ACTA UNIVERSITATIS LODZIENSIS
FOLIA IURIDICA 108, 2024

https://doi.org/10.18778/0208-6069.108.06

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DIVINE LAW IN CANON 22 OF THE CODE OF CANON LAW

Abstract. Civil law norms may operate in the Church's legal order. Canon law refers to them as a general norm expressed in canon 22 of the Code of Canon Law. This phenomenon is referred to as the canonisation of civil law. The studies concerning this topic focus on the issues of the concept of canonisation and the technique of its application or practical problems arising from the general norm. The study addresses issues concerning the use of the reference to the divine law in canon 22 and its influence on the interpretation of the norm, the influence of the canonical norm on the understanding of the divine law, and the necessity of its citation in the text of the canon. The author believes that the subject of the just canonical norm (*norma iusta*) should be added to the existing considerations in canonical doctrine.

Keywords: divine law, civil law, canon 22 of the CCL, canonisation, just norm

PRAWO BOSKIE W KANONIE 22 KODEKSU PRAWA KANONICZNEGO

Streszczenie. W porządku prawnym Kościoła mogą funkcjonować normy prawa cywilnego. Prawo kanoniczne odsyła do nich stanowiąc normę ogólną wyrażoną w kan. 22 Kodeksu prawa kanonicznego. Zjawisko to określane jest jako kanonizacja prawa cywilnego. Opracowania dotyczące tej tematyki koncentrują się wokół zagadnień koncepcji kanonizacji i techniki jej stosowania czy problemów praktycznych wynikających z normy ogólnej. W opracowaniu zostały podjęte zagadnienia dotyczące zastosowania w kan. 22 odniesienia do prawa Bożego i jego wpływu na interpretację normy, wpływu normy kanonicznej na rozumienie prawa Bożego oraz konieczności jego przywołania w tekście kanonu. Autor uważa, że do dotychczasowych rozważań w doktrynie kanonistycznej należy dołączyć tematykę słusznej normy kanonicznej.

Słowa kluczowe: prawo Boże, prawo cywilne, kan. 22 KPK, kanonizacja, norma słuszna

1. INTRODUCTION

Since the advent of Christianity, its adherents have lived according to their faith in Christ and the laws they established. This fact was a source of unrest

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Received: 22.05.2024. Verified: 18.07.2024. Revised: 4.08.2024. Accepted: 5.08.2024.

on the part of the imperial power of the time and persecution, as was expressed by Galerius in the edict of toleration issued on 30th April, 311, in Nicomedia (Daniélou, Marrou 1986, 187). The emperor, stating that the Christians made their laws, which they obeyed, allowed them to practice their religion freely. He made it a condition, however, that they would not do anything against the order (Lactantius 1844, 249–250).[1] The Christians' way of life to date has been to remain faithful to Christ and loyal to the state by Christ's instruction to render to Caesar what belongs to Caesar, and God what belongs to God.[2] The dual obligation caused the followers of Christ to contribute to the sociopolitical dualism, the consequence of which was the dualism of the two legal orders: the Church and the state (Sobański 1994, 305). This dualism gave rise to all kinds of issues and problems in the area of state-Church relations, including those concerning law.

The presence of Christians in the world brings many aspects of life under the concern of both the Church and political communities, within the scope of their responsibilities, which should be respected as they contribute to the well-being of the people (Gaudium et Spes, n. 76). Independence, autonomy, and cooperation mean that the two legal systems do not compete. Ecclesiastical law does not seek to influence state law or compete with it. Instead, it aims to shape the legal awareness of Church members so they can fulfil their roles as citizens of a political community. Thus, the Church incorporates references to the law of these communities in its own laws, thus avoiding contradictions between ecclesiastical and secular laws and helping Christians navigate the political order (Jagodziński 2004, 356). The status of the faithful (*christifidelis*) coexists within the same person with the status of a citizen (*civis*), as realised within the state organisation (*status*). The subordination to the two legal orders, where the specific and separate tasks of the two communities do not come into play, brings with it the possibility of canon law agreeing with and accepting the requirements of the law of the civil community. A similar attitude is encountered in the case of the law of political communities, within which the phenomenon of the influence of canon law is indicated (Wolanin 2023, 27–30). The interaction of canon law and state law is, therefore, not merely a matter of historical background.

