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THE AUTONOMOUS RIGHTS IN THE CANONICAL LEGAL ORDER,
CENTRAL TO CARRYING OUT THE RIGHTS OF MINORS.
THE DILEMMA APPERTAINING TO THE CLAUSE
“WITH EXCEPTION TO CASES WHICH, ON THE BASIS OF DIVINE
OR CANON LAW, EXEMPT THE MINOR FROM PARENTAL
OR GUARDIAN AUTHORITY” (CAN. 98 § 2 CIC/83)

Abstract: In the study presented, the author points out the dilemmas which arose as a result of his reflection on the clause “except in cases in which minors, on the basis of divine law or canon law, are excluded from the authority of their parents or guardians,” included in can. 98 § 2 of the Code of Canon Law, in the context of the problem of autonomous rights to exercise the powers of minors in the canonical legal order. Without questioning the legitimacy of the introduction of the clause, he showed that the reference in it to Divine law generates serious difficulties of interpretation due to the fact that the autonomous matters of minors that result from the positivisation process in the canonical legal order, have not been precisely articulated. He pointed out that it is very difficult to draw clear, precise boundaries between divine law and positive law. He expressed the view that the autonomy of the powers of minors is not absolute in relation to matters of divine law, opting for the possibility for parents or guardians to correct attitudes.

In view of the current scant state of the canonical heritage on this issue, which basically boils down to an exemplary enumeration of powers by the commentators of can. 98 § 2 of the Code of Canon Law (can. 89 CIC/17), the author postulates, suggesting more reliable research on this interesting issue.

Keywords: canon law; minors; parents; guardians; autonomous rights.

INTRODUCTION

Regardless of the fact that the 1983 Code of Canon Law has been in force for forty years, there are “general provisions” in Book I, which to this day remain inconclusively interpreted. One of them is clause which is laid down in can. 98 § 2: “A minor, in the exercise of his or her rights, remains subject to the authority of parents or guardians **except in those matters in which minors are exempted from their authority by divine law or canon law** (highlighted G.D.)(...).” Based on initial analysis of contents, it seems that the legislator upheld the autonomy of certain rights exercised by minors, on the basis of the general terms and sources of origin i.e. from Divine law and canon law. This approach, from the aspect of law-making principles, should be considered to be appropriate, on the grounds that can. 98 § 2 is lawful: however the content of the law is to a high degree characterised by conceptualisation. The ecclesiastical legislator therefore left the separation of autonomous rights of minors to the the doctrine.

Subject literature research with regard to commentary on this paragraph indicates that canonists, as a rule, undertake this field of enquiry laconically and commonly pointing to certain permissions. Further to canonistic achievements, it appears difficult to see any solid monographic positions or devoted study on this issue. Undoubtedly, *crux interpretum* refers to the standard norm of Divine law resulting from the fact that the permissions that originate from this area of law, have not been applied precisely in the code regulations i.e. clearly articulated.

Therefore this article will also attempt an in-depth reflection on this difficult issue. To all intents and purposes, this research project will be approached genetically by exposing the evolution of the clause content of the subject in question. The accomplishment of this objective may be achieved, as long as the commentary to can. 89 CIC/17¹ is also taken into account alongside the commentary to can. 98 § 2 together with the process of codification.

1. THE 1917 CODE OF CANON LAW (CAN. 89 CIC/17)

The starting point of the analysis is can. CIC/17, in which the legislator constitutes the general rule, in accordance with the minor executing rights

¹ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, pp. 1-593 (further: CIC/17).

subject to the authority of parents or guardian, adding the clause “with the exception of those rights by which the law removes minors from their authority” (*iis exceptis in quibus ius minores a patria potestate exemptos habet*) which in its modified form is found in can. 98 § 2. With reference to the above, the canonists of that time upheld that the rule had an exceptional character which distinguished it from that of the fundamental rule; according to which minors are subject to the authority of parents or guardians.² It is important to note, that the content of the normative reservations were of hypothetical character.

