

GRAVE DEFECT OF DISCRETION OF JUDGEMENT IN DOCTRINE AND JURISPRUDENCE

POWAŻNY BRAK ROZEZNANIA OCENIAJĄCEGO W DOKTRYNIE I ORZECZNICTWIE

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Abstract

Discretion of judgement can be defined as the level of maturity of a free and rational person capable of self-management and of his actions, which is proportionate to the object of the conjugal consent whereby a man and a woman establish a community to which they are entitled, being indebted to each other. Without this degree of self-control, the subject is unable to legally transfer marital rights to himself or assume obligations. This article aims to answer the basic question: Does a grave defect of discretion have to result from some mental anomaly, and does it always have to concern marital rights and obligations? In my opinion, we cannot speak of a grave defect of discretion as reason enough for marriage nullity if only one of the above-mentioned conditions is met, i.e. when there is a mental anomaly, but there is no reference to specific marital rights and obligations, or when this reference is present in terms of critical faculty and inner freedom, but mental anomaly has been found, because both doctrine and jurisprudence clearly indicate the need for both criteria to be present.

Keywords: mental anomaly, marital rights and obligations, discretion of judgement, consensual incapacity

Abstrakt

Rozeznanie oceniające można zdefiniować jako poziom dojrzałości wolnego i rozumnego człowieka zdolnego zarządzać sobą i swoim działaniem proporcjonalny do przedmiotu zgody małżeńskiej, dzięki któremu mężczyzna i kobieta ustanawiają między sobą wspólnotę, do której mają prawo i są sobie wzajemnie dłużni. Bez tego stopnia władzy nad sobą podmiot nie jest zdolny, w sposób wywołujący skutki prawne, przekazać praw małżeńskich do siebie ani przyjąć obowiązków.

Niniejszy artykuł jest próbą odpowiedzi na podstawowe pytanie: czy poważny brak rozeznania musi wynikać z jakiejś anomalii psychicznej i czy zawsze musi odnosić się do praw i obowiązków małżeńskich? W moim przekonaniu nie można mówić o poważnym braku rozeznania jako tytule nieważności małżeństwa, gdy spełniony jest jedynie jeden z wyżej wskazanych warunków, czyli wówczas gdy istnieje anomalia psychiczna, ale nie ma odniesienia do konkretnych praw i obowiązków małżeńskich, albo gdy jest owo odniesienie w kontekście zdolności krytycznej i wolności wewnętrznej, ale nie ma stwierdzenia istnienia jakiejś anomalii psychicznej, gdyż zarówno doktryna, jak i orzecznictwo wyraźnie wskazuje na konieczność zaistnienia obydwu kryteriów.

Słowa kluczowe: anomalia psychiczna, prawa i obowiązki małżeńskie, rozeznanie oceniające, niezdolność konsensualna

Introduction

The act of marital consent, which a person performs, should be conscious and free. This implies that it should be made without any external or internal coercion, which would deprive the person of the ability to make a choice and a decision to marry. Here, we are speaking of the absence of external coercion and the necessary inner freedom to perform the act of marital consent.¹ This freedom, as emphasized by Pompedda, means that the human will is capable of dismissing all internal pressures to the extent that they do not determine the subject's decisions. The human being, despite his or her subjection to diverse conditions springing from upbringing, culture, environment, affectivity, as well as the subconscious, is capable of making a conscious and prudent decision through an act for which they feel responsible. People, as rational and uniquely spiritual beings, can come to terms with themselves and make, perhaps with the utmost difficulty, rational and motivated decisions, giving them a sense of agency [Pompedda 1999, 31-32]. In practice, this inner freedom

¹ Sent. c. Ewers of 10 January 1980, RRD 72 (1980), p. 49. It says: "Consensus matrimonialis certo certius actus humanus sit oportet: verum ad istum ponendum homo debet esse sui actus dominus, quidem per rationem et voluntatem. Quod importat eliciti actus libertatem. Libertas autem duplicem rem seu subiecti conditionem requirit: idest, indeterminationem atque simul potestatem determinandi seu decisionis. Loquimur imprimis de indeterminatione, idest de illa hominis conditione in qua, praesuppositis omnibus exstantibus necessariis ad agendum, ipse potest agere vel non agere, agere ita vel aliter. Sed requiritur insuper potestas sese determinandi, vi cuius homo ex seipso valet auferre illam indeterminationem atque decernere actionem vel non, actionem istam vel aliam."

means that the subject can choose to marry or choose any other path of life, choose one person or another as a future spouse, evaluate motives and freely take a certain action.

