warszawa 2013.

authorities respect freedom of expression within public life. The Preamble of the Constitution includes the declaration of respecting the universal human and Christian values rooted in the national culture.

The requirement of Concordat's compliance with the Constitution includes the protection of religious freedom in an individual aspect both in private and public life (Art. 53 of the Constitution). It should be noted then that principles of the state-Church relations in Concordat comply with the constitutional ones. They create a Polish model of secular state in a version of friendly separation¹⁸.

Democratic Poland in a process of building social order needs the allies of other public entities, particularly of the Catholic Church to which more than 90 % of the population of contemporary Polish society belong to. The Church, as the Side of cooperation with the state, should not be identified with a political party which aim is to gain the state apparatus. The Church does not seek to gain the state power but fulfills the function of independent moral authority in shaping social attitudes in the spirit of respect for fundamental human values.

2. The Principles of Effectiveness of the Concordat

A concordat, as any international agreement, is an effective instrument if it is used with respect for the principles of international and constitutional law. The principle *pacta sunt servanda* („agreements must be kept”) has significant meaning among all the principles of public international law. It means that the state which enters into an international commitment also in a form of concordat, is obliged to implement necessary changes to the legislation respecting commitments which have been established in the concordat.

An international law does not specify the ways of implementation of international agreements into internal legal order. Between the signing of the Concordat (1993) and the adoption of the new Constitution of the Republic of Poland (1997) did not exist obvious constitutional regulations concerning the implementation of the international agreements into Polish legal order. The relevant

¹⁸ J. Krukowski, *Polskie prawo wyznaniowe*, op. cit., p. 61-68; H. Suchocka, *Polski model relacji państwo-Kościół w świetle Konstytucji z 1997 r. i Konkordatu z 1993 r.*, in: *Konkordat Polski w dziesięć lat po ratyfikacji*, ed. J. Wroceński, H. Pietrzak, Warszawa 2008, p. 41-67.

principles are stipulated in Art. 8, 9, 87 and 91 of the Constitution of the Republic of Poland of 1997¹⁹. These principles refer also to the Concordat.

The legislator in Art. 9 of the Constitution of the Republic of Poland stipulates: „the Republic of Poland shall respect international law binding upon it”. The State’s authorities are obliged to respect the Concordat’s law and apply it in the internal legal order. The legislator in Art. 9 creates the presumption of the Concordat’s incorporation into the internal legal order. Poland is obligated to respect the Concordat in the internal legal order as a law binding at the international level.

Art. 87 Sec. 1 of the Constitution of the Republic of Poland stipulates the hierarchy of the sources of positive law. „The sources of universally binding law of the Republic of Poland shall be: the Constitution, laws, ratified international agreements, and regulations”. The norms being for the state authorities bases of taking decisions to the citizens and other legal entities are the universally binding law in Poland. Among the international agreements the Polish legislator indicates: an international agreement ratified upon prior consent of the Parliament granted by laws and international agreement ratified without such consent. An international agreement ratified upon prior consent granted by laws shall have precedence over laws if such an agreement cannot be reconciled with the provisions of laws. The Constitution is the supreme law in the hierarchy of the source of positive law. The primary source of the Constitution is „the inherent dignity of the human being” (Art. 30 of the Constitution).

The Concordat which is an international agreement ratified upon consent of the Parliament granted by law is in the first place after the Constitution in the hierarchy of the source of law. The Constitution is „the supreme law [positive law – J. K.] of the Republic of Poland” (Art. 8 Sec. 1). The Concordat cannot be contrary to the Constitution. It should be presumed that after Concordat’s ratification its norms are complied with the Constitution. Art. 91 Sec. 1 of the Constitution stipulates that the international agreements ratified upon prior consent granted by law shall be applied directly, unless its application depends on the enactment of a law. The Polish Concordat as a solemn agreement –ratified upon prior consent of the Parliament – shall be applied directly. The norms of the Concordat shall be applied by the judicial or administrative organs without establishing any further executive norms. The

¹⁹ A. Wyrozumska, *Formy zapewnienia skuteczności prawa międzynarodowemu w porządku krajowym*, in: *Prawo międzynarodowe i wspólnotowe w wewnętrznym porządku prawnym*, ed. M. Kruk, Warszawa 1997, p. 56-57.

passing a proper „realization law” would be necessary only if it would be a „framework agreement” with the clauses to the future regulations. As a consequence, a directly application of it would be impossible²⁰.

Art. 91 Sec. 2 of the Constitution stipulates that an international agreement – thus the Concordat – ratified upon prior consent granted by law shall have precedence over laws. The Polish legislator shall avoid passing laws which would be contrary to the Concordat’s regulation. In case of conflict between the Concordat and the simple law, the Concordat have precedence over the laws. At the beginning it should be make an attempt to „reconcile” the law with the Concordat. It might be in a form of amendment to the law. If not, the legal regulations should be interpreted in accordance with the Concordat²¹. The principle of a directly application of the Concordat includes the right to a judicial protection, i.e. the right to lodge a complaint by anyone who claims to be an injured side because of the violation of the Concordat.

In accordance with Art. 91 of the Constitution of the Republic of Poland it cannot be directly applied the Concordat’s regulation which depends on the issue a law in a legal order. Taking Art. 25 Sec. 4 of the Constitution into account – which specifies the „mixed” form of the relations between the state and the Catholic Church – it should be noticed that the directly application of the Concordat is impossible if its norms is not complete, i.e. does not include the necessary elements. It could be completed in the following ways: by the state legislator unilaterally in a form of the law (reference to the law); or by the new agreement between the Holy See and the supreme authority of the Republic of Poland or between the Bishops’ Conference and the Government of the Republic of Poland (reference to the establishment of the complete norms)²².

V. The Object of the Concordat

The object of the Polish Concordat²³ are the following issues:

²⁰ P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 117.

²¹ P. Winczorek, *Komentarz*, op. cit., p. 117-118.

²² J. Rokita, *Realizacja postanowień Konkordatu 1993 w kontekście polskiego prawodawstwa państwowego*, in: *Konkordat 1993. Dar i zadanie dla Kościoła i Polski*, op. cit., p. 53-58; B. Trzeciak, *Klauzule odsyłające w konkordatach z Hiszpanią i z Polską*, Lublin 2007, *passim*.

²³ J. Krukowski, *Polskie prawo wyznaniowe*, op. cit., p. 61-88; H. Suchocka, *Polski model relacji państwo-Kościół w świetle Konstytucji z 1997 r. i Konkordatu z 1993 r.*, in: *Konkordat Polski w dziesięć lat po ratyfikacji*, Warszawa 2008, p. 41-67; 87-120; W. Góralski, *Ochrona małżeństwa i rodziny*, *ibidem*, p. 131-149; K. Warchałowski, *Szkolnictwo katolickie i nauczanie religii w szkołach*

1. **The diplomatic relations between the Holy See and Poland** (Art. 2). The Concordat includes the confirmation of the first class diplomatic relations between the two Sides, that had been reactivated on the basis of the exchange of the diplomatic notes between the President of the Republic of Poland and Pope John Paul II.

2. **The guarantees of free communication in the Church in a vertical and horizontal plane** (Art. 3). It is the confirmation of Art. 9 of the Law of 1989 on the Relations between the State and the Catholic Church.

