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SEXUAL ABUSE OF MINORS IN CURRENTLY APPLICABLE CANON LAW – SELECTED ISSUES

INTRODUCTION

Canon law does not provide its own, uniform definition of sexual abuse of minors, but adopts solutions on this matter as provided by international organizations and under the law of individual countries. The Congregation for the Doctrine of the Faith in its *Vademecum* published in 2022 set out a norm, under which, "The delict in question includes every external offense against the sixth commandment of the Decalogue committed by a cleric with a minor."[1] Further, current canonical legislation gives a typology of sexual abuse crimes, namely the crime of sexual harassment of minors and the production and distribution of child pornography. These offences, which cover a broad spectrum of acts of a sexual nature, in the case of clergy are reserved to the Disciplinary Section of the Dicastery for the Doctrine of the Faith.[2] They also entail severe punishment for both conse-

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[1] Congregation for the Doctrine of the Faith, *Vademecum on certain points of procedure in treating cases of sexual abuse of minors committed by clerics – Ver. 2.0* (05.06.2022), https://www.vatican.va/roman_curia/congregations/ cfaith/ddf/rc_ddf_doc _20220605_vademecum-casi-abuso-2.0_en.html [last access: 01.06.2023].

[2] Cf. Pope Francis, Apostolic constitution *Praedicate Evangelium* on the Roman Curia and Its Service to the Church in the World (19.03.2022), https://www.vatican.va/

crated persons and lay faithful serving in the Church. This article sets out to discuss these in terms of the objective aspect (*actus reus*) and the subjective aspect (the offender and the victim).

1. CANON LAW CONCERNING SEXUAL ABUSE OF MINORS

1.1. Sexual harassment – general overview of *actus reus*

The ecclesiastical legislator in Can. 1395 § 2 of the 1983 Code of Canon Law[3] states as follows, "A cleric who has offended in other ways against the sixth commandment of the Decalogue, if the offence was committed in public, is to be punished with just penalties, not excluding dismissal from the clerical state if the case so warrants." Moreover, a cleric who, by force, threats or abuses of his authority commits an offence against the sixth commandment of the Decalogue or forces someone to perform or submit to sexual acts is to be punished with the same penalty (Can. 1395 § 3). Under the legal norm contained in this canon, all acts in violation of the sixth commandment of the Decalogue and featuring at least one of the elements mentioned in the canon become canonical crimes. An act which does not meet these conditions cannot be considered a crime *sensu stricto*. Using force, as stipulated by the legislator, means not only rape, but any way of violating the integrity of another person against his or her will for sexual gratification of the offender. Rape is a forceful intrusion into the sexual intimacy of another person, regardless of their gender, and causing them to engage in sexual intercourse (in this case, the rapist is a cleric). It should therefore be noted that under the canon, forcible abuse is not only rape itself, but any offence against the sixth commandment of the Decalogue using physical violence. All these forms are classified as sexual harassment [Syryjczyk 2003, 164; Borek 2015, 73].

In addition to physical force, canon law also specifies threat, that is, psychological pressure in order to obtain sexual contact. In this case, a cleric, through psychological coercion (e.g., threatening to defame, cause

content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate- evangelium.html [last access: 21.05.2023].

[3] *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, pp. 1-317 ["CIC/83"].

damage or promise a benefit to the victim), makes the victim to submit themselves to him in order to satisfy his desires. The victim decides to do this out of fear of incurring some evil. This situation is one of limited choice, as opposed to a situation of physical coercion, where the victim no longer has any choice [Borek 2015, 74-75].

The legislator in Can. 1395 § 2 CIC/83 also mentions the "public" aspect of an offence committed by a cleric against the sixth commandment of the Decalogue. When interpreting this provision, it should be presumed that the legislator has in mind a crime committed among a larger number of people, made public by the media or on the Internet, committed in a public or widely accessible place, such as a park, street, cinema, swimming pool, etc. This may also include exhibitionism witnessed by minors. In this cases, a cleric's acting in public is deliberate and wilful [Syryjczyk 2003, 164-65].

