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## THE CIVIL LAW EFFECTS OF A CONCORDAT MARRIAGE

In the late 19<sup>th</sup> century various countries started to recognise religious marriages contracted on the grounds of a concordat agreement. “Concordat” is a general name applied to the international agreements concluded between the Holy See of the Roman Catholic Church and individual states, although sometimes a particular agreement of this type may be known under a different, individual name.<sup>1</sup>

The first concordat agreements were drawn up during the period of reforms initiated in the mid-11<sup>th</sup> century by Pope Gregory VII. The Concordat of Worms, concluded in 1122 between Pope Calixtus II and Holy Roman Emperor Henry V, is generally considered the very first of these agreements. Concordats drawn up to regulate matrimonial affairs appeared in the 19<sup>th</sup> century, and a series of concordats referring to marriage law were concluded in the 20<sup>th</sup> century.<sup>2</sup> Noteworthy examples of concordats entered into since the Second Vatican Council to regulate

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<sup>1</sup> Cf. J. KRUKOWSKI, *Konkordaty współczesne. Doktryna. Teksty (1964–1994)*, Warszawa, 1995, pp. 22 f.

<sup>2</sup> Cf. J. KRUKOWSKI, *Konkordaty współczesne . . .*, pp. 17 f.

the civil law effects of marriages contracted under canon law include those concluded with Columbia,<sup>3</sup> Portugal,<sup>4</sup> Spain,<sup>5</sup> Italy,<sup>6</sup> and Poland.<sup>7</sup>

All the concordats have very similar general provisions concerning marriage.<sup>8</sup>

The Columbian Concordat (1973) – “The State recognises the full civil law effects of marriages contracted pursuant to the provisions of canon law...”<sup>9</sup>

The Portuguese Concordat (1975) – “The State recognises the civil law effects of marriages contracted pursuant to the provisions of canon law...”<sup>10</sup>

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<sup>3</sup> The Concordat of 12 July 1973 between the Holy See and the Republic of Columbia (AAS 67/1975, pp. 421-434).

<sup>4</sup> Cf. The Concordat of 7 May 1940 between the Holy See and the Republic of Portugal (AAS 32/1940, pp. 217-233) and the Additional Protocol to the Concordat, concluded on 15 February 1975 (AAS 67/1975, pp. 435-436), which modified only Art. 24, leaving the other articles of the Concordat of 7 May 1940 in force (AAS 32/1940, pp. 217-233), and the Concordat of 18 May 2004 (AAS 17/2005), pp. 29-50.

<sup>5</sup> The Agreement on legal issues concluded between the Holy See and the Spanish State on 3 January 1979, (AAS 72/1980, pp. 29-36).

<sup>6</sup> The Agreement concluded on 18 February 1984 between the Holy See and the Italian Republic, concerning the revision of the Lateran Concordat (AAS 77/1985, pp. 521-535).

<sup>7</sup> The Concordat of 28 July 1993 between the Holy See and the Republic of Poland (AAS 85/1993, pp. 310-329 = Dz.U. 1998, No 51, Item 318). See also W. GÓRALSKI, *Konkordat Polski 1993, od podpisania do ratyfikacji*, Warszawa, 1998; J. KRUKOWSKI, *Konkordat Polski, znaczenie i realizacja*, Lublin 1999. The Concordat concluded between the Holy See and the Republic of Poland on 10 February 1925, which did not explicitly regulate matrimonial issues, nonetheless in its Art. 1 guaranteed the Roman Catholic Church in Poland a full scope of freedom for the exercise of its spiritual power and jurisdiction, in compliance with the divine laws and canon law; cf. Dz.U. RP 1925, No. 47, Item 501.

<sup>8</sup> Cf. J. ZABŁOCKI, *Małżeństwo konkordatowe*, «Studia Iuridica» 37/1999, pp. 196 f.; IDEM, *Skutki cywilne małżeństwa konkordatowego*, [in:] *Przyszłość rodziny w UE*, Warszawa 2017, pp. 271-288.

<sup>9</sup> Cf. Art. 7.: “Lo stato riconosce pieni effetti civili al matrimonio celebrato conformemente alle norme del diritto canonico. Per rendere effettivo tale riconoscimento, la competente autorità ecclesiastica trasmetterà copia autentica dell’Atto al rispettivo funzionario dello Stato il quale dovrà trascriverlo nel registro civile.”