Canon law refers to civil law in various forms. However, this is not done without limitations. Canon 22 states that "civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law". The issues most often addressed in the so-called canonisation of state law revolve around the problems of practical consequences arising from normative provisions, to which many studies have been devoted. There are also numerous extensive

[1] "(…) ita sibimet leges facerent, quas observarent, et per diversa varios populos congregarent ut denuo sunt Christiani, et conventicula sua componant, ita ut ne quid contra disciplinam agant".

[2] Mt 22, 21.

studies on the concept and technique of the appeal of canon law to non-canonical legal orders (Ciprotti 1941; Cassola 1944; Miñambres 1992b; Boni 1996; Minelli 1996). These are outside the scope of the present reflections. In what follows, my attention will focus on three issues: (1) the influence of divine law on the interpretation of the canon; (2) divine law versus civil law; (3) the necessity and usefulness of the reference to divine law in canon 22. The above issues allow us to go beyond the frequent and "keyword" view of divine law as a limit for the reference by canon law to secular law.

2. DIVINE LAW (*IUS DIVINUM*) AND CIVIL LAW (*LEX CIVILIS*) IN CAN. 22

The phenomenon of the incorporation of civil law by canon law has a long tradition behind it. Until the first Code of Canon Law of 1917, the point of reference for canon law remained Roman law, which was regarded as a complementary source of law in matters concerning temporal affairs, especially in the field of property, to which ecclesiastical tribunals referred (Chiappetta 1988, 46; Dębiński 2008, 17–64). To a considerable extent, the norms of law functioned within the ecclesiastical order independently of their source, thus testifying to the interpenetration of both laws and giving an idea of the scale of the phenomenon (Sobański 1992, 25–33).

With the first Code of Canon Law, Roman law lost its role in favour of state law. In contrast to previous ecclesiastical practice, state law did not play the role of complementary law. Its usefulness was reduced to the individual solutions permitted by the individual canons of the code.[3] The possibility of referring to secular law was limited by divine law and canon law, with which state law could not conflict.

In the 1983 Code of Canon Law, the norm contained in canon 22 took on the character of a general norm referring to possible situations of reference to state law going beyond the area of contracts regulated by the previous code. The reference to other sources of law in the current legal order of the Church has become part of the ordinary legislative technique and the administration of justice insofar as state law is not contrary to divine law and canon law (Miñambres 1992b, 172).

In the quoted canon, the legislator refers to divine law as *ius divinum*. A similar formulation is found in several other canons.[4] In the Code, we also encounter the term *lex divina*.[5] The divine law, referred to as *ius divinum*, is used

[3] Individual canons addressed the issue of prescriptions (can. 1508), contracts (can. 1529), settlements (can. 1926), arbitration courts (can. 1930).

[4] Divine law in the sense of *ius* appears in canons: 22; 24 § 1; 1059; 1075 § 1; 1163 § 2; 1165 § 2; 1290; 1692 § 2.

[5] Canons: 98 § 2; 199; 748 § 1; 1249; 1315 § 1; 1399.

three times in opposition to state law.[6] An analysis of these norms, which refer to individual situations, does not indicate that state law, as a legal order in its entirety, is regarded as contrary to divine law (Sobański 1994, 309). The situation of contradiction can arise at the level of the particular law of the Church, which comes into contact with a particular legal order. In specific situations, individual normative provisions may, for the ecclesiastical legislator, be in conflict with divine law. For this reason, the legislator safeguards themselves by pointing to divine law as the limit of the possibility of referring to state law and complying with its provisions (Gałkowski 2023, 75).

