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The New Penal Canon Law – Future Prospects in the Time of Crisis

[Nowe kanoniczne prawo karne – perspektywy na przyszłość w czasach kryzysu]

Streszczenie: Przestępstwa związane z nadużyciami wobec najsłabszych członków Kościoła stały się przyczyną jednego z najpoważniejszych kryzysów w jego historii. Wśród różnych działań podejmowanych w celu przezwyciężenia sytuacji kryzysowych istotne miejsce zajmuje nowelizacja księgi kodeksowej zawierającej przepisy kanonicznego prawa karnego. W artykule podjęto badania znowelizowanego prawa w świetle nadziei i oczekiwań wiernych. Reforma wyznaczyła kierunek, ku któremu będzie zmierzać wspólnota, stanowiąc i stosując prawo jako instrument eliminowania nadużyć i przywracania sprawiedliwości.

Summary: Crimes related to abuse of the weakest members of the Church have caused one of the most serious crises in the history of the Church. Among the various actions taken to overcome crisis situations, an important role is played by the amendment of the code book containing the provisions of penal canon law. The article examines the amended law in the light of the hopes and expectations of the faithful. The reform set the direction towards which the community would move, establishing and applying the law as an instrument for eliminating abuse and restoring justice.

Słowa kluczowe: nadużycia, kryzys, nowelizacja kanonicznego prawa karnego, nadzieje i oczekiwania wiernych.

Keywords: abuse, crises, amendment of the penal canon law, hopes and expectations of the faithful.

Introduction

The amendment of the penal canon law raised hopes among the faithful and gave grounds for expecting that the disciplinary crisis in the

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Church would be overcome, if not in the near future, then in the coming decades. The provisions of Book VI should already be considered an important point of reference and a signpost for superiors who impose penalties and for all those responsible for the prevention and protection of minors and vulnerable persons (Arrieta J.I., 2021, p. 245–267; Boni G., 2022, p. 75). For this reason, an academic reflection on the reformed law in the light of the hopes and expectations of the faithful would seem justified. The codifications determine the direction towards which the community of the Church, which makes and applies the law, is heading.

In order to fully grasp the research topic, one ought to examine the book titles of two codifications containing the provisions of penal canon law: Book V of 1917 (Codex 1917 – CIC/1917) – *De delictis et poenis* and Book VI of 1983 (Codex 1983 – CIC/1983) – *De sanctionibus in Ecclesia*, and the title of the amended Book VI of 2021 (Liber VI 2021) – *De sanctionibus poenalibus in Ecclesia*. How the titles are drafted shows that the legislator in 1983 had created a disciplinary system, but at the expense of the power to punish itself. The title of the book does not include the concept of "penalty", but only the word "sanction". In 2021, probably largely to overcome the anti-juridical mentality and evident criminal problems in many local Churches, the concept of "penalty" was included in the title of the book, thus encouraging canonists to deepen its meaning in contemporary contexts. It should be emphasized that the problem of penalty, its concept, its aims, the typology of penalties and their types find an important place in the centuries-old canonical doctrine (Rees W., 1993). So, does the future of the Church involve punishing the faithful, especially clerics who have committed a crime? How to reconcile such an approach with the leading pastoral dimension of the conciliar documents? Will punishment be understood by the Church in the same way as the CIC/1917, or differently? The article aims to examine whether the amended penal law gives hope that the crisis in the Church may be overcome.

1. The next decades: a time of accelerated legislation

Asking about the future of penal canon law, we should think about what its enactment will look like in the coming decades? Can the provisions contained in Book VI be considered definitive and resolve the crisis defined by abuse and crime, the overcoming of which will ensure the effective protection of minors and vulnerable persons? Such an approach would be contrary to the principle known in law as *Lex seguitur vitam*. Positive law owes its existence to the will of the legislator, but it develops its meaning thanks to the community for which it is granted (Kroczek P., 2014, p. 169–170). The provisions of 1917 were considered a modern code

and an epochal work (Salinas Araneda C., 2008, p. 352–354). Over time, however, deficiencies caused by the passage of time and the social changes associated with it were noticed. The development of theological thought and changes in the Church and the world have prompted the Holy See to analyze the existing legal status and its functionality. Pope John XXIII understood that many new problems cannot be solved by means of partial amendments to laws, but that the entire code needed to be revised. After the Second Vatican Council the need to revise the code was a common belief (Pawluk T., 2015, p. 103–104). However, the new codification did not take place until 18 years after the closure of the Council.

