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The Significance of the Techniques of Encoding Canonical Norms in an Act of Law, CIC 1983 as an Example

1. Canonical Norm

1.1. Notion of Canonical Norm

The problem of canonical norm, given its importance, has been many times taken up as a subject in Polish canonical literature¹. The authors usually follow their civil colleagues trying to keep an eye on their achievements and adjusting their findings to church law. Although, the church law is spe-

¹ R. Sobański, *Norma kanoniczna – norma etyczna*, „Collectanea Theologica”, R. 54, 1984, f. 3, p. 5–10; R. Sobański, *Przedmiot normy kanonicznej*, „Śląskie Studia Historyczno-Teologiczne”, R. 21, 1988, p. 19–30; tenże, *Recepcja normy kanonicznej*, „Śląskie Studia Historyczno-Teologiczne”, R. 23–24, 1990–91, p. 77–85; tenże, *Z zagadnień normy kanonicznej*, „Prawo Kanoniczne”, R. 33, 1990, no. 1–2, p. 3–20; tenże, *Charyzmat i norma kanoniczna*, „Studia Warmińskie”, R. 31, 1994, p. 65–79; P. Kroczek, „Funkcja prawa” jako skutek wprowadzenia do systemu prawnego normy prawnej, „Annales Canonici”, R. 4, 2008, p. 173–180.

cific and differs markedly from law made by other than church legislators², still canon lawyers may learn a lot from civil jurisprudence³.

The term „norm” in the law context can be clearly seen and fully understood only after making some necessary distinctions between some legal terms⁴. The first expression is „a law”, which means a normative legal text. It is a formal product of legislative action taken by a competent lawmaker. The product has a form of a normative text issued to put into practice of the community some legal norms⁵. The next term is „a legal article”, which is a sentence, graphically singled out by full stop or semicolon (but not comma), which builds a law⁶. It is the smallest unit of it. Sometimes a legal article creates itself a separate and distinct part of writing, that is, basic technical unit of a law, which is denoted as: canon, article, and paragraph (sometimes as § sign)⁷. It is so, e.g., in case of can. 1: „Canones huius Codicis unam Ecclesiam latinam respiciunt”⁸. It happens also that some legal articles are gathered together as a separate basic technical unit of a law, e.g., can. 2: „Codex plerumque non definit ritus, qui in actionibus liturgicis celebrandis sunt servandi; quare leges liturgicae hucusque vigentes vim suam retinent, nisi earum aliqua Codicis canonibus sit contraria”⁹. Two sentences are divided by semicolon.

² The differences can be clearly noticeable in origin of the Church law, its aims and functions also in motives to observe the law, see more: P. Kroczek, *The Art of Legislation*, Kraków 2011, p. 19–52.

³ See more: R. Sobański, *Metodologia prawa kanonicznego*, Warszawa 2009, p. 36–37.

⁴ For grounds and methods of such distinction in Polish theory of law, see, e.g.: Z. Ziemiński, *Przepis prawny a norma prawna*, „Ruch Prawniczy i Ekonomiczny”, R. 22, 1960, no. 1, p. 105–122; S. Wrórkowska, Z. Ziemiński, *Zarys teorii prawa*, Poznań 1997, p. 134. About the differences in understanding and usage of the terms in different legal cultures, see, P. Skonieczny, *La buona fama: problematiche inerenti alla sua protezione in base al can. 220 del Codice di Diritto Canonico latino*, Romae 2010, p. 10.

⁵ Cf. R. Sobański, *Teoria prawa kościelnego*, Warszawa 1992, p. 122; cf. Act, [in:] *Black's Law Dictionary*, ed. B. A. Garner, St. Paul 2004, p. 28.

⁶ M. Zieliński, *Wykładnia prawa. Zasady. Reguły. Wskazówki*, Warszawa 2002, p. 16; S. Wrórkowska, *Podstawowe pojęcia prawa i prawnoustawa*, Poznań 2005, p. 64.