3. **The recognition by the State of the juridical personality of the Church and its organizational units established by the Church authority according to the canon law** (Art. 4). It is the confirmation of Art. 7, 8 and 9 of the Law of 1989 on the Relations between the State and the Catholic Church. The public and legal status of the Catholic Church in Poland was recognized for the first time.

4. **The free and public exercise of the Church's mission, as well as the exercise of its jurisdiction in a public life** (Art. 5). It is the confirmation of Part III of the Law of 1989 on the Relations between the State and the Catholic Church.

5. **Freedom of the Church's authorities to modify a territorial structure** (Art. 6 Sec. 1-3). The Holy See is obliged to: 1) respect for the territorial integrity of the State when implementing by the competent Church authorities changes in the diocesan territorial borders; 2) appoint bishops in Poland from amongst priest who are the Polish citizens.

6. **Respect for the independence of the Church authority from the State one with regard to the appointment of diocesan bishops** (Art. 7). The State is obliged to respect the postulate of the Second Vatican Council not to interfere in the process of bishops' nomination (*Christus Dominus*, 20). The Holy See „prior to a public announcement of the appointment of a diocesan bishop shall make known his name in confidence at an opportune time to the Government of the Republic of Poland. All possible steps will be taken to ensure that such a communication is made promptly” (Art. 7 Sec. 4). However, such notification of the Government does not give rise to veto the nomination for the office of bishop.

7. **Freedom of the Church to conduct public services** „in accordance with canon law” and with regard to the relevant Polish laws „for reasons of public safety

publicznych w Konkordacie polskim z 1993 r., ibidem, p. 151-176; W. Adamczewski, *Kompetencje komisji konkordatowych w Polsce, ibidem*, p. 177-192.

and order” (Art. 8 Sec. 2-3). The State guaranteed „the inviolability of places which are designated for religious services and for cemeteries”. The opponents of the Concordat’s ratification mistakenly claimed that such regulation prohibited the burial of the non-Catholics in the Catholic cemetery. Therefore, the Government of the Republic of Poland issued the „Declaration” of 15 April 1997 in which stipulated: „the concept of the sanctity of cemeteries, as described in Art. 8 Sec. 3 of the Concordat, must not be understood as the right to refuse the burial in a Catholic cemetery a person of a different creed or an unbeliever”²⁴. Subsequently, the Government passed the Law Amending the Law on Cemeteries and Burials of 26 June 1997²⁵.

8. Respect for Sundays and holy days (Art. 9). The list of holy days which shall be free from work contains Sundays and 7 holy days. It is the confirmation of Art. 7 of the Law of 1989 on the Relations between the State and the Catholic Church.

9. Religious education in the state preschools and schools as a facultative subject (Art. 12). It is the confirmation of guarantees of the Law of 1990 on the Educational System and the Ordinance of 14 April 1992 of the Minister of Education on the Organization of Religious Instruction in State Schools²⁶. The State relinquished the approval of the religion teaching program in the state schools.

10. Adult’s catechesis, in particular young people studying at the universities (Art. 12 Sec. 5). It is the confirmation of Art. 18 Sec. 2 of the Law of 1989 on the Relations between the State and the Catholic Church.

11. Religious practices of children and young people who take part in summer holiday camps (Art. 13). It is the confirmation of Chapter IV of the Law of 1989 on the Relations between the State and the Catholic Church.

12. Catholic institutes for the education and bringing-up of children (Art. 14). It is the confirmation of Art. 29 of the Law of 1989 on the Relations between the State and the Catholic Church.

13. Catholic higher education (Art. 15). The State confirmed the recognition of the Church’s right to establish and freely manage universities and other higher education institutes, as well as the theological faculties at the state universities²⁷. The

²⁴ M. P. 1998, Nr 4, poz. 51.

²⁵ Dz. U. 1997, Nr 126, poz. 805.

²⁶ Dz. U. 1992, Nr 36, poz. 115.

²⁷ Umowa między Konferencją Episkopatu Polski i Ministerstwem Spraw Zagranicznych, opublikowana w formie obwieszczenia Ministra Spraw Zagranicznych z dnia 29 lipca 1999 r. o wykonaniu Konkordatu między Stolicą Apostolską i Rzeczpospolitą Polską, Dz. U. 1999, Nr 63, poz. 727.

State guaranteed to subsidize the Cracow Pontifical Academy of Theology and the Catholic University of Lublin, including financial assistance²⁸.

14. **Regulations on the pastoral service of the specific social groups** (Art. 16, 17, 18), namely:

- a) **recognition of the legal status of the Military Ordinariate of Poland, reactivated by the Holy See on 21 January 1991 based on the Law on the Relations between the State and the Catholic Church** (Art. 25-28). The Ordinariate functions in two legal orders. In the Church order it is a personal particular Church – established in accordance with the Constitution *Spirituali militum curae* promulgated by the John Paul II and the Statute of 21 January 1991 promulgated in agreement with the State authorities²⁹ functioning in accordance with the implementing acts of the Government of the Republic of Poland³⁰.
- b) **recognition of the pastoral service in prisons, institutions for rehabilitation and for social reintegration, and also in health and social care institutions** (Art. 17). It is the confirmation of Chapter IV of the Law of 1989 on the Relations between the State and the Catholic Church.

15. **Duties of diocesan bishops to determine the organization of the pastoral ministry and catechizing to ethnic minorities** (Art. 18).

16. **Respect for the right of the faithful to assembly** „in accordance with canon law and within the confines specified there” (Art. 19). Respect for the canon law was guaranteed for the first time.

17. **Respect for the right of the Church to:** 1) print, publish and freely disseminate any publication pertaining to its mission; 2) possess and make use of all means appropriate for social communication; 3) broadcast programs over public

²⁸ Ustawa z 10 października 2008 r. o zmianie ustawy o finansowaniu Katolickiego Uniwersytetu Lubelskiego z budżetu państwa, Dz. U. 2008, Nr 203, poz. 1258; P. Stanisławski, *Sprawy majątkowe jako element stosunków między państwem a związkami wyznaniowymi*, in: *Finansowanie Kościołów i innych związków wyznaniowych*, ed. P. Sobczyk, K. Warchałowski, Warszawa 2013, p. 17-32; D. Walencik, *Formalnoprawne uwarunkowania regulacji prawnych dotyczących finansowania związków wyznaniowych*, in: *Finansowanie Kościołów i innych związków wyznaniowych*, ed. P. Sobczyk, K. Warchałowski, Warszawa 2013, p. 53-55.

²⁹ AAS 83 (1991), p. 155-157.

³⁰ Decyzja Ministra Obrony Narodowej z dnia 28 sierpnia 2006 r. w sprawie organizacyjnego usytuowania Ordynariatu Polowego w resorcie Obrony Narodowej oraz współpracy organów wojskowych z Ordynariatem Polowym (Dz. U. MON, Nr 16, poz. 202).

radio and television (Art. 20) in accordance with the Law of 29 December 1992 on the Radio and Television Broadcasting³¹. The realization of these guarantees regulates the Agreement between the Secretary of the Polish Bishops' Conference and the organizational units of the public radio and television.

