

N O R M Y G E N E R A L N E I K O Ś C I E L N E P R A W O K O N S T Y T U C Y J N E

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THE REQUIREMENT OF PROMULGATION OF NON-LEGISLATIVE ACTS IN THE 1983 CODE OF CANON LAW

INTRODUCTION

The word “promulgation” is usually associated with laws entering into force. This is confirmed in Can. 7,¹ which reads, “A law is established when it is promulgated.” At the same time, a careful analysis of the content of the 1983 Code of Canon Law reveals that such an approach should be considered a simplification. In the current legal order, the ecclesiastical legislator demands that not only laws but also some non-legislative acts be promulgated: general executive decrees (Can. 31 § 2) and laws that are authentic interpretations put forth in the form of law (Can. 16 § 2). Moreover, the general principle worded in Can. 31 § 2 was also translated into more detailed norms included outside Book I. General Norms.

This legal circumstance raises certain doubts: Why does the legislator require the acts named in Cans 16 § 2 and 31 § 2 to be promulgated? And if so, why does the same not apply to other laws similar to general decrees,

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¹ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [hereinafter: “CIC/83”].

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such as instructions (Can. 34)? Strictly speaking, the doubts lead to a question about the *ratio legis* of the adopted solutions. The primary goal of this article is to provide an answer.

1. GENERAL EXECUTIVE DECREES (CAN. 31 § 2)

The requirement of promulgation in relation to general executive decrees is given in Can. 31 § 2 where the ecclesiastical legislator provides, “With respect to the promulgation and suspensive period (*vacatio*) of the decrees..., the prescripts of can. 8 are to be observed.”

Considering the key question of this paper, it should be noted that this category of laws was not seen in the Pio-Benedictine Code. The discussion of the necessary promulgation of general decrees was sparked during the codification process. It was held, in the context of the draft Can. 2, at the fifth session of the working group “*De normis generalibus*,” between 29 September and 4 October 1969, when such a solution was put forward (*Disceptatio in canones emendatos “de praeceptis,” a Rev.mo Secretario ad propositos*).² During the debate, one of the speakers proposed that the passage “*ad eorum promulgationem et vacationem quod attinet valent praescripta can. 9,*” be struck out, which was opposed by the secretary who insisted that the norm should be promulgated as a law since it was not an interpretation but a prescription.³

Francesco Urrutia criticized the introduction of this requirement even before the entry into force of the Code of Canon Law. He maintained that the promulgation itself was requisite, yet he discarded the proposal of *vacatio legis* in each case as unnecessary, since, as he claimed, it would have

² Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber I-De normis generalibus-Sessio V*, 29.09-4.10.1969, “*Communicationes*” 19 (1987), p. 212: “Can. 2 § 1. Praecepta communia secundum normarum iuris praescripta dari possunt, intra fines suae competentiae, ab iis qui potestate gaudent executiva; ad eorum promulgationem et vacationem quod attinet, valent praescripta (aut: applicentur praescripta) can. 9 (de legibus)”.

³ *Ibid.*, p. 215: “*Quidam Rev.mus Consultor declarat quod praeceptum non indiget promulgatione et proponit ut supprimantur verba «ad eorum promulgationem et vacationem quod attinet valent praescripta can. 9». E contra Rev.mus Secretarius Ad. respondet quod praeceptum promulgant debet sicut lex, quia praeceptum non est mera interpretatio, sed determinatio legis*”.

only been necessary if new regulations had had to be put forth [Urrutia 1979, 408; Dzierżon 2005, 196].

In the current legal order, the requirement of promulgating general executive decrees is a fact. Now therefore, what is the *ratio legis* behind this strict condition? Some present-day commentators attempt to expound that. When looking at the published material on the subject, a number of interpretation trends can be identified. The advocates of one of the trends point out that although general decrees are not laws, they make objective legal norms anyway [Socha 1985, ad 31, 10; Bunge 2006, 113; Jimènez Urresti 1985, 40]. The opinions of Franciscus Urrutia and Remigiusz Sobański also fall within the same trend. They emphasize the general nature of these norms [Urrutia 1983, 28; Sobański 2003, 90]. In contrast, Joseph Listl claims that the ecclesiastical legislator made such a decision driven by an urge to maintain legal clarity (*Rechtsklarheit*) and, on the other hand, to create a sense of legal certainty (*Rechtssicherheit*) [Listl 1983, 85]. Another group of canon law experts highlight the close link between general executive decrees and laws [De Paolis and D'Auria 2008, 196-97; Miras, Canosa, and Baura, 2001, 93-94; Otaduy 2002, 65]. This trend is also supported by Michael R. Moodie. In his commentary to Can. 31, he notes the similarity between law and general executive decree [Moodie 2000, 99].⁴