⁷ Cf. Article, [in:] *Black's Law Dictionary*, ed. B. A. Garner, St. Paul 2004, p. 127.

⁸ Can. 1: „The canons of this Code concern only the Latin Church”. English translation of the canons: *Code of Canon Law Annotated*: Prepared under the Responsibility of the Instituto Martín de Azpilcueta, ed. E. Caparros, M. Thériault, J. Thorn, H. Aubé, 2nd ed., rev. and updated of the 6th Spanish language edition, Montréal 2004.

⁹ Can. 2: „For the most part the Code does not determine the rites to be observed in the celebration of liturgical actions. Accordingly, liturgical laws which have been in ef-

The last term and the most important in this article is a term „norm”. It is understood as a rule, a legal rule to be exact. Norm is an instruction, a regulation for conduct or a pattern to follow, or a model or standard according to which someone is obliged to act. Norm is an indication of the way of acting, a prescription how to behave in certain situations. Norm explicitly orders what to do¹⁰. In the material sense, norm is a structure of values. In the formal sense, norm is a structure of obligation¹¹.

1.2. Usefulness of Canonical Norm

The ground for understanding usefulness of the distinction presented above comes from two directions. The first is legislation. The lawgiver must be aware that he is not witting norm directly¹², but a product of his activity, as legislator, is a legal text. No sentence taken from a law can be directly applied to legal situation. Rather, the norm that flows from it is suitable to regulate live. The norm comes as a result of the process of interpretation¹³.

Also interpretation shows that division in question can be of help for practice of law. Anyone who wants to get to know the will of the legislator must not just read the text of a law, but go through the whole process of interpretation of the text in question. Usually norm is interpreted from a legal article or legal articles. Sometimes, the norm is reconstructed from different acts of law, as can. 17 orders: „Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et

fect hitherto retain their force, except those which may be contrary to the canons of the Code”.

¹⁰ Cf. Norm, [in:] *Black's Law Dictionary*, ed. B. A. Garner, St. Paul 2004, p. 1159–1160; Norms, Rules, [in:] B. H. Bix, *A Dictionary of Legal Theory*, New York 2004, p. 149, and p. 192–193.

¹¹ H. Pree, *Die evolutive Interpretation der Rechtsnorm im Kanonischen Recht*, Wien–New York 1980, p. 217.

¹² As it was said, norms are rather not written directly, although some legal articles can make an impression of being norms. Some canons, like can. 1398, have a shape of norm: „Qui abortum procurat, effectu secuto, in excommunicationem latae sententiae incurrit” or like can. 1087: „Invalide matrimonium attentant, qui in sacris ordinibus sunt constituti”, which can be easily transformed into norm.

¹³ R. Sobański, *Nauki podstawowe prawa kanonicznego*, vol. 1, *Teoria prawa kanonicznego*, Warszawa 2001, p. 150–151.

obscura manserit, ad locos parallelos si qui sint, (...)”¹⁴. The context can be other legal articles in a law, and parallel places can be juridical documents surrounding it. It can be said that norm is hidden or coded in a legal article or legal articles, and by interpretation it is uncovered¹⁵. So, legislation is a process, which aims to „encode” a general norm into a form of a legal article.

1.3. Structure of Canonical Norm

Norm is always a general statement and can be applied in unspecified number of cases. That is why a norm must be later on applied to a concrete situation. It is built according to a schema: a subject of norm (S), in the certain conditions (C), that are equal to situation described in law (L), must lead to the result (R). In short: every C carries S to state R. The schema can be transformed into the concept of norm as a three-element-body¹⁶. In this concept typical norm consists of 1) hypothesis, 2) disposition, and 3) sanction. Hypothesis is a subject in certain conditions prescribed in law who is instructed to do something, which is in disposition. In case of different behavior of addressees of a norm, they will be punished as it is provided in sanction¹⁷.