18. The recognition of the right of the Church institutions to carry out missionary, charitable and welfare activities as well as set up organizational structures (Art. 21). It is the confirmation of Art. 29 of Law of 1989 on the Relations between the State and the Catholic Church.

19. The legal parity for the activity undertaken by the persons of the Church for humanitarian, charitable, welfare, scientific aims, and for upbringing and educational purposes with activity carried out for similar purposes by the civil institutions (Art. 22). It concerns: exemption of taxes of the juridic persons of the Church and subsidies from the State, i.e. taxpayers' incomes for the whole society activities.

20. Regulations on the financial matters concerning institutions and ecclesiastical property, including clergy (Art. 20). There are two references: 1) reference to the norms that were in force at the time of signing the Concordat. The source is the Law of 1989 on the Relations between the State and the Catholic Church (Art. 55-57) in the amended Law of 11 October 1991³²; 2) reference to the establishment of the special commission (Art. 22 Sec. 3). Therefore, the two commissions have been established after the Concordat came into force: 1) the Concordat Commission appointed by the Holy See, 2) the Concordat Commission appointed by the Prime Minister of the Republic of Poland³³.

In application of the Concordat, in 2011 the following problem has arose: Could the State change the legal norms of the Law on the Relations between the State and the Catholic Church, concerning: 1) the Property Commission functioning on the basis of the Law on the Relations between the State and the Catholic Church (Art. 60-

³¹ Ustawa z dnia 29 grudnia 1992 r. o radiofonii i telewizji (Dz. U. 1993, Nr 7, poz. 34; tekst jednolity: Dz. U. 2004, Nr 253, poz. 2531 ze zm.); Rozporządzenie Krajowej Rady Radiofonii i Telewizji z dnia 2 czerwca 1993 r. w sprawie zawartości wniosku oraz szczegółowego trybu postępowania w sprawach zawartości w sprawach udzielania i cofania koncesji na rozpowszechnianie programów radiofonicznych i telewizyjnych (Dz. U. 1993, Nr 52, poz. 244).

³² Dz. U. 1991, Nr 107, poz. 459.

³³ W. Adamczewski, *op. cit.*, p. 177-179.

61); 2) the establishment and functioning of the Church Fund which source is the Law of 1950³⁴. This issue would be discussed in the fifth part of this article.

21. Protection of restoration of the historical monuments (Art. 22 Sec. 4). The State guaranteed „whenever possible” to provide material support for conservation and restoration work on sacred sites which have value as monuments and the adjacent buildings, as well as for works of art which are part of Polish cultural heritage.

22. Guarantees of property rights of the juridical persons of the Church (Art. 23). The State guaranteed that the juridic persons of the Church may acquire, possess, profit by and dispose of both moveable and immoveable property, as well as acquire and dispose of charges and assets, in accordance with the provisions of Polish law. It is the confirmation of Art. 52 of the Law of 1989 on the Relations between the State and the Catholic Church.

23. The sacred and ecclesiastical buildings and cemeteries (Art. 24). It is the confirmation of Art. 41-45 of the Law of 1989 on the Relations between the State and the Catholic Church.

24. Church foundations (Art. 26). The State guaranteed the right to establish foundations based on the Law of 1989 on the Relations between the State and the Catholic Church.

VI. **The Stabilization Function of the Concordat**

In the light of the abovementioned guarantees in the Concordat of 1993 it should be concluded that these guarantees are preponderantly the confirmation of the legal norms that were in force at the time of its ratification or the confirmation of the agreement between the Holy See and the supreme authorities of the Republic of Poland based on the exchange of the diplomatic notes³⁵.

The changes in the legal norms that were in force at the time of the Concordat's ratification were introduced to some provisions, e.g. pursuant to Art. 12 Sec. 2, the teaching program for the Catholic religion, as well as the textbooks used, shall be determined by the competent Church authority and shall be made known to

³⁴ Dz. U. 1959, Nr 6, poz. 87. See also K. Ners, *Zasady finansowania instytucji kościelnych w Polsce. Problematyka de lege lata i de lege ferenda*, in: *Systemy finansowania instytucji kościelnych w Europie*, ed. J. Krukowski, Lublin 2000, p. 141-146.

³⁵ J. Krukowski, *Stabilizacyjna rola Konkordatu z 1993 r. w stosunkach między państwem a Kościołem katolickim i innymi związkami wyznaniowymi*, op. cit., p. 153-155.

the relevant civil authorities. Therefore, the requirement of the approval by the state authorities has been abolished.

The stabilization function of the Concordat in a formal aspect means that the Polish legislator without the consent of the Holy See is not allowed to impose the unilateral norms into domestic legal system being contrary to the Concordat's norms. It does not mean that the Polish system has been closed to the new regulations. The norms that were in force at the time of the Concordat's ratification can be amended on the basis of the new bilateral agreements respecting the partnership of the Sides and the compulsory procedure. The Concordat's text analysis shows that the changes in Polish legal system concerning the issues which have been included in the Concordat are regulated in the following references:

1) Reference to the future law in Art. 10 Sec. 6: „With a view to making the current article practicable, changes which need to be made to Polish law shall be made to Polish legislation”. The State is obliged to pass the law concerning the civil effects of canonical marriage. Therefore, after the entry into force of the Concordat it has been passed the law of 24 July 1998 amending the laws on the Family and Guardianship Code, on the Code of Civil Procedure, on the Public Registry Records Law, on the Law of 1989 on the Relations between the State and the Catholic Church³⁶.

2) Reference to the executive norms issued in a form of the agreement between the Polish Bishops' Conference and the Government of the Republic of Poland which are included in four articles of the Concordat, namely: Art. 12 – to determine the criteria for educational training for teachers of religion; Art. 15 Sec. 2 – recognition by the State of degrees and ecclesiastical academic titles including the legal status of the Catholic theological faculties within the state universities; Art. 25 – to access the property of cultural value which remains in the possession of the Church; Art. 27 – to regulate the matters requiring new or additional solutions.

3) Reference to the „Polish law” in the Concordat: Art. 4 – to recognize the legal status of „other Church institutions” which are not mentioned in Sec. 2 and 3; Art. 8 Sec. 2 and 4 – to organize of public service in public places; Art. 12 Sec. 4 – requirements for the teachers of religion; Art. 14 – to establish and run institutes for the education and bringing-up of children; Art. 19 – the right of the faithful to assembly; Art. 20 – the right to possess and make use of media in accordance with

³⁶ Dz. U. 1998, Nr 17, poz. 157.

norms established by Polish law; Art. 23 – to acquire, possess, profit by and dispose of both moveable and immovable property; Art. 26 – the right to establish foundations, which shall be subject to Polish legislation.

4) Reference to the „canon law” in the Concordat: Art. 5 – the free exercise of the Church’s mission in accordance with canon law; Art. 7 Sec 1 – to conduct religious services; Art. 8 Sec. 2 – the organization of public services; Art. 10 – the form of the celebration of marriage; Art. 14 Sec. 1 – to establish and run own schools; Art. 16 Sec. 1 – the pastoral care in the Military Ordinariate.

It happens that in the concordats are the „derogation clauses” which abolish the previous norms. The Polish Concordat of 1993 does not include the derogation clause abolishing in whole or in part the earlier concordat. The Polish Concordat of 1925 expired after more than half a century of *desuetetudo* (1939-1993).