It is necessary to diverge the views of Ludovicus Bendera as can. 89 CIC/17 was not enumerative of all cases falling under the clause.³ Hence it was necessary to specify the essential detail within the doctrine concerning the autonomous rights of minors.

A number of analysts who have pondered over this issue in can. 89 CIC/17, highlighted that in this instance it was not simply pertaining to matters arising from constituted law but also from Divine law.⁴ Gommarus Michielsa’s viewpoint, adopted by the legislator in the second paragraph of can. 89, is the solution correlated by one of the assumptions articulated in the “Introduction” to the pio-benedictine code, which, in principle, is codified disciplinary canonical law in its entirety: with the exception of references to Divine law – natural and positive.⁵

De facto canons containing precise description regarding relevant cases of minors were non-existent in the pio-benedictine code. Canonists *implicite* derived them from general regulations as well as from systemic doctrinal assumptions.⁶ Above all they professed the necessity to safeguard the development of faith,⁷ an example of which is expressed in the formalised regulation of can. 745 § 2, n. 2 CIC/17 highlighting the right to receive baptism.⁸

² L. BENDER, *Normae generales de personis. Commentarius in canones 87-106*, Roma–Parigi–New York–Tournai: Desclée & C.–Editori Pontifici 1957, p. 33.

³ *Ibidem*.

⁴ A. VERMEERSCH, J. CREUSEN, *Epitome iuris canonici*, vol. 2, Mechline–Romae, H. Des-sain 1937, p. 177; G. MICHIELS, *Principia generalia de personis in Ecclesia*, Parisiis–Torna-ci–Romae: Typis Societatis Joannis Evangelistae Desclée et Socii S. Sedis Apostolicae et S. Rituum Congregationis Typographi 1955, p. 62; L. BENDER, *Normae generales*, p. 34.

⁵ G. MICHIELS, *Principia generalia*, p. 61.

⁶ A. VERMEERSCH, J. CREUSEN, *Epitome iuris canonici*, p. 177.

⁷ H. JONE, *Commentarium in Codicem Iuris Canonici*, vol. 1, Padeborn: Oficina libraria F. Schoningh 1950, p. 99.

⁸ G. MICHIELS, *Principia generalia*, p. 62.

Canonistics practised during the legitimacy of the 1917 Code of Canon Law made it less difficult to differentiate cases developing from canon law. During the course of anylising commentary on can. 89 CIC/17, it is important to take into account that it would prove difficult to find the appropriate information for the subject in question relating to minors. Ordinary commentators, for example, named certain regulations, pointing to: the right to acquire a permanent or temporary place of residence (can. 93 § 2 CIC/17),⁹ the right to choose a funeral (can. 1223 § 2 CIC/17),¹⁰ the right to appear in court in spiritual matters or those connected with spiritual (can. 1648 § 3 CIC/ 17),¹¹ the right to marry provided that the minor has the use of reason (can. 1307 § 2 CIC/17) or the right to marry (can. 1034 CIC/17).¹²

In addition to the explicit norms, some authors *implicite* derived certain rights. They considered that it could be the case, firstly, providing that the law does not stipulate certain conditions whilst excluding the need for parental intervention, an example of this could be receiving paschal Communion: secondly, when the ability of validity and legitimacy of actions would depend on the decision of the ecclesiastical authority. Deliberating, they invoked the capacity to appear in the court of law in the form of a witness (can. 1757, 1765 CIC/17).¹³

2. CODIFICATION WORKS

During the course of codification works, the discussion on the clause contained in can. 89 CIC/17 was undertaken on 5-6 May 1967, during the first session “Study Group for special issues Book II,”¹⁴ which suggested the

⁹ E. REGATILLO, *Institutiones iuris canonici*, vol. 1, 6 ed., Santander: Editorial «Sal Terrae» 1961, p. 147.

¹⁰ A. VERMEERSCH, J. CREUSEN, *Epitome iuris canonici*, p. 177; G. MICHIELS, *Principia generalia*, p. 62; M. CONTE A CORONATA, *Compendium iuris canonici a usus scholarum*, vol. 1, 5 ed., Taurini–Romae: Marietti 1950, p. 201; E. REGATILLO, *Institutiones iuris canonici*, p. 147.