The issue of a serious lack of discretion of judgement *vis-a-vis* the essential marital rights and obligations, both given and assumed, as generally referred to in Canon 1095, 2° of the 1983 Code of Canon Law,² is linked to the concept of inner freedom and the subject's critical faculty to validly give marital consent. This capacity presupposes both discretion of judgement, which is proportional to the object of marital consent, and the necessary inner freedom to give that consent [Pompedda 1987, 543]. However, the question arises: Does the grave defect of discretion of judgement always result from some disturbance in the psychical nature of the person, or can interpretation ignore such a cause? Also, should a grave defect of discretion of judgement concern marital rights and obligations? Therefore: Is it necessary to meet both criteria to be able to speak of a grave defect of discretion as the grounds for the nullity of marriage or will, for example, the criterion of mental disorder suffice only? Or is the existence of some mental disorder not necessary, as some authors or advocates claim, whereas the lack of critical capacity may be due to a slight emotional disturbance?

1. The inner freedom of a contracting party

The act of marital consent does not call for the person to be fully free, which, incidentally, is not possible. It only requires a degree of inner freedom that is proportional to the object of marital consent. The object is the community of life and love, and the spouses themselves, who transfer and receive the right to each other. In the sentence c. Caberletti of 31 July 2014,³ we read that the subject of discretion of judgement concerns marital rights and duties defined as essential, and therefore pertaining to the essence of marriage, oriented towards the spouses' well-being, giving birth and raising offspring, and the unity and indissolubility of marriage [Góralski 2023, 53].

² *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus* (25.01.1983), AAS 75 (1983), pars II, p. 1-317; English text available at: https://www.vatican.va/archive/cod-iuris-canonici/cic_index_en.html [henceforth: CIC/83]; legal state as of 18 May 2022.

³ Sent. c. Caberletti of 31 July 2014, RRD 106 (2014), p. 247.

Inner freedom chiefly refers to a person's ability to direct his or her own actions in accordance with an option determined by the intellect.⁴ As Paździ- or notes, inner freedom is the property of a person causing that the object which is known and appraised as positive (i.e., sufficiently motivated) is voluntarily and personally accepted by that person [Paździ- or 2004, 15-46].

This freedom is not of an abstract nature but should be construed in the context of all the real conditions of man's existence, both external and internal, which jointly affect the functioning of his will. Under normal circumstances, the influence of these conditions is not strong enough for a person to be unable to direct his or her actions in accordance with the option chosen by the intellect.⁵ It follows that inner freedom does not exclude – but on the contrary – presupposes the impact of instincts, emotions, habits and many other elements constituting human personality on the actions the person takes [Leszczyński 2004, 242]. If, nonetheless, the influence of these elements is too powerful, the person's conduct cannot be described as free and undertaken responsibly. In this case, one can speak of the lack of inner freedom necessary for marital consent [Gil de las Heras 1988, 289].

⁴ Sent. c. Huber of 26 March 1997, RRD 89 (1997), p. 237. It says: "Vera habetur libertas cum voluntatis determination, quae dicitur election, libera est ab intrinseca determinatione ad unum, ita ut possit agree vel non agree, agree unum vel oppositum ex extremis, iudicio indifferenti proposition [...]. Deest libertas interna si voluntas absque manifesta lesione intellectus speculative determinatur ex eo, quod intellectus practicus nullo modo vel saltem non sufficienter motive electionis aestimare valet."

⁵ See also Sent. c. Egan of 12 January 1984, RRD 76 (1984), p. 3; Sent. c. Fiore of 16 February 1985, RRD 77 (1985), p. 89. It says: "Reapse, cum intellectus et voluntas sint facultates animae apprime inter se distinctae et unaquaeque in suo exercitio peculiaribus functionibus organicis subiiciatur, quamplures sunt morbi seu etiam perturbationes organicae quae ideo perturbationem quoque inducunt sive tantum functionis intellectivae, sive tantum functionis volitivae sive etiam utriusque hominis facultatis spiritualis. Cum tantum voluntas perturbatur, intellectus manere potest etiam integer in sua functione, seu voluntarium deficit, praecise quia voluntas non habet dominium suorum actuum. Cum autem obiectum proprium voluntas, quae est facultas critica, recipiat ab intellectu, deficiente functione hominis intellectiva necessario corrumpitur etiam functio volitiva etiam si huius propriae functiones organicae integrae sint et sanae, praecise quia ad actum humanum constituendum requiritur una simul sive praevia adaequata cognitio ex parte intellectus, sive etiam libera a quavis compulsione intrinseca determinatio voluntatis."