The interpretation clause in Art. 28 of the Concordat of 1993 determines: the Contracting Sides shall try to resolve through diplomatic channels any prospective divergences of interpretation or application of the provisions made in this current Concordat. The Concordat does not include the temporal reference – specifying the time of its validity period. It means that the Concordat was concluded for an indefinable period. Therefore, the principle of the international law: *pacta sunt servanda, rebus sic stantibus* is in force.

VII. The Financial Clauses

The problems have arisen due to the realization of the reference to the norms that were in force at the time of the Concordat’s ratification in financial issues.

The legislator in Art. 22 Sec. 2 of the Concordat 1) obliged the State to obey „in financial matters concerning institutions and ecclesiastical property, including that of the clergy, and having as a starting point Polish legislation”; the State is obliged to obey in these matters the laws that were in force at the time of the Concordat’s ratification; 2) obliged the Sides to set up a special commission „to deal with relevant changes”. The changes of the regulations at the time of the signing the Concordat can be introduced in the new Concordat negotiated by the commission. Thus the following problem occurred: Has the State the right to introduce unilateral changes into domestic legal order without the formal agreement with the Holy See concerning the financing needs of the Church arising from Art. 24 of the Concordat, in particular – abolition of the Church Fund? The opponents of this right of the Holy See refer to

the statement of the Prime Minister W. Cimoszewicz in the „Declaration” of 15 April 1997³⁷: „The Concordat respects the authority of State institutions, as described in the Polish legislation, to regulate the financial and tax matters of the physical and legal persons of the Church. To this end, the State party shall familiarize itself with the Church party’s opinion within a special commission mentioned in Art. 22 Sec. 2 and 3”. According to some authors, this Declaration provides basis for the changes of financial situation of the Church by the State only when familiarizing with the Church side’s opinion³⁸. It should be noticed that it is a wrong opinion. The „Declaration” of Cimoszewicz is not binding both from the principles of Polish constitutional law point of view and from the principles of international law point of view. However, this Declaration was published in „Monitor Polski” definitely it is not and cannot be considered as a source of law binding in Polish legal order. The system of the sources of law in Poland is explicitly determined in Chapter III of the Constitution of the Republic of Poland of 1997. The declaration of the Government of the Republic of Poland is not specified as such source of law. It should be considered as a sign of „legislative pathology” to issue and publish such declaration changing the meaning of Art. 22 of the bilateral international agreement – the Concordat. It is a violation of the regulation of Chapter III of the Constitution of the Republic of Poland of 1997. It is a breach of the rule of law according to which the decisions of the authorities cannot be contrary to the principles of the Constitution of the Republic of Poland.

The publication of the Declaration of the Prime Minister in „Monitor Polski” does not form grounds for the acceptance of an opinion that the State can unilaterally determine the meaning of the Art. 22 only when familiarizing with the Church party’s opinion. This declaration is not binding from the requirements of international law point of view; it has not been ratified by the President of the Republic of Poland and by the Pope to be the source of an international law.

However, the Prime Minister in „Declaration” refers to the „agreement” with the Holy See. In reality it is just an unilateral statement of the Prime Minister which is not an „enclosure” to the Concordat – bilateral international agreement ratified by two Sides with the consent of Parliament. Therefore it is not a bilateral international agreement. It should be noticed that it is just a political will without any legal consequences.

³⁷ M. P. 1998, Nr 4, poz. 51.

³⁸ M. Pietrzak, *Głos w dyskusji*, in: *Dziesięć lat polskiego konkordatu*, ed. P. Borecki, Cz. Janik, Warszawa 2009, p. 133.

Conclusion

An analysis of the issues concerning the State-Church relations in Poland based on the Concordat permits to formulate the following conclusions.

1. The conclusion of the Concordat brought about a definitive break with the Bisantine and Stalinist Caesaropapism by the authorities of the Third Republic of Poland which was imposed on Poland after the Second World War by the Soviet Union were the relations between the state and the Church were unilaterally regulated from a position of the supremacy of the state over the Church.

2. There was a return to the paradigm of religious and political dualism, which is characteristic for the European culture. The regulation of the state-Church relations in a form of bilateral agreement constitutes the essential element of it.

3. The achievement of the higher degree of the stabilization of the relations between the state and the Church. However, the Concordat pertains directly to the situation of the Catholic Church, indirectly it contributed also to the higher degree of the stabilization of the relations between the state and other religious organizations with a regulated legal situation. In accordance with the constitutional principle of the equality of the religious communities (Art. 25 Sec. 2), the Polish legislator is obliged to the extension of the freedom guarantees that under the Concordat are entitled to the Catholic Church to other religious communities issuing the individual laws based on the agreements negotiated by the Government and its competent representatives³⁹. From many minority religious organizations existing in Poland (in 2006 – 160) the 11 of them have the individual laws. These laws, after entry into force of the Concordat, have been amended to be complied with the Concordat's guarantees. The *Law of 1989 on the Guarantees of Freedom of Conscience and Religion has been amended* and the freedom guarantees have been extended to the religious organizations with their legal status regulated by the entry into a register by the Minister of the Interior and Administration (currently the Ministry of Administration and Digitization).

³⁹ See also W. Wysoczański, *Wpływ konkordatu z 1993 r. na sytuację prawną kościołów i innych związków wyznaniowych mniejszościowych*, in: *Konkordat polski w dziesięć lat po ratyfikacji*, op. cit., p. 69-85; T. Zieliński, *Konkordat a sytuacja prawna wyznań nierzyskokatolickich*, in: *Dziesięć lat polskiego konkordatu*, Warszawa 2009, p. 51-60; P. Leszczyński, *Regulacja stosunków między państwem a nierzyskokatolickimi Kościołami i innymi związkami wyznaniowymi określona w art. 25 ust. 5 Konstytucji RP*, Gorzów Wielkopolski 2012.

Therefore, the following question arises: is there a need to conclude any agreements between the Holy See and Poland in the future due to the previous obligations of the Sides or new circumstances? It should be emphasized that in accordance with Art. 22 Sec. 2 of the Concordat there is a need to conclude a partial concordat in order to a systematic regulation of the financial matters of the Church institutions.

The achievement of the higher degree of the stabilization between the state and the Church rather than by the legislation creates for the society a greater sense of security in a public life. The conclusion of the Concordat caused that the legal situation of the Church and faithful does not depend on the interests of the political parties.

The Catholic Church in Poland by its moral authority – regardless of the interests of the political parties – supports the democratic state in the activities aimed at the protection of the fundamental human values. The Concordat is more effective than a law in realization of the constitutional principle of cooperation between the Church and the state „for the welfare of human being and the common good” in various personal, family and national areas of life.

The Polish Concordat as other contemporary concordats – with respect to the object of its regulation – is one of the international agreements called „social agreements”. They regulate the relations between the Holy See and the supreme authorities of the given state as the subjects of the public international law as well as the relations between the authorities of the state and the citizens from the protection of human rights point of view. The regulations in the Concordat are the detailed regulations of the Constitution of the Republic of Poland and the ratified by Poland the multilateral international agreements concerning the protection of human rights and fundamental freedoms.

Title

The Concordat between the Holy See and the Republic of Poland (1993-1998). Main Questions of the Normalization of the Relations between the Catholic Church and the Polish State after the Collapse of Communism.

