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THE PROBLEM OF RETROACTIVITY OF CAN. 1098 IN THE JUDGMENT OF THE C. ERLEBACH OF 17 MAY 2018

The 17 May 2018 decision of the Roman Rota c. Erlebach concerns a marriage contracted under the Pio-Benedictine Code in one of the Polish dioceses.¹ Before the Roman Rota, issues would be joined following the formula, *An constet de nullitatae matrimonii in casu*. The Rotal decision is made up of two segments: inability to assume the essential obligations of marriage (can. 1095, 3^o) and deception (can. 1098).² From the research perspective, the judge's analyses of the problem of retroactivity of can. 1098, included in the *in iure* part of the decision, deserve a deeper insight. Therefore, this will be the central motif of this commentary on the Rotal decision.

1. The origin of can. 1098

In the other *in iure* part of the decision c. Erlebach, the issue of retroactivity of can. 1098 concerning deception came to the fore. The author of the decision made an effort to seek the source of the norm under can. 1098, i.e. whether it is derived from natural or positive law.³ It should be noted that a positive answer would have sanctioned the application of the referenced regulation to a marriage contracted before the promulgation of CIC/83, which

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¹ Sent. 99/2018, Dec. c. Erlebach of 17.05.2018, nos. 1-24 (unpublished).

² *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317 [henceforth cited as: CIC/83].

³ Sent. 99/2018, Dec. c. Erlebach of 17.05.2018, no. 14.

would not have excluded the possibility of its nullification on grounds of deception, which was not provided for in the Pio-Benedictine codification.⁴

Referring to the literature on the subject, as well as other Rotal decisions (L. Ghisoni, *La questione della retroattività o meno del can. 1098 secondo la giurisprudenza rotale*, Decision c. Stankiewicz of 27 January 1994, response of the Pro-President of the Pontifical Commission for Authentic Interpretation of the Code of Canon Law, Card. Rosalio José Castillo Lara of 8 February 1986), the auditor highlighted that despite the fact that the subject of retroactivity of can. 1098 had been studied extensively, there was no consensus among canon law experts on this matter.⁵

He also recalled that the codification of present can. 1098 was attributed to Heinrich Flatten who had proposed the extension of the scope of can. 1083 CIC/17. Furthermore, he pointed out that before the promulgation of the current Code of Canon Law, the doctrine was dominated by the view that deception of the other partner by malice did not result in the nullity of the marriage by itself, hence the proposal to introduce a new regulation in the future code. In this context, the author of the decision referred to the opinion of members of the *De Matrimonio* codification team who were unanimous on introducing the new legal ground. He also stressed that Flatten himself had not opted for the retroactivity of the ground in question.⁶

2. Interpretation of can. 1098

According to the judge, the key to the interpretation of can. 1098 is the participle “deceptus” referring to an error caused by deception (*deceptus dolo*). While reflecting on this question, he referred to the article, “Canon 1098 e errore doloso estne iuris naturalis an iuris positivi Ecclesiae” by Urbano Navarrete. He pointed out that a deceitful act in itself was not legally relevant, and, under certain conditions, it produced a legal effect when it mis-

⁴ *Codex Iuris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (27.05.1917), AAS 9 (1917), pars II, p. 1-593 [henceforth cited as: CIC/17].

⁵ Sent. 99/2018, Dec. c. Erlebach of 17.05.2018, no. 14.

⁶ *Ibid.*, no. 16.

leads the deceived person.⁷ Therefore, the issue of error and its relevance became the auditor's main focus in the drafted decision.

Referring to can. 1098, he found that four major components should be distinguished in this norm: a deceitful act, misleading a spouse by deception, a personal quality with specific parameters and the purpose, which is to obtain matrimonial consent.⁸ The judge expressed the view that the total of these components did not yet result in the nullity of marriage. Such a thesis, in his opinion, can be attributed to the fact that an error concerning a quality of the person, even if it would seriously disturb the partnership of conjugal life, still falls within the domain of accidental error. By extension, in the auditor's opinion, can. 1098 is derived from positive law.⁹