2. Discretion of judgement

The incapacity defined in Canon 1095, 2° CIC/83, which is a declaration of natural law, presupposes in the contracting party not only a sufficient use of reason, but also a certain maturity of judgement. Such a judgement is formed not only by the intellect, but also the will in their joint action [Paździor 2004, 15-16], that is why the jurisprudence of the Roman Rota, both prior to 1983 and later, betrays a visible trend pointing to a disturbance in intellectual and volitional functions as causing the lack of discretion of judgement.⁶

The concept of *discretio iudicii* includes three constituents: intellectual cognition of the object of marital consent, critical appraisal, i.e., the right judgement about the marriage to be contracted, and inner freedom to make an unimpeded choice. So, the first two elements involve the cognitive sphere, while the third relates to volitional faculty [Góralski 1996, 25-42].⁷

⁶ Sent. c. Colagiovanni of 20 July 1984, RRD 76 (1984), p. 488. It says: “Amplissimus et aliquando ambiguus fuit usus in doctrina necnon in iurisprudencia capitis nullitatis quod sub nomine defectus discretionis iudicii sumitur. Apte nunc canone 1095 triplex distinguitur fons nullitatis reducibilis, at diversimode, defectui consensus matrimonialis. Praeter enim casum carentiae usus rationis sufficienti, saltem uti recensetur sub can. 1096, haberi poterit defectus gravis discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda. Sive prior quam alter casus respicit ipsum subiectum contrahens qui inhabilitatus est relate ad intellectionem et liberam volitionem, tertius casus in canone recensitus se attinet potius ad obiectum seu ad capacitatem assumendi tales obligationes. Defectus discretionis iudicii duo elementa implicat: sufficientem cognitionem – cribrationem; sufficientem deliberationem seu capacitatem sese determinandi inter alternativas, in philosophia thomistica veluti classicas, seu agendi vel non agendi et agendi hoc vel illud.”

⁷ Sent. c. Annè of 26 January 1971, RRD 63 (1971), p. 66-67; Sent. c. Davino of 5 February 1975, RRD 67 (1975), p. 42; Sent. c. Ragni of 26 November 1985, RRD 77 (1985), p. 545; Sent. c. Jarawan of 24 October 1990, RRD 82 (1990), p. 716-17. It says: “Discretio iudicii necessaria ad validum matrimonium contrahendum exigit ut nupturiens, praevia scientia de qua in can. 1096, circa iura et officia matrimonii essentialia mutuo tradenda et acceptanda, non in abstracto sed in casu concreto considerata, ita deliberare valeat, ut decisio contrahendi sit libera et responsabilis. Quamobrem, graviter perturbatis, vel facultate critica ad ponderandas, ex una parte, rationes quae ad matrimonium alliciunt, et, ex alia, quae ab eodem deterrent, vel voluntate ad liberam decisionem sumendam, matrimonium invalidum est... Recolere liceat quod essentialia iura et officia matrimonialia sunt, non solum quae proprietates essentielles unitatis et indissolubilitatis exigunt, verum etiam illa sine quibus vitae consortium existere nequit.”

At this point, it should be noted that intellectual cognition refers to the sufficient use of reason and as such as an element common to the form of incapacity referred to in Canon 1095, 1° [Bianchi 2006, 193-94]. The element setting apart discretion of judgement from the sufficient use of reason (necessary to posit a human act) is critical faculty, i.e., proper judgement about the marriage to be entered into, and inner freedom. Indeed, as we read in the judgement *c. Pompedda* of 3 July 1979, for valid marital consent a purely abstract cognition as to marriage and its attributes is not sufficient, but it is necessary to be able to critically evaluate the motives that suggest one and not the other choice with regard to marital rights and obligations [Mendonça 1987, 86].⁸ Moreover, critical capacity is not sufficient, but inner freedom is necessary to enable a free choice [Zhurowski 1983, 270]. This is because no judgement is neutral but requires the involvement of the will. This will, as we read in the sentence *c. Stankiewicz* of 23 February 1990, does not entail a desire to make a decision, but the ability to make a free choice.⁹ For this freedom gives the subject, as we read in *c. Colagiovanni* of 30 June 1992, the possibility of both indetermination