<sup>10</sup> Cf. Art. 22.: “Lo stato portoghese riconosce gli effetti civili ai matrimoni celebrati in conformità con le leggi canoniche, a condizione che l’atto di matrimonio sia trascritto nei competenti uffici dello stato civile”... and Art. 14 of the 2004 Concordat:

The Spanish Concordat (1979) – “The State recognises the civil law effects of marriages contracted in compliance with the provisions of canon law...”<sup>11</sup>

The Italian Concordat (1984) – “The civil law effects of marriages contracted under the provisions of canon law are hereby recognised...”<sup>12</sup>

The Polish Concordat (1993) – “A marriage contracted under the provisions of canon law has the same legal effects as soon as it is contracted as a marriage contracted in compliance with Polish law...”<sup>13</sup>

In all the concordats the same components occur in the same order: the State as the legal entity holding the obligation; the civil law effects as the legal effects of the State’s responsibility; and marriage contracted under the provisions of canon law as the subject of the contractual obligations. Only in the Polish Concordat does the subject of the contractual obligations (*viz.* marriage contracted pursuant to canon law)

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“Il matrimonio canonico produce tutti gli effetti civili a partire dalla data della celebrazione, se la trascrizione verrà fatta entro sette giorni. Se ciò non avviene, produrrà effetti relativamente a terzi soltanto a cominciare dalla data della trascrizione.”

<sup>11</sup> Cf. Art.6 Part 1: “1: Lo Stato riconosce gli effetti civili al matrimonio celebrato secondo le norme del diritto canonico. Gli effetti civili del matrimonio canonico si producono al momento della celebrazione. Per il loro pieno riconoscimento, sarà necessaria l’inscrizione nel Registro civile, che si effettuerà mediante la semplice presentazione del certificato ecclesiastico dell’esistenza del matrimonio.”

<sup>12</sup> Cf. Art. 8 Part 1: “Sono riconosciuti gli effetti civili ai matrimoni contratti secondo le norme del diritto canonico, a condizione che l’atto relativo sia trascritto nei registri dello stato civile, previe pubblicazioni nella casa comunale. Subito dopo la celebrazione, il parroco o il suo delegato spiegherà ai contraenti gli effetti civili del matrimonio, dando lettura degli articoli del codice civile riguardanti i diritti e i doveri dei coniugi, e redigerà quindi, in doppio originale, l’atto di matrimonio, nel quale potranno essere inserite le dichiarazioni dei coniugi consentite secondo la legge civile...”

<sup>13</sup> Cf. Art.10 Part 1: “A marriage contracted under the provisions of canon law has the same legal effects as soon as it is contracted as a marriage contracted in compliance with Polish law, providing 1) there are no impediments under Polish law debarring the couple from marrying, 2) when contracting the marriage they make a joint declaration of will for the recognition of the civil effects of their marriage; and 3) their marriage is recorded in the Polish marriage register within five days of the ceremony; the term for registration is prolonged if failure to meet the deadline was due to force majeure, until the cessation of the cause of force majeure.”

come first, followed by the obligation (although the State holding the obligation is not mentioned by name, as in the Italian Concordat), and the legal effects of the obligation (viz. its effects in civil law) come last.<sup>14</sup>

The following question arises in the context of the way these regulations are formulated: to what extent do the canon law provisions on marriage enter into the given State's system of civil law due to the concordat agreement that State has concluded with the Holy See? There is no clear-cut, generally accepted interpretation of the theory of the reception of the canon law provisions on marriage by the system of civil law applicable in the given State.

Incidentally, sometimes the reception of civil law by canon law is referred to as "the canonisation of civil law," and by analogy we could speak of a "civilisation of canon law," though the expression would sound strange. I would like to point out that canon law/civil law dichotomy may lead to numerous misunderstandings between canonists and civil lawyers. For some canonists criminal law, administrative law, and fiscal law are all "civil law"; while some lawyers operating within the scope of the law applicable in a given State would never consider labour law, commercial law, or family law as part and parcel of civil law.

That is why I prefer to speak of the dichotomy of canon law versus State law.

Now coming back to reception. Some are in favour of substantive reception, which is based on the premise that canon law becomes part of the given State's civil law within the scope defined under the concordat, and thereby the civil law of that State recognises the full consequences of canon law, including the indissolubility of marriage.

Others speak of a formal reception, arguing that only certain provisions of canon law apply in the State's system of civil law, but they do not thereby become civil law norms. In other words, a marriage contracted under the provisions of canon law is also contracted in compliance with civil law, but its purely canonical effects (viz. indissolubility and the prohibition on divorce) do not apply under civil law.

