Biuletyn Stowarzyszenia Kanonistów Polskich XXX (2020), no. 33, p. 171-180
https://doi.org/10.32077/skp.2020.33.1-10en

Józef Krzywda

# THE CONSEQUENCES OF THE DIFFERENCES BETWEEN AND CONVERGENCE OF THE RULES AND NORMS OF MARITAL CANON LAW AND POLISH FAMILY LAW

## Preliminary remarks

As demonstrated in the title of the article, it has a comparative character. It attempts to juxtapose and compare the essential principles and norms of two legal systems: the 1983 Code of Canon Law[1] and Polish civil law and their provisions on matrimony. This is intended to highlight the similarities and points of convergence as well as differences between them with a view to exposing both the benefits and undesirable consequences of the two legal orders crossing. It is worth noting that both legal orders, although based on similar axiological foundations, are consistent with each other in some key teleological areas, while being very divergent in some others. This state of affairs, as proven historically, has presented difficulties and generated conflicts, especially in the case of marriages by partners of different persuasions. It also seems justified to bring to mind, with no prejudice to the original normative systems of the two legal orders, that the standards of civil law in certain areas drew from the religious legacy [Winiarz 1996, 41; Kuglarz and Zoll 1994, 9], especially the Christian tradition [Winiarz 1996, 41; Kuglarz and Zoll 1994, 41]. By extension, the fact that the legislator and public awa-

Rev. JÓZEF KRZYWDA, Professor, Head of the Department of Marriage Law, Faculty of Canon Law, the Pontifical University of John Paul II in Kraków; ul. Kanonicza 9/408, 31-002 Kraków, Poland; e-mail: jozefkrzywda@misjonarze.pl; https://orcid.org/0000-0002-8369-3257

[1] *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].

reness were under the influence of the guidelines and teaching of the Second Vatican Council should not be denied, either.[2]

## 1. Place and role of natural law in the institution of matrimony and family

The subject of this paper so framed requires, first of all, reference to natural law, which (contrary to some factions of legal positivism) underpins the institution of matrimony and family [Hervada 1999, 39-45]. In other words, it must be stressed that both institutions, like only few other, boast a natural law *descent* [underlined by the author], and, as perceived in the light of divine reality or in the domain of religious faith, have their source in God's natural law.[3] Thus, matrimony and the family are not the effect of a positive act of any authority, either secular or spiritual, when it comes to the process of their establishing, the actual establishment, and their functioning.[4] Indeed, they go back to the act of creation and the vocation of the first people and were created out of God's will and in collaboration with the Creator (Gen 1:27; 2:23-24).[5] An interesting reflection on the findings of the Magisterium

[2] See The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 2009, No. 114, item 946, Preamble.

[3] Sacrosanctum Concilium Oecumenicum Vaticanum II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (7.12.1965), AAS 58 (1966), p. 1025-115 [henceforth cited as: GS], no. 48: "The intimate partnership of married life and love has been established by the Creator and qualified by His laws, and is rooted in the conjugal covenant of irrevocable personal consent. Hence by that human act whereby spouses mutually bestow and accept each other, a relationship arises which by divine will and in the eyes of society too is a lasting one. For the good of the spouses and their off-springs as well as of society, the existence of the sacred bond no longer depends on human decisions alone. For God Himself is the author of matrimony, endowed as it is with various benefits and purposes."

[4] Ioannes Paulus PP. II, Adhortatio apostolica de Familiae Christianae muneribus in mundo huius temporis *Familiaris consortio* (22.11.1981), AAS 74 (1982), p. 81-191 [henceforth cited as: FC], no. 11; *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997 [henceforth cited as: CCC], nos. 2202-2203. See Ratzinger 2017, 512-28; Hervada 1998, 39.

[5] See GS 48; CCC 369-372; FC 12; *Doktryna katolicka o sakramencie małżeństwa (1977). A. Propozycje zatwierdzone in forma specifica przez Międzynarodową Komisję Teologiczną*, in: *Od wiary do teologii. Dokumenty Międzynarodowej Komisji Teologicznej 1969-1996*,

of the Catholic Church on natural law comes from Cardinal Zenon Grocholewski who, when alluding to Pope Benedict XVI, recalled the following statement in the conclusion of his work, "Blind trust in technology as the only guarantor of progress without a simultaneous indication of the code of ethics to follow […] would amount to a violation of the human nature with disastrous consequences for all" [Grocholewski 2009, 33-45]. This truth on matrimony and family was confirmed in the Preamble of the Charter for the Rights of the Family, "Marriage is the natural institution to which the mission of transmitting life is exclusively entrusted."[6] Based on this fundamental principle, a derivative rule has been formulated that, "Every man and every woman […] has the right to marry and establish a family […]" (CRF, Preamble, C-D; CCC 2207-2210).