Canonist terminology is quite free in using both Latin formulations referring to divine law. The canonist tradition of using the two formulations interchangeably occupies a privileged position regarding the precision and unambiguity of the content covered. The broader meaning of *lex*, which encompasses a wider range of behaviours beyond those of a merely legal nature,[7] proves the openness of canon law to extra-legal elements that motivate and evaluate actions within the scope of legal regulation. Here the situations of dispensation, dissimulation, tolerance, or *epikeia* specific to canon law find their origin and place. The more frequent use of the term *ius* in the Code indicates the terminological and semantic preference of the legislator, who is closer to Thomas Aquinas's reflections on the divine law than to Francis Suarez's (Gałkowski 2023, 63–69). Such a situation is encountered in the case of canon 22. The hypothetical case concerns the impossibility of referring to the law because it is contrary to divine law, since it is recognised that the ecclesiastical legislator would not have allowed such norms to exist in the law of the Church had they been known to them. Such norms should, therefore, be rejected. There remains, however, an unsettled legal situation that needs to be resolved. The function of divine law is not merely reduced to a restricting limit on the applicability of the law. Indeed, a norm must be derived from it to resolve a legal case. Such a situation arises in connection with a statute of limitations, the validity of which requires the existence of good faith not only at the outset but also throughout the statute of prescription.[8] This means that with the cessation of good faith, an obligation of restitution arises regardless of any initiative on the part of the one who holds the right. Canon law does not allow solutions based on the assertion *mala fides superveniens non nocet*. The good faith that is required in canon law has a broader scope than that assumed in and regulated by the law. It has a theological sense referring not to the conditions expressed in the law, but to conscience, which is the norm of action (De Paolis and D'Auria 2014, 527). Divine law in such a situation acts as a source of law in the sense found in Thomas Aquinas, *ipsa res iusta*. It allows the

[6] Canons: 22; 1290; 1692 § 2.

[7] Canons: 199, 1[0]; 1315 § 1. Divine law goes beyond the meaning of an interpersonal legal relationship. It also refers to the sphere of the personal relationship between God and a human being.

[8] Can. 198.

person judging the case to determine rights and duties ("facit ius inter partes"[9]), to resolve the legal situation, and to restore justice.

The general nature of the norm contained in canon 22 and the wording *ius divinum* used therein may seem inconsistent with the concept of *leges civiles* used, since *lex* is translated as law in the Code. The motives why the 1978 version of *ius civile* used during the drafting of the canon was replaced in the subsequent 1979 version by the formulation *lex civilis* are not known. One can only surmise that *lex civilis* was intended to correspond to the formulation of *lex divina* found in the first drafting schemes of canon 22. Ultimately, however, it was considered as too general and difficult to define, and was replaced by *ius divinum* (Minelli 1996, 475). The use of *ius civile* would have been appropriate. However, the phrase *leges civiles* in the canonical tradition goes beyond a literal translation as civil statutes in the sense of a branch of civil law. The Code of Canon Law uses the term to refer to any law in force in a given territory, regardless of its source (state law, international law, customary law, enforcement norms of various kinds). It refers to any law other than canon law (Galles 1989, 241). The canons containing specific norms allowing canon law to be referred to as *leges civiles* indicate that, in these situations, divine law has a specific role as a source of law underlying the formulation of positive norms.

3. FORMS OF REFERRAL

The general statement that canon law refers to civil law ("*leges civiles, ad quas ius Ecclesiae remittit*") includes the possibly different forms and effects provided for in the Code of Canon Law. Their presentation makes it possible to identify the object elements of the hypothesis of the norm contained in canon 22 and brings one closer to identifying the function of divine law. The reference to civil law is not unambiguously understood in canonistics. In its broadest sense, it means any form of reference that does not have effects in canon law. In the Code of Canon Law, one can find canons that: 1) mention secular law indicating its knowledge or stating the competence of the state;[10] 2) prescribe or recommend the observance of civil law, thus guaranteeing the efficacy of canon law actions in the civil forum;[11] 3) grant civil law norms efficacy in the forum of canon law.[12] All the indicated canons remain material and formal norms of civil law. In some situations, the canonical effects depend on the performance of an act according

[9] Can. 1642 § 2.