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<sup>14</sup> Cf. W. ADAMCZEWSKI, *Uznanie skutków cywilnych małżeństwa kanonicznego w najnowszych umowach konkordatowych*, «Jus Matrimoniale» 1/1996, pp. 172 f.

An example of the application of the substantive reception of canon law is provided by the Portuguese Concordat of 1940. Its Article 24 determined that Catholics who had married on the grounds of the Concordat's provisions had thereby renounced the potential to have a divorce under Portuguese civil law.<sup>15</sup> The prohibition on divorce proceedings in the country's courts if the marriage was contracted in the form prescribed by the Concordat was revoked in an Additional Protocol in 1975. This article<sup>16</sup> also contained the Holy See's declaration obligating Catholics to respect the essential attributes of marriage, and its recommendation that persons who had married on the grounds of the Concordat should not apply for a civil divorce. In other words, the declaration repeated the Church's prohibition on divorce, which is an inherent consequence of the canon law provisions, yet on the other hand it acknowledged the possibility for couples who had married on the concordat grounds to apply for a divorce in the civil courts, though this did not mean that it approved of that, but merely that the civil law effects of the marriage would be revoked.

Occasionally there are certain differences between the diverse concordats in the details concerning the procedure for the entry of a concordat marriage in the State registers.<sup>17</sup>

The 1973 Columbian Concordat makes the civil effects of a concordat marriage subject to the submission of an authentic copy of the document certifying the marriage to the registrar or applicable state official for entry in the Columbian marriage register. The person responsible for submitting this church certificate is the parish priest of the place where the marriage was contracted. If this is not done straight after the ceremony it may be done at any time, even after the death of one or both

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<sup>15</sup> This arrangement was undoubtedly a reference to the concept of marriage in § 11 of the Austrian Allgemeines Bürgerliches Gesetzbuch.

<sup>16</sup> Viz. the modified Art. 24.

<sup>17</sup> More on this in W. GÓRALSKI, *Wpis małżeństwa kanonicznego do rejestru cywilnego jako warunek uzyskania dla skutków cywilnych w świetle umów Stolicy Apostolskiej z państwami zawartych po Soborze Watykańskim II*, «Metryka. Studia z zakresu prawa osobowego i rejestracji stanu cywilnego» 2.2/2012, pp. 41-77, with a bibliography of the subject.

of the spouses, and anyone with a legal interest may apply for the civil registration of the church certificate.<sup>18</sup>

The 1975 Portuguese Concordat binds the parish priest of the place where the marriage was contracted to send a certified copy of the church marriage certificate to the civil registry office within three days of the ceremony, and the registrar has two days to make the entry and record its date. He is to notify the parish priest of this not later than by the next day after the day on which the entry was made. The civil effects of the marriage ensue as of the time it was contracted provided it is entered in the civil register within seven days of the ceremony. If the marriage is recorded in the civil register after this time, even after the death of one or both of the spouses, civil effects ensue as of the day on which the entry is made, not as of the day of the marriage ceremony.<sup>19</sup>

The 1979 Spanish Concordat also prescribes a civil registration procedure for the recognition of civil effects for a concordat marriage. The persons responsible for presenting the church marriage certificate to the registrar are firstly the spouses, but the time in which they may do so is not defined; and secondly the parish priest of the place where the ceremony was held, who has five days to do so as of the day of the ceremony.<sup>20</sup>

The provisions prescribed in the 1984 Italian Concordat say that only those couples married in compliance with canon law are entitled to the civil effects of marriage if they are eligible for marriage under Italian law and on the completion of the procedure for civil registration. The parish priest of the place where the marriage was celebrated sends an application for its registration within five days of the ceremony, and the registrar has 24 hours to make the entry. A special feature of the Italian Concordat is the unconditional nature of the deadline within which the parish priest is to notify the registrar of the marriage, which cannot be recorded in the civil register if the priest fails to meet this deadline. However, should this happen the spouses may apply jointly or severally (with the knowledge and consent of the other spouse) to have

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<sup>18</sup> Cf. W. GÓRALSKI, *Wpis małżeństwa kanonicznego do rejestru cywilnego...*, pp. 42-45.

<sup>19</sup> Cf. *Ibidem*, pp. 45-48.