Yet, the last of the provided arguments seems less unconvincing. Notably, the ecclesiastical legislator did not insist on the need to promulgate instructions (Can. 34), which are of a general nature, too, and are issued for clarification of existing laws. Lothar Wächter and few other scholars framed such a question, but they failed to answer it [Wächter 1989, 192]. Other authors discussing this problem seem to support the argument that promulgation is required for instructions, since such instruments do not introduce new substantive law [Socha 1985, ad 34, 7; Wächter 2008, 472; Dzierżon 2017, 22].

To continue, it should be noted that Can. 455 § 1-2, which mentions the requirement of promulgation of general decrees issued by bishops' conferences, clearly alludes to the provisions of Can. 31 § 2. In this wording, the term "general decree" is apparently of a general nature. As a follow-up to this regulation, on 5 July 1985, the Pontifical Commission for Authentic

⁴ "Although this canon clearly states that general executory decrees are not laws but applications of existing laws, the analogy to law remains."

Interpretation of the Code of Canon Law published an extensive answer, explaining that the notion of “general decrees” also embraces general executive decrees referred to in Cans 31-33.⁵ Therefore, they also require promulgation.

In this context, Can. 466 is also worth considering, regarding the publication of declarations and decrees of a diocesan synod. It might seem that since these acts are issued by the diocesan bishop as legislator, they should all have the power of laws. Yet, this is not the case. Some of synod statutes may have the nature of general executive decrees [Góralski 2019, 15-17]. For example, if a diocesan bishop urged the clergy under his jurisdiction to observe celibacy, he would not enact a law but a general executive decree which provides, among other things, for such an objective to be achieved. Interestingly enough, the legislator did not use the term “promulgation” in the said regulation but “publicatio” – as in the normative wording, “tantum publici iuris fieri possunt.” Therefore, it is justified to make a *de lege ferenda* proposal to harmonize the terminology in the future codification and supplement the norm with the term “promulgatio.” This proposal is fully justified as the doctrine does not approach the term “publicatio” as equivalent to “promulgatio.” Valesio De Paolis and Andrea D’Auria highlight this problem when they ponder upon the category of instruction. They point out that instructions do not establish new substantive laws, therefore they are only published and not promulgated. In their argument, they also note that instructions do not refer to the ecclesiastical community as such but only to those who are tasked with implementing laws [De Paolis and D’Auria 2008, 198].

2. AN AUTHENTIC INTERPRETATION PUT FORTH IN THE FORM OF LAW (CAN. 16 § 2)

Another hypothesis concerns an interpretation put forth in the form of law, as referred to in Can. 16 § 2. This option was already provided for in

⁵ Pontificia Commissio Codici Iuris Canonici Authentice Interpretando, *Responsa-14.05.1985*, AAS 77 (1985), p. 771: “D. Utrum sub locutione «decreta generalia» de qua in can. 455, § 1, veniant etiam decreta generalia exsecutoria de quibus in cann. 31-33. R. Affirmative.”

Can. 17 § 2 CIC/17.⁶ Still, major differences can be identified between the wordings of Can. 17 § 2 CIC/17 and Can. 16 § 2 CIC/83. In the former regulation, the legislator chose not to promulgate an authentic declarative interpretation. However, if a questionable law needed to be elaborated upon, extended or restricted, then promulgation was necessary [Vermeersch and Creusen 1937, 114; Regatillo 1961, 82-83]. Authors commenting upon Can. 17 § 2 CIC/17 enumerated various reasons for this approach. For example, Arthur Vermeersch and Joseph Creusen supported a view that it had arisen from the nature of things [Vermeersch and Creusen 1937, 114]. In contrast, in *Komentarz*, Franciszek Bączkiewicz, Józef Baron, and Władysław Stawinoga maintained that a declarative interpretation did not require promulgation because it did not form a new law [Bączkiewicz, Baron, and Stawinoga 1957, 207].