[10] Canons: 492 §1; 799; 1059; 1152 § 2; 1344, 2^0; 1672.

[11] Canons: 98 § 2; 231 § 2; 365 § 1; 668 § 1, § 4; 1105 § 2; 1274 § 5; 1284 § $2,3^0$ i 4^0; 1286, 1^0; 1299 § 2; 1500; 1715.

[12] Canons: 105 § 1; 110; 285 §§ 3–4; 289 § 2; 877 § 3; 1062 § 1; 1071 § 1, 2^0; 1152 § 2; 1296; 1479; 1540 § 2; 1558 § 2; 1672; 1689; 1692; 1716.

to civil law (Sobański 1994, 307).[13] However, not all canonists recognise the above situations as forms of referral by canon law to civil law (Miñambres 1992b, 5–17). It is believed that the above norms have a protective character against possible conflicts between the two legal orders.

In the narrower sense, and for the above-mentioned canonists in the proper sense, as civil law referrals are considered cases in which the provision making the referral does not regulate its factual situation but takes over the regulation made by a provision of another legal system (Miñambres 1992a, 716). In this sense, a formal referral is distinguished when a norm of civil law does not form part of the canonical order but produces effects in the area regulated by that law. Canon law recognises its incompetence in the area regulated by civil law. Such situations are most frequently encountered when decisions are made in ecclesiastical tribunals (Boni 1996, 302). Another case is that of substantive referral, in which a norm of civil law passes into canon law forming part of it (Otaduy 1996, 412). In both situations, civil law norms are valid in the canonical forum. In the second case, there is a canonisation of civil law, which can take a double form: 1) dynamic canonisation (*in blanco*), when a civil law norm is taken over by canon law with its changes, interpretation, concretisation as it functions in civil law, but may be subject to limitations in application by divine law or canon law;[14] 2) static canonisation, when a civil law norm is inscribed into canon law functioning in it independently of secular law (Sobański 1994, 308).[15]

The reference to civil law in the sense of its canonisation is indicated by the canon's statement that canonised norms "should be observed in canon law with the same effects" as state laws "insofar as they are not contrary to divine law and unless it is provided otherwise in canon law". The explicit indication of the canonical effects that civil law has in the Church's legal order brings one at the same time closer to knowing not only the function of divine law but also to understanding it. By becoming part of the Church's legal order, civil law adapts itself to its presuppositions and requirements. The concept and broad meaning of divine law from the area of theology enters the canonical order taking on a legal and concrete meaning. Divine law together with human law jointly determines the life of the community of believers and constitutes a single legal order in which what comes from God coexists with what comes from a human being. The statement that the canonised norms have effects in the area of canon law indicates at the same time that the divine law is part of the structure of the Church and is directed towards it as a requirement of the life of the community of the faithful. Divine law is, therefore, not – and cannot be – an element of civil law, since its presence serves the mission, which is the specificity and task of the

[13] Canons: 105 § 1; 110.

[14] Canons: 1290; 1714.

[15] Canons: 208–223; 135 § 1.

Church community only, not of the State. In the mission and task of the Church, there is a rationale for invoking divine law in situations of civil law canonisation. Intuitively, this interpretation is indicated using the phrase *ius divinum* instead of *lex divina*, which seemed too broad in meaning to the editors of the canon. Civil law is not referred to the broadly understood *lex divina*, which in the theological and canonist tradition defines an integral part of the reality created by God, in which all relations, including legal ones, find their origin and purpose. The order of the universe with its goods and purposes expressed as *lex* is also concretised in the interpersonal relations of justice created by *ius*. This is reflected in canon 22, where the application of the *ius divinum* to the *lex civilis* points unambiguously to relations of justice within the canonical order without claiming to reflect them in extra-canonical orders. This is also confirmed by other forms of reference of canon law to civil law. Divine law in canon law is not a determining element in the observance of civil law by the faithful. The two legal orders function independently.