Summary

The article contains the explication of the very important questions respecting the normalization of relations between the democratic Poland and the Catholic Church using the international agreement between the Holy See and the supreme authority of Polish State, called „concordat”. This event is considered in the historical context of political transformations from the communist totalitarian regime to liberal democracy and at the same time from atheistic state based on the hostile separation to the secular one based on the friendly separation. It complains the following issues: 1) notion and classification of concordats, 2) axiological and formal dimension of its conclusion between the Holy See and Poland (1993-1998), 3) compliance Concordat's with the Constitution of Poland, 4) the stabilization function of Concordat, 5) financial clauses.

Key words: Holy See, Polish State, concordat, Constitution, Church-State relations.

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**La costituzione e l'applicazione delle pene canoniche
negli Istituti Religiosi clericali di diritto pontificio
secondo CIC 1983**

Introduzione

Il presente articolo viene concentrato su alcuni aspetti connessi con la problematica riguardante la potestà penale che può essere esercitata negli Istituti Religiosi clericali di diritto pontificio. In primo luogo si tratta della potestà comune a tutti gli Istituti di Vita Consacrata per la professione dei Consigli Evangelici. In seguito sarà presentata la problematica riguardante la potestà ecclesiastica di governo esistente in alcuni di essi. Infine, si cercherà di analizzare alcuni aspetti connessi all'esercizio della potestà degli Istituti Religiosi clericali di diritto pontificio.

**1. La potestà comune a tutti gli Istituti di Vita Consacrata per la
professione dei Consigli Evangelici**

Come possiamo leggere nel can. 596 § 1 del Codice del 1983, il governo interno, specifico, esistente in tutti gli Istituti¹, si divide in due categorie: personale e collegiale. La prima è esercitata attraverso l'autorità personale dei Superiori, invece la seconda tramite i Capitoli. Secondo il canone, la potestà dei Superiori e dei Capitoli viene definita o determinata dal diritto universale e dalle costituzioni. Nella legislazione attuale, però, non c'è un termine tipico per indicare la potestà comune degli Istituti di vita consacrata, della quale si parla nel paragrafo 1 del can 596; anzi, il Codice del 1983 omette espressamente il termine *potestà dominativa* che si trovava nel Codice precedente. Con il termine *potestà dominativa* veniva denominato quel potere di comandare, ordinare e dirigere che, prescindendo dal voto di obbedienza,

¹ Il can. 596 è uno dei canoni che si trovano tra le norme comuni per tutti gli Istituti di vita consacrata, e quindi può essere riferito sia agli Istituti religiosi, che agli Istituti secolari, cfr. P. Marcuzzi, *Considerazioni sulla natura della potestà degli Istituti di vita consacrata*, Salesianum 46 (1984), p. 773.

avevano tutti i Superiori religiosi. La suddetta potestà era distinta chiaramente dalla potestà di giurisdizione, con la quale si governava la Chiesa e che comprendeva le tre funzioni dell'autorità: quella legislativa, giudiziale ed esecutiva². Nonostante questa chiara distinzione, il Codice del 1917 non risolveva il problema dell'origine e della natura della *potestà dominativa*³.

La potestà comune degli Istituti si basa sul doppio fondamento: da una parte sull'accordo di soggezione dei membri, assunto con la professione del voto di obbedienza, e dall'altra parte sulla natura degli Istituti⁴. A proposito del primo fondamento, nel decreto *Perfectae caritatis* possiamo leggere: „I religiosi con la professione di obbedienza offrono a Dio la piena dedizione della propria volontà come sacrificio di se stessi (...), i religiosi, mossi dallo Spirito Santo, si sottomettono nella fede ai superiori, che fanno le veci di Dio”⁵. Nella professione di obbedienza, con la quale avviene la soggezione ai Superiori, troviamo allora il primo fondamento della potestà comune di tutti gli Istituti. Ma la potestà comune di tutti gli Istituti non proviene solamente dalla volontà naturale dei membri dell'Istituto e neanche solo dal loro voto di obbedienza. La riduzione della fonte della potestà solo a un voto di obbedienza dei membri, non garantisce la base e l'ampiezza della potestà che si esercita nella Chiesa. Il voto non può dare ai Superiori di un Istituto tutte le competenze riguardanti istituzione, organizzazione, missione, lavoro apostolico, beni temporali⁶. La potestà comune di tutti gli Istituti è data ad ogni Superiore e ai Capitoli dallo Spirito del Signore in connessione con la gerarchia, che ha canonicamente eretto l'Istituto e autenticamente approvato la sua missione. Come infatti risulta dalle *Nomrae Mutuae Relationes*: „Superiores munus suum serviendi et dirigendi explent intra religiosum Institutum secundum propriam ipsius indolem. Eorum autem auctoritas a Spiritu Domini procedit in conexione cum sacra Hierarchia, quae canonicè Institutum erexit eiusque specialem missionem authentice approbavit”⁷. A proposito dell'origine della potestà degli Istituti di vita consacrata, già prima del documento *Mutuae Relationes*, il Papa Pio XII, nel discorso ai Superiori

² Cfr. A. Tabera, *Il diritto dei religiosi*, Roma 1961, p. 84.

³ Cfr. S.M. Ragazzini, *La potestà nella Chiesa*, Roma 1963, p. 245-285; J.L. Gutiérrez, *Dalla potestà dominativa alla giurisdizione*, *Ephemerides Iuris Canonici* 39 (1983), p. 79-82.

⁴ Cfr. D.J. Andrés, *Il diritto dei religiosi*, Roma 1996, p. 41.

⁵ Concilio Vaticano II, Decreto sul rinnovamento della vita religiosa, *Perfectae Caritatis* n. 14, in: *Enchiridion Vaticanum* 1, Documenti ufficiali del Concilio Vaticano II (1962-1965), Bologna 1997, 1/746.

⁶ Cfr. J. Beyer, *Il diritto della vita consacrata*, Milano 1989, p. 123.

⁷ Sacra Congregatio pro Religiosis et Institutis Saecularibus, *Normae, Mutuae Relationes*, 14 maii 1978, n. 13, *AAS* 70 (1978), p. 481.

generali, ha detto: “In hac igitur parte Nostri muneris, vobis, dilectissimi Filii, sive recto tramite, aliquid vobis per Codicem Iuris delegantes Nostrae supremae iurisdictionis, sive per ipsa Nobis probata Regulas et Instituta vestra illius potestatis vestrae, quam *dominativam* appellant, fundamenta ponentes, vos socios Nostri supremi officii assumpsimus. Hinc fit ut Nostra plurimum intersit, ut ad mentem Nostram et Ecclesiae hanc vestram auctoritatem exerceatis”⁸. Secondo il Papa Pio XII la potestà dei Superiori è concessa dalla gerarchia, la quale viene considerata come l’unica fonte della potestà di giurisdizione⁹. Gli Istituti di vita consacrata, in ragione dell’attività che realizzano nella Chiesa, acquistano la natura pubblica, cioè sono persone giuridiche pubbliche, a norma dei cann. 634 § 1 e 116, le quali agiscono a nome della Chiesa e in vista del suo bene pubblico. Perciò il potere di tutti gli Istituti non è di natura privata, ma pubblica, e come tale può essere denominato come ecclesiastico, perché, come afferma il can. 618, è dato da Dio mediante il ministero della Chiesa ed è collegato ad un ufficio ecclesiastico, secondo la normativa del can. 145 § 1. In favore del carattere pubblico di tale potestà è il fatto che il paragrafo 3 del can. 596 applica alla potestà comune degli Istituti i vari canoni riguardanti la potestà di governo.