According to the judge, this way of approaching the problem is even better justified when, using a comparative analysis, can. 1098 is compared with can. 1097. Based on the concept of error caused by deception, he focused primarily on the forms of error occurring in the regulations. He noticed that the error concerning the person referred to in can. 1097 § 1 was a substantial one. It is different with the error as to the quality of the person, which is an accidental one. Therefore, as a rule, it does not render a marriage contracted invalidly (first part of can. 1097 § 2). In some systemic solutions, as the auditor emphasises, there are also forms of error resulting in the nullity of an act, an example of which is an error concerning a quality that is directly and principally intended (the second part of can. 1097 § 2) and an error in the form of a condition *sine qua non* (can. 126). In his opinion, however, these forms should not be seen as an exception to the principle of irrelevance of an error concerning a quality of the person, since it is (*ex se*) accidental.¹⁰ He further argues that the error could be substantial if the contracting party reduced a specific quality of the partner to a principled consensus, and this quality would in fact be absent at the time of consenting to a marriage. According to the judge, such a situation could occur in two cases: in the case of the lack of a material object of a subjectively principled consensus (the second part

⁷ Ibid.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid., p. 17: "Hi tamen errores non constituunt veram et propriam exceptionem principi irrelvantiae erroris qualitatis – ut dicimus – error circa qualitatem est «ex se» accidentalis."

of can. 1097 § 2) and in a situation where a specific quality would be the object of the condition *implicite* while being the object of the error (can. 126). He also added that both forms only then generate the conventional category of nullity when the cause of nullity occurs in the volitional sphere.¹¹

According to the author of the decision, the norm of can. 1098 refers only to an accidental error, which is not an error concerning a quality which is directly and principally intended, and is not an error in the form of a condition *sine qua non*. The *ratio legis* of this regulation is, in the judge's view, in the protection of the person who found him or herself in an accidental (*ex se*) error, of a special attribute, and meeting the parameters specified in can. 1098.¹² In this context, the auditor firmly emphasised that the interpretation of this regulation should follow the methodological principle that the *ratio legis* of this norm should not be mixed with the *ratio nullitatis* dependent solely on the law-maker's will. As regards the *ratio nullitatis*, the author takes the view that can. 1098 originates from positive law, and, therefore, it is not retroactive.¹³

Another judge's remark is worth noting, namely that deception by malice (*deceptio dolosa*) can be manifested in any (*qualibet*) specific form of a factual error, both substantial and accidental. He is of the opinion that in cases not based on ground of deception, matrimonial consent is invalid because in this case there is always an immediate cause to nullity (*causa proxima nullitatis*). In his view, from the perspective of substantive law, in the case of a substantial error (error concerning the person, directly and principally intended error concerning the person's quality, error concerning the person's quality expressed in the form of condition *sine qua non*), the remote cause is insignificant; it may, however, have an evidential value, yet, the immediate cause is more significant in normative terms.¹⁴

Further, the auditor noted that can. 1098 did not mean any error caused by deception, but deceiving aimed to obtain matrimonial consent. He explai-

¹¹ Ibid.: "In his tamen duobus figuris iuridicis nullitatis, error constituit nonnisi categoriam conventionalem nullitatis, ordinis mere systematici, dum causa efficiens nullitatis pertinent ad ambitu voluntatis personae alund erantit."

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid., no. 18.

ned that this regulation did not refer to a general error but concerns the invalidity of consent due to the occurrence of a specific form of error caused by deception. As such, it is an accidental error that has strictly defined normative parameters, such as: obtaining consent and the other partner's quality which, by its nature, can seriously disturb the partnership of conjugal life. In his opinion, can. 1098 by no means implies a substantive error. Therefore, this regulation is not retroactive.¹⁵

Based on such assumptions, the auditor focused on the concept of invalidity of matrimonial consent due to deception. He first pointed out that in the early period after the promulgation of CIC/83, the Roman joined issues by adopting various formulas, for example: *ob errorem causatam in actrice* (Dec. c. Burke of 25 October 1990) or *ob deceptionem dolosam a parte conventa patratam* (Dec. c. Stankiewicz of 27 January 1994). Nevertheless, he noticed that generally the *ob dolum* formula had prevailed.¹⁶ In his opinion, the substantive perception of this issue did not change when, after 1994, the Rotal tribunal admitted the formula, *An constet de matrimonii, in casu*.¹⁷

3. Procedural law

Another auditor's focus was procedural law. It stated that the ground of nullity was closely related to the petition (*causa petendi*). On the one hand, comparing can. 1639 § 1 and 1683, and on the other, referring to Art. 289,¹⁸ the author emphasised that the ground reflected the actual identity of the case. Hence, the applicability of the principle of *tot capita, tot sententiae*.¹⁹

He also noted that some cases were examined at the interface of two or more grounds. An example are processes related to personality issues. To support this thesis, the author of the decision pointed to two cases: one in which the process could be based on the defect of discretion of judgement (can.

