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**Zmiany zapisów kanonów w obszarze materialnego prawa małżeńskiego na mocy motu proprio „De concordia inter Codices”**

**The Changes in the Text of Canons in the Area of Material Marital Law Based on Motu Proprio „De concordia inter Codices”**

On 31 May 2016, Pope Francis issued the motu proprio „De concordia inter Codices”, under which certain canons of the current Code of Canon Law were amended<sup>1</sup>. As the author of the document writes in the „Introduction”, the main aim of the published legal act is to harmonise normative provisions appearing in the Code of Canon Law of 1983 and in the Code of Eastern Canons of 1990 (hereinafter CCEO).

In this paper, attention will not be paid to all modifications made, but only to those introduced in the area of substantive matrimonial law. It appears from an initial reading of the papal document that the starting point for making the changes has become the ambiguity of the can. 1127 § 1 of the Code of Canon Law (hereinafter CIC), concerning the conditions of assistance in marriage between Catholics and a non-Catholic party of the Eastern rite.

**1. The ambiguity of can. 1127 § 1 of the CIC**

As regards the can. 1127 § 1 of the CIC the legislator has introduced different arrangements with regard to mixed marriages concluded by Latin Catholics with Eastern rite acatholics and other baptised acatholics. In the case of marriages with Eastern rite faithful, the

canonical form is only required for fairness; the participation of the saintly minister is obligatory for validity.

As regards the interpretation of can. 1127 § 1 of the CIC, there is no consensus between Latin and Eastern commentators on who can act as saint minister. The first of them explaining this problem, taking into account the disposition of the can. 1108 § 1 of the CIC, do not rule out the possibility that a marriage in the configuration according to the can. 1127 § 1 of the CIC could also be concluded before a deacon<sup>2</sup>; moreover, few authors even advocate the possibility of delegating power under ordinary conditions to a lay person<sup>3</sup>, which is categorically not permitted in the Eastern doctrine, since it particularly emphasises the need for a priest to bless a marriage<sup>4</sup>. In explaining this, Joseph Prader stated that in Eastern law it is unthinkable that a marriage could be celebrated without the presence of a local ordinate or a pastor<sup>5</sup>.

The doctrine's inconsistency of canonists' views has led the legislator to introduce the phrase „l'intervento di un sacerdote” instead of „interventus ministri sacri” in Article 11 of the DCIC. In analysing this provision, I would first like to point out that the Latin word „interventus” was translated as „participation” by the Polish translator. In my opinion, however, this Polish term does not fully reflect the thoughts of the legislator. According to the „Polish Dictionary”, one of the meanings of the word „participation” is „taking part in something”<sup>6</sup>, while one of the designators of the normative term „interventus” is „advocacy, intercession”<sup>7</sup>. The latter meaning has a dynamic dimension, not a passive one. That is why the Italian expression „l'intervento di un sacerdote” should be translated as „intervention by a priest”.

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<sup>1</sup> FRANCISCUS, *Motu proprio De Concordia inter Codices*, 31.05.2016, [https://www.vatican.va/content/Francesco/it/motu\\_proprio/documents/papa-francesco-motu-proprio-20160531\\_de-concordia-inter-codices.html](https://www.vatican.va/content/Francesco/it/motu_proprio/documents/papa-francesco-motu-proprio-20160531_de-concordia-inter-codices.html) [access: 6.10.2016], (hereinafter: DCIC).

<sup>2</sup> Cf. F. BERSINI, *Il diritto canonico matrimoniale*, Torino 1994, p. 187; J. J. GARCÍA FAÍLDE, *La nulidad matrimonial, hoy*, Salamanca 1999, p. 334; R. ALTHAUS, J. PRADER, J. F. REINHARD, *Das kirchliche Eherecht in der seelsorgische Praxis*, Essen 2013, p. 161. For more on this subject see T. JAKUBIAK, *Początki prawa regulującego możliwość asystowania diakona przy zawarciu małżeństwa w zwykłych warunkach*, *Studia Bobolanum* 3 (2015), p. 171-187.

<sup>3</sup> Cf. V. POSPISHIL, *Eastern Catholic Marriage Law*, Brooklyn 1991, p. 372.

<sup>4</sup> Cf. K. NITKIEWICZ, *Katolickie Kościoły Wschodnie*, Sandomierz 2014, p. 89-90; N. DURÀ, T. PETRESCU, *Institution of the Family according the Teaching of the Orthodox Church*, *Ecumeny and Law* 2 (2104), p. 120.