I soggetti attivi di questa potestà comune possono, in conformità con le proprie competenze, secondo quello che è stabilito nelle costituzioni e nel diritto universale, dare norme, dirimere controversie e provvedere alle attività dell’Istituto e dei membri, disponendo e decidendo quanto è necessario a questo fine. Allora la potestà concessa a tutti gli Istituti di vita consacrata dal can. 596 § 1 è di carattere pubblico. Tuttavia questa potestà viene ricevuta ed esercitata entro i limiti determinati dal § 3 dello stesso canone. Secondo alcuni autori, nel can. 596 §§ 1-2 si tratta di una sola potestà - la potestà ecclesiastica di governo - però concessa in modo quantitativamente diverso¹⁰. Non mancano, però, autori secondo i quali la distinzione tra queste due potestà è essenziale, qualitativa, il cui fondamento diversificante è l’ordine sacro. Questa distinzione viene poi sottolineata dal fatto che il canone parla delle due potestà in due diversi paragrafi, come pure dall’aggiunta della parola

⁸ Pio XII, Alloc. *Moderatoribus Generalibus Religiosorum Ordinum ac Sodalitatum in Urbe exstantibus*, 11 februarii 1958, AAS 50 (1958), p. 154.

⁹ Cfr. A. Montan. *Gli Istituti di vita consacrata e le Società di vita apostolica*, in: *Il diritto nel mistero della Chiesa*, vol. 2, Roma 1990, p. 235.

¹⁰ Cfr. J.L. Gutiérrez, op.cit., p. 102-103; A. Boni, *Gli istituti religiosi e la loro potestà di governo (c. 607/c. 596)*, Roma 1989, p. 499; G. Ghirlanda, *De natura, origine et exercitio potestatis iuxta novum Codicem*, Periodica 74 (1985), p. 143-149; F. Iannone, *Il capitolo generale. Saggio storico-giuridico*, Roma 1988, p. 141. B. Senofonte, *La „potestas” negli Istituti di vita consacrata*, *Monitore Ecclesiastico* 117 (1992), p. 313.

insuper; con ciò si afferma che la potestà ecclesiastica di governo si aggiunge alla potestà comune di tutti gli Istituti di vita consacrata¹¹.

2. La potestà di governo degli Istituti Religiosi clericali di diritto pontificio

Secondo il can. 596 § 2, godono della potestà di governo solo i Superiori e i Capitoli degli Istituti religiosi clericali di diritto pontificio. Tale potestà è estesa anche alle Società di vita apostolica clericali di diritto pontificio a norma del can. 732. I Superiori e i Capitoli dei suddetti Istituti, secondo la normativa vigente, possono usufruire della doppia potestà: quella generale, comune a tutti gli Istituti, e quella di governo - sia per il foro esterno che per il foro interno. Ma questi Istituti devono realizzare prima la doppia condizione: essere clericali, a norma del can. 588 § 2 ed essere di diritto pontificio, secondo il can. 589¹².

Possiamo definire il potere, di cui nel paragrafo 2 del can. 596, come la potestà ecclesiastica pubblica di giurisdizione, e questa potestà esiste nella Chiesa per la divina costituzione, che compete ai Superiori degli Istituti clericali di diritto pontificio, con la finalità di governare i propri sudditi al fine di realizzare lo scopo soprannaturale della Chiesa e lo scopo proprio dell'Istituto. Essa, la potestà di governo deriva, oltre da quello che si è detto per il § 1, dalla doppia sorgente: dell'istituzione divina e dell'ordine sacro, il quale, secondo il can. 129, abilita ad essa¹³. Sulla distinzione tra la potestà comune di tutti gli Istituti e la potestà di governo, ricevuta ed esercitata in modo pieno in alcuni di essi, si riflette allora la distinzione tra sacerdozio comune e sacerdozio gerarchico¹⁴. L'ampiezza e il contenuto di questa potestà devono essere stabiliti dal diritto universale e nelle Costituzioni proprie di ogni Istituto. Gli Istituti, che in forza del Codice, godono del

¹¹ Cfr. P. Marcuzzi, op.cit., p. 782; E. Gambari, *I religiosi nel Codice*, Milano 1986, p. 77-78; A. Celegghin, *Sacra Potestas: Quaestio post-Conciliaris*, Periodica 74 (1985), p. 223-225.

¹² Cfr. M. Stokłosa, *La figura del superiore provinciale nel nuovo Codice di Diritto Canonico e nel diritto proprio della Congregazione dei sacerdoti del Sacro Cuore di Gesù*, Roma 2007, p. 412.

¹³ Cfr. D.J. Andrés, op.cit., p. 41-42.

¹⁴ „Sacerdos quidem ministerialis, potestate sacra qua gaudet, populum sacerdotalem efformat ac regit, sacrificium eucharisticum in persona Christi conficit illudque nomine totius populi Deo offert; fideles vero, vi regalis sui sacerdotii, in oblationem Eucharistiae concurrunt, illudque in sacramentis suscipiendis, in oratione et gratiarum actione, testimonio vitae sanctae, abnegatione et actuosa caritate exercent”, Concilio Vaticano II, Const. Dog. de Ecclesia *Lumen Gentium* n. 10, w: Enchiridion Vaticanum 1, Documenti ufficiali del Concilio Vaticano II (1962-1965), Bologna 1997, 1/312.

potere di governo, dovranno, nelle loro Costituzioni, determinare a quali Superiori¹⁵ e Capitoli spetta tale potestà e le varie funzioni o atti in esse contenute, tenendo però sempre presenti le norme del diritto universale¹⁶. Normalmente si ammette che i Capitoli generali¹⁷ e i Moderatori supremi degli Istituti in questione hanno la facoltà di emanare decreti generali aventi valore di leggi, oppure precetti singolari per tutto l'Istituto. Per quanto riguarda, però, la potestà dei Moderatori supremi di fare le norme con forza di leggi essi avrebbero tale potestà solo se avessero ricevuto prima un mandato dal Capitolo generale¹⁸.

Detta potestà di governo compete ai Superiori e ai Capitoli per il foro interno ed esterno. Nel primo caso, il potere si estende alla potestà di assolvere i peccati, di assolvere da certe censure, in primo luogo stabilite dal diritto proprio degli Istituti. Invece riguardo al foro esterno, esso è previsto per gli atti e con gli effetti giuridici rilevati nell'ordinamento pubblico della Chiesa. Così, per esempio, i Superiori maggiori degli Istituti religiosi clericali di diritto pontificio, sulla base della potestà concessa loro dai cann. 596 § 2; 134 § 1, come pure dal can. 1427, dove si concede ai suddetti Istituti la facoltà di avere i propri tribunali, sono titolari della potestà di giudicare sia persone fisiche che giuridiche dello stesso Istituto¹⁹. La potestà giudiziale di questi tribunali è di ambito generale, e comprende le azioni contenziose e le azioni criminali. Per quanto riguarda le azioni contenziose, questi tribunali possono giudicare soltanto quelle che sorgono "inter religiosos vel domos eiusdem instituti religiosi clericalis iuris pontificii"²⁰.