It must be noticed that most of norms in CIC 1983 are without sanctions. All canons due to the fact that they are given to the faithful to protect and promote practice of faith should be freely accepted as the faith itself is. When a norm is not observed, it is usually considered a sin. It is because canon law not only creates legal obligation, as generally law does, but due to its connection to faith canonical norms bind also in conscience¹⁸. It means, in short, that who does not observe canon law commits a sin. It is considered that for the faithful the sanction of sin is enough. Of course, some sanctions are needed to protect community and individuals especially when the danger is serious. A legislator in the Church cannot take as his position the way of

¹⁴ Can. 17: „Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any (...)”.

¹⁵ R. Sobański, *Teoria prawa kościelnego...*, dz. cyt., p. 153.

¹⁶ More about it see: J. Śmiałowski, W. Lang, A. Delorme, *Z zagadnień nauki o normie prawnej*, Warszawa 1961.

¹⁷ M. Zieliński, *Wykładnia prawa...*, dz. cyt., p. 32.

¹⁸ R. Sobański, *Teoria prawa kanonicznego*, Warszawa 1992, p. 187–188.

thinking according to which the law without sanction is the law of second quality canons (*normae imperfectae*). They both fit perfectly the community inside which they will be used, that is, community of Church.

2. The Techniques of Encoding Canonical Norms

The legislator often uses two techniques in drafting the law. The first is condensation of norms in a legal article; the next one is division of norms in legal articles¹⁹. The main aim of both is to economize the text of law and make it shorter. It can be obtained by avoiding repetitions of parts of sentences or duplication of whole sentences.

2.1. Condensation and Division

Condensation means that legislator puts norms in a legal article. It means that one legal article includes more than one norm. A good example of it is can. 1447: „Qui causae interfuit tamquam iudex, promotor iustitiae, defensor vinculi, procurator, advocatus, testis aut peritus, nequit postea valide eandem causam in alia instantia tamquam iudex definire aut in eadem munus assessoris sustinere”²⁰. There are several norms, in which conditions change depending on subjects. All enumerated subjects can find a role for themselves independently from others. There is no need to repeat the sentence as many times as a number of subjects. The presented above situation must be distinguished from a quite different situation, which is in case of can. 60: „Rescriptum quodlibet impetrari potest ab omnibus qui expresse non prohibentur”²¹. There is only one norm in the canon, because the subject of norm is expressed as *omnibus* that is „all” who are entitled.

¹⁹ M. Zieliński, *Wykładnia prawa...*, p. 103–131. See also: A. Bator, Kondensacja norm, [in:] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, *Wprowadzenie do nauk prawnych. Leksykon tematyczny*, ed. A. Bator, Warszawa 2010, p. 112–113 and A. Bator, *Rozczłonkowanie norm w przepisach*, [in:] A. Bator, W. Gromski, A. Kozak, S. Kaźmierczyk, Z. Pulka, *Wprowadzenie do nauk prawnych...*, dz. cyt., p. 154–155.

²⁰ Can. 1447: „Any person involved in a case as judge, promotor of justice, defender of the bond, procurator, advocate, witness or expert cannot subsequently, in another instance, validly determine the same case as a judge or exercise the role of assessor in it”.

²¹ Can. 60: „Any rescript can be obtained by all who are not expressly prohibited”.

Another example of condensation of norms in legal article can be can. 1031 § 1: „Presbyteratus ne conferatur nisi iis qui aetatis annum vigesimum quintum expleverint et sufficienti gaudeant maturitate, servato insuper intervallo sex saltem mensium inter diaconatum et presbyteratum; qui ad presbyteratum destinantur, ad diaconatus ordinem tantummodo post expletum aetatis annum vigesimum tertium admittantur”²². It consists of two sentences, which encode two norms.

Canon 754 is also worth mentioning. It goes as follows: „Omnes christifideles obligatione tenentur servandi constitutiones et decreta, quae ad doctrinam proponendam et erroneas opiniones proscribendas fert legitima Ecclesiae auctoritas, speciali vero ratione, quae edit Romanus Pontifex vel Collegium Episcoporum”²³. The sentence consists of at least two norms. The first is that the faithful are obliged to observe the constitutions and decrees, which is a norm that orders something. The second is an obligation for the lawful ecclesiastical authority to issue such laws for the purpose of proposing doctrine or of proscribing erroneous opinions.