<sup>5</sup> Cf. J. PRADER, *La forma del celebrazione del matrimonio*, in: *Il matrimonio nel Codice dei Canonici delle Chiese Orientali*, Città del Vaticano 1994, p. 298; G. KADZIOCH, *Il ministro del sacramento del matrimonio nella tradizione e nel diritto canonico latino e orientale*, Roma 1997, p. 219.

<sup>6</sup> Cf. *Udział*, at: L. DRABIK, A. KUBIAK-SOKÓŁ, E. SOBOL, L. WIŚNIAKOWSKA (ed.) *Słownik języka polskiego*, Warszawa 2014, p. 1080.

<sup>7</sup> Cf. *Interventus*, in: A. JOUGAN, *Słownik kościelny łacińsko-polski*, Warszawa 1992, p. 355; *Interventus*, in: J. SONDEL, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 1997, p. 519.

The modification of the content of the can. 1127 § 1 of the CIC, introduced in art. 11 of the DCIC, thus ends the doctrinal dispute concerning the subject entitled to blessing in the configuration specified in can. 1127 § 1 of the CIC. Indirectly, it also ends the dispute over the validity of this type of marriage. Thus, the marriages with the Eastern faithful, about whom can. 1127 § 1 of the CIC treats cannot currently be blessed by a deacon. The modification of the content of this canon therefore meets the demands expressed in n. 18 of the Council „Decree on Ecumenism” and in the course of the codification work<sup>8</sup>, in order to avoid the invalidity of mixed marriages by introducing appropriate solutions<sup>9</sup>.

Commenting on Article 11 of the DCIC, I would also like to point out that the legislator did not use in the Latin legislation the term „benedictio” existing in the Eastern legislation; he remained with the term „interventus” in order not to blur the doctrinal differences between the Latin tradition and the Eastern tradition in this matter.

## **2. The consequences of the change in the record of the can. 1127 § 1 of the CIC**

The introduction of changes to the can. 1127 § 1 of the CIC has by its very nature forced further changes in the content of several other canons concerning the canonical form of marriage celebration. The provisions of can. 1108 (Article 6), can. 1111 of the CIC (Article 8), and can. 1112 of the CIC (Article 9) have been modified in DCIC. It should be stressed that introducing a new third paragraph in Article 6 of the DCIC, which came into the structure of the can. 1108 of the CIC, is crucial in this case.

### **2.1. Priest assisting in the celebration of a mixed marriage (Article 6 DCIC)**

As has already been mentioned, the legislator has changed the provision of the can. 1108 of the CIC in Article 6 of the DCIC by adding the following § 3: „Only a priest validly

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<sup>8</sup> Cf. PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, *Relatio complectens synthesim animadversionum ab. Em. mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis*, Typis Polyglotis Vaticanis 1981, p. 261; M. ORTIZ, *La supplenza della facoltà per assistere al matrimonio e la funzione della forma al servizio dello ius connubii*, in: H. FRANCESCHI, M. ORTIZ (ed.), *Ius et matrimonium*, Roma 2015, p. 46.

<sup>9</sup> Cf. J. FORNÉS, *La forma en el matrimonio de un católico con acatólico*, in: R. RODRÍGUEZ-OCAÑA *Forma jurídica y matrimonio canónico*, Pamplona 1998, p. 77; F. AZNAR GIL, *Derecho matrimonial canónico*, t. 3, Salamanca 2003, p. 99.

assists at the marriage between two Eastern parties or between one Latin party and one Eastern Catholic or non-Catholic party”.

In presenting this issue, it should first be noted that the modification in question is linked to that introduced in Article 11 of the DCIC. It is related to the institution of the holy ritual which functions in the tradition of Eastern Churches. The research carried out by J. Prader shows that since the 8<sup>th</sup> century there has been a requirement of liturgical ritual in the East. In the 12<sup>th</sup> century, a doctrine was formed, influenced mainly by the views of Greek theologians, according to which the essence of the sacrament of marriage is expressed in priestly blessing. The priest is therefore a minister of the sacrament of marriage<sup>10</sup>.