Si possono distinguere come altre competenze dei Superiori di un Istituto clericale: l'ammissione nell'Istituto, l'ammissione ai ministeri istituiti e agli ordini sacri, la facoltà di dare le lettere dimissorie necessarie per l'ordinazione o di fare

¹⁵ È importante ricordare, che il can. 134 nel § 1 identifica come Ordinari solo i Superiori maggiori degli Istituti religiosi di diritto pontificio clericali e delle Società di vita apostolica di diritto pontificio clericali, e perciò la potestà propria ad essi non spetta agli altri Superiori. Cfr. J. Krukowski – R. Sobański, *Komentarz do Kodeksu Prawa Kanonicznego. Tom I, Księga I Normy Ogólne*, Poznań, 2003, p. 219-220; V. De Paolis – A. D'Auria, *Le Norme Generali. Commento al Codice di Diritto Canonico. Libro Primo*, Città del Vaticano 2008, s. 433-435.

¹⁶ Cfr. M. Stokłosa, *op.cit.*, p. 412-455.

¹⁷ „Questo potere di legislatore mediante norme universalmente vincolanti, nell'ambito interno del IVCR, è esclusivo del capitolo, di fronte a tutte le altre assemblee previste dal diritto proprio, la cui natura è essenzialmente consultiva, informativa, animatrice”, D.J. Andrés, *op.cit.*, p. 173.

¹⁸ Cfr. J. García Martín, *Le norme generali del Codex Iuris Canonici*, Roma 1995, p. 53; V. De Paolis, *De sanctionibus in Ecclesia. Adnotationes in Codicem: Liber VI.*, Romae 1986, p. 52-53.

¹⁹ „Tribunalia religiosa sunt hodie constituta pro solis personis, physicis vel iuridicis, eiusdem Instituti religiosi”, J. Ochoa, *Ordinatio tribunalium religiosorum iuxta vigentem disciplinam*, Commentarium pro Religiosis et Missionariis 64 (1983), p. 135. Cfr. J. Ochoa, *I processi canonici in generale*, Apollinaris 57 (1984), p. 208; J.M. Arroba Conde, *Diritto processuale canonico*, Roma 1994, p. 139-141.

²⁰ CIC/1983, can. 1427 § 1.

nomine ecclesiastiche in accordo con l'ordinario del luogo interessato²¹. Naturalmente non sempre sarà facile dire se i vari atti realizzati dai Superiori nascono dalla potestà comune a tutti gli Istituti oppure dalla potestà di giurisdizione.

3. La costituzione e l'applicazione delle pene canoniche negli Istituti Religiosi clericali di diritto pontificio

Il diritto penale nella Chiesa, del quale si tratta nel Libro VI del Codice attuale, si riferisce anche ai religiosi come a tutti i fedeli, chierici e laici come soggetti attivi o passivi delle sanzioni. In modo particolare le sanzioni interessano tutti i Superiori degli Istituti religiosi clericali di diritto pontificio e delle Società di vita apostolica clericali di diritto pontificio, perché essi, in forza della potestà di governo che spetta loro, anche in foro esterno, possono costituire e infliggere sanzioni penali²². Tra le varie sanzioni, che possono essere costituite e applicate, possiamo indicare le seguenti: la privazione, per un periodo determinato, della voce attiva e passiva; la privazione di tutte o alcune funzioni esercitate nell'Istituto; il trasferimento, *in poenam*, da una casa ad un'altra dello stesso Istituto; il divieto di assentarsi dalla casa religiosa; la limitazione della corrispondenza; il dovere di fare il ritiro spirituale; il dovere di superare gli esami nelle materie riguardanti la vita religiosa e i documenti della Chiesa; la privazione del diritto di portare l'abito religioso²³.

Secondo il can. 1315 il Superiore che ha la potestà legislativa può emanare leggi penali nell'ambito della sua competenza o territoriale o personale. Questo Superiore può anche sancire, attraverso una legge penale, sia le leggi emanate da lui stesso, sia quelle emanate da un qualsiasi altro legislatore ecclesiastico, o le stesse leggi divine, purché la loro violazione implichi, in quel territorio o per quelle persone, una gravità o uno scandalo particolare. La possibilità della legge particolare di aggiungere una nuova pena a quella stabilita già dalla legge universale, può essere giustificata soltanto da una gravissima necessità. In conformità con quello che abbiamo detto nel punto precedente, in pratica, si tratterebbe solo del Capitolo generale degli Istituti

²¹ J. Beyer, *op.cit.*, p. 132-133.

²² Cfr. V. De Paolis, *De sanctionibus in Ecclesia...*, p. 52-53.

²³ Cfr. J. Kałowski, *Życie braterskie we wspólnotcie*, Warszawa 1999, p. 257; M. Stokłosa, *op.cit.*, p. 445-455.

religiosi clericali di diritto pontificio e delle Società di vita apostolica clericali di diritto pontificio come l'autore delle leggi penali per tutto l'Istituto²⁴.

Il can. 1319 tratta della potestà di emanare i precetti da parte di quel Superiore che abbia la potestà di governo in funzione amministrativa nel foro esterno²⁵. Il paragrafo primo esclude la possibilità di dare, attraverso il precetto penale, pene espiatorie perpetue, perché la condizione di perpetuità rende le pene particolarmente gravose, e per la loro inflizione sono richiesti alcuni requisiti preliminari. Per analogia, nel paragrafo secondo, viene esclusa, rinviando al can. 1317, la possibilità di dimissione dallo stato clericale²⁶. Come soggetti attivi, che hanno la facoltà di comminare con un precetto le pene determinate, possiamo riconoscere i seguenti: i Capitoli generali degli Istituti religiosi clericali di diritto pontificio e della Società di vita apostolica clericali di diritto pontificio e i loro rispettivi Superiori maggiori. Per quel che riguarda, invece, i Superiori locali degli Istituti di vita consacrata clericali di diritto pontificio, si può dire che anch'essi, avendo la potestà di governo esecutiva in foro esterno²⁷, possono imporre precetti penali. Certamente tale facoltà trova delle limitazioni nelle costituzioni proprie di ogni Istituto come pure nel diritto universale²⁸.

Gli Istituti religiosi clericali di diritto pontificio, avendo la potestà ecclesiastica di governo e in forza del can. 1427, possono avere tribunali propri per i loro sudditi. La competenza di questi tribunali in materia penale riguarda la possibilità di giudicare le cause in cui si tratta di delitti commessi dalle persone fisiche o giuridiche religiose, membri del proprio Istituto. Così i tribunali religiosi, avendo la giurisdizione, potrebbero fare i processi giudiziari penali di dimissione dallo stato clericale dei propri membri²⁹. Si deve annotare che la dimissione dallo stato clericale di un religioso chierico, non significa contemporaneamente la dimissione dallo stato di vita consacrata, per la quale ci vuole un'altra procedura ben determinata, però non

²⁴ Cfr. A. Calabrese, *Diritto penale canonico*, Città del Vaticano 1996, p. 14; F. Iannone, *Potestà del Capitolo Generale*, *Commentarium pro Religiosis et Missionariis* 67 (1987), p. 243-244; J. Stryjczyk, *Sankcje w Kościele. Część ogólna. Komentarz*, Warszawa 2008, p. 76-80.