<sup>20</sup> Cf. *Ibidem*, pp. 48-51.

their marriage registered in an overdue record. An overdue registration may be made only if the spouses have remained single (from the point of view of civil law) since the church wedding to the time the application is submitted. However, an overdue registration may not infringe the lawful rights of any third party.<sup>21</sup>

The 1993 Polish Concordat makes the civil effects of a concordat marriage depend on its entry in the civil register within five days of the ceremony. In the event of force majeure the term admitted for registration is prolonged until such time as the force majeure ceases to apply. This concordat authorises the Polish legislator to establish the details regulating the procedure for registration.<sup>22</sup>

If we refer to the sources of the provisions of canon law currently in force, viz. Can. 1059 CIC<sup>23</sup> and Can. 780 CCEO,<sup>24</sup> we read that “Even if only one party is Catholic, the marriage of Catholics is governed not only by divine law but also by canon law, without prejudice to the competence of civil authority concerning the merely civil effects of the same marriage.”<sup>25</sup>

In accordance with the Polish Concordat of 1993, a marriage contracted on the grounds of canon law has the same civil effects as a marriage contracted under Polish law as soon as it is contracted providing 1) there are no impediments under Polish law debarring the couple from marrying<sup>26</sup>, 2) when contracting the marriage they make a joint declaration

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<sup>21</sup> Cf. *Ibidem*, pp. 51-58.

<sup>22</sup> Cf. *Ibidem*, pp. 63-69.

<sup>23</sup> Can. 1059: *Matrimonium catholicorum, etsi una tantum pars sit catholica, regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus* (AAS 75/1983, No. 2, pp. 1-320).

<sup>24</sup> Can. 780 § 1: *Matrimonium catholicorum, etsi una tantum pars est catholica, regitur iure non solum divino, sed etiam canonico salva competentia auctoritatis civilis circa effectus mere civiles matrimonii* (AAS 82/1990, No. 11, pp. 1033-1353).

<sup>25</sup> The purely civil effects of marriage include the matrimonial community of the spouses, inheritance, titles, and maintenance. Those effects which are an inherent part of marriage, such as mutual rights and duties, and rights and duties with respect to the children, are not civil effects.

<sup>26</sup> A. SZADOK-BRATUŃ, *Procedura zawierania małżeństwa „konkordatowego” w kontekście prawa administracyjnego*, Wrocław 2013, pp. 199 f.

of will for the recognition of the civil effects of their marriage<sup>27</sup>; and 3) their marriage is recorded in the Polish marriage register within five days of the ceremony<sup>28</sup>; the term for registration is prolonged if failure to meet the deadline was due to force majeure, until the cessation of the cause of force majeure.<sup>29</sup>

The preliminary procedure the prospective spouses for marriage in compliance with the provisions of canon law entails instruction on the indissolubility of the marriage and on the provisions of Polish law in respect of the effects of marriage.<sup>30</sup>

The determination of the validity of a marriage contracted under canon law, as well as of other matrimonial matters prescribed by canon law, is the exclusive prerogative of the authorities of the Roman Catholic Church.<sup>31</sup> On the other hand, rulings on matrimonial matters within the scope of their effects defined under Polish law lie within the exclusive powers of the courts of the State.<sup>32</sup>

The regulation of the details concerning the procedure for the contracting of marriage has been reserved for the Polish legislator,<sup>33</sup> who introduced the required amendments to Polish law,<sup>34</sup> primarily in the Act of 24<sup>th</sup> July 1998.<sup>35</sup>

Pursuant to Art. 1 of this Act, Art. 1 of the 1964 Polish Family and Custodial Code was amended to read as follows: § 1. "A marriage is contracted when a man and a woman present at the same time before

<sup>27</sup> P. KŁOCZEK, *Zgoda nupturientów na skutki cywilne małżeństwa wyznaniowego* (art.10 ust.1 pkt 2 Konkordatu), «Bielsko Żywieckie Studia Teologiczne» 15/2014, pp. 137 f.

<sup>28</sup> Cf. A. SZADOK-BRATUŃ, *op. cit.*, pp. 300 f.

<sup>29</sup> Cf. Art. 10 Part 1 of the Polish Concordat.

<sup>30</sup> *Ustawa z dnia 24 lipca 1998 r. o zmianie ustaw - Kodeks rodzinny i opiekuńczy* (The Act of 24 July 1998 on amendments to the Family and Custodial Code). Cf. Art. 10 Part 2.

<sup>31</sup> Cf. Art. 10 Part 3.

<sup>32</sup> Cf. Art. 10 Part 4.

<sup>33</sup> Cf. Art. 10 Part 6.