⁸ Sent. *c. Pompedda* of 3 July 1979, RRD 71 (1979), p. 392. It says: “Ad sufficienter deliberandum haud sufficit cognitio speculativa matrimonii huiusque proprietatum essentialium: etenim quo intellectus valeat elicere iudicium practicum valoris, utrum nempe matrimonium contrahendum sit necne, interveniente appetitu sensitivo debet percipere atque aestimare motiva, adeo ut sufficienter conferre seu opponere possit motiva ad nuptias inducentia cum aliis dissuadentibus. Cum autem in matrimonio assumenda sint onera atque officia graviora in perpetuum ac vicissim paria iura tradenda, consequitur necessitas aptae aestimationis illorum officiorum-iurium a contrahente peractae iudicio critico.”

⁹ Sent. *c. Stankiewicz* of 23 February 1990, RRD 82 (1990), p. 154-55. It says: “Eapropter in conceptum gravis defectus discretionis iudicii, iuxta terminos a iurisprudencia digestos, includi solent non solum perturbationes facultatis cognoscitivae, criticae vel aestimativae, impediennes rectam apprehensionem debitamque ponderationem naturae et substantialis valoris normativi mutuae personarum traditionis et acceptationis in totius vitae consortium, essentialibus iuribus officiisque coniugalibus praeditum, verum etiam conturbationes facultatis electivae, praepediennes libertatem internam in deliberanda electione personae compartis in consortium coniugale ducendae. Agitur enim de capacitate psychica perficiendi realem integramque electionem irrepitibilis personae compartis intuitu aequalis consortii matrimonialis, non vero de perficienda electione substitutiva cuiusdam figurae parentalis vel imaginariae aut complementarioris, puta in functione exclusiva acquirendi veluti quandam corporis alterius partis proprietatem in simplex concupiscentiae remedium, absque ulla consideratione aequalium iurium officiorumque coniugalium, quae nupturientes mutuo tradere et acceptare debent [...]”

and self-determination, i.e., the ability to choose among many possible options or to select one indicated motive.¹⁰

Discretion of judgement can be therefore defined, as Viladrich does, as a level of maturity of free and rational management of oneself and one's conduct, proportional to the object of marital consent, by which a man and a woman establish between themselves a community to which they are entitled, being indebted to each other. Without this degree of power over himself, the subject is not able, in a way that produces legal effects, to transfer marital rights to himself or assume obligations [Viladrich 2000, 63].

As observed by Żurowski, it is commonly assumed that after reaching maturity, everyone has sufficient discretion of judgement necessary to enter into marriage. This basic presumption contains another presumption that physical development goes hand in hand with mental and psychological development. However, practice shows that reality can be different, and presumption gives way to the truth [Żurowski 1985, 10].

It should be noted here that the legislator does not require the contracting party to have full discretion of judgement, but it is commensurate with the object of marital consent. For this reason, Góralski notes that in the jurisprudence of the Roman Rota it is generally accepted that in assessing the presumed nullity of marriage under Canon 1095, 2° one should employ the criterion of proportionality between the degree of disruption of the very cognitive-volitional and emotional capacity and the substantive and formal object of marital consent [Góralski 1996, 30].

3. A grave defect of discretion of judgement

A grave defect of discretion of judgement, as we read in the sentence c. Pompedda of 25 November 1978, occurs in three cases: the lack of intellectual cognition of the object of marital consent, the lack of discretion of judgement commensurate with the marriage contract, i.e., lack of critical capacity, and the lack of inner freedom necessary for marital consent.¹¹

¹⁰ Sent. c. Colagiovanni of 30 June 1992, RRD 84 (1992), p. 386.