¹¹ F. WERNZ, P. VIDAL, *Ius canonicum Codicis normam exactum*, vol. 2, Romae: Apud Aedes Universtatis Gregorianae 1923, p. 5; G. MICHIELS, *Principia generalia*, p. 62; M. CONTE A CORONATA, *Compendium iuris canonici*, p. 201.

¹² G. MICHIELS, *Principia generalia*, p. 62.

¹³ G. MICHIELS, *Principia generalia*, pp. 62-65; H. JONE, *Commentarium in Codicem Iuris Canonici*, p. 99.

¹⁴ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *De quaestiones specialibus libri II-Sessio I, 5-6.05.1967*, “Communicationes” 21 (1989), pp. 35-55.

introduction of the reservation: “or if the Ordinary deems it necessary to provide otherwise” (*vel nisi Ordinarius aliter providere necessarium aestimaverit*).¹⁵ During a debate, one of the experts considered the issue of religious element to be all-important, taking account of the view of reason of the minor's capability to choose religion. They considered that in the context of this hypothesis, the bishop could not appoint a guardian. They ascertained that the detail in can. 89 CIC/17 did not refer to the capability of minors to act but rather to the capability to exercise their rights.¹⁶

This resulted in the additional clause to can. 2 § 2 (can. 89 CIC/17) schema of canons concerning the status of persons by virtue of age, gender, mental capacity, origin, residence, affinity and rite (*Schema canonum de personarum statu canonico ratione aetatis, sexus, status mentis, originis, habitations, consanguinitatis, affinitatis et ritus*). The above recommendation reads as follows: “even if, in certain circumstances, canon law does not provide otherwise as to the guardian or to their authority or if the diocesan bishop, in the event of a just cause, or has decided otherwise.”¹⁷ This subject of interest was also discussed at the eight session of the study team entitled, “On the subject of natural and legal persons” (4-8 October 1971). During the aforementioned session, the second expert objected to the direct reference to civil law, advocating the introduction of explicit reference to canon law. He pointed out that there are many exceptions in the canonical legal order, one of them being the right to receive baptism. This view however, was not fully acknowledged by the team's secretary who upheld that future regulation should not contain reference to the guardian. Simultaneously, the secretary considered it necessary to proceed further on the content of the clause. The second expert therefore proposed the following formula: “iis exceptis in quibus ius canonicum minores a patria potestate exemptos habet.” In response, the team secretary suggested a slightly different variant: “iis

¹⁵ Ibidem, p. 39.

¹⁶ Ibidem, “Etiam Rev. mus tertius Consultor consentit cum regula de tutoribus proposita; animadvertit hanc quaestionem esse magni momenti pro «Religionsmündigkeit», pro capacitate suam eligendi religionem, et aestimat Episcopo competere potestatem dicendi tutorem in hac materia nihil posse. Notat etiam in canone 89 tantum agendum esse de capacitate agendi seu de capacitate exercitii.”

¹⁷ Ibidem, p. 52: “§ 2. Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, secundum praescripta iuris civilis respectivae nationis, nisi ius canonicum de tutore vel de eiusdem potestate aliud praescriptum pro certis causis statuerit, aut Episcopus dioecesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit.”

exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt,” which was unanimously accepted by all.¹⁸

The team secretary's recommendation resulted in discussion by the Study Team over proposals to can. 3 § 2, which took place on 15 -20 October 1979 during the first session on the subject of “God’s people.”¹⁹ The same formulation also appeared in can. 2 § 2 (CIC/83) Approved canons (*Canones approbati*)²⁰ as well as in can. 2 § 2 (CIC/83) Appendix of canons approved by the Team “On the subject of legal and physical persons” (*Appendix canones approbati a coetu de personis physicis et iuridicis*).²¹ At the present moment the same wording appears in the clause of can. 98 § 2 CIC/83.