### 1.1. The principle of correlation between natural and positive law

The discussion above leads, among other things, to an important conclusion, or even a recommendation, that positive law should not ignore the principles of natural law so as not to create a radical conflict between law and the conscience of those for whom it was made. This truth is voiced particularly firmly in the encyclical of Pope John Paul II *Evangelium vitae*,[7] to which Pope Benedict XVI has repeatedly referred. In his Message for the 41st World Day of Peace 2008,[8] when also referring to the Charter for the Rights of the Family of 1983, the Pope said, "The rights set forth in the Charter are an expression and explication of the natural law written on the heart of the human being and made known to him by reason. The denial or even

ed. J. Królikowski, Wydawnictwo Księży Sercanów, Kraków 2000, p. 96 [Chiappetta 1990, 10; Góralski and Pastwa 2015, 11-12; Rychlicki 1997, 49-50].

[6] Pontificio Consiglio per la Famiglia, *Carta dei diritti della famiglia* (22.10.1983), in: *Enchiridion della Famiglia. Documenti Magisteriali e Pastorali su Famiglia e Vita 1965-2004*, ed. Pontificio Consiglio per la Famiglia, EDB, Bologna 2004, p. 1489-506 [henceforth cited as: CRF], Preamble, C, 7.

[7] Ioannes Paulus PP. II, Litterae encyclicae de vitae humanae inviolabili bono *Evangelium vitae* (25.03.1995), AAS 87 (1995), p. 401-522.

[8] Benedict XVI's Address to the Participants in the International Congress on Natural Moral Law. Paragraph 5. Next, the Holy Father added, "On this basis it is possible to develop a fruitful dialogue between believers and non-believers; between theologians, philosophers, jurists and scientists, which can offer to legislation as well precious material for personal and social life." quoted after Grocholewski 2009, 39.

the restriction of the rights of the family, by obscuring the truth about man, threatens the very foundations of peace" (no. 4). Pointing to the necessary relationship between natural and positive law, he reminded that, "The answer is: yes, such norms exist, but to ensure that they are truly operative it is necessary to go back to the natural moral norm as the basis of the juridic norm; otherwise the latter constantly remains at the mercy of a fragile and provisional consensus" (no. 12).[9] When invoking the Universal Declaration of Human Rights in his speech before the UN General Assembly (18 April 2008), he also pointed out that, "They are based on the natural law inscribed on human hearts and present in different cultures and civilizations. Removing human rights from this context would mean restricting their range and yielding to a relativistic conception, according to which the meaning and interpretation of rights could vary and their universality would be denied in the name of different cultural, political, social and even religious outlooks […]"[10] Also, J. Krukowski referred to this reflection by stressing that, "Human dignity is the basic principle of the social order, and the fundamental social principles are tied with it" [Krukowski 2013, 97]. Among these principles, as Krukowski put it, there are, "the principle of the common good, the principle of subsidiarity, the principle of solidarity, and the principle of justice" [ibid.].

### 1.2. Definition of marriage and family in Polish civil law and in the Code of Canon Law

In the context of this discussion, the definition of marriage and family must be addressed, as it plays a central role in the legal doctrine. Indeed, such a definition contains a specific record (or a preamble) of the concept and values behind this institution, and even more than that: it gives direction to relevant legislative solutions. However, because both legal systems emerged and evolved, in certain aspects, basically to pursue different tasks and goals [Winiarz 1996, 14; Kuglarz and Zoll 1994, 8-9], yet resting on different axiological and teleological foundations [Winiarz 1996, 40], they deserve at least a high-level description. Regrettably, Polish law fails to provide one [Ku-

[9] Quoted after Grocholewski 2009, 39.

[10] Ibid., 40.

glarz and Zoll 1994, 9][11] as J. Winiarz points out, although he further concludes, "[…] the institution of the family has proven to be socially indispensable at every stage of human development" [Winiarz 1996, 20]. It may, therefore, come as a surprise that the two institutions (matrimony and family), while enjoying constitutional protection and consistently remaining in focus in general laws and prescriptive acts, have not been actually defined in a way that would reflect their special status (Art. 18 and 48 of the Constitution of the Republic of Poland) [ibid., 21], except for a concise statement that, "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland" (Art. 18 of the Constitution of the Republic of Poland).