Nowadays, reflections on the dynamics of law-making must refer directly to the life of the community, marked by evil done to the weakest. Luis Recaséns Siches (1959, p. 108) believed that norms are nothing more than "objectified human life" and that law is created by interpreting human life in society. Carlos Cossío (1987), on the other hand, advocated an "ecological concept of law", i.e. an understanding of law as "lived human life". Both concepts were reconciled by Antonio Martínez Blanco (1976, p. 394). The author stated that one of the most important dimensions of law is the need to "justify norms", and legal acts affecting social coexistence, in order to be legal and fair, must prove themselves in justice at a given historical moment[2]. This postulate puts the structure of society in order, because, as Javier Hervada (2015, p. 53–54) stated, the law also has such a task, and not only to regulate the behavior of an individual. The recognized canonist reminded that the law is commonly defined as *lex*, as an indicator or measure of social life. The author opposed the vision of restricting law to regulate activities.

Penal canon law regulates actions, prescriptions and procedures serve this purpose, but it must also be sensitive, and thus not indifferent to the conduct of the faithful – clergy and laity, criminals and victims – so that under the influence of "lived human life" it can be updated according to what should be "objectified". A reality that is regulated is constantly changing and evolving under the influence of many heterogeneous determinants. The legislator's knowledge must be update with the help of determinants of legislation. Nowadays, they affect the shape of legislation in various legal systems. Piotr Kroczek (2014, p. 169) listed the following determinants of legislation for various legal systems: sociological, cultural, economic, geographical, demographic, philosophical, theological, religious, civil legal and political, technical. Among the above-mentioned factors, in terms of their impact on the change of penal law, the following should be distinguished: sociological, cultural and theological. Pope Francis noted that in the context of rapid social changes "we are experiencing

[2] The English translation is ours.

not simply an epoch of changes but an epochal change" (Francis, 2022). The analysis of social phenomena connected with the phenomenon of sexual abuse in the Church and other disturbing phenomena led his predecessor – Benedict XVI – to a similar reflection, which John XXIII had considered some years ago: many new problems cannot be solved by amending individual ecclesiastical laws (Freije, R.F., 2019). The entire Book VI was modified during the next pontificate. Although it was not an update of the entire code, the reform of the entire book was unprecedented and follows the logic of revising laws that no longer solve problems.

Future amendments, perhaps even new codification, will take place at a much faster pace due to the "epochal change" characterized by the speed of social and cultural shifts. While the two codifications are 66 years apart, CIC/83 and the 2021 amendment to Book VI are almost half as many. Between the idea of reforming the CIC/17 and the promulgation of CIC/83, three popes held their pontificate, while two popes held office between the idea of the reform of Book VI CIC/83 and its amendment in 2021. In the future, the universal legislator will update its knowledge about "human life" much faster determinants of legislation. The speed of change concerns not only the social dimension, but also the cultural one. The main direction of transformations in penal matters should be defined as overcoming the phenomenon of clericalism, which penetrated the structures of the Church as negligence in the exercise of the power of punishment, and sometimes also in terms of issuing laws (Arrieta J.I., 2010, p. 433). In the past, clerical culture has manifested itself in the elimination of punishment as an instrument for restoring justice and reparation. Clerical attitudes were conducive to granting "immunity" to clergy, who had to be justly punished for the crime they had committed. In the future, such "immunity" will not be possible.