Sometimes reverse process to condensation can be applied, when legislator divides one norm into few legal articles. The reason for doing this is also economy of the text. By the division legislator omits repetitions of some parts of the text.

There are two kinds of division. One is the syntactic division. It is the division of subjects of norms, or circumstances that are then placed in different legal articles. There is no need to repeat many times the same. It takes place, for instance, in can. 540 § 1: „Administrator paroecclesialis iisdem adstringitur officiis iisdemque gaudet iuribus ac parochus”²⁴, and there is no need to repeat

²² Can. 1031 § 1: „The priesthood may be conferred only upon those who have completed their twenty-fifth year of age, and possess a sufficient maturity; moreover, an interval of at least six months between the diaconate and the priesthood must have been observed. Those who are destined for the priesthood are to be admitted to the order of diaconate only when they have completed their twenty-third year”.

²³ Can. 754: „All Christ’s faithful are obliged to observe the constitutions and decrees which lawful ecclesiastical authority issues for the purpose of proposing doctrine or of proscribing erroneous opinions; this is particularly the case of those published by the Roman Pontiff or by the College of Bishops”.

²⁴ Can 540 § 1: „The parochial administrator is bound by the same obligations and has the same rights as a parish priest”.

„administrator paroecialis”, („the parochial administrator”) in every canon that concerns „parochus” („pastor”). Of course, some exceptions can be made, but still it is better to make the text shorter. The similarity of the office of „a parish priest” and of „the parochial administrator” allows for this.

Next kind of division is the content division. It happens when legislator in one legal article presents general norm, but in other legal article modifies it. For instance, can. 1376: „Qui rem sacram, mobilem vel immobilem, profanat, iusta poena puniatur²⁵”. But the canon must be read together with can. 1323–1326, where circumstances of abolishing penalty, diminished punishment or more serious punishment are presented. Also, the general canon is modified by, for instance, can. 1327: „Lex particularis potest alias circumstantias eximentes, attenuantes vel aggravantes, praeter casus in cann. 1323–1326 (...)”²⁶, and together with law to which the canon in question refers to.

2.2. Disadvantages of Condensation or Division

Occasionally both condensation and division do not play their roles correctly and cause some troubles. Too intensive condensation can result in unclearness of the text as a consequence of too many idiomatic expressions in the text of law. Idioms are expressions the meaning of which cannot be derived from the conjoined meanings of its elements but rather the meaning is linked to the whole expression, as if it were one word. The legislator should avoid using too many idioms or expressions that look like idioms. There are some problems with them. Sometimes they cannot be recognized by the interpreter as idioms and are read as the separate sentences²⁷. The proper understanding of idiomatic expression requires a certain level of proficiency in a language. Also, it is possible that interpreter, in wishing to fulfill to the end the legislator’s will and in getting to know the *mens legislatoris*, can over-read the text

²⁵ Can. 1376: „A person who profanes a sacred object, moveable or immovable, is to be punished with a just penalty”.

²⁶ Can. 1327: „A particular law may, either as a general rule or for individual offences, determine excusing, attenuating or aggravating circumstances, over and above the cases mentioned in can. 1323–1326 (...)”.

²⁷ M. Zieliński, *Interpretacja jako proces dekodowania tekstu prawnego*, Poznań 1972, p. 10–11.

and put his own ideas into the text rather than decode what is encoded in a law by legislator.

Exaggerated usage of the techniques of division of norm can result in references or even cascade references, which are very difficult to handle in process of interpretation. Cascade reference happens when a legal article refers to another article, which is in turn not an express norm but refers to the next article. It is in case of can. 288: „Diaconi permanentes praescriptis cann. 284, 285 §§ 3 et 4, 286, 287 § 2 non tenentur, nisi ius particulare aliud statuat”²⁸. Instead of making several norms whose addressee is a permanent deacon, legislator decided to make only one legal article with reference to others, which bind directly clerics.