¹⁸ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber I-De personis physicis et iuridicis-Sessio VIII, 4-8.10.1971*, “Communicationes” 22 (1990), pp. 45-46: “Quoad § 2: Rev. mus secundus Consultor declarat sibi non piacere ut immediate ad ius civile fiat recursus; prius agendum est de iure canonico, in quo multiplices dantur exceptiones, uti ex. gr. in iure baptismali. Respondet Rev. mus Secretarius Ad. in iure canonico nihil inveniri de tutore, de quo hic agitur, quia semper ad ius civile remittitur. Et regula exceptiones praecedere debet. Rev. mus secundus Consultor sequentem formulam proponit adiungendam post «tutorum»: «iis exceptis in quibus ius canonicum minores a patria potestate exemptos habet». Est locutio Codicis et hoc modo ius canonicum remanet ius principale, dum ius civile subsidiarium fit. Post disceptationem Rev. mus Secretarius Ad. formulam quae sequitur proponit: «iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta...». Placet omnibus propositio.”

¹⁹ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber II-De Populo Dei (Sessio Altera)-Sessio I, 15-20.10.1979*, “Communicationes” 12 (1980), p. 63: “§ 2. Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta iuris civilis respectivae nationis, nisi ius canonicum de tutore vel de eiusdem potestate aliud praescriptum pro certis causis statuerit, aut Episcopus dioecesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit.”

²⁰ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber I-De personis physicis et iuridicis-Sessio VIII, 4-8.10.1971*, p. 65: “§ 2. Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta iuris civilis respectivae nationis, nisi ius canonicum de tutore vel de eiusdem potestate aliud praescriptum pro certis causis statuerit, aut Episcopus dioecesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit.”

²¹ Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Liber I, Liber I-De personis physicis et iuridicis-Sessio XI, 13-17.1972*, “Communicationes” 22 (1990), p. 146-147: “§ 2. Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, servantur praescripta iuris civilis res-

The result of the conducted analysis indicates that the content of the clause evolved during the codification works. By comparison to the reservations identified in can. 89 CIC/17, the updated description provided more detail. This was due to the fact that it was grounded on explicit reference to Divine law and canon law, as suggested by the analysing experts. It is important to add the legislator's usage of terms of *lex divina* which points not only to the legal but to the moral character of minors rights.²²

3. THE 1983 CODE OF CANON LAW (CAN. 98 § 2)

As previously mentioned, the contents of the clause “iis exceptis in quibus minores lege divina aut iure canonico a patria potestate exempti sunt” contained in can. 98 § 2 CIC/83, developed during codification works. The following two principles can be deduced from the documented description: to begin with, in ecclesiastical law, minors have limited legal capacity to undertake action²³; secondly, parental or guardian authority over minors is not outright but of ancillary character.²⁴ It is important to bear in mind that in cans. 226 § 2; 793 § 1 and 1136, the legislator highlighted in detail the parental rights in respect of raising offspring. The meaning of this with relevance to the issue in question is the exception to the general rule, as pointed out by the experts in can. 89 CIC/17. It is therefore legitimate to ascertain a certain degree of autonomy on the part of minors in exercising their powers. Remarking on this subject Rosalio L. Castillo Lar highlighted that the autonomy shouldn't be understood in the sense that parents or guardians cannot intervene in advisory or in helpful matters but in the sense that they cannot oppose or prohibit particular action. In such cases, a parental or guardianship order is not legally binding.²⁵ Focusing upon the wording from

pectivae nationis, nisi ius canonicum de tutore vel de eiusdem potestate aliud praescriptum pro certis causis statuerit, aut Episcopus dioecesanus in certis casibus iusta de causa per nominationem alius tutoris providendum aestimaverit.”

²² T. GAŁKOWSKI, *Prawo Boże w kanonistyce*, Warszawa: Wydawnictwo Naukowe UKSW 2023, p. 85.

²³ L. NAVARRO, *Persone e soggetti nel diritto della Chiesa*, Roma: Apollinare studi 2000, p. 17.

²⁴ G. DEGIORGI, *I minori nella legislazione della Chiesa*, Venezia: Marcianum Press 2015, p. 115.