The future should bring a decisive acceleration of theological reflection, so that it would give an even more effective impulse in creating a system of protection of minors and vulnerable persons. The document of the Pontifical Biblical Commission recalls the words of the prophet Isaiah: "Learn to do right; seek justice. Defend the oppressed. Take up the cause of the fatherless; plead the case of the widow" (Isaiah 1:17) (Pontifical Biblical Commission 2014, no. 72). The prophet mentions three groups of the weakest members of the community at that time. In all cases, the fate of the oppressed depended on those in power. Whereas, in the apostolic letter *Ad theologiam promovendam,* Francis stated that theology in the future should become "fundamentally contextual", that is, the point of crystallization of the identity of theology should be the living word of God read in faith here and now, each time in a particular situation of life, in a particular culture (Francis 2023, no. 4). In addition, theology should

be practiced by the "inductive method" (Francis 2023, no. 8). Thus, the Holy Father rejected deduction, that is, thinking beginning with doctrine, norm, abstraction. Penal canon law will in the future be created and used as an instrument sustained by a contextual theology based on the word of God and on the present situation of the Church, wounded by abuse against the weakest.

The first symptom of the expectation described above is the momentous change made in Book VI. Offences *contra sextum cum minore* have been moved from the title about offences against the exercise of duties to Part II, Title VI: *Offences against human life, dignity and liberty*. The legislator, under the influence of theological and philosophical reflection, definitively decided that the dignity of the wronged person is in the foreground, and not the failure to comply with the disciplinary duty. Future laws will strengthen the legal protection of the victim, because "closeness to victims of abuse is no abstract concept, but a very concrete reality". "Closeness" in the Pope's intention is comprised of listening, intervening, preventing and assisting (Francis 2024). Future amendments to the laws should depend on the normative effectiveness in achieving the above objectives.

2. From an anti-juridical to an integrated mentality

Overcoming the crisis caused by sexual abuse should be considered one of the most important goals to be achieved in the future by penal canon law. This corresponds to the hopes and expectations of the community of the faithful. Firstly, structures and institutions should be examined critically, and the reform of Book VI is an important step in this direction. Secondly, overcoming the crisis is not possible without a critical revision of the mentality, which is fundamental for the functioning of structures, especially for the application of the law.

As already mentioned, the title of Book VI before the amendment did not contain the concept of "penalty", and the provisions contained in it were intended to create a disciplinary system. After the Second Vatican Council, it was suggested that "the idea of penal law should be abandoned [...], so as not to condemn the individual, but rather to indicate what types of conduct are contrary to the nature and mission of the ecclesial community" (Huizing P., 1967, p. 306–307)[3]. In an article by Peter Huizing from 1967, the way of thinking about law in the post-conciliar years can be seen as if through a lens. The author opposed the creation of law by officials detached from reality, juridically and laboratory, as an ineffective

[3] The English translation is ours.

instrument in restoring discipline in local Churches. Instead, he proposed a reflection on general principles and guidelines, which instead of precise regulations were to help maintain proper discipline. He frankly admitted that such an experiment requires a relatively long trial period to structure the system and organize the rules. Time has shown that the experiment failed. Juan Ignacio Arrieta pointed out that the anti-juridical mentality stood in the way of reconciling the requirements of pastoral charity with the requirements of justice and good governance. The author noted that some canons of the CIC/83 were interpreted as an encouragement not to use penalties, although justice required it (Arrieta J.I., 2010, p. 432).

In criticizing the anti-juridical mentality, one cannot ignore the fact that it was born, without going into details, from the shortcomings of the juridical mentality. So, can the legislator or the subject of authority in the Church applying the law choose between just two attitudes: juridical and anti-juridical? Is the anti-juridical mentality identical with the pastoral mentality? According to the new Book VI, the Ordinary has the duty to use penal law – understood not as a last resort, but as an ordinary and obligatory instrument within the framework of *caritas pastoralis* (CIC/83, can. 1717). A completely new canon 1311 § 2 is addressed directly to pastors. The superior in the Church "must safeguard and promote the good of the community itself and of each of Christ's faithful, through pastoral charity, example of life, advice and exhortation and, if necessary, also through the imposition or declaration of penalties". It should be noted that this last duty applies to superiors who are Ordinaries. The reformed Book VI thus reconciles law and pastorality. In other words, penal law plays an eminently pastoral function today, as it has done since the earliest times, but it would be wrong to say that the future of penal law is to link it to a pastoral mentality.