It should be added that, at present, the requirement for a holy ritual in the Eastern Churches is based on the assumption that the provisions on canonical form are closely linked to those on liturgical form. The latter is obligatory in ordinary circumstances<sup>11</sup>. An important component of the liturgical form is the crowning rite<sup>12</sup>. In raising this problem, Marek Lewreszuk even speaks of the sacrament of the crowning.<sup>13</sup> As Grzegorz Kadzioch writes, this rite in liturgical books is considered an essential element of the sacrament of marriage. The author has shown that since early Christian times it has been celebrated during the Eucharist, so the priest's participation was necessary<sup>14</sup>. According to Kadzioch, the sacred rite is not a ritual which is external to the canonical form, but an essential element of sacramentality, resulting from the will of the Church. A priest in this legal order is a minister of the sacrament of marriage including nupturients<sup>15</sup>.

In Eastern legislation, the requirement for the indispensable blessing of the priest was codified in can. 828 § 1 of the CCEO with the following wording: „Only those marriages are valid which are celebrated with a sacred rite, in the presence of the local hierarch, local pastor, or a priest who has been given the faculty of blessing the marriage by either of them [...]”<sup>16</sup>.

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<sup>10</sup> Cf. J. PRADER, *La forma del celebrazione del matrimonio*, op. cit., p. 286.

<sup>11</sup> Cf. G. KADZIOCH, *Il ministro del sacramento del matrimonio nella tradizione e nel diritto canonico latino e orientale*, op. cit., p. 222.

<sup>12</sup> For more information on this ritual see J. MEYENDORFF, *Małżeństwo w prawosławiu. Liturgia, teologia, życie*, Lublin 1995, p. 41-50. The author writes that, according to Eastern doctrine, this ritual should also be observed during the celebration of mixed marriages.

<sup>13</sup> Cf. M. LEWRESZUK, *Sakrament małżeństwa. Liturgiczna symbolika i znaczenie sakramentu małżeństwa w Kościele prawosławnym*, Białystok 2014, p. 45-116.

<sup>14</sup> Cf. G. KADZIOCH, *Il ministro del sacramento del matrimonio nella tradizione e nel diritto canonico latino e orientale*, op. cit., p. 222.

<sup>15</sup> *IBID.*, p. 236.

<sup>16</sup> For more on the meaning of the sacred ritual in the Orthodox Church see J. STOJANOVIC, *Interkonnessionelle Ehen. Die kirchenrechtliche und pastorale Praxis der Orthodoxen Kirche*, München 2013, p. 56.

In interpreting this canon, commentators stress that only presbyters and bishops are entitled to bless a marriage; deacons do not have such powers<sup>17</sup>. On explaining this problem, Prader stated that canonical sources show that in none of the Eastern Churches is marriage blessed by a deacon<sup>18</sup>. This principle has been highlighted in several canons of the CCEO (can. 302 § 2, 789, 828 § 1-2, 832, 834 § 2, 839, 840 § 1, 841 § 1 and 3)<sup>19</sup>. In Eastern law, therefore, a competent authority cannot delegate the power to bless marriages to a deacon<sup>20</sup>, and even more so to the layman<sup>21</sup>.

Continuing these considerations, it should be added that the term „sacred rite” is defined in the can. 828 § 2 of the CCEO as follows: „That rite which is considered a sacred rite is the intervention a priest assisting and blessing”. This notion is not entirely consistent with the wording of can. 1108 § 2 of the CIC in which it is stated that: „Only that person who, being present, asks the contracting parties to manifest their consent and in the name of the Church receives it, is understood to assist at a marriage”<sup>22</sup>. It should be noted that such a provision, when interpreted literally in conjunction with the first paragraph of this canon, does not exclude the possibility of assisting in the celebration of a marriage - also in relation to mixed marriages contracted by Eastern believers - by a deacon<sup>23</sup>. Many canonists therefore believe that a Latin deacon could be delegated to bless marriages entered into by Eastern Catholics<sup>24</sup>.

The lack of interpretative consensus on the question of the sacrament minister for marriage between Latin Catholics and Eastern Catholics or acatholics has led the legislator to opt in art. 6 DCIC for a solution, according to which in such a hypothesis, only a priest, i.e. a presbyter or bishop, may be the assistant.

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<sup>17</sup> Cf. H. ALWAN, *Commento al can. 828 CCEO*, in: P. V. PINTO (ed.) *Commento al Codice dei Canonici delle Chiese Orientali*, Città del Vaticano 2001, p. 707-708; G. KADZIOCH, *Il ministro del sacramento del matrimonio nella tradizione e nel diritto canonico latino e orientale*, op. cit., p. 219-220.

<sup>18</sup> Cf. J. PRADER, *Il matrimonio in Oriente e in Occidente*, Rome 2003, p. 226.