<sup>34</sup> For more on the nature and significance of the amendments, see W. GÓRALSKI, *Zawarcie małżeństwa konkordatowego w Polsce*, Warszawa, 1998, pp. 15 f.; J. KRUKOWSKI, *Konkordat Polski...*, pp. 189 f.; and A. SZADOK-BRATUŃ, *op. cit.*, pp. 46 f.

<sup>35</sup> Cf. Dz.U., 1998, No. 117, Item 757.

the head of a Polish registry office for birth, marriages, and deaths [*urząd stanu cywilnego*], jointly declare that they are hereby contracting marriage.”<sup>36</sup> § 2. “A marriage is contracted also when the man and woman contracting the marriage pursuant to the internal legal provisions of a Church or other religious union make a declaration in the presence of a minister of the said church or religious union, of their joint will to contract marriage in compliance with the provisions of Polish law, and when subsequently the head of a Polish registry office for births, marriages, and deaths enters the marriage in the register of marriages. When the aforementioned conditions have been fulfilled the marriage is considered contracted as of the time of the spouses’ joint declaration of will made before the minister of religion.”<sup>37</sup> § 3 “The provision of the previous paragraph is applicable if a ratified international agreement or act regulating relations between the State and a Church or other religious union envisage a potential for a marriage contracted under the internal provisions of the said Church or religious union to bring about the same legal consequences as those brought about by a marriage contracted before the head of a [Polish] registry office for births, marriages, and deaths.”<sup>38</sup>

The required amendments were also made to the particular (*viz.* Polish) canon law.

At its Plenary Session of 4<sup>th</sup> June 1988 the Conference of the Roman Catholic Bishops of Poland adopted a resolution whereby members of the Roman Catholic Church in Poland contracting marriage under the provisions of canon law are obliged to obtain the civil law effects guaranteed for their marriage in Art. 10 of the Polish Concordat. Under this resolution, no-one [*viz.* no Roman Catholic priest or religious] may assist at a marriage contracted by a couple who do not want their marriage to have the civil effects prescribed by Polish law, unless the ordinary bishop of the given diocese has issued his consent for the procedure. The ordinary bishop of the said diocese may consent to a marriage

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<sup>36</sup> Cf. Art. 1 § 1, in the wording established by the Act of 24 July 1998.

<sup>37</sup> Cf. Art. 2 § 2, in the wording established by the Act of 24 July 1998.

<sup>38</sup> Cf. Art. 1 § 3, in the wording established by the Act of 24 July 1998.

being contracted without the civil effects only in exceptional cases for important pastoral reasons.<sup>39</sup>

At a plenary session held on 22<sup>nd</sup> October 1998 the Bishops' Conference issued an Instruction (*Instrukcja*) on concordat marriages, addressed to priests ministering to the laity. This document concerned the resolutions of Article 10 of the Concordat and the recent amendments to Polish legislation which gave Catholics in Poland the opportunity to contract a marriage in compliance with the provisions of canon law which also brings about the legal effects of marriage as prescribed under Polish law, providing the required conditions were met. The Instruction also gave a full account of the principles for the procedure and the details of what had to be done to prepare for and contract a concordat marriage.

Under canon law instructions of this type are issued by holders of executive power, within the scope of their powers.<sup>40</sup> Instructions do not introduce amendments to legislative acts, but explain how they are to be applied. They are not binding if they are incompatible with the provisions of the applicable acts of legislation.<sup>41</sup>

The legal grounds for this Instruction is the Bishops' Resolution (*Uchwała Episkopatu*) quoted in it, which reads, "No person may assist at a marriage contracted by a couple who do not want their marriage to have the civil effects prescribed by Polish law, unless the ordinary bishop of the given diocese has issued his consent for the procedure. The ordinary bishop of the said diocese may consent to a marriage being contracted without the civil effects only in exceptional cases for important pastoral reasons." The Resolution refers to Can. 1071 § 1. 2, which in fact

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<sup>39</sup> Cf. *Instrukcja*, n. 3. See also P. MAJER, *Konieczność zezwolenia na zawarcie małżeństwa bez skutków cywilnych: racje uzasadniające taką decyzję Konferencji Episkopatu Polski*, «*Jus Matrimoniale*» 5(11)/2000, pp. 169 f.