²⁵ R.L. CASTILLO LARA, *La condizione e lo statuto giuridico del minore nell'ordinamento giuridico della Chiesa*, “Salesianum” 52 (1990), p. 260.

can. 98 § 2 CIC/83 and the issue in question, the problem ought to be addressed from two perspectives: Divine law and canon law.

3.1. DIVINE LAW

By comparison to the clause in can. 89 CIC/17, the formulated clause in can. 98 § 2 CIC/83, despite its detailed content, is of hypothetical character. On the grounds of this, the legislator allowed for the canonists to determine minors rights under Divine law. Whilst undertaking to solve this issue, it is essential to take into account that the difficulties in implementing this premise arise from the fact that matters developing from Divine law have not been clearly and normatively formulised.²⁶ In such situations expert analysts, as a rule, rely on inferential reasoning; initially in cases of minors, focusing on Christian doctrine and maintaining on the one hand that they have the right to the truth of faith and to promote it, whilst on the other hand they also have the right to care for the development of religious life in the perspective of salvation of souls (can. 1752).²⁷

A further object of expert analysis is the listed knowledge base of law (catalogue) and responsibilities of all the faithful (cans. 208–223). Further to the aforementioned catalogue, there is strong association including the right of usage of spiritual goods (can. 213) and the right to follow one's own path of spiritual life (can. 214). The cited regulations correspond to the articulated content of can. 748 § 1: "All men are bound to seek the truth about God and his Church and in recognition of what they find they have the duty and responsibility by the power of Divine law to accept and uphold." Further within the above mentioned list of rights and duties, there is also the right to choose a condition of life (can. 219).²⁸ Regulations with a greater degree of detail are found within the current binding Code. Whilst addressing this issue Alejandro Bunge pointed to the rights of minors to receive the sacraments of

²⁶ Further to the subject see P.A. BONNET, *I diritti-doveri fondamentali del fedele non formalizzati nella positività canonica umana*, [in:] *Diritti fondamentali del fedele*, Città del Vaticano: Libreria Editrice Vaticana 2004, p. 131: "Non tutte le condizioni giuridiche fondamentali del fedele «uti singulis», incluse nel diritto-dovere primario alla salvezza (...) sono state formalizzate nelle componente umana del diritto ecclesiale."

²⁷ H. PREE, *Allgemeine Normen*, [in:] *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. K. Lüdicke, vol. 1, Essen: Ludgerus Verlag 1983, ad 98, n. 6; R. SOBAŃSKI, *Komentarz do kan. 98 KPK*, [in:] J. KRUKOWSKI, R. SOBAŃSKI, *Komentarz do Kodeksu prawa kanonicznego*, vol. 1, Poznań: Pallottinum 2003, p. 168.

²⁸ R. SOBAŃSKI, *Komentarz do kan. 98 KPK*, p. 168.

baptism, confirmation and the Eucharist.²⁹ In turn, Winfried Aymans and Klaus Mörsdorf underlined situations in which the spiritual well-being would be at risk, i.e. minors have the right to receive the sacrament of baptism, participate in catechesis and attend Holy Mass.³⁰ These views are anchored in the regulations in the fourth Book of the Code “The sanctifying task of the Church.” In the same way can. 865 § 1 defines “in order for the adult to be baptised, it is necessary that they declare the will to receive baptism.” Aside from this, can. 852 § 1 stipulates that the “Norms contained in the canons pertaining to baptism of adults apply to all, who upon leaving adulthood are capable of using reason.” Bearing in mind the essence of this subject regarding the specific status of minors, it is important to mention that consistent with can. 97 § 1 there are those who have attained the age of 18 years (can. 97 § 1).