<sup>19</sup> Cf. J. PRADER, *La forma del celebrazione del matrimonio*, op. cit., p. 298.

<sup>20</sup> IBID.

<sup>21</sup> Cf. G. KADZIOCH, *Il ministro del sacramento del matrimonio nella tradizione e nel diritto canonico latino e orientale*, op. cit., p. 222.

<sup>22</sup> See the List of can. 1108 CIC and 828 CCEO in: A. D’AURIA, *Il matrimonio canonico nell’ordine della natura e della grazia*, Roma 2016, p. 302.

<sup>23</sup> For more on this subject see T. JAKUBIAK, *Diakon świadkiem urzędowym zawarcia małżeństwa w zwykłych warunkach według prawa obowiązującego od promulgacji Kodeksu z 1983 r.*, *Ius Matrimoniale* 1 (2016), p. 45-74.

<sup>24</sup> Cf. J. PRADER, *Il matrimonio in Oriente e in Occidente*, op. cit., p. 226: „D’altronde é da considerarsi valido il matrimonio benedetto da diacono latino per benedire il matrimonio di cattolici orientali”.

## 2. 2. Changes introduced in other canons (Articles 8 and 9 of the DCIC)

The further consequence of the changes made to can. 1127 § 1 of the CIC are modifications to the wording of two other canons from the area of regulations on canonical form, which are the can. 1111 and 1112 of the CIC. In the first paragraphs of both regulations, there appeared an identical clause „with observance of what was ordered in can. 1108 § 3 of the CIC” (*fermo restando quanto disposto dal can. 1108 § 3 CIC*). This means, therefore, that a competent authority in the case of entering into marriages in the configuration referred to in the DCIC cannot delegate power to a deacon, and even more so to a lay person.

## 3. Changes to the can. 1109 of the CIC (Article 7 DCIC)

The modifications present in the Article 7 of the DCIC concerning the content of the can. 1109 of the CIC relating to the scope of authority of the ordinary of the place and the parish priest are of a slightly different nature. The legislator in Article 7 of the DCIC has abandoned the phrase „sit ritus latini” present in can. 1109 of the CIC, introducing in this place the phrase „sia ascritta alla Chiesa latina”.

The concept of „rite” in the sense of ritual was defined in can. 28 § 1 of the CCEO as a liturgical, theological, spiritual and disciplinary heritage, distinguished by the culture and historical circumstances of the peoples, expressed in the experience of faith, which is specific to each Church *sui iuris*<sup>25</sup>. Such a definition does not exist in Western legislation

While examining the terminology of the 1983 Code, commentators stress that the term „ritus” functioning in this collection is not unequivocal. Analysing this problem, Natale Loda mentioned three of its meanings: liturgical meaning, meaning in the sense of „coetus fidelium” and legal-ecclesiological meaning<sup>26</sup>. Referring to this thread, Elmar Güthoff pointed out that in this codification the term „rite”, in the most of the norms, is identified with the Church. Nevertheless, as the German canonist noted, the term „Ecclesia ritualis sui iuris”

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<sup>25</sup> Cf. U. NOWICKA, *Obrządek*, in: G. LESZCZYŃSKI (ed.), *Wielka Encyklopedia Prawa*, t. 2, Warszawa 2014, p. 138.

<sup>26</sup> Cf. N. LODA, *Rito*, in: J. OTADUY, A. VIANA, J. SEDANO (ed.) *Diccionario general de Derecho Canónico*, t. 7, Pamplona 2012, p. 43.

(can. 111 of the CIC)<sup>27</sup>, also appears in this collection, introduced into circulation already in the course of codification works to ensure coherence with the terminology functioning in Eastern law<sup>28</sup>.

Article 7 of the DCIC uses the concept of ritual in the legal and constitutional sense, as the legislator uses the term „Latin Church”<sup>29</sup>. The provision of this article corresponds to the terminological changes introduced in Article 1-2 of the DCIC, and these are consistent with the terminology found in the can. 29-30 of the CCEO.

#### **4. New regulation in the structure of can. 1116 of the CIC (Article 10 DCIC)**

In Article 10 of the DCIC, the legislator has added the § 3 to can. 1116 of the CIC, governing the celebration of marriages in extraordinary form, stating that the Ordinary of the place may give any Catholic priest the authority to bless the marriage of faithful of Eastern Churches who are not in full communion with the Catholic Church and who voluntarily ask for it, if nothing prevents the validity and fairness of the marriage.