¹⁵ Ibid.

¹⁶ Ibid., no. 19.

¹⁷ Ibid.

¹⁸ Pontificium Consilium de Legum Textibus, Instructio servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii *Dignitas connubii* (25.01.2005), "Communicationes" 37 (2005), p. 11-92.

¹⁹ Sent. 99/2018, Dec. c. Erlebach of 17.05.2018, no. 20.

1095, 2^o) or the inability to assume the essential obligations of marriage (can. 1095, 3^o) and the other in which it is difficult to make a decision whether the process should address the inability to marry or simulation (can. 1101 § 2).²⁰

According to the auditor, the thesis that among numerous cases falling under can. 1098 it is not possible to rule out *a priori* that some of them originate from natural law.²¹ When analysing this issue, he quoted the aforementioned reply of Castillo Lara of 8 February 1986, in which the author found that some natural law cases had been resolved prior to the promulgation of CIC/83. As an example, he provided the example of Decision c. Canals of 21 April 1970.²²

As regards the response of the Pontifical Commission, the auditor noted that it laid emphasis on two hypotheses: nullity of marriage resulting from positive law and, in some cases, nullity derived from natural law. In connection with the document, the auditor did not exclude the option of a substantive error that might have been made by one of the contracting parties deceived by the other or by a third party. He noted, however, that in this case, a deceitful action would have only been a remote cause (*causa remota*) and not an immediate one. He stressed that in the interpretation of can. 1098 a principle should be followed that the ground of nullity should be determined mainly taking into account the immediate cause (*ratione nullitatis proxime*), and deception is not such a cause. Consequently, if, due to a deceitful act, the contracting party were exposed to a substantive error, then *litis contestatio* would not be based on the ground of deception, which has specific parameters under can. 1098, but based on that substantive error. Precisely speaking, in relation to a substantive error, the ground of deception mentioned in can. 1098 would not apply.²³

The judge went further to considered one more case, while not excluding that the nullity of marriage could be attributed to the nature of matter (*ex natura rei*). To support this thesis, he referred to Decision c. Serrano Ruiz of 28 May 1982 which points to another case in which, as a result of a deceitful

²⁰ Ibid., no. 21.

²¹ A similar thesis was advanced by, and not only, U. Navarrete. For more on this subject, see Dzierżon 2004, 238.

²² Sent. 99/2018, Dec. c. Erlebach of 17.05.2018, no. 21.

²³ Ibid.

act, a false image of the partner would be created that is completely different from the one to be accepted by the other party. When exploring this hypothesis, the auditor inclines towards the thesis that in this case the immediate cause of invalidity was total simulation.²⁴

Finally, the author of the decision addressed yet another issue. He stated that it could not be ruled out that, after the joinder of the issue based on deception, in the course of the process, it may turn out that a substantive error had been made caused by deceitful action or another act rendering matrimony invalid by nature. Hence, he suggested that, in order to avoid grave injustice, the judge had been able to modify the terms of the controversy (can. 1514), establishing a new and proper ground of nullity (can. 1680 § 4).²⁵

4. Remarks to the decision

Although CIC/83 was promulgated so many years ago, the problem of retroactivity of can. 1098 has not been fully resolved in the doctrine and case-law. In the view of Linda Ghisoni, the doctrinal uncertainty is attributed, *inter alia*, to the lack of authentic response [Ghisoni 2005, 123]. The discussed Decision c. Erlebach of 17 May 2018 organically fits in a legal theory in which the Rotal auditors take the position that can. 1098 is derived from positive law.²⁶ It should be noted that the analyses contained therein are closely related to another unpublished decision of the same auditor of 31 January 2002 [ibid., 144]. In Decision c. Erlebach of 2018, the auditor clearly supported the non-retroactivity of can. 1098. In his arguments, he did not focus primarily on deception, as in the case in the prevailing case-law, but on error resulting from deceitful actions [Idem 2004, 67]. According to the general principle contained in can. 125 § 2, deception does not invalidate a performed legal act [Dzierżon 2017, 23-32]. The auditor referred to this principle *implicitite* in no. 16 noting that deceitful action as such was not legally effective. Yet, he added that it may nevertheless lead to the nullity of a marriage if it misleads the partner. As a result, in the discussed decision the main focus was not deception but the form of error [Idem 2018, 3-14]. The structure of

²⁴ Ibid.