In contrast, and this should be particularly emphasised, the ecclesiastical legislator (without creating any confrontational situation), taking care of a clear communication of the concept of marriage and family, has framed and adopted it unequivocally in accordance with the teaching of the Gospel, the apostolic tradition, and the teaching and decisions of the Magisterium of the Catholic Church.[12] The well-known theologian of law, E. Corecco, provided an excellent interpretation of this question. He found that the entire Latin theological tradition, which had borrowed certain ideas from the Stoic and Ciceronian philosophy, had rested its concept on eternal law (*lex aeterna*), that is, on the God's plan of creation and salvation [Corecco 1990, 177]. All in all, the definition of marriage was sanctioned by the ecclesiastical legislator and provided in CIC/83 (can. 1055) after its renewal by the Second Vatican Council (GS 48).

## 2. The right to contract marriage and the right and obligation to achieve its objectives

Considering the teleological issues linked to the institution of marriage and the family, both the secular and ecclesiastical legislator take a similar, if not identical, position in essential and fundamental matters. Above all, they

[11] B. Walaszek subscribes to the same opinion after P. Kuglarz and F. Zoll. See Walaszek 1971, 23-25.

[12] *Doktryna katolicka o sakramencie małżeństwa (1977)*, in: *Od wiary do teologii*, p. 102-105. See Pawluk 1996, 15-18.

recognise, based on natural law, the right of every person to contract marriage.[13] The specific requirements and conditions that follow from the above, the most important of which are: matrimonial consent, impediments to marriage, the legal form of contracting marriage, and also prohibitions involving the sanction of iniquity [Góralski 2006, 46], regard the interest of the conjugal union as the first priority, followed by starting a family and implementing the relevant tasks and objectives. It should be noted that certain constraints imposed by the legislator (mainly to protect the interest of the spouses and offspring) are not absolute law, which is reflected in the pertinent dispensations and permissions [ibid., 46-47]. Similar guidelines and clauses, as mentioned earlier, are to be found in the Family and Guardianship Code (Art. 1-22) [Kuglarz and Zoll 1994, 10-12]. It should also be underlined that the rights and obligations assumed by the contracting parties in the act of contracting marriage reveal a dual nature and dimension, namely the dimension of moral and legal obligations. However, the question is whether the two legislators attach the same importance to this dual nature of the requirements. Apparently, it is not the same [ibid., 10], and yet the values and interests of the highest order are at stake.

### 2.1. Effectiveness of marriage and family objectives and specific requirements of the two legal orders

When assessing the special value and role of marriage for itself and for the family, J. Winiarz approaches it (marriage) as "molecular social organisation" [Winiarz 1996, 14] which, in its own unique way, plays a distinctive generic role in the process of creating and evolving larger communities, such as tribes, families, and nations. It is this very partnership-forming dynamics of matrimony that makes, as he points out, marriage and family also became the subject of interest and the domain of secular law [ibid.], which is manifested in attaching special importance to the very act of contracting marriage (Art. 1 k.r.o.). When describing other important norms governing the proper functioning of the conjugal union in both legal systems, and highlighting mainly their axiological background, the following should be enu-

[13] Cf. Art. 47 of the Constitution of the Republic of Poland; Act of 25 February 1964 the Family and Guardianship Code, Journal of Laws of 2019, item 2086 [henceforth cited as: k.r.o.], Art. 1f; can. 1058 CIC/83. See Góralski 2006, 45-47; Winiarz 1996, 46-48.

merated: the legal capacity of the contracting parties, the requirement of single status and freedom of candidates from canonical impediments (can. 1083-1094 CIC/83), or prohibitions, as worded in the Family and Guardianship Code (Art. 3-16 k.r.o.). When comparing the teleological functions of the two systems, apart from similarities existing in the regulations, there are also differences, especially, and this should be particularly emphasised, included in the attached clauses. When it comes to a civil marriage concluded against a prohibition (obstacle), it is considered valid, but, due to certain circumstances, it may be subject to nullity (Art. 17 k.r.o.). The ecclesiastical legislator takes a different stance. In every case when a marriage is "contracted" despite an existing impediment (if no dispensation has been granted) or against an impediment based on God's natural law, it is considered invalid (*matrimonium non existens*). In conclusion, such systemic discrepancies, i.e. occurring in both legal orders, may pose serious challenges. Hence, the question of what the reasons are for such far-reaching legislative discrepancies.