As amended by Pope Francis, Book VI CIC/83 in Title VI "Offences against human life, dignity and freedom", in its Can. 1398 § 1, gives an exhaustive typology of all acts of a sexual nature committed by a cleric with minors, "A cleric is to be punished with deprivation of office and with other just penalties, not excluding, where the case calls for it, dismissal from the clerical state, if he: 1° commits an offence against the sixth commandment of the Decalogue with a minor or with a person who habitually has an imperfect use of reason or with one to whom the law recognises equal protection; 2° grooms or induces a minor or a person who habitually has an imperfect use of reason or one to whom the law recognises equal protection to expose himself or herself pornographically or to take part in pornographic exhibitions, whether real or simulated; 3° immorally acquires, retains, exhibits or distributes, in whatever manner and by whatever technology, pornographic images of minors or of persons who habitually have an imperfect use of reason." The above canon specifies a minor, i.e., any person under 18 years of age. Moreover, the consent of a minor to an act, or its absence, is irrelevant to stating the commission of an offence. Similarly, other circumstances, such as the minor's initiation of the act, provoking, signalling awareness, or ignorance, of what is going to happen next, the minor's gender, are all irrelevant to the legal classification of the act committed by a cleric. The fact of the crime is determined by intent of the offender, who aims to obtain fulfilment or some gratification of a sexual nature. Therefore, apart from the sexual intercourse itself, this crime may take the form of, for example, a kiss, immodest touch, exhibitionism,

etc. There is also an indirect abuse, such as an immodest conversation between a cleric and a minor, encouraging intercourse, making pornographic materials available to minors, etc., both in direct conversation and using modern social media. Procurement and inducement to prostitution entail particular moral evil. Significantly, the legislator in Can. 1398 § 1, 2°-3° separately sanctions the creation of pornographic images or recordings with the participation of minors, their distribution, and even their very possession [Stawniak, Jarząbek-Bielecka, and Bielecka-Gąszcz 2017, 155; Domaszk 2012, 75].

The pastoral relations towards the minor can also be relevant to the gravity of the offence in question, as under Can. 1326 § 1, 2° and Can. 1395 § 3 abuse of a position of dignity, authority or an office in order to commit a crime requires a more severe punishment. Noteworthy, the offences listed in Can. 1398 § 1 are punishable even if committed once [Stawniak, Jarząbek-Bielecka, and Bielecka-Gąszcz 2017, 155].

1.2. Harasser – the active subject of the crime

The active subject, i.e., the offender, under Can. 1398 § 1 CIC/83, motu proprio *Sacramentorum sanctitatis tutela*[4] and Article 6 § 1, 2° *Normae de gravioribus delictis*,[5] is only a cleric (*clericus*), i.e., a bishop, presbyter or deacon.[6] This means that in canon law these offences have a character *delicta propria*, i.e., they are limited to a specific group of people and reserved to the Dicastery of the Doctrine of the Faith [Lempa 2013, 59; Mazur 2021, 125]. Further, the provision of Can. 1398 § 2 gives a typology of offences committed by members of institutes of consecrated life who have not been ordained and the faithful who enjoy a dignity or performs an office or function in the Church (Can. 207 CIC/83) [Kaleta and Krukowski 2022, 335-37]. In the case of members of institutes of consecrated life or societies of apostolic life, the competent diocesan bishop should apply the

[4] Ioannes Paulus PP. II, Litterae apostolicae motu proprio datae quibus Normae de gravioribus delictis Congregationi pro Doctrina Fidei reservatis promulgantur *Sacramentorum sanctitatis tutela* (30.04.2001), AAS 93 (2001), pp. 737-39 ["The Norms *De gravioris delictis*"].

[5] Congregatio pro Doctrina Fidei, *Normae de gravioribus delictis* (21.05.2010), AAS 102 (2010), pp. 419-30 ["The Norms *De delictis reservatis*"].

[6] In this concept, the legislator includes both ordained deacons as candidates for the presbyterate and permanent deacons, cf. Can. 236, 1031 and 1032 CIC/83.

general rules of procedure contained in Can. 695, 729 and 746, as well as in Can. 1336 § 2-4 CIC/83 [Borek 2014, 6]. A similar punishment is to be imposed on a lay faithful who commits crimes sanctioned in Can. 1398, which should prompt the ecclesiastical authority to revoke a canonical mission or to dismiss them from office if such a faithful performed a public service in the Church, e.g., by being a lay minister of lector, acolyte or catechist [Arrieta 2023, 858; Dohnalik 2015, 55; Mazur 2022, 106; Klimkiewicz and Mazur 2023, 152].