The expectations of the faithful regarding penal law can be met by promoting an integrated mentality. Otherwise, there is a danger of balancing between juridism and pastorality, which, as the past has shown, does more harm than good. The integrated mentality assumes, first of all, high quality laws, i.e. a professional legislative process. Therefore, greater specialization in the creation of laws is desirable. This requires both high legislative technique and theological reflection on the Church's pastoral activity. In the future, both the legislator and the canonists should critically reflect on the provisions that create doctrinal and practical problems. For example, in a preliminary investigation, according to the current regulations, a suspect may not be interrogated (see Dicastery for the Doctrine of the Faith 2022, no. 52). This generates specific problems. For instance, how to reconcile the requirement of thoroughness in collecting data during an investigation and the possibility of not questioning the accused? How to

determine the accountability of the alleged perpetrator without interaction between him and the person conducting the investigation? How to reconcile the obligation to protect the suspect's good name internally with the simultaneous failure to listen to what he has to say? etc.

In jurisprudence, there is an assumed division between a dogmatic (formal) and sociological (factual) legislator (Kroczek P., 2013, p. 309). In the case of the former, it is an entity to which the norm is officially assigned, while in the latter, it is an entity or a group of entities actually involved in the process of preparing a legal text. They have a real influence on the normative content. In the future, the role and significance of the sociological legislator should be strengthened, so that the shape of the law would be influenced by experts from various fields of knowledge (apart from canon law and theology, secular law, sociology, sexology, forensic psychiatry, psychology) and entities creating systems of protection for minors in the Church. In addition, the synodal feature of Pope Francis' pontificate urges a greater universality of the synodal model in lawmaking (see more Kroczek P., 2013, p. 312–313). This model is based on the cooperation of the members of the legislative body: the synod of bishops (CIC/83, can. 342–348) and the diocesan synod (CIC/83, can. 460–468). It is also necessary to consider the possibility of accepting laws created exogenously, i.e. in other legal systems. Sexual abuse is a social and global problem, which is why many systems create laws to prevent this phenomenon. The Church has already had positive experiences in such a reception in the field of administrative canon law.

In the Synthesis Report of the XVI Ordinary General Assembly of the Synod of Bishops (First Session, 4–29 October 2023), it was noted that many bishops face the difficulty of reconciling "the role of father with that of judge". It is suggested that the entrustment of the judicial task to another body should be considered as a matter for canonical clarification (XVI Ordinary General Assembly of the Synod of Bishops 2023, no. 12i). This type of postulate should not "shift" the obligation of punishment from the bishop to other subjects, because to pass judgment by bishops is "the sacred right and the duty before the Lord" (Second Vatican Council 1965, no. 27). The problem signaled concerns not so much the judicial process, but the extrajudicial process. The solution is the distinction already made when creating the law: the subject imposing punishment in the dogmatic sense and in the sociological sense. The Ordinary cannot be left to his own in administering penalty, although it is he who executes the juridical act assigned to him by virtue of law. The problem raised by the bishops arises from the burden of responsibility, which could be distributed among other subjects and thus not harm the father-son relationship between the bishop and the clergy.

3. A new hierarchy of penalty goals as a paradigm for the future

In the CIC/83 before the reform, the aims of penalty were defined by the legislator in only two canons: 1341 and 1347 § 2, and in the following order: to repair scandal, restore justice and reform the offender. After the amendment, the legislator expressed his opinion on this issue in as many as nine canons: 1311 § 2, 1335 §1; 1341; 1343; 1344; 1345; 1349; 1347 § 2; 1361 § 4. He did so for the first time in the first "programmatic" canon of Book VI. It is important to note the change in the hierarchy of goals: in all nine canons, the legislator placed the restoration of justice first, before reforming the offender and repairing scandal. Piotr Skonieczny (2021, 101) called this change "a program of renewed penal canon law", which will undoubtedly affect the future.