It should be noted that within the interpretation of this canon the “minor falls within the scope of the concept of “adult.” The same applies to the subsequent general terms: “faithful” and “baptised” which is addressed in cans. 890 and 912 CIC/83. The first one (can. 890 CIC/83) states that the faithful are obliged to receive the sacrament of confirmation within at the appropriate time. In compliance with can 912 “each person baptised, unless prohibited by law, may (...) be permitted to receive Holy Communion. Ultimately the legislator clearly articulated yet another right within the “Processes” in can. 1478 § 3 CIC/83 of Book seven, stating “Furthermore, in spiritual matters and those connected with spiritual, minors who are capable of sound reason may act in their own official capacity without the consent of parents or guardians.” This norm remains strictly associated with can. 1401, n. 1, which stipulates that “the Church by its own power and exclusive rights, recognises issues concerning spiritual matters and those associated with them.”³¹

3.2. CANON LAW

Another factor made known by the clause is canon law. According to the regulations of the Code, minors are excluded from the authority of their

²⁹ A. BUNGE, *Las claves del Código. El libro I del Código de Derecho Canonico*, Buenos Aires: San Benito 2006, p. 192; V. DE PAOLIS, A. MONTAN, *Libro I del Codice: Norme generali (can. 1-203)*, [in:] *Il diritto nel mistero della Chiesa*, eds. Gruppo Italiano Docenti di Diritto canonico, Roma: Pontificia Università Lateranense 1998, p. 334.

³⁰ W. AYMANS, K. MÖRSDORF, *Kanonisches Recht*, vol. 1, Paderborn–München–Wien–Zürich: F. Schönigh 1991, p. 297.

³¹ C. PAPAIE, *I processi. Commento ai canoni 1400-1670 del Codice di Diritto Canonico*, Roma Città del Vaticano: Urbaniana University Press 2016, p. 138.

parents or guardians in the event of: acquiring a permanent or temporary place of accommodation (can. 105 § 1 CIC/83) prospect of marriage (can. 1071 § 1, n. 6 and can. 1072) and appearance in the court of law (can. 1478-1479 CIC/83).³² Aside from this, in the applicable legal order, the legislator permits undertaking of certain actions by minors dependent on age criteria: initially after reaching the age of 14 years. Whilst deciding on baptism, they have the choice of the Latin or other Church *sui iuris* (can. 111 § 3), they may be called to be witnesses which means that they may be called to testify before the Church tribunal (can. 1550 § 1), a woman acquires the legal capacity to enter into marriage (can. 1083 § 1); secondly, after reaching 16 years of age they acquire the right to become Godparents and witnesses to Confirmation (can. 874 § 1, n. 2 and can. 893), a man acquires the legal capacity to enter into marriage (can. 1083 § 1); a minor who has reached the age of 17 years may enter the noviciat (can. 643 § 1, n. 1), and it is also possible to be received, for a trial period, into the Congregation of Apostolic Life (can. 643 § 1, n. 1; can. 735 § 2).³³

IN PLACE OF CONCLUSION

Up until now, the debate conducted on the subject of the clause in can. 98 § 2 appears not to present interpretation difficulties. However *de facto* these difficulties do exist: above all they are generated in the reference of the second paragraph of Divine Law. It is true, on the one hand, that this particular dimension of law is the constitutive law of the Church, whereas on the other hand, it sets the boundaries of interpretation and its application in the canonical legal order.³⁴

It is without doubt, that the norms of Divine law by which the reception of truth is revealed by God, are the fundamental norms of Church law. In canonistics these are referred to as precanons.³⁵ From the legislative aspect

³² L. CHIAPPETTA, *Il Codice di Diritto Canonico. Commento giuridico – pastorale*, vol. 1, Roma: Edizioni Dehoniane Bologna 1996, p. 148.

³³ Ibidem.

³⁴ G. DZIERŻON, *Funkcjonowanie kanonicznego porządku prawnego. Prawo Boże, prawo ludzkie, prawo czysto kościelne w prawie kanonicznym*, “Kościół i Prawo” 10 (2021), no. 1, p. 48.