The concept of *clericus*, i.e., a cleric, as the subject of a crime, requires some clarification in the light of the Code of Canons of the Eastern Churches[7] (Can. 325, 327) and the Norms of 2010. According to the norms of these documents, the group of clerics, apart from bishops, presbyters and deacons, i.e., those who hold higher orders, also includes persons with lower orders (e.g., subdiaconate), if so prescribed by the particular law of each Church *sui iuris*. Therefore, a person who holds only lower orders, but who, according to the Church's own law, is classified as a cleric, will commit a canonical offence, reserved in such case to the Dicastery for the Doctrine of the Faith [Lempa 2013, 60].

1.3. Harassed – the passive subject of the crime

In canon law, the victim, i.e., the passive subject of the crime of sexual harassment, is a minor, i.e., a child or anyone under 18 years of age. Neither the gender nor the attitude of the minor is relevant, i.e., it does not matter whether the minor consented to a sexual conduct, whether they even provoked it, or whether it was completely against their will. Moreover, there does not necessarily have to be physical contact between a cleric and the minor. It is enough that a cleric takes action aimed at obtaining sexual arousal, whether or not he obtained satisfaction. In this case, the legal protection is vested in the juvenile themselves, hence the crime is committed regardless of the minor's conduct [Stawniak, Jarząbek-Bielecka, and Bielecka-Gąszcz 2017, 157]. The code legislator originally penalized sexual contact with a minor under 16 years of age (it was in itself a much more demanding provision than, for example, the requirement contained in Polish law, under which a person must be 15 years of age to

[7] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), pp. 1033-363.

be able to freely engage in sexual activities).[8] In the latest legislation, i.e. in the Norms *De gravioris delictis* of 2001, and then in the Norms *De delictis reservatis* of 2010, the age level was further increased in order to protect a larger number of juveniles and due to the high gravity of crimes of this type and the scandal they cause. Currently, a victim of the crime of sexual abuse in canon law is any person under 18 years of age. As a result of the revisions, the classification of sexual acts undertaken by a cleric with minors aged 16-18 has changed, as until the enactment of the Norms *De gravioribus delictis* in 2001 these had not been a canonical offence. Now, as T. Jarząbek notes, a cleric who commits sexual abuse with a person under 18 years of age will always be punished, even if he did not have full knowledge of the victim's minority. Only in the case of clear misrepresentation (e.g., by presenting a false identity card) or non-culpable fault (Can. 1321 § 2 CIC/83), the offender will not be punished for paedophilia [Jarząbek 2019, 73; Mazur 2021, 132].

In the case of sexual abuse, the Norms *De delictis reservatis* of 2010 novated the standard by equating a person who permanently (habitually) has an imperfect use of reason with a minor. In this case, the legal norm does not require a permanent and complete lack of use of reason, but the crime also covers abuse of a person whose volitional and cognitive functions are at least partially impaired.[9] Still, the legislator requires that this imperfection of the abused person be habitual, even if they may have some *lucida intervalla*.[10] However, a person who is in a state of temporary or transitional loss of cognitive or volitional powers, e.g. as a result of alcohol or drug intoxication, cannot be considered a victim of abuse equated with a minor [Stawniak, Jarząbek-Bielecka, and Bielecka-Gąszcz 2017, 158]. The current Can. 1398 CIC/83, in addition to minors under 18 years of age and persons who have an imperfect use of reason, also protects persons "to whom the law recognises equal protection", which covers almost every

[8] Act of 6 June 1997, the Criminal Code, Journal of Laws of 2020, item 1444 as amended ["CC"].

[9] Article 6 § 1, 1º of the Norms *De delictis reservatis*: "…delictum contra sextum Decalogi praeceptum cum minore infra aetatem duodeviginti annorum a clerico commissum; in hoc numero minori aequiparatur persona quae imperfecto rationis usu habitu pollet…"

[10] *Lucida intervalla* (Latin), moments of consciousness, "bright moments" in the insane and mentally ill in which they temporarily regain full consciousness, see https://www.gutenberg.czyz.org/index.php?word=42504 [last access: 15.05.2023].

form of helplessness of a crime victim [Arrieta 2023, 859; Mazur 2022, 106; Klimkiewicz and Mazur 2023, 153].