²⁵ Ibid.

²⁶ For more on the subject, see Nogar 2017, 114-15.

the argumentation mainly highlighted the theoretical and legal distinction drawn between a substantive and accidental error. By the way, Gommarus Michiels understood the substantive error as affecting specific elements of a legal act, i.e. its substance; on the other hand, he linked the accidental error to accidental elements.²⁷

In the auditor's view, the value of an error concerning a quality of the person is of particular importance when interpreting can. 1098. He claimed that the canon covered this very form of error. He even expressed the view that if we were faced with an error that met the conditions set out in can. 1098, that is, one that, by its nature, would seriously disturb the partnership of conjugal life, it would not be a substantive error but an accidental error resulting in the nullity of the marriage based on positive and not natural law.

He supported his thesis with a comparative analysis of can. 1098 and can. 1097 § 1-2, which includes two forms of a factual error: an error concerning the person (can. 1097 § 1) and an error concerning a quality of the person directly and principally intended (can. 1097 § 2). He noticed that only in the first hypothesis provided for a substantive error;²⁸ in contrast, in his opinion, the error concerning a quality of the person has a different character, since the quality of the person is accidental in itself. Therefore, any error concerning any person's quality does not render marriage invalid. In his view, however, it could be a substantive error if there were no material object of a subjectively principled consensus (the second part of can. 1097 § 2), or if a specific quality were the object of the condition *implicite* and, at the same time, the object of error (can. 126). These forms, by the auditor's standards, do not fall under can. 1098.

This problem is approached by Ghisoni in her article, "La decezione dolosa (can. 1098) secondo la giurisprudenza della Rota Romana: rilevamenti sistematici." She pointed out that a substantive error caused by deception should not be ruled out. This form, however, is not the same as that under can. 1098. In the event of a substantive error, the nullity of marriage would be obvious by the nature of matter, irrespective of the cause of the error. In her opinion,

²⁷ Michiels 1955, 653: "Error substantialis ille dicitur, qui cadit in illa actus juridici determinata elementa, quae ad normam juris pertinent ad eius substantiam; *accidentalis* vero, qui afficit tantum accidentalialia ejusdem elementa."

²⁸ For more on the subject, see Franchetto 2011.

this is not the case with can. 1098 in which the legislator demands the occurrence of specific elements, such as the teleological component of action aimed at obtaining consent (*ad obtinendum consensum*) [Ghisoni 2004, 71]. It should be noted that this line of argument is also adopted by the author of the discussed decision in no. 18.

It is also worth stressing that the entire focus in Decision c. Erlebach is on the cause of nullity (*ratio nullitatis*) in the context of can. 1098.²⁹ When addressing this issue, the auditor distinguished between a remote cause and immediate cause of nullity. He takes the position that only the immediate cause results in the nullity of a marriage. He believes that deception cannot be regarded as an immediate cause of nullity but only as a remote one. In his opinion, based on the hypothesis contained in the norm of can. 1098, the immediate cause may be an error caused by deception. This form of error *ex se*, however, does not invalidate matrimonial consent; yet, it can produce it as a result of the decision of the ecclesiastical legislator. The auditor also subscribes to the opinion that can. 1098 is not retroactive.

Finally, the auditor did not rule out the occurrence of a substantive error. Its examples may be the forms of error mentioned in the decision: an error concerning a quality of the person directly and principally intended and an error in the form of the condition *sine qua non*.³⁰ These forms, however, do not fall under can. 1098 in the judge's opinion. If these forms of error emerged in the process, then, according to the auditor, the judge overseeing the case should, depending on the circumstances, join the issue based on the ground specified in can. 1097 § 2 or on the ground specified in can. 126.