Commenting on this regulation at the outset, it must be said that it is new. The provision contained in it is in some way related to the provision of can. 844 § 3 of the CIC, according to which „Catholic ministers may lawfully administer the sacraments of penance, the Eucharist and anointing of the sick to members of the eastern Churches not in full communion with the Catholic Church, if they spontaneously ask for them[...]”. The direct source of this canon is the content of n. 14 of the Council's „Decree on Ecumenism”, which states that „the Churches of East and West have for many centuries walked their own paths united, however, by a community of faith and sacramental life”. (DE 14). This truth is made even clearer in Article 122 of the Ecumenical Directorate<sup>30</sup> in the following statement:

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<sup>27</sup> Cf. E. GÜTHOFF, *Rito*, w: S. HAERING, H. SCHMITZ (ed.), *Diccionario enciclopédico de Derecho Canónico*, (tłum. H. Bernet), Barcelona 2008, p. 743.

<sup>28</sup> Cf. „Communicationes” 12 (1980), p. 72. For more on this subject see J. GARCÍA MARTÍN, *Le norme generali del Codex Iuris Canonici*, Roma 1999, p. 378. Valesio de Paolis and Andrea D'Auria claim that the introduction of the term „Ecclesia ritualis sui iuris” in the Code of 1983 is a logical consequence of the provision of the can. 372 § 2 of the CIC creating the possibility of creating a particular Church not on the basis of territory but on the basis of ritual. Cf. V. DE PAOLIS, A. D'AURIA, *Le norme generali di Diritto Canonico. Commento al Codice di Diritto Canonico*, Roma 2008, p. 305.

<sup>29</sup> For more on this subject see R. SOBAŃSKI, *Komentarz do kan. 1 KPK*, in: J. KRUKOWSKI, R. SOBAŃSKI, *Komentarz do Kodeksu Prawa Kanonicznego*, t. 1, Poznań 2003, p. 46.

<sup>30</sup> Cf. PAPIESKA RADA DO SPRAW JEDNOŚCI CHRZEŚCIJAN, *Dyrektorium w sprawie realizacji zasad i norm dotyczących ekumenizmu - 25.03.1993*, „Communio” 14 (1994) n. 2, p. 57.

„Between the Catholic Church and the Eastern Churches, there is still a very close communion in matters of faith”<sup>31</sup>.

In the final sentence of Article 10 of the DCIC, the legislature obliges the blessing priest to inform the competent authority of the non-catholic person concerned. It seems that the obligation in question *implicite* stems from Article 125 of the Ecumenical Directorate, which emphasises that all proselytism should be avoided when administering the sacraments.

### Conclusion

The analyses carried out show that the modification of the provisions of several canons made in DCIC was supported by various reasons. The first of these, as already noted in the „Introduction” of the papal document, is the harmonisation of standards functioning in Western legislation with those in Eastern legislation. In addition to this, another reason highlighted in the DCIC's „Introduction” is that Eastern Catholics are obliged to maintain their discipline wherever they are (can. 40 § 3 of the CCEO)<sup>32</sup>.

In conclusion, it should be stated that the clarification contained in Article 11 of the DCIC, according to which the marriage of a Catholic with an Eastern faithful can only be celebrated in ordinary circumstances with the active participation of the priest, puts an end to the doctrinal discussions on the possibility of the deacon blessing such a relationship.

In turn, a slight, albeit significant modification of the content of the can. 1109 of the CIC (art. 7 DCIC) is connected with the ambiguity of the term „ritus” functioning in Western legislation. The emphasis on the meaning of the legal and constitutional concept of the „Latin Church” on the one hand corresponds to the terminological changes introduced in art. 1-2 DCIC, and on the other hand is consistent with the terminology present in can. 29-30 of the CCEO.

Finally, the new hypothesis introduced in Article 10 of the DCIC concerning the extraordinary form of marriage celebration extends the powers of the Catholic ordinary of the place. The legislator, taking into account ecumenical considerations, wishes to meet the spiritual needs of Eastern acatholics in special circumstances. He has therefore widened the

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<sup>31</sup> Cf. K. LÜDICKE, *Heiligungsamt: Sakramente in allgemeinem*, in: K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, t. 4, Essen 1985, ad. 844, 1.

<sup>32</sup> Cf. J. PRADER, *Aspetti specifici nel Codice Orientale rispetto al Codice Latino in materia matrimoniale*, Quaderni della Mendola, t. 3, Milano 1996, p. 37.



scope of his ministry to the acatholic faithful who find themselves in an extraordinary situation.