2. THE CRIME OF CHILD PORNOGRAPHY

2.1. Child pornography – *actus reus*

The Norms *De delictis reservatis* of 2010 specified the crime of child pornography among other offences against the sixth commandment committed by clerics against minors, even though since 2001 the Congregation for the Doctrine of the Faith had punished this crime as standard. In accordance with Article 6 § 1, 2º of the 2010 Norms, the acquisition, possession, exhibition, or distribution, for purposes of sexual gratification or profit, of "pornographic images of minors under the age of fourteen years, in any manner and by any means whatsoever, by a cleric", is classified as a crime. According to the legal norm, all written texts must be excluded from this crime, even those of a highly erotic nature, which do not contain pornographic photos or illustrations [Skonieczny 2017, 116]. This crime involves a "passive," as it were, inactive "consumption" of pornography that has already been produced. However, creating pornography with the participation of minors is a crime against the sixth commandment of the Decalogue with minors, penalized under Article 6 § 1, 1º of the Norms *De delictis reservatis* of 2010, which was already mentioned earlier.

According to P. Skonieczny, in terms of the objective aspect of the crime, it is necessary to distinguish from erotic images (photos, recordings, etc.) such images that depict a minor in an obviously sexual context, e.g., nude or semi-nude, especially with genital organs exposed or during sexual intercourse with an adult or other minor. The canonical offence mentioned above is therefore the so-called "objective child pornography". This condition is not met when a minor is shown even in a provocative pose, but without an obvious sexual context. Therefore, other photos that do not focus directly on the area of genital organs (e.g., showing minors in swimsuits or underwear) may, of course, fulfil the role of "subjective pornography" and be used for sexual gratification, but they do not exhaust the elements of a crime under the Norms *De delictis reservatis* of 2010 [Skonieczny 2017, 116].

In the Norms *De delictis reservatis* of 2010, the legislator classifies the crime of paedopornography by three types of conduct that carries criminal liability. The first form is "acquisition" of pornographic content involving minors from third parties. The offender, most often via the Internet, acquires pornographic content, which he then stores on his computer or other data carriers. For a crime to occur, a cleric must act deliberately and wilfully. An unwilful (non-culpable) act (e.g., an accidental click on a website) does not constitute a crime. Undoubtful proof of intent is, for example, payment for downloaded materials [Słowiński 2016, 89].

The second type of penalized conduct related to child pornography is "possession" or storage of materials acquired earlier in any place, either in digital form (on the computer's hard drive, external memory, on the Internet, etc.) or in the form of printed images. What is relevant is that the offender deliberately stores these materials in order to use them at a time of his choice [Słowiński 2016, 89; Majer 2015, 112-13].

The third form of child pornography crime is the distribution of such materials, which may be paid or free of charge. The essence of this crime is the fact that the offender possesses pornographic materials with a minor and makes them available to third parties. The form through which these materials are disseminated is irrelevant. As J. Sowiński notes, making the collected materials available for free access and download from a computer or Internet server by third parties is also a crime of distribution of child pornography [Słowiński 2016, 89].

In Book VI CIC/83 revised by Pope Francis, all aspects of child pornography, as a novation in the Code of Canon Law, from grooming and inducing a minor to participate in pornographic scenes to storage and distribution, were typified in Can. 1398 § 1, 2°-3° CIC/83.

2.2. Child pornography – subjective aspect

The active subject of a crime in accordance with Article 6 § 1, 2° of the Norms *De delictis reservatis* of 2010 is a cleric, i.e., a bishop, presbyter or deacon (also permanent). The concept of a cleric also covers those holding lower orders, if so prescribed by the particular law of each Church *sui iuris*. As mentioned earlier, members of institutes of consecrated life are not included among clerics if they have not been ordained. To the consecrated faithful who are not ordained and have been accused of the crime of child

pornography, pursuant to Can. 1398 § 2 CIC/83, their own diocesan bishop should apply the general rules of procedure under Can. 695, 729 and 746, and 1336 § 2-4 CIC/83 [Borek 2014, 62; Słowiński 2016, 80]. A lay faithful who commits the crime of child pornography is not liable to punishment under Article 6 § 1, 2º of the Norms *De delictis reservatis* of 2010, but it is equitable that on the basis of Can. 1398 § 2 CIC/83 they be dismissed by the competent authority from their canonical mission or office, if they hold any in the Church [Dohnalik 2015, 55].