¹¹ Sent. c. Pompedda of 25 November 1978, RRD 70 (1978), p. 509-10. It reads: "Iamvero tunc discretio seu maturitas iudicii deficere posse videtur, cum aliqua ex tribus sequentibus conditionibus seu hypothesibus verificatur: 1) aut deest sufficiens cognitio intellectualis circa obiectum consensus praestandi in matrimonio ineundo; 2) aut nondum contrahens

As we have seen, the legislator does not require the contracting party to have a full discretion of judgement as to the essential marital rights and obligations, but discretion that is proportional to the contract of marital consent [Gramunt and Wauck 1991, 543]. That is why the legislator, in defining the degree in which discretion of judgement may be lacking thus causing the contracting party's consensual incapacity, speaks of a grave defect of discretion of judgement. We are dealing with a grave defect of discretion of judgement when the contracting party, as we read in the sentence c. Di Felice of 14 May 1984, is not capable of a judgement that would be proportional to the object of marital consent, that is, marital rights and obligations.¹²

The criterion of proportionality, *discretio iudicii*, used in jurisprudence in relation to marital rights and obligations, involves an assessment of how severe is the lack of discretion using two parameters: subjective and objective. In the subjective aspect, the lack of discretion remains linked to the subject's psychological pathology, whereas the objective aspect concerns the importance of essential marital rights and obligations. By adopting both parameters, marital jurisprudence always requires the presence of a serious abnormality or psychic pathology¹³ to find a person incapable of consent due to his or her lack of discretion of judgement.

For marital rights and obligations, a grave defect of discretion of judgement entails incapacity for a proportional judgement about the essence of marriage and a lack of inner freedom, which is necessary for marital consent. The lack occurs when there is a serious impairment of cognitive, critical and volitional faculties *vis-a-vis* the transfer and acceptance of marital rights and obligations [Leszczyński 2009, 185].

attigit illam sufficientem aestimationem proportionatam negotio coniugali, idest cognitionem criticam aptam tanto officio nuptiali; 3) aut denique alteruter contrahens caret interna libertate idest capacitate deliberandi cum sufficienti motivorum aestimatione et voluntatis autonomia a quolibet impulsu ab interno.”

¹² Sent. c. Di Felice of 14 May 1984, RRD 76 (1984), p. 81. It reads: “Discretio iudicii semper requiritur matrimonio proportionata, quae tamen sufficienter componitur etiam cum animi vitiositatibus liberam deliberationem minime auferentibus.” C. Burke observes: “Essential rights and obligations derive from the essence of matrimony, and from everything necessarily connected with the essence, such as the essential properties, but as I see it, they do not derive from the ends [...]” [Burke 1992, 386].

¹³ Sent. c. Pompèdda of 19 May 1994, RRD 86 (1994), p. 208.

4. Causes of a grave defect of discretion of judgement

Personal health is a difficult concept to define. Nonetheless, by analysing the reality of man, medicine and psychology are trying to define the boundaries between health and disease to be able to define a particular person as a healthy individual or afflicted by a specific disorder or disease. Health is the opposite of disease or a disorder. Therefore, it could be said that the absence of disease or a disorder in the person means his or her health. Such a definition of illness, however, seems to be a purely tautological formulation: illness is a state of complete physical, mental and social well-being, not just the absence of disease or infirmity. In recent years, the fitness to lead a productive social and economic life has been added to the definition. Disease is the opposite of a state of normality. It is a limitation of the value of the body, something detrimental, a negative value [Jaspers 1964, 830].

The term 'mental health' refers to psychological and emotional well-being. Mental health can be defined as a state of mental and emotional well-being. In a state of mental health, a person is capable of using his cognitive, volitional, emotional abilities, function in society and meet the demands of everyday life. It should be noted, however, that there is no single official definition of mental health, as cultural differences, subjective feelings and competing professional theories affect the understanding of this term. The only aspect that most experts accept is that mental health and a mental disorder are not opposing terms. This means that the absence of a diagnosis of mental illness or disorder does not indicate mental health, especially since the term 'illness' actually refers to few disorders, usually with an organic background. What is more, mentally ill people only manifest a different way of life, closed, inaccessible, contrary to ostensible normality – a way in which they function under strict rules, nonetheless. It follows that putting normality and disease side by side in relation to specific individuals seems to be a wrong criterion. The relativity of such a criterion can be seen, for example, in the theory of Sigmund Freud or Melanie Klein, where the former considers a neurotic to be normal, and the latter considers a psychotic as such.¹⁴

¹⁴ G. Zuanazzi notes: "Per Freud l'individuo normale (sano) è potenzialmente un nevrotico; per Melanie Klein, è potenzialmente uno psicotico. In un modo di funzionamento psichico