4. THE PRESENCE OF DIVINE LAW IN CANON 22

The canonisation of civil law indicates that the Church, having legislative possibilities in matters covered by canonised norms, refers to them because its norms also have effects on other legal orders (Baura 2013, 197). It, therefore, accepts civil law solutions insofar as they are compatible with divine law and canon law. Canon law places limits on the canonisation of civil law. However, this process emphasises that the Church remains completely independent in deciding whether to incorporate norms outside its legal order and in deciding whether to remove them. Two clauses in canon 22 serve this purpose.

In the canonical doctrine, the prohibition contained in the content of the canon concerning the canonisation of civil law, if it is contrary to canon law, does not raise any doubts. A not-so-unequivocal opinion is encountered in the case of a prohibition introduced explicitly by including a reference to divine law in the content of a general norm. The object of these opinions is not the divine law itself, which remains irrevocable in the whole concept of canonisation, but only the sense and necessity of including it in the content of the general norm. This is an unnecessary exercise, for the divine law constitutes the integrating axis for the entire ecclesiastical legal order. Norms coming from outside and contradicting canon law are at the same time contradictory to divine law (Miñambres 1992a, 737).

The aforementioned author points out that the content expressed by the concept of divine law also carries with it practical difficulties of application (Miñambres 1992a, 749). In his opinion, a more dynamic and comprehensible concept could be used, such as public policy, to which legal doctrine refers

(Miñambres 1992b, 107–116). Chiara Minelli finds this idea unoriginal and unconvincing. This is attested to by the problems that arise in the field of private international law concerning conflicts of rights in space, especially issues arising from civilisational, cultural, and religious differences of persons residing within a single legal order. This situation is compounded in the case of two such differing legal orders: ecclesiastical and legal. By appealing to the public order as a criterion for the acceptance of civil norms, canon law would be deprived of its distinctiveness as the law of the divine-human community, for which divine law constitutes the *norma normans* of the entire legal order (Minelli 1996, 480–487; Boni 1998, 313–358).

The rationale for the inclusion of an explicit reference in the text of canon 22 to divine law can be traced back to the period of work on the revision of the 1917 Code and the lively discussion around the ontological foundations and justification of canon law. Issues relating to the nature, content, and character (legal, moral-pre-canonical) of divine law, the levels of the normativity of divine law and canon law could, therefore, not be avoided (Gałkowski 2023, 107–123). The proposed solutions, which differed in their point of departure by adopting a legal or theological paradigm, aimed to show the unity of the canonical order integrating its two dimensions: divine and human. The diversity of proposals and solutions may have influenced the will of the legislator to explicitly point in canon 22 to the divine law, which may be opposed by individual, extra-canonical normative provisions.

This move by the legislator can be read in protective terms, "safeguarding" the legal order by unambiguously emphasising its source, which goes beyond positive enactments. On the other hand, however, the development of canonist thought, especially within the theology of canon law, makes it possible to take a critical approach to the formulation of legal texts written more than 40 years back. In the light of these studies and considerations – and juxtaposing their achievements with the formulation of canon 22 – it is possible to go beyond showing the divine law in its negative function as a limit for canonisation, or even a positive account as a source of canon law norms. The reflections around the formulation of the canon 22 in the light of the nature of the legal order bring one closer to an understanding of the divine law and the necessity to invoke it in the general norm.

Canon law is the law of the ecclesial community, the legal dimension of the Church, and its faith. It unites what comes from God with what comes from a human being, concretising itself on a practical level in a single legal order of the community of the Church willed and existing by the will of Christ. Reflections on divine law should, therefore, be made in the light of considerations around the Church, its nature and its mission, in the fulfilment of which ecclesiastical law is involved. The missionary imperative addressed by Christ to his disciples and the ecclesial institutions established by him (the apostolic college or the

sacraments) need different forms of historical realisation expressed in the law of the Church. Hence the close dependence of the human element of state-making on the constitutive elements of the Church.

Canon law is not the result of legislative independence, but a set of norms capturing the legal effects of theological imperatives. The integration of divine law and human law in one legal order makes them neither two sources of law nor indicative of two different levels of normativity. Canon law is not a two-element legal order. It unifies the realising structure of the community gathered around Christ with the requirements of the Gospel message. The law of the Church is a complementary set of rules that realise the unifying continuity of the community of believers by Christ's missionary imperative and ensure the immutability of the gospel content.