The victim, i.e., the passive subject of the crime of child pornography, is, in accordance with Article 6 § 1, 2º of the Norms *De delictis reservatis* of 2010, a minor under 14 years of age. In this approach, child pornography included films and photos showing sexual intercourse between minors under 14 years of age, or between them and adults, or showing nude persons under 14 years of age in explicit poses or situations. The purpose of such images is to cause sexual arousal in the viewers. For a crime to be ascertained, the image or recording had to concern minors under 14 years of age and the recorded situation had to have actually occurred. The photo or video was to be documentation of an actual incident involving a person under 14 years of age. "Virtual paedopornography," i.e., one containing artificially (e.g., digitally) created images or with actors made up to look like children, did not exhaust the elements of the crime [Skonieczny 2017, 124].

A kind of difficulty, widely commented on by canon law scholars, came from the age limit for child pornography set at 14 years. Doubts arose because it is often very hard to determine the age of a juvenile captured in pornographic images. While it is easy to recognize and assess the age of a pre-pubescent child, it is much more difficult to determine the exact age of a teenager. Moreover, it is equally morally wrong and scandalous to use for pornographic purposes a child aged 13 years and one who has already turned 15, hence the age limit originally set by the legislator in the context of child pornography seemed rather contrived and unnecessary. Many canon law scholars (e.g., D. Borek, J. Słowiński, P. Skonieczny) postulated raising the age limit to 18 years, which would also be consistent with domestic law [Borek 2015, 117; Słowiński 2016, 84]. The revised Book VI CIC/83 in Can. 1398 met that postulate and now the crime of child pornography applies to all minors under the age of eighteen and to persons who have an imperfect use of reason. Further, the penalization of "virtual paedopornography" also seems to be an important demand, since in the

age of digital technological growth it is increasingly difficult to distinguish fiction from real images, and both are equally morally reprehensible and socially very harmful. This would also be consistent with the Polish Criminal Code, which penalizes such conduct (Article 202 § 4b of the Criminal Code).

CONCLUSIONS

In response to the research question posed, it should be noted that all legal regulations regarding the offences against the sixth commandment of the Decalogue committed by clerics, as enacted by competent church authorities throughout history, are an expression of the Church's great concern for the well-being of minors and their protection from harm. The very fact that such detailed regulations are established, as accompanied by severe sanctions, shows the determination of the Church in combating pathological conduct towards minors and helpless people in the ecclesiastical milieu. This can also be seen in the legal norms contained in CIC/83, and especially in Book VI of the Code reformed by Pope Francis. What favourably distinguishes the Church's preventive effort is the age limit for absolute protection of minors under 18 years of age, as well as protection of those who have an imperfect use of reason (equated in law with minors) and protection of other helpless victims. The issuance of legal norms regarding the protection of children and young people in the virtual world and the fight against paedopornography is another significant achievement. The process of legal amendments continues, as evidenced by the reformed Book VI CIC/83 promulgated by Pope Francis. It entered into force on 8 December 2021, further clarifying the issues of protection of minors and the helpless in Church law and extending legal liability not only to clerics but also to persons of consecrated life and all persons holding any offices in the Church.

The criminal law of the Catholic Church regarding the violation of the sixth commandment of the Decalogue by a cleric with a minor penalizes largely the same crimes that also exist under domestic law (e.g., Articles 197-205 of the Criminal Code). With the norms issued by recent popes, sexual offenders in the Church are liable to punishment imposed not only by the Dicastery for the Doctrine of the Faith, but also by state authori-

ties. What is more, even prior punishment by the competent church authority does not release a cleric from being held to account for wrongdoings under the state legal order. The duty to conduct an investigation and ensure that an offence is reported to the competent church and state authorities rests with diocesan bishops. The legal norms issued by Pope Francis on this issue are designed to end the scandalous practice of "sweeping sexual abuse cases under the carpet" in the Church once and for all.