The appropriate criterion for defining mental health is to relate the individual to his or her ability to function socially, including the capability of establishing interpersonal relationships. This criterion makes it possible to define a disorder within the framework of its consequences, and therefore describe a person as capable or incapable of establishing certain relationships and undertaking certain life and social tasks and functions.¹⁵ The causes of the grave defect of discretion of judgement are diverse. As Paździor notes, these are typically psychoses, neuroses, or personality disorders or pathologies [Paździor 2004, 25-26]. Psychoses are groups of psychological conditions that are considered more profound and severe. The following are the proposed criteria for identification of those conditions: a significant reduction or loss of the ability to critically assess reality due to cognitive impairment, a proven or hypothetical somatic background, and particularly a profound or total disorganization of mental and social functioning.¹⁶

Mental disorders are divided into psychotic and non-psychotic syndromes. The criterion of division is the occurrence of specific psychopathological symptoms, which include delusions, hallucinations, disturbed thinking and behaviour, mood swings, and significant thought deficits. In these cases, for medical reasons, there is a pronounced disturbance of the sense of reality, a limitation or inability to critically, realistically evaluate oneself, the environment, or the relationships between these. Non-psychotic syndromes are ones that do not meet the criterion of belonging to psychotic syndromes [Bilikiewicz 2002, 404-405].

The core aspect of psychosis is a lack of criticism of one's own incorrect perceptions and judgements. The term 'psychosis' thus refers to the inability to analyse reality, which is usually accompanied by hallucinations, delusions and other thinking disorders. Psychotic syndromes are considered

dominato da processi emotivi non c'è spazio per la distinzione tra normale e patologico, distinzione che si rende possibile solo se si ammette anche un funzionamento governato da processi razionali e volitivi" [Zuanazzi 2006, 66].

¹⁵ Minkowski writes: "Siamo di fronte ad un essere radicalmente diverso, e con il termine *radicalmente* esprimiamo il fatto che non si tratta certo di semplici differenze individuali, quali ne incontriamo in ogni momento nella vita quotidiana, né di di quelle gradazioni che sul piano empirico possono portare insensibilmente dal normale al patologico. Ci si rivela un modo di esistenza particolare che si basa su una differenza di natura" [Minkowski 1973, 66].

¹⁶ Sent. c. Funghini of 19 May 1993, RRD 75 (1993), p. 404.

to be mental disorders in which the sense of reality is clearly disturbed for medical reasons, i.e. a noticeable reduction or inability to perform a critical and realistic assessment of reality, including of oneself, one's environment and the relationships between them [Grzywa 2005, 16]. It should be noted, however, that the cause of a serious defect of discretion of judgement can be not only psychoses, although by far in their purest form they are such causes, but also other mental disorders that are not psychoses, but in a lighter form constitute personality disorders, mood disorders or simply the so-called psycho-emotional immaturity, but also all kinds of addictions to the mother or father, insofar as, of course, they deprive the subject of the necessary ability to discern or the proper functioning of practical reason, and inner freedom necessary for a valid marital decision. Therefore, one speaks of severe disorders that are not a typical difficulty, but indeed a cause of incapacity, as mentioned in Canon 1095. That is why the role of forensic experts, whose job it is to assess, among other things, the severity of the disorder, is so important.

Indeed, at this point attention should be drawn to an important term used by the legislator in Canon 1095, 2° with respect to lack of discretion of judgement. The term is *gravis*, meaning 'serious, grave.' Although the 1983 Code does not elaborate on the term *gravis*, the opinions of various authors and justifications written by ponenses widely indicate that only a profound mental abnormality, including emotional immaturity, can be regarded as a cause of marriage nullity. It should also be noted, very importantly, that the canonical concept of consensual incapacity does not completely coincide with the so-called psychological concept. This means that a person considered emotionally immature from the psychological point of view is not necessarily regarded as such under canon law, in the proper interpretation of Canon 1095 [Leszczyński 2004, 241].