³⁵ T.I. JIMÉNEZ URRESTI, *Comento al can. 98 CIC*, [in:] *Código de Derecho Canónico. Edición bilingüe comentada*, ed. L. De Echeveria, Madrid: Biblioteca de Autores Cristianos 1985, p. 80; P.V. PINTO, *De normis generalibus*, [in:] *Commento al Codice di Diritto Canonico*, ed. P. V. Pinto, Città del Vaticano: Libreria Editrice Vaticana 2001, p. 62.

in the canonical order, there is a process of positivisation of this law.³⁶ It is however important to note, that in this matter of interest, these directives were not articulated in the church law in the form of precise statements. They are grounded within the doctrine, by the way in which Christians apply the principles of faith in specific existential situations.³⁷ Peter Kistner perceives this form of law as *ius imperfectum*, articulated in framework standards and indicative guidelines, without precise specification by the Church legislator.³⁸ Referring to the subject raised in discussion, Giorgio Degiorgi clearly noticed that it is not easy to simply draw a demarcation line which would legally define the limits of parental authority; nor it is an easy task to work out a canonist criteria with precise definition to determine legitimate autonomy of a minor when exercising their subjective rights.³⁹ The specific nature of the phenomenon of Divine law in can. 98 § 2 CIC/83 is reflected in approved evaluation. At present, there is no known author who has compiled an exhaustive catalogue of the rights of minors originating from Divine law.

Seemingly, such type of dilemma materialises from the fact that autonomic matters concerning minors are, in the first instance, derived theoretically from regulations containing various degrees of obscurity: the catalogue listing the rights of all faithful whereupon the contents of norms are to a greater degree characterised generally but also contain forms of abstract, an example of which are; the right to receive the sacrament of baptism, the right to participate in catechesis and the right to attend Holy Mass. It is also important to point out, that throughout canonical practise during the period of the legitimacy of the pious-benedictine code, such experts applied this type of hypothesis *implicite* deriving the rights of minors from Divine law from the general rights of the faithful.⁴⁰

³⁶ T.I. JIMÉNEZ URRESTI, *De la teología a la canónica*, Salamanca: Universidad Pontificia de Salamanca 1993, pp. 209-210.

³⁷ W. AYMANS, K. MÖRS DORF, *Kanonisches Recht*, p. 297.

³⁸ P. KISTNER, *Das göttliche Recht und die Kirchenverfassung. Der Freiraum für eine Reform*, Berlin: LIT 2009, pp. 24-25: "Das göttliche Recht, auf das sich der CIC bezieht, ist schließlich nicht selten *ius imperfectum*: eine Rahmenregelung oder Orientierungsvorgabe, deshalb aber ohne konkretisierende Ergänzung durch dem kirchlich-menschlichen Gesetzgeber volziehbar."

³⁹ G. DEGIORGI, *I minori*, p. 115: "Non é sempre facile tracciare una linea di confine che stabilisca in modo chiaro quale sia il limite al legittimo esercizio della potestà dei genitori. Non é neppure facile ravvisare, all'interno della legislazione canonica alcuni criteri che stabiliscano la giusta autonomia del minore (...)."

⁴⁰ A. VERMEERSCH, J. CREUSEN, *Epitome iuris canonici*, p. 177; G. MICHIELS, *Principia generalia*, p. 62.

To all intents and purposes, the shortcomings on the part of expert commentary to can. 98 § 2 (can. 89 CIC/17) shows the example of listing individual rights without supporting grounds with rationalisation. On the contrary, the point of contention appears quite different in jurisprudence by the Roman Rota, whereupon reflecting upon the material norms of matrimonial rights originating from Divine law, rotal auditors, as a rule, support their standpoints by solid rationalisation.

From this point of view, I would like to emphasise that, up until the present, it proves difficult to obtain literature containing critical viewpoints on the subject of the dilemmas described by the title of this study. An example of the interpretation difficulties of this undertaken topic are the regulations specific to the age necessary to enter the noviciate. Accordingly many expert commentators uphold the view that minors benefit from such rights by the power of Divine law.⁴¹

Whilst pondering over this issue, it should be noted that the 1917 Code of canon law does not specify the age limit (can. 542, n. 1; can. 543 CIC/ 17); currently the age limit has been set to 17 years (can. 643 § 1, n. 1 CIC/ 83).