### 2.2. The significance and role of essential marital requirements and qualities in the pursuit of its objectives

As mentioned elsewhere, the type and nature of the requirements for marriage are linked to the concept and teleological tasks of the conjugal union, and they gain special significance and effectiveness in the sacramental marriage thanks to its inviolable attributes: unity and indissolubility (can. 1056 CIC/83). These attributes, implanted in the sacramental character of marriage, determine its special dynamics also in the implementation dimension [Góralski 2006, 31-34]. Thus, marriage, as a sacrament and having the nature of a contract between the parties (can. 1057 CIC/83), is a one of a kind and *sui generis* unique reality; thus, it is afforded a special significance in social life and in the life of a nation [Chiappetta 1990, 24-25; Corecco 1990, 178]. Again, this institutional aspect of marriage received a new, profound theological justification in the Pastoral Constitution on the Church in the Modern World (GS 48). It gained acceptance and recognition also in the civilized world (apart from ideologies) while strengthening and enhancing the unique place and role of marriage and family in the Church and in the world. Among the many testimonies in the literature on the subject, the testimony-statement by T. Pawluk deserves special attention. He says that, "Conjugal unity generally does not raise any objections today. It is commonly accepted in civi-

lized societies that a monogamous marriage is the most perfect form of marital life. That is why monogamy," he concluded, "is the prevailing and legitimate form" [Pawluk 1996, 32; Legrain 1983, 132-33; Bonnet 2004, 424-28]. Admittedly, the Polish civil-law legislator seems to be aligned with this positive trend of normative solutions of its ecclesiastical counterpart as evident from the content of the Concordat.[14] However, is the existing provision of the k.r.o. that, "Spouses […] are obliged to live together, assist each other and remain faithful, and to work together for the welfare of the family their marriage has created" (Art. 23 k.r.o.) [Winiarz 1996, 89-97] not in conflict with Art. 56 § 1-3 k.r.o. [Winiarz 1996, 141-69; Hervada 1999, 39-61]? In his extensive commentary regarding divorce, J. Winiarz notes, "No express provision provides that, in determining the complete and irretrievable breakdown of a marriage, the court should assess the validity of its causes" [Winiarz 1996, 141]. If the last statement by J. Winiarz is set against the provision of Art. 61 § 1 of the Act on Separation, "If one of the spouses requests a decision on legal separation and the other a divorce decree and this request is justified, the court decides the divorce,"[15] the question is: how does that relate to Art. 23 k.r.o. obliging the parties "to live together, assist each other and remain faithful, and to work together for the welfare of the family their marriage has created?"[16]

## REFERENCES

Bonnet, Louis. 2004. *La communauté de vie conjugale au regard des lois de L'Église catholique*. Paris: Cerf.

Chiappetta, Luigi. 1990. *Il matrimonio nella nuova legislazione canonica e concordataria*. Roma: Edizioni Dehoniane.

Corecco, Eugenio. 1990. *Théologie et droit canon*. Fribourg: Éditions Universitaires.

Góralski, Wojciech. 2006. *Kościelne prawo małżeńskie*. Warszawa: Wydawnictwo UKSW.

[14] Concordat between the Holy See and the Republic of Poland, signed at Warsaw on 28 July 1993, Journal of Laws of 1998, No. 51, item 318.

[15] Act of 21 May 1999 amending the Family and Guardianship Code, the Civil Code, the Code of Civil Procedure and some other acts, Journal of Laws, No. 52, item 532.

[16] See Kuglarz and Zoll 1994, 44.

Góralski, Wojciech, and Andrzej Pastwa. 2015. *Rodzina suwerenna – Kościół domowy. W nurcie współczesnej myśli prawnej Kościoła powszechnego i Kościoła w Polsce*. Katowice: Wydawnictwo Uniwersytetu Śląskiego.

Grocholewski, Zenon. 2009. *Refleksje na temat prawa. Prawo naturalne. Filozofia prawa*. Kraków: Wydawnictwo "Homo Dei".

Hervada, Javier. 1999. *Carta sobre el divorcio: el matrimonio y la fe de la Iglesia*. Ed. 2. Navarra: Navarra Gráfica Ediciones.

Kasprzyk, Piotr. 1999. *Instytucja separacji małżeńskiej*. Lublin–Sandomierz: Wydawnictwo Diecezjalne w Sandomierzu.