In the binding code, the ecclesiastical legislator adopted this solution in relation to each of the forms of interpretation named in the norm, i.e. declarative interpretation, restricting interpretation, and extending interpretation [Chiappetta 1994, 64]. Can. 16 § 2 demonstrates that this interpretation is not a law, hence the wording, “has the same force as the law itself” (*eadem vim habet ac lex*). Clearly, its characteristic attribute is that, in this case, on the one hand, it is similar to a law, as is the case with a law [García Martín 1999, 109], and, on the other hand, it is also general; moreover, the community are its addressees [Urrutia 1983, 18].

And, also in this case, the *ratio legis* of the adopted solution should be determined. Speaking of Can. 17 § 2 CIC/17, the problem was discussed by Gommarus Michiels. He purported that promulgation should take place due to the general nature of an interpretation and its intent to bind all addressees governed by the relevant law [Michiels 1929, 389]. In turn, De Paolis and D’Auria note that this form of interpretation has the weight of a law and, therefore, calls for promulgation [De Paolis and D’Auria 2008, 145].⁷ According to Pio Vito Pinto, this particular interpretation is a new law, practically speaking [Pinto 2001, 18]. Heribert Socha refuses to share

⁶ *Codex Iuris Canonici auctoritate Pii X Pontificis Maximii iussu digestus. Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 1-593 [hereinafter: “CIC/17”].

⁷ “L’interpretazione per modu legis ha la medesima forza della legge. Tale interpretazione è perciò soggetta all’iter della legge e quindi alla promulgazione, nonchè alla promulgazione.”

this view. He is of the opinion that the normative expression “per modum legis” does not indicate that a new law arises through an interpretation, but an interpretation made binds the persons subject to a law. It has the same power as the law and applies to an indefinite number of cases. In his view, due to obligations similar to those under a law, as well as due to the need to achieve certainty, an authentic interpretation put forth in the form of a law should be promulgated [Socha 1985, ad 16, 7].

In fact, the Pontifical Council for Legislative Texts is competent to give interpretations in this form.⁸ Given that, Javier Otaduy reflects on the problem in question. He pointed out that the acts of the council are not interpretations in the form of a law in every case. Even if this is the case, such interpretations are marked by generality. He emphasized that an investigated case remains closely related to the general nature of doubt created by the law. Therefore, council’s decisions require promulgation [Otaduy 1985, 759-60].

CONCLUSION

In etymological terms, the work “promulgatio” derives from “proulgare,” which comes from “pro vulgo” or “ob vulgum ponere,” which can be interpreted as “announcement,” or “disclosure” [Michiels 1929, 149].⁹ In doctrinal terms, “promulgation” is defined as “an act of law in which the legislator communicates a new law to the addressees and implements it” [Sitarz 2019, 2344-345; van Hove 1928, 112; Jone 1957, 20]. According to Otaduy, in substantive terms, promulgation in the canonical legal order is the official publication of a law [Otaduy 2012, 564].¹⁰

This definition, however, does not tally with all solutions existing in the canonical legal order. In CIC/83, the ecclesiastical legislator also demands promulgation in relation to non-legislative acts, such as general executive decrees (Can. 31 § 2) and authentic interpretations made in the form of a law (Can. 16 § 2). It seems that the definitions of promulgation prevailing

⁸ Francesco, *Costituzione Apostolica «Praedicate Evangelium»-19.03.2022*, Città del Vaticano 2022, no. 176.

⁹ See Plezia 1999, s. 370.

¹⁰ “En el ordenamiento canónico la promulgación es en sustancia el acto de publicación de la ley.”

in the doctrine have been determined by the principle “leges instituuntur, cum promulgantur,” as specified in decretal law (X.1.3.4),¹¹ and its reception by canon jurists from the period predating the codification who reflected on *The Decretals of Gregory IX* [Reifenstuel 1854, 109; Santi 1892, 18].¹²

Based on completed analysis, it transpires that authors offer various reasons for adopting such solutions. Apparently, the claim that general executive decrees are closely related to laws is far from convincing. Although this claim is based on a true premise, it does not correspond to the legal situation because, as commonly known, systemic solutions also see instructions whose content is of an abstract nature, and despite this fact, they do not need to be promulgated. The arguments concerning the making of a new law are not airtight, either. This thesis can be easily refuted by referring to instructions that are of a different nature because they clarify the prescripts of laws as well as elaborating upon and furnishing arguments that should be taken into account in the application thereof (Can. 34 § 1). Therefore, the argument emphasizing the public nature of the act (as intended for the general public) seems to be reasonably justified. In my view, this component should be considered common to the analyzed acts.