Consequently some uncertainty materialises as to whether the set age limit derives from Divine law? Should the answer to the question be conclusive, then it would be legitimate to say that it was determined as a result of deep reflection on this phenomenon by the Church legislator. It should however be noted, that the exposed issue is not merely theoretic or academic but of practical significance. For instance, should one settle upon the thesis that the age limit derives from Divine law, then it would not be possible to dispense from it (can. 85). Another aspect of the complexity of issue in question was raised by Ludovicus Bender. He highlighted that an act based on Divine law is obligatory and therefore in undertaking this type of action, the minor is independent from the views taken by parents or guardians. To the contrary, there is a difference with acts that are doubtlessly bonded with Divine law. Further to his opinion and with reference to this issue, the exercise of rights *hic et nunc* would not be obligatory. Furthermore expanding on the subject of obligation, it cannot be ruled out that the parent or guardian could still exclude some of these hypothetical and potential actions that enable minors to exercise their rights. By way of explanation he used the following situation, namely, that the right to receive frequent, daily Holy Communion origi-

⁴¹ T.I. JIMÈNEZ URRESTI, *Comento al can. 98 CIC*, p. 80; H. PREE, *Allgemeine Normen*, ad 98, n. 6.

nates from Divine law. Should a 13 year old son wish to exercise his right each day and if the parent perceives that this could cause physical harm or serious neglect of education or daily tasks then, according to Bender, for this reason he could limit the exercise of these rights to the reception of this sacrament solely on Sundays. The Dominican's opinion in such a situation, is that the son would be obliged to respect parental decision.⁴²

In conclusion, the presented study is of contributory character. It is intended to provide inspiration to undertake further research on these exposed issues. The Book of "General norms" requires in-depth contribution to hand-picked canons and likewise to all canons. Additionally the positions taken up by expert commentators on certain issues require well-grounded hypothesis, which cannot be said about the commentaries found in contemporary publications on can. 98 § 2 CIC/83.

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⁴² L. BENDER, *Normae generales*, p. 34.

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AUTONOMICZNE PRAWA DO WYKONYWANIA UPRAWNIEŃ MAŁOLETNICH
W KANONICZNYM PORZĄDKU PRAWNYM.
DYLEMATY NA KANWIE KLAUZULI „Z WYJĄTKIEM SPRAW,
W KTÓRYCH MAŁOLETNI NA PODSTAWIE PRAWA BOŻEGO LUB KANONICZNEGO
SĄ WYJĘCI SPOD WŁADZY RODZICÓW LUB OPIEKUNÓW” (KAN. 98 § 2 KPK)

STRESZCZENIE

W zaprezentowanym opracowaniu Autor ukazał dylematy jakie powstały w wyniku jego namysłu nad klauzulą „z wyjątkiem spraw, w których małoletni na podstawie prawa Bożego lub kanonicznego są wyjęci spod władzy rodziców lub opiekunów” ujętą w kan. 98 § 2 KPK w kontekście problematyki autonomicznych praw do wykonywania uprawnień małoletnich w kanonicznym porządku prawnym. Nie podważając zasadności wprowadzenia klauzuli wykazał, iż występujące w niej odniesienie do prawa Bożego generuje poważne trudności interpretacyjne wynikające z faktu, iż autonomiczne sprawy małoletnich w wyniku procesu pozytywizacji w kanonicznym porządku prawnym nie zostały precyzyjnie wyartykułowane. Wskazał, iż bardzo trudno jest wyznaczyć jasne, precyzyjne granice pomiędzy prawem Bożym a prawem pozytywnym. Wyraził pogląd, iż autonomiczność uprawnień małoletnich nie jest absolutna w odniesieniu do spraw związanych z prawem Bożym, optując za możliwością korekty postaw przez rodziców lub opiekunów.

Ze względu na obecny znikomy stan dorobku kanonistyki w tej kwestii, który w zasadzie sprowadza się do egzemplarycznego wymienienia uprawnień przez komentatorów kan. 98 § 2 KPK (kan. 89 CIC/17) Autor postuluje, sugerując prowadzenie bardziej rzetelnych badań w nad tym interesującym zagadnieniem.

Słowa kluczowe: prawo kanoniczne; małoletni; rodzice; opiekunowie; autonomiczne uprawnienia.