REFERENCES

Dzierżon, Ginter. 2004. "Ratio legis kan. 1098 KPK oraz problem jego retroaktywności." In Wojciech Góralski, and Ginter Dzierżon, *Nieważność małżeń-*

²⁹ This problem had already appeared in the aforesaid Decision c. Erlebach of 31.01.2002. For more on the subject, see Ghisoni 2005, 144-45.

³⁰ Roberto Serres López de Guereñu explained the substantiation process in this specific error form as follows, "Al versar in condicin implicita sobre el miso objeto el error accidental, esté se convierte en un error sustancial, invalidante del acto jurídico, pues el objeto pretendido es ahora sustancialmente de tinto del objeto decralarado" [Serres López de Guereñu 1997, 158].

- stwa zawartego pod wpływem podstępny*, 129-244. Warszawa: Wydawnictwo UKSW.
- Dzierżon, Ginter. 2017. "Wpływ podstępny na ważność aktu prawnego (kan. 125 § 2 KPK)." *Prawo Kanoniczne* 60, no. 1:23-32.
- Dzierżon, Ginter. 2018. "Wpływ błędu i ignorancji co do istoty aktu prawnego na jego nieważność (kan. 126 KPK)." *Prawo Kanoniczne* 61, no. 1:3-14.
- Franchetto, Fabio. 2011. «*Error in persona*» (can. 1097 § 1). *Il dibattito sul concetto di persona nella trattazione dell'error facti. Analisi della dottrina e della giurisprudenza*. Roma: Gregorian University Press.
- Ghisoni, Linda. 2004. "La decezione dolosa (can. 1098) secondo la giurisprudenza della Rota Romana: rilevi sistematici." *Quaderni dello Studio Rotale* 14:63-84.
- Ghisoni, Linda. 2005. "La questione della retroattività o meno del can. 1098 secondo la giurisprudenza rotale." *Quaderni dello Studio Rotale* 15:123-50.
- Michiels, Gommarus. 1955. *Principia generalia de personis in Ecclesia*. Parisiis–Tornaci–Romae: Typis Societatis S. Joannis Evengelistaee Desclee et Soci.
- Nogara, Marco F. 2017. *La qualitas nel can. 1098 CIC: determinazioni giurisprudenziali*. Roma: EDUSC.
- Serres López de Guereñu, Roberto. 1997. «*Error recidens in condicionem sine qua non*» (Can. 126). *Estudio histórico-jurídico*. Roma: Gregorian University Press.

The Problem of Retroactivity of Can. 1098 in the Judgment of the c. Erlebach of 17 May 2018

Summary

The presented study is a commentary to the judgment of the c. Erlebach of 17 May 2018. The main interest of the Author has become only one thread of this the Rota's judgment, which is the problem of retroactivity of the can. 1098. In this judgment, ponens argued for the origin of this regulation from positive law, and therefore its non-retrocativeness. In the final remarks, the Author highlighted the specificity of the arguments Rota's auditor. In his reflection over can. 1098, based on both dogmatic and comparative analysis, showed that the error resulting from deceptive action is not a substantive error, but an accidental one. Therefore, in his opinion, can. 1098 comes from positive law.

Key words: canonical marriage, deception, error, retroactivity

Problem retroaktywności kan. 1098 w wyroku c. Erlebach z 17 maja 2018 roku

Streszczenie

Zaprezentowane opracowanie jest komentarzem do wyroku c. Erlebach z 17 maja 2018 r. Głównym przedmiotem zainteresowania Autora stał się tylko jeden wątek

tego rotalnego orzeczenia, jakim jest problem retroaktywności kan. 1098. W wyroku tym ponens opowiedział się za pochodzeniem tej regulacji z prawa pozytywnego, a więc za jej nieretroaktywnością. W końcowych uwagach Autor wyeksponował specyfikę argumentacji audytora rotalnego. W swym namyśle bowiem nad kan. 1098 w oparciu zarówno o analizę dogmatyczną, jak i komparatystyczną wykazał on, iż błąd powstały wskutek działania podstępnego nie jest błędem substancjalnym, lecz akcydentalnym. Dlatego, w jego przekonaniu, kan. 1098 pochodzi z prawa pozytywnego.

Słowa kluczowe: małżeństwo kanoniczne, podstęp, błąd, retroaktywność

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