It is also clear that canon law now provides for a very strict treatment of clerics when it comes to crimes of a sexual nature, including the crimes of harassment of minors and using child pornography. This is supported by the theological argument invoked by canon law, according to which a cleric, especially in the case of the presbyterate and episcopate, acts in the exercise of divine worship and teaching the faithful *in persona Christi Capitis*, which is why sexual crimes appear to be extremely scandalous. The particular gravity of sexual harassment and child pornography also links to the fact that it violates the physical, mental and moral integrity of minors and persons equated with minors, i.e., the most defenceless members of the Church. What is also significant is the possibility of holding to account diocesan bishops and other administrators to whom a sexual offender reports, if they fail to respond as required by law to information about justified suspicions regarding a cleric under their supervision. It is undoubtedly justified to punish also other persons performing tasks and functions in the Church for sexual crimes committed against minors.

In terms of the development of canon law norms regarding sexual abuse, the rightful demands for punishing "child pornography" up to the age of 18 years have been met, even if punishment issues for virtual paedopornography still need to be refined. Perhaps a consideration should be given to whether it would be justified to punish paedophilia in a similar way as, for example, abortion, through excommunication *latae sententiae*. It remains an open question why, despite a range of educational works in the Church, led, for example, by orders and congregations that historically boasted a prevention system, the experience gained in the process has not helped protect children and young people from sexual abuse? Why did this legacy not provide sufficient inspiration to take proactive legal effort, without waiting for social pressure from yet another scandal? These questions still wait for their answers. For now, we should trust that the latest

legislation of the Catholic Church will bear fruit in growingly better protection of minors and the helpless in the future.

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Sexual Abuse of Minors in Currently Applicable Canon Law – Selected Issues

Abstract

Acts *contra sextum* with minors are one of the most serious ecclesiastical crimes. For this reason, they have always been a subject matter of ecclesiastical law and have been punished in various ways. The article discusses selected aspects of sexual abuse concerning minors in the current canon law, especially in the light of Book VI of the Code of Canon Law of 1983 reformed by Pope Francis. It presents what sexual abuse is in terms of canon law and discusses the active subject (the offender) and the passive subject (the victim) of a criminal act as well as the issue of child pornography. The article outlines the characteristics of the canonical and criminal liability of the clergy. The analysis of the literature clearly indicates that the penalty imposed on a clergyman in the canonical system neither relieves nor replaces the penalty imposed in the penitential system of state law, hence the clergyman is somehow subject to double responsibility. First under canon law and then under state law.

Keywords: harassment; paedophilia; *delicta graviora*; child pornography; canonical criminal law

Wykorzystywanie seksualne małoletnich w obowiązującym prawie kanonicznym – wybrane zagadnienia

Abstrakt

Czyny *contra sextum* z osobami małoletnimi stanowią jedne z najcięższych przestępstw kościelnych. Z tej racji zawsze stanowiły materię prawa kościelnego i były w różny sposób karane. W artykule omówiono wybrane aspekty wykorzystywania seksualnego małoletnich w obowiązującym prawie kanonicznym, zwłaszcza w świetle zreformowanej przez papieża Franciszka Księgi VI Kodeksu Prawa Kanonicznego z 1983 r. Przedstawiono, czym jest wykorzystywanie seksualne w ujęciu prawa kanonicznego oraz omówiono podmiot czynny (sprawcę) i podmiot bierny (ofiarę) czynu przestępnego, a także problematykę pornografii dziecięcej. W artykule nakreślono charakterystykę odpowiedzialności kanonicznej oraz karnej duchownych. Analiza literatury jednoznacznie wskazuje, że kara, którą ponosi duchowny w porządku kanonicznym, nie zwalnia ani nie zastępuje kary wymierzonej w karnym systemie prawa państwowego, stąd

duchowny podlega niejako podwójnej odpowiedzialności. Pierwszej w ramach prawa kanonicznego oraz drugiej w ramach prawa państwowego.

Słowa kluczowe: molestowanie; pedofilia; *delicta graviora*; pornografia dziecięca; kanoniczne prawo karne

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