Given the fact that, in the canonical legal order, the ecclesiastical legislator demands that some non-legislative acts be promulgated next to laws, the definition of promulgation should be modified. It seems that the definition developed by Eduardo Baura corresponds to the existing legal circumstances. He proposes that it is an act of the competent authority under which it makes a legal text addressed to a certain community public [Baura 2013, 259].¹³

¹¹ *Decretales Gregorii IX*, in: *Corpus Iuris Canonici*, vol. 2, Lipsiae Emil Friedeberg 1881.

¹² Reifenstuel 1854, 109: “*Ad debita promulgatio*-Requiritur ad rationem legis debita eius promulgato; quae conditio in dicta definitione denotetur per ly, communitati denuntiata. id est promulgata. Nam, ut hebeat receptum iuris consultorum dictum, ex can. 3, diet. 4 desumptum: «Leges instituuntur, cum promulgantur...»”; Santi 1892, 18: “Ut lex in suo esse formali obligandi constituatur, non solum requiritur voluntas legislatoris qui legem jubeat, sed requiritur etiam ut signum externis promulgatur. Leges enim tradit can. 3. distinct. 4 instituuntur cum promulgantur”.

¹³ “...l’idea generica di promulgazione, quale atto dell’autorità competente mediante il quale rende pubblico il testo legale alla comunità alla quale si rivolge.”

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The Requirement of Promulgation of Non-Legislative Acts in the 1983 Code of Canon Law

Abstract

In this study, the author reflects on the *ratio legis* of the necessity of promulgating certain non-legislative acts in the 1983 Code of Canon Law, such as general executory decrees (Can. 31 § 2) and authentic interpretation put forth in the form of law (Can. 16 § 2). By examining the opinions of canonists, the author shows that this reason is the public character of the act, in the sense of being intended for the general public. In his opinion, the occurrence of such solutions in the canonical legal order calls for a revision of the definition of promulgation, which, in his opinion, was determined by the principle set out in the decretal law "leges instituuntur, cum promulgantur" (X.1.3.4)

and the considerations of pre-code canonists referring to it. The author considers the definition of promulgation developed by Javier Otaduy to be adequate for the systemic solutions: “promulgation is the act of a competent authority by which it makes public a legal text addressed to a certain community”.

Keywords: promulgation; non-legislative act; general executory decrees; authentic interpretation put forth in the form of law.

Konieczność promulgacji aktów nielegislacyjnych w Kodeksie Prawa Kanonicznego z 1983 roku

Abstrakt

W zaprezentowanym opracowaniu Autor podjął namysł nad kwestią *ratio legis* konieczności promulgacji niektórych aktów nielegislacyjnych w Kodeksie Prawa Kanonicznego z 1983 r., jakimi są ogólne dekrety wykonawcze (kan. 31 § 2) oraz interpretacja autentyczna przedłożona w postaci ustawy (kan. 16 § 2). Badając opinie kanonistów wykazał, iż tym powodem jest publiczny charakter aktu, w sensie przeznaczenia dla ogółu. W jego opinii występowanie w kanonicznym porządku prawnym takich rozwiązań domaga się zrewidowania definicji promulgacji, która jego zdaniem, została zdeterminowana zasadą określoną w prawie dekretałowym „leges instituuntur, cum promulgantur” (X.1.3.4) oraz nawiązującymi do niej rozważaniami kanonistów przedkodeksowych. Za adekwatną do rozwiązań systemowych uznał definicję promulgacji wypracowaną przez Javera Otaduya: „promulgacja jest aktem władzy kompetentnej, na mocy którego czyni on publicznym tekst prawny adresowany do pewnej wspólnoty”.

Słowa kluczowe: promulgacja; akt nielegislacyjny; ogólne dekrety wykonawcze; interpretacja autentyczna przedłożona w formie ustawy.

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