Krukowski, Józef. 2013. *Kościelne prawo publiczne. Prawo konkordatowe*. Lublin: Towarzystwo Naukowe KUL.

Kuglarz, Paweł, and Fryderyk Zoll. 1994. *Małżeństwo konkordatowe. Analiza prawno-porównawcza zawarcia małżeństwa w prawie kanonicznym i w prawie polskim. Rozważania na tle Konkordatu z dnia 28 lipca 1993 r.* Kraków: Staromiejska Oficyna Wydawnicza.

Legrain, Michel. 1983. *Questions autuor du mariage Permanences et mutations*. Strasbourg: Salvator.

Pawluk. Tadeusz. 1996. *Prawo kanoniczne według Kodeksu Jana Pawła II*. Vol. 3: *Prawo małżeńskie*. Olsztyn: Warmińskie Wydawnictwo Diecezjalne.

Ratzinger, Joseph. 2017. "O teologii małżeństwa." In *Joseph Ratzinger. Opera omnia. Wprowadzenie do Chrześcijaństwa*, ed. Krzysztof Góźdź, and Marzena Górecka, vol. 4, s. 512-28. Lublin: Wydawnictwo KUL.

Rychlicki, Czesław. 1997. *Sakramentalny charakter przymierza małżeńskiego. Studium teologiczno-dogmatyczne*. Płock: Płocki Instytut Wydawniczy.

Uruszczak, Wacław. 2017. *Opera historico-iuridica selecta. Prawo kanoniczne – Nauka prawa – Prawo wyznaniowe*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Walaszek, Bronisław. 1971. *Zarys prawa rodzinnego i opiekuńczego*. Warszawa: PWN.

Winiarz, Jan. 1996. *Prawo rodzinne*. Ed. 9. Warszawa: PWN.

## The Consequences of the Differences Between and Convergence of the Rules and Norms of Marital Canon Law and Polish Family Law

Summary

Even just a cursory glance at the issues raised in the paper shows that the project's objective, included in the topic, has essentially been achieved. Taking as the subject of analyses and comparisons the complex problem of two institutions: marriage and family, in two legal systems – the state and the Church – it was necessary to bring out those essential constitutive elements and aspects which would make it possible to show: the convergence and differences in dispositions in the two legal systems, in

order to indicate the practical advantages and disadvantages for married couples and families, consisting especially of persons of different religious and social provenance. Ending the reflection on such a rich and complex problem, it is necessary to refer, bearing in mind the postulate of natural law, to the famous rule, according to which "Quod omnes tangit ab omnibus approbari debet" [Uruszczak 2017, 492].

**Key words:** marriage, family, divorce, separation, state, Church, natural law, community, dignity of persons

**Konsekwencje zbieżności zasad i norm małżeńskiego prawa kanonicznego z polskim prawem rodzinnym oraz zachodzących między nimi różnic**

Streszczenie

Nawet tylko pobieżny rzut oka na poruszone zagadnienia w artykule pokazuje, że zawarty w temacie cel projektu został zasadniczo osiągnięty. Przyjmując za przedmiot analiz i porównań złożony problem dwóch instytucji: małżeństwa i rodziny, w dwóch systemach prawnych – państwowym i kościelnym – trzeba było wydobyć te istotne konstytutywne elementy i aspekty, które by pozwoliły ukazać: zbieżności i różnice w dyspozycjach w obu porządkach prawnych, by w rezultacie wskazać na praktyczne korzyści i niekorzyści dla małżeństw i rodzin, składających się zwłaszcza z osób różnej proweniencji religijnej i społecznej. Kończąc refleksję nad tak bogatą i złożoną problematyką, wypadałoby odwołać się, mając na uwadze postulat prawa naturalnego, do słynnej reguły, w myśl której „Quod omnes tangit ab omnibus approbari debet" [Uruszczak 2017, 492].

**Słowa kluczowe:** małżeństwo, rodzina, rozwód, separacja, państwo, Kościół, prawo naturalne, wspólnota, godność osób

**Informacje o Autorze:** Ks. prof. dr hab. JÓZEF KRZYWDA, kierownik Katedry Prawa Małżeńskiego, Wydział Prawa Kanonicznego, Uniwersytet Papieski Jana Pawła II w Krakowie; ul. Kanonicza 9/408, 31-002 Kraków, Polska; e-mail: jozefkrzywda@misjonarze.pl; https://orcid.org/0000-0002-8369-3257