<sup>40</sup> Cf. Can. 34 §1 CIC: *Instructiones, quae nempe legum praescripta declarant atque rationes in iisdem exsequendis servandas evolunt et determinant, ad usum eorum dantur quorum est curare ut leges executioni mandentur, eosque in legum executione obligant; eas legitime edunt, intra fines suae competentiae, qui potestate executiva gaudent.*

<sup>41</sup> Cf. Can. 34 § 2 CIC: *Instructionum ordinationes legibus non derogant, et si quae cum legum praescriptis componi nequeant, omni vi carent.*

relates to a slightly different situation:<sup>42</sup> “Except in a case of necessity, a person is not to assist without the permission of the local ordinary at... a marriage which cannot be recognised or celebrated according to the norm of civil law (*ad normam legis civilis*).”<sup>43</sup> It is clear that while Can. 1071 § 1. 2 refers to the situation where the couple *cannot contract civil marriage*,<sup>44</sup> the provision in the Instruction issued by the Bishops of Poland applies to the situation where the couple *do not want their marriage to bring about the civil effects of marriage*. The formula used in the Instruction is an extension of the canon law provision, and as such it needed approval by the Holy See for validity.<sup>45</sup> A resolution adopted by a bishops’ conference is a general decree, and as such it is therefore an act of legislation in the true sense of the term.<sup>46</sup> Thus, in Poland if a couple wants to contract marriage in compliance with canon law but without the civil effects, they must have the ordinary bishop’s consent, which is only granted for important pastoral reasons.

The question arises why these strictures were brought into the particular, Polish version of canon law.

As can be observed, a couple who want a Catholic marriage in compliance with the provisions of the Polish Concordat have to decide for

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<sup>42</sup> Can. 1071 § 1: Excepto casu necessitatis, sine licentia Ordinarii loci ne quis assistat: ... 2° matrimonio quod ad normam legis civilis agnosci vel celebrari nequeat.

<sup>43</sup> Cf. Point 3: “the marriage of a person who is bound by natural obligations due to a former union with respect to another party or children.”

<sup>44</sup> For example, if one of the couple is still married under civil law to another person.

<sup>45</sup> On the grounds of the requirements of canon law – can. 455 CIC § 1: Episcoporum conferentia decreta generalia ferre tantummodo potest in causis, in quibus ius universale id praescripserit aut peculiare Apostolicae Sedis mandatum sive motu proprio sive ad petitionem ipsius conferentiae id statuerit, § 2: 2. Decreta de quibus in § 1, ut valide ferantur in plenario conventu, per duas saltem ex tribus partibus suffragiorum Praesulum, qui voto deliberativo fruentes ad conferentiam pertinent, proferri debent, atque vim obligandi non obtinent, nisi ab Apostolica Sede recognita, legitime promulgata fuerint – the Vatican issued its approval in rescript N. 8426/98/RS of 29 October 1998, which has been in force since 15 November 1998.

<sup>46</sup> Cf. Can. 29 CIC: Decreta generalia, quibus a legislatore competenti pro communitate legis recipiendae capaci communia feruntur praescripta, proprie sunt leges et reguntur praescriptis canonum de legibus.

themselves whether they want to marry with or without the civil effects. We may say that the Parties to the Polish Concordat adopted a simple, clear-cut and unambiguous regulation. Moreover, on 15<sup>th</sup> April 1997 the Polish government issued a unilateral declaration on the interpretation of the Concordat, in which it affirmed that the Polish government fully respected “the freedom of the couple wanting to marry to decide what kind of marriage they would contract, and in which forum it would bear effects.”<sup>47</sup>

Theoretically the autonomy of the couple about to marry was fully guaranteed, and all of their constitutional freedoms were respected. Or was it really?

We sometimes say, simplifying things quite considerably, that marriage means a “community of life” (*consortium vitae*)<sup>48</sup> or “a community of bed and board” (*consortium quoad torum et mensam*). Canonists agree that no marriage is contracted if there is no sharing of a connubial bed. But can a couple be married if there is no consortship *quo ad mensam* – if they do not jointly contribute to the material maintenance of a life together? What sense would there be in such a marriage? Can there be any rational reason to give up the civil effects of a marriage in church? That is a question the ordinary bishop of the diocese concerned must answer before he can permit such a couple to go ahead with a marriage in the Catholic Church. And it is not a question concerning all the civil effects of marriage, but only those which may have a negative effect on the couple jointly maintaining their “connubial table.” For example, the forfeiture of the status of a single person bringing up a child, which would mean losing a financial entitlement such as a single parent’s pension, benefit, or welfare payment, or priority in the queue for a place for the child in preschool education; or it could be the forfeiture of the opportunity to bypass the prohibition on spouses holding certain offices.