Similar situation takes place in can. 1364 § 1: “Apostata a fide, haereticus vel schismaticus in excommunicationem latae sententiae incurrit, firmo praescripto can. 194 § 1, n. 2; clericus praeterea potest poenis, de quibus in can. 1336 § 1, nn. 1, 2 et 3, puniri”²⁹. Canon in question refers to can. 1336 § 1 no. 3, and this canon refers to 1336 § 1 no. 2. In result, too many norms can be encoded from the articles, which is difficult to understand. It is also possible that a norm can be omitted by mistake, simply not seen.

2.3. Misuse of Condensation or Division

Unfortunately, also some misuse of them can be noticed. For instance, there are two canons similar in content. The first is can. 521 § 1: „Ut quis valide in parochum assumatur, oportet sit in sacro presbyteratus ordine constitutes”³⁰, and second is can. 546: „Ut quis valide vicarius paroecialis nominetur, oportet sit in sacro presbyteratus ordine constitutes”³¹. The only difference is in the subject of the two norms. Probably because of dissimilar-

²⁸ Can. 288: „Permanent deacons are not bound by the provisions of cann. 284, 285 §§ 3 and 4, 286, 287 § 2, unless particular law states otherwise”.

²⁹ Can. 1364 § 1: „An apostate from the faith, a heretic or a schismatic incurs a latae sententiae excommunication, without prejudice to the provision of can. 194 § 1, n. 2; a cleric, moreover, may be punished with the penalties mentioned in can. 1336 § 1, nn. 1, 2 and 3”.

³⁰ Can. 521 § 1: „To be validly appointed a parish priest, one must be in the sacred order of priesthood”.

³¹ Can. 546: „To be validly appointed an assistant priest, one must be in the sacred order of priesthood”.

ity between „parochus” („an parish priest”) and „vicarius paroecialis” („an assistant priest”) the legislator decided to write two canons. But it seems that condensation of norms in one legal article done by putting together both subjects would be quite a good step. It was done, for instance, in can. 540 § 1: „Administrator paroecialis iisdem adstringitur officiis iisdemque gaudet iuribus ac parochus, nisi ab Episcopo dioecesano aliter statuatur”³².

Summary

The problem of the techniques of encoding norms in legal articles, namely, condensation and division, is very important for legislators and interpreters as well. In CIC 1983 a lot of examples can be found of both techniques.

The legislator must not look only at the sentences he wrote and analyze their external wordy shape. He must go deeper and be imaginative enough to see how users of law in process of interpretation would get out the norms from the text, and what the norms would be. In this sense a legislator is the first interpreter of his law, even before promulgation of a law. During the process of drafting the law, he must try to foresee situations in which the norms from the canons would be interpreted and applied.

The interpreter, knowing that the norm he is trying to find can be encoded in many canons, is urged to know duly the whole system of law. He must also try to take out every possible norm which legislator encoded. The awareness of the problem of encoding norms in legal text and of the proper usage of the techniques of condensation and division can be of great help for church legislators and interpreters in fulfilling their duties for the sake of the community of the faithful.

³² Can. 540 § 1: „The parochial administrator is bound by the same obligations and has the same rights as a parish priest, unless the diocesan Bishop prescribes otherwise”.

Znaczenie technik kodowania norm kanonicznych w ustawie na przykładzie KPK 1983

Streszczenie

Niniejszy artykuł dotyczy sposobów kodowania normy prawnej w przepisach ustawy, a mianowicie kondensowania norm i ich rozczłonkowania (syntaktycznego i treściowego), na przykładzie KPK 1983. Obie metody mają na celu uniknięcie powtórzeń w tekście ustawy. Ich znajomość jest potrzebna zarówno dla prawodawcy, jak i dokonującemu wykładni ustawy.