²⁵ Cfr. J. Stryjczyk, *op.cit.*, p. 87-94.

²⁶ Cfr. CIC/1983, can. 1342 § 2.

²⁷ CIC/1983, can. 596 § 2.

²⁸ Per esempio, a norma del can. 1341 solo Ordinario può avviare la procedura giudiziale o amministrativa per infliggere o dichiarare la pena. Ma il Superiore locale non essendo Ordinario non avrebbe la potestà di fare osservare il precetto da lui dato. Su questo argomento discutevano anche i commentatori del Codice precedente, cfr. G. Michiels, *De delictis et poenis: Commentarius libri V Codicis Iuris Canonici*, vol. 2, *De poenis in genere: Canones 2214-2240*, Paris-Tournai-Romae-New York 1961, p. 150.

²⁹ Cfr. CIC/1983, can. 1425 § 1, n. 2.

giudiziale³⁰. Gli altri esempi di esercizio del potere penale in via giudiziale riguarda le pene previste, per esempio: per abuso e preferenza di persone nelle nomine ed elezioni³¹; contro i Superiori che non compiono il dovere di residenza³²; contro i trasgressori della normativa sulla alienazione³³; contro i trasgressori della norma sull'astensione da ciò che è indecoroso ed alieno al proprio stato³⁴; contro i trasgressori della norma sull'attività affaristica o il commercio³⁵.

Non possiedono la potestà di governo né gli Istituti religiosi laicali, né gli Istituti secolari, anche se clericali e di diritto pontificio, né quelli clericali di diritto diocesano. A tutti questi Istituti spetta soltanto la potestà comune, secondo la portata del can. 596 § 1. Non si può negare, però, che ognuno di questi Istituti può emanare statuti e norme in generale, e norme penali in particolare, può modificarle, se non sono state approvate da una autorità esterna superiore, e interpretarle, almeno con interpretazioni dichiarative. L'Istituto ha il potere di fare eseguire le suddette norme e di applicarle; inoltre di dirimere le controversie, infliggere le punizioni o di avviare le procedure per l'esclusura imposta o la dimissione dall'Istituto³⁶.

Riassumendo, possiamo dire che tutti gli Istituti di vita consacrata, in ragione dell'attività che svolgono nella Chiesa, fanno parte della sua missione, sono persone giuridiche e godono di una certa potestà di carattere pubblico per poter conseguire il proprio fine. Va sottolineato il fatto che solo gli Istituti religiosi clericali di diritto pontificio e le Società di vita apostolica clericali di diritto pontificio godono della potestà ecclesiastica di governo, della quale la potestà coercitiva è un aspetto. I rispettivi Superiori e i Capitoli di detti Istituti potrebbero emanare le leggi penali, oppure, in forza della potestà esecutiva, comminare, con un precetto, le pene determinate, eccetto quelle perpetue. Nell'ambito di questa potestà esecutiva hanno ancora la facoltà di far eseguire le pene già inflitte o dichiarate. Avendo invece la facoltà di costituire i propri tribunali, possono giudicare non solo le controversie contenziose sorte tra le persone fisiche o giuridiche dello stesso Istituto, ma anche giudicare le cause che riguardano i delitti commessi dai membri dello stesso Istituto.

³⁰ Cfr. CIC/1983, cann. 694-704.

³¹ Cfr. CIC/1983, cann. 626, 1399.

³² Cfr. CIC/1983, cann. 629, 1396.

³³ Cfr. CIC/1983, cann. 638, 1377.

³⁴ Cfr. CIC/1983, cann. 285, 672, 1399.

³⁵ Cfr. CIC/1983, cann. 286, 1392.

³⁶ Cfr. A. Calabrese, *op.cit.*, p. 15. Per quanto riguarda la procedura per la dimissione dall'Istituto va sottolineato il fatto che qui si tratta di una procedura speciale al di fuori dell'ambito giudiziale e penale. E non può neanche essere determinata come un processo amministrativo (can. 1732), cfr. V. De Paolis, *La vita consacrata nella Chiesa*, Bologna 1992, p. 383.

Conclusione

La pena rimane sempre un male, perché con essa il reo viene privato dei diritti e della libertà che gli appartengono in forza del suo stato di fedele, o per la sua particolare posizione giuridica nella Chiesa. Per questo motivo la Chiesa non ricorre troppo facilmente al potere penale e all'applicazione della pena, ma tende sempre a recuperare la persona alla propria vocazione. Si cerca dapprima una soluzione dei problemi piuttosto attraverso altri mezzi, detti di sollecitudine pastorale, che mediante le sanzioni penali. Però la Chiesa non può non tenere presente la necessità della fedeltà ai doveri che un fedele ha nei confronti sia di Dio che della Chiesa. Qualora gli altri mezzi non fossero sufficienti per garantire l'osservanza della disciplina ecclesiastica, la Chiesa riconosce il suo diritto di ricorrere al potere coattivo. L'applicazione delle pene spetta all'autorità competente, che può iniziare la procedura per irrogazione o dichiarazione della pena solo se è consapevole che non c'è altra via, cioè quando attraverso i detti mezzi pastorali non è riuscita a ottenere la triplice finalità: dell'emendamento del reo, dell'eliminazione dello scandalo e del ristabilimento della giustizia.

Tutti gli Istituti di vita consacrata in ragione dell'attività che svolgono nella Chiesa, fanno parte della sua missione, sono persone giuridiche e godono di una certa potestà di carattere pubblico per poter conseguire il proprio fine. Va sottolineato, però, il fatto che solo gli Istituti religiosi clericali di diritto pontificio e le Società di vita apostolica clericali di diritto pontificio godono della potestà ecclesiastica di governo, della quale la potestà coercitiva è un aspetto. I rispettivi Superiori e i Capitoli di detti Istituti potrebbero emanare le leggi penali, oppure, in forza della potestà esecutiva, comminare, con un precetto, le pene determinate, eccetto quelle perpetue. Nell'ambito di questa potestà esecutiva, hanno ancora la facoltà di far eseguire le pene già inflitte o dichiarate oppure avviare la procedura per infliggere o dichiarare la pena. Grazie alla facoltà di costituire i propri tribunali possono giudicare, non solo le controversie contenute sorte tra le persone fisiche o giuridiche dello stesso Istituto, ma anche le cause che riguardano i delitti commessi dai membri dello stesso Istituto.

Title

La costituzione e l'applicazione delle pene canoniche negli Istituti Religiosi clericali di diritto pontificio secondo CIC 1983

Summary

The present article focuses on various aspects of execution of ecclesiastical penal authority in clerical Religious Institutes on pontifical law. Firstly, the issues of authority common to all the Institutes of Consecrated Life are discussed. Secondly, the problems connected with the exercise of government authority in the above mentioned institutes are presented. Finally, the analysis of some chosen aspects of executing ecclesiastical penal authority in clerical Religious Institutes on pontifical law follows.

Key words: ecclesiastical penal authority, establishing of penalties, application of penalties.

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