According to the statement of St. Thomas Aquinas, "bonum non indiget malo, sed e converso" (Thomas Aquinas 1961, lib. III, q. 146, n. 3). It is impossible to truly build the common good of the Church without reacting to the evil done to the victim of a canonical crime. In this way, its good is sacrificed by not delivering justice. Justice given to the victim is justice given to the whole community, even to those who are not directly affected by the situation of a specific crime. In this sense, it contributes to the building of the common good (Skonieczny P., 2021, p. 109). In the coming decades, canonists will reread and redefine – in the light of the classical doctrinal foundations – the assumptions adopted after the Second Vatican Council. This process has already begun and will continue for some years to come. Manuel J. Arroba Conde recalled a decade ago, in the spirit of the post-conciliar premises adopted in CIC/83 before the reform, that penal law is only one of the means of protecting the identity of the Church and realizing the common good. The meaning of its existence is explained by the salvific purpose proper to the canonical order. In the author's opinion, this is what caused the limitation of the number of penalties in the CIC/83, the frequent reference to indefinite penalties, the possibility of imposing penance in place of penalty, and the non-obligatory nature of the penal process (Arroba Conde M.J., 2013, p. 38–39). Interestingly, the eternal salvation of the offender, and consequently his conversion on this earth, as well as the protection of the common good, are referred to by Juan Arias and Juan Ignacio Arrieta in their commentary on the reformed Book VI, where the number of penalties is increased and the number of situations in which the penalty itself and the choice of its type are left to the discretion of the Ordinary is reduced. The authors emphasized that the penalty is to defend the fundamental legal interests of the Church (Arias J. and Arrieta J.I., 2022, p. 877).

The change in the hierarchy of goals will allow us to face the crisis in the Church more effectively. Geraldina Boni (2022, p. 30) noted that although the legislator prioritized the restoration of justice, this does not mean trivializing or diminishing the significance and harm caused by the scandal itself. The discovery of a crime has a negative impact on the People of God, weakens faith and breaks *communio*. The author added, as did Arias and Arrieta, that through the restoration of justice, the full protection of the fundamental legal interests of the Church is comprehensively fulfilled. This means that penal canon law is meant to protect the community. It is not an instrument that will effectively help the wronged person, but it is itself an instrument to restore order, credibility, trust and effectiveness in fulfilling the mission in the Church. We should beware of using the law as an instrument of revenge that the victim turns against the perpetrator, which unfortunately can be the case in the case of sexual crimes. In the whole penal law, the direction set by the reformers of CIC/1917 should be continued. They abandoned the term "vindicative penalties" in favor of "expiatory penalties" (Bernal 1998). This does not change the fact that the imposition of a just penalty in the legal order is an important element of reparation and therapy, and on these orders – spiritual and psychological – help for the victim should be based first and foremost. In the past, attempts were made at all costs to avert the scandal by instrumentally using prescriptions. Whereas overcoming the scandal is connected with the necessity of reparation as a meta-legal requirement, assuming the administration of penalty in the canonical order.

Conclusion

The revision of Book VI should be considered an important step towards overcoming the crisis of abuses in the Church. The legislator noticed that the community wounded by scandals is experiencing an "epochal change", which requires quick and effective actions taken now and in the future. Among them, based on the classical foundations of canon law, it is necessary to point out the exercise of the power of punishment by superiors. Penalty, however, cannot be understood in a formalistic and vindicative way, but must be placed within the framework of *caritas pastoralis*, using promulgated laws in order to solve problems quickly and efficiently.

The new hierarchy of the classic aims of penalty expresses the expectation that the "penalty of the future" will be an element of reparation, the restoration of justice, an instrument protecting the fundamental legal interests of the community. It will be imposed in accordance with laws promulgated on the basis of the legislator's constantly updated knowledge, affected by sociological, cultural and contextual theology factors.

Future amendments to laws should depend on normative effectiveness in overcoming crisis situations.

Penal canon law will fulfill a pastoral function in the future, but it should be independent of both pastoral and juridical mentality. The "law of the future" in its creation and application should be subject to an integrated mentality, which implies greater specialization in the creation of laws by strengthening the sociological legislator and appreciating the synodal model.

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