The nature of the canonical norm, which requires an axiological justification of its validity through the category of rightness, remains tangible for the unifying interpretation of canon law, for the norm's validity and its rightness are not two phenomena independent of each other. A canonical norm, to be valid, must be a just norm. A canonised norm may, therefore, become a canonical norm insofar as it shares with it the internal elements testifying to its rationality. An unjust or unintelligent norm is not in force. The rationality of a norm is determined by a) fairness, understood as not contradicting divine law, even if the content of the norm is morally indifferent, but its fairness is determined by its purpose and circumstances; b) just, i.e. issued for the sake of the common good with appropriate proportions in the distribution of benefits and burdens; c) physically and morally feasible (Sobański 2001, 96).

The conformity of a canonical norm with divine law, i.e. its fairness, determines that the ecclesiastical legislator cannot issue or accept laws that will be contrary to divine law. Fairness is inscribed in the nature of the norm itself. It determines its rationality, which is not to be regarded merely as a negative criterion constituting limits to legislative activity. Rationality is a positive feature of a legal norm affecting the unity of the canonical order. The canonical norms form a sensible whole that results from an axiological justification determined by faith. The rationality of a norm is a positive factor of the Church's legal system. Owing to it, every other norm finds justification in the system and is coherent with other norms. This also applies to canonised norms, which can become part of the Church's legal system insofar as they accept its rationality, i.e. the rightness contained in the canonical norm.

Issues relating to the canonical norm may be a new direction of consideration around the proper formulation of the code canons and the necessity of referring to divine law in them. Divine law presents itself as an extra-legal and wide-ranging ideal, in the light of which particular solutions existing in legal orders are evaluated. The wording of the canon suggests an understanding of divine law in its prior evaluative role of civil law norms as a condition of security for canon

law fulfilling a protective function towards it. Thus, the divine law is shown in its negative function as a limit for the acceptance of civil law norms in the Church's legal order.

Meanwhile, the positive role of divine law is most evident in the specificity and characteristics of the canonical norm. The invocation of divine law in a general norm may have a practical significance for those responsible for lawmaking and application, for whom an unambiguous invocation of divine law affects the certainty of action. Considerations around the legal norm and knowledge of the principles of legislative technique remain the domain of specialists. The substitution and sufficiency of the proposed other terms possible in canon 22 – such as foundations of the canonical order, principles of canon law, canonical doctrine, and constitutive law (Gherri 2004, 219) – are not always, in the practical sphere, as clear as the explicit formulations indicating the principles of the canonisation of civil law.

5. CONCLUSIONS

1. Divine law in canon 22 is cited as *ius divinum*, which broadens the applicability of the norm contained therein. Therefore, divine law should not be considered merely as a limit for the possibility of canonising civil law. Its role becomes apparent when it is necessary to resolve a legal case requiring a legal decision.

2. The positive role of divine law expressed in canon 22 concerns the legal order of the Church. The divine law understood as structural elements of the community of the Church with legal effects does not apply to communities for which they are foreign and absent. The two legal orders have different purposes and functions. The law of the Church is an instrument for the fulfilment of its mission, which the state organisation does not have. The norm allowing the canonisation of civil law is an expression of the Church's legislative openness to civil legal solutions as long as they are not in conflict with the realisation of the Church's mission. The evaluation of extra-ecclesiastical legal orders in their conformity with divine law is made only at the level of concrete normative solutions in the perspective of their canonisation.

3. The presence of divine law in the general norm is not necessary due to the unity of the canonical order combining elements originating from God with those originating from humans. Divine law in the legal sense (*ius*) exists together with the legal rules formulated by the ecclesiastical legislature. The argument for the above statement also derives from the nature and specificity of the legal norm itself due to its aspect of decency as a condition for belonging to the canonical order. The unworthiness of a legal norm indicates the lack of rationality, thus affecting its validity and observance.

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