If we put aside this regulation applicable in exceptional cases, we can say that in practice all Catholic marriages contracted in Poland

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<sup>47</sup> Cf. P. MAJER, *Konieczność zezwolenia na zawarcie małżeństwa bez skutków cywilnych ...*, pp. 174 f.

<sup>48</sup> Cf. M. Al. ŻUROWSKI, *Kanoniczne prawo małżeńskie Kościoła Katolickiego*, Warszawa 1987, pp. 79 i n.

should carry civil effects. These may be achieved either in the way practised hitherto, viz. by marrying first in a civil registry office, followed by a church ceremony; or by means of the procedure prescribed by the legislation relating to the Polish Concordat for a concordat marriage.<sup>49</sup>

Now let us take a closer look at the way the new version of Art. 1 § 2 of the Polish Family and Custodial Code is phrased: “A marriage is contracted also when the man and woman... make a declaration... of their joint will to contract marriage in compliance with the provisions of Polish law...,” and compare it with Art. 10 Point 1 of the Polish Concordat: “A marriage contracted under the provisions of canon law has the same legal effects as soon as it is contracted as a marriage contracted in compliance with Polish law” provided that (Point 3) when contracting the marriage the newlyweds “make a joint declaration of will for the recognition of the civil effects of their marriage...”

As may be seen, a marriage contracted by a couple marrying on the grounds of the Polish Concordat is neither a civil marriage nor a marriage *utriusque iuris* (viz. one that is both a civil and a church marriage), but only a marriage on the grounds of canon law which carries the same legal effects as a civil marriage. Yet the provision in the Polish Family and Custodial Code does not mention the civil effects of marriage at all, it only speaks of the contracting of marriage.

A concordat marriage is contracted before a minister of religion, but the head of a Polish registry office still exercises the full scope of his powers.

The head of the registry office issues an endorsement confirming that there are no impediments to the marriage, and checks the newlyweds', witnesses' and minister's signatures on the declaration of will that the couple want their marriage to have the civil effects of marriage. The minister may not embark on the preparations for a marriage with civil

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<sup>49</sup> Cf. W. GÓRALSKI, *Zawarcie małżeństwa konkordatowego w Polsce...*, p. 130.

effects until he produces the endorsement issued by the head of the registry office confirming that there are no impediments to the marriage.<sup>50</sup>

Only if one of the couple about to marry is in danger of death may the declarations of will required by the law be made before the minister of religion without the need for the presentation of an endorsement from the head of the registry office confirming that there are no impediments to the marriage. In that situation it is enough for them to make a statement that there are no impediments.<sup>51</sup> The minister of religion present at the marriage should fill in all the required documents and send them to the head of the registry office,<sup>52</sup> notifying him that the marriage was contracted in a situation where one of the couple was in danger of death. If the minister was not authorised to assist at the marriage,<sup>53</sup> he should write in the documents “minister of religion present at this marriage contracted in a situation of danger of death” after his first name and surname instead of his title or office (parish priest, administrator, curate acting as the parish priest’s deputy etc.).

The minister assisting at the marriage is duty-bound to fill in the form to certify that the couple have contracted the marriage; he should see to it that they sign the declaration of will to have their marriage bring about the civil effects; he should check that the documents are signed as required also by the witnesses and by himself; and he should send the documents to the registry office not later than within five days of the marriage.<sup>54</sup> This deadline may only be suspended in the event of force majeure, for the duration of the obstruction.

If the certificate the minister has drawn up and presented to the registry office is formally defective, the head of the registry office requires him to correct it within seven days. If the content of the minister’s

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<sup>50</sup> Cf. Art. 8 § 1 of the Polish Family and Custodial Code, and Point 13 of the Bishops’ Instruction.

<sup>51</sup> Cf. Art. 9 § 2 in the wording established under the Act of 24 July 1998.

<sup>52</sup> As prescribed in Arts. 1 § 2 and 3 of the Polish Family and Custodial Code, in the wording established under the Act of 24 July 1998.

<sup>53</sup> Cf. Can. 1116 CIC.