5. Essential marital duties

In defining consensual incapacity in Canon 1095, 2°, the legislator relates it to the so-called essential marital rights and obligations. The object of discretion of judgement is the essential marital rights and obligations, mutually transferred and assumed [Burke 1991, 147-48]. This term is also to imply goals and attributes of marriage. The incapacity in question does not apply to non-essential duties, but only to those which, if not assumed,

may seriously impede the establishment of marriage, which is a community of life and love. A detailed specification of essential duties of marriage is not easy, and various authors interpret them differently. Some of them, discussing the scope of essential marital duties at large, distinguish between duties that chiefly serve to ensure the well-being of the spouses. In this regard, duties related to giving birth and rearing offspring are mentioned. They include in this group, for example, the duties of marital fidelity and living intimately with one's spouse, and the duty of indissolubility, i.e. preserving the life-long nature of marriage.¹⁷

It can be assumed, then, that essential marital duties should be primarily related to the purposes and attributes of marriage, mentioned in Canons 1055 § 1 and 1056¹⁸ or, as we read in the sentence c. Colagiovanni of 23 January 1990, to *consortium totus vitae*.¹⁹ Duties of an ethical, customary or social nature certainly play an important role in the lives of two people united by the matrimonial bond, but it is difficult to consider them as those which the CIC/83 defines as *essentiales*. Instead, it seems that the primary marital duty is the full integration of the spouses, based on mutual devotion and acceptance of each other, in soul and body, and the creation of a mutual bond. All other dimensions of the marital relationship, such as fatherhood, motherhood, mutual fidelity, indissolubility originate in this exclusive

¹⁷ Sent. c. Burke of 19 January 1995, RRD 87 (1995), p. 53; Sent. c. Stankiewicz of 23 June 1988, RRD 80 (1988), p. 417. It reads: "Inter obligationes matrimonii essentialia, quas contrahentes tempore celebrationis nuptiarum foedere irrevocabili assumunt, quaedam sunt, quae in tribus traditionalibus coniugii bonis continentur, sicut obligatio servandi fidelitatem seu exclusivitatem (bonum fidei) ac perpetuitatem seu indissolubilitatem consortii matrimonialis (bonum sacramenti) nec non obligatio acceptandi procreationem ex altero coniuge, per copulam modo naturali peractam, prolemque natam educandi (bonum prolis); quaedam autem habentur, quae ad bonum coniugum, ad quod sua natura ordinatur foedus coniugale (can. 1055, § 1), spectant."

¹⁸ Sent. c. Giannecchini of 26 June 1984, RRD 76 (1984), p. 391; Sent. c. Stankiewicz of 23 June 1988, RRD 80 (1988), p. 417.

¹⁹ Sent. c. Colagiovanni of 23 January 1990, RRD 82 (1990), p. 12. It reads: "Inter onera matrimonialia essentialia... profecto includi debet consortium seu communitas vitae coniugalitatis. Iam age verbum ac conceptus 'vitae' adeo primigenium est, et latum, et ab ipsa natura sponte oblatum atque expressum, ut vix innumeras species admittat nec plane saepe erit discernere utrum vita hic sit, an vero ibi desit. Quo in negotio extricando, certo non procedere possumus, sic agentes de proprietatibus matrimonii essentialibus – puta indissolubilitatem et exclusivitatem quarum notio secumfert determinatos fines et rationes perspectos."

integration of the spouses. For obvious reasons, an obligation for one party is a right for the other, so that is why the title refers to marital rights and obligations.

Conclusion

Answering the questions formulated in the introduction, we can say that a grave defect of discretion of judgement involves two criteria that are necessary in the evaluation of lack of discretion as a title for rendering marriage invalid. It is therefore important to determine whether there is a mental disorder, which is up to an expert in the matrimonial process, and relate it to specific marital rights and obligations, which the subject is unable to discern and freely assess. As the above-cited ponens Caberletti rightly points out, the expert's task is to determine the mental anomaly, its severity, and the historical circumstances regarding its onset,²⁰ meaning that we are not dealing with a grave defect of discretion of judgement within the meaning of Canon 1095 of the 1983 Code if no such mental anomaly exists. Nevertheless, this grave defect should refer to specific duties and rights that the subject is unable to discern (by reason of his or her anomaly) and undertake in an internally free manner. Therefore, we cannot speak of a profound lack of discretion as a reason for marriage nullity, when only one of the above-mentioned conditions is met, since both doctrine and case law clearly indicate the need for the existence of both.

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²⁰ Sent. c. Caberletti of 31 July 2014, RRD 106 (2014), p. 249-50.

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