<sup>54</sup> These are his duties as prescribed in Art. 10 Part 1 Point 3, and in Art. 8 § 3 of the Polish Family and Custodial Code.

certificate raises any doubts the head of the registry office conducts an investigation.<sup>55</sup> If the minister fails to submit the certificate within five days, the head of the registry office refuses to register the marriage and notifies the interested persons of the reason for his refusal. An interested person may apply to the district court applicable for the registry office within fourteen days of receiving the registrar's notification, for a ruling on whether the registrar's decision was lawful. The court's ruling is binding.<sup>56</sup>

When the marriage has been entered in the register of marriages the head of the registry office deposits all the documents relating to the marriage in the registry records.<sup>57</sup>

The Polish Concordat of 28<sup>th</sup> July 1993 gave the country's Catholics the opportunity to contract a church marriage which also brought about the same legal effects as a civil marriage, thereby dispensing them of the need to have a double (civil and church) ceremony. Members of other churches and religious unions acceded to the enjoyment of the same opportunity when the Act of 24<sup>th</sup> July 1998 became law. We may treat this as an expression of the legislator's acknowledgement of the equal status of the country's citizens in the eyes of the law. At the same time neither the Church nor the State was deprived of their respective influence on marriage, which is nowadays an institution of signal importance both for the religious as well as for the political community.

Rulings on the validity of a marriage contracted under canon law, as well as on other matrimonial issues regulated by canon law, are the exclusive power of the Church authorities in Poland, while rulings on matrimonial matters within the scope of their legal effects under Polish law belong to the exclusive powers of the courts of the Polish State.

This arrangement, based on the principle of autonomy for the two legal orders – the civil and the canonical order – each within its own

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<sup>55</sup> Cf. Art. 64 § 2 of the Polish Family and Custodial Code, Dz.U. 2000, No. 98, Item 1071 with later amendments.

<sup>56</sup> Cf. Art. 7 of *Ustawa Prawo o aktach stanu cywilnego* (the Registry Office Records Act).

<sup>57</sup> Cf. Art. 61a Part 3 of the Registry Office Records Act.

scope of powers, is the scheme which has found its full expression in the Polish Concordat.

Couples who want to marry in church may avail themselves of a ceremony in the concordat form; but they may also have two successive ceremonies, a church and a civil ceremony, to achieve the same result as regards legal effects. The State acknowledges the individual's decision to opt for a religious marriage ceremony; while the Church consents to marriages contracted in church being treated on a par with those contracted in another way – as regards civil effects which may be dissolved if the couple are granted a divorce in accordance with Polish civil law.

Marriage contracted under the provisions of canon law endows the newlyweds with a matrimonial bond which is indissoluble by its very nature; while the recognition of such marriages by the Polish State brings about the legal effects envisaged under the country's civil law. Thus, if a couple who married in church later divorce, the civil effects of their marriage are terminated. In the event of an ecclesiastical annulment of the marriage its civil effects continue in force, unless the couple are also granted a divorce in a court. The determination of the validity (or nullity) of a marriage contracted under canon law rests entirely with the Church authorities. This is the legal construction adopted in the Polish Concordat, which respects the separate status of the courts of the Polish State and the ecclesiastical courts.

## SKUTKI CYWILNE MAŁŻEŃSTWA KONKORDATOWEGO

### Streszczenie

Małżeństwo zawarte zgodnie z prawem kanonicznym stwarza między małżonkami węzeł ze swej natury nierozzerwalny, a uznanie takiego małżeństwa przez państwo wywołuje również skutki przewidziane w prawie cywilnym. W przypadku zatem rozwodu cywilnego, ustają skutki cywilne małżeństwa. W przypadku zaś stwierdzenia nieważności małżeństwa sakramentalnego, skutki cywilne nie ustają, chyba, że zostanie orzeczony rozwód. Stwierdzenie nieważności małżeństwa kanonicznego należy wyłącznie do kompetentnych instytucji kościelnych.

## THE CIVIL LAW EFFECTS OF A CONCORDAT MARRIAGE

## Summary

Marriage contracted under the provisions of canon law endows the newlyweds with a matrimonial bond which is indissoluble by its very nature; while the recognition of such marriages by the Polish State brings about the legal effects envisaged under the country's civil law. Thus, if a couple who married in church later divorce, the civil effects of their marriage are terminated. In the event of an ecclesiastical annulment of the marriage its civil effects continue in force, unless the couple are also granted a divorce in a court. The determination of the or nullity of a marriage contracted under canon law rests entirely with the Church authorities.

**Słowa kluczowe:** konkordat; prawo kanoniczne; prawo krajowe (polskie); małżeństwo; zawarcie małżeństwa; skutki cywilne małżeństwa

**Keywords:** concordat; canon law; the law of the (Polish) State; marriage; the contracting of marriage; the civil effects of marriage.

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