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MARITAL UNITY VS. PROPERTY SEPARATION OF SPOUSES IN LIGHT OF CANON LAW AND CIVIL LAW

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Abstract

The article reflects on the validity of canonical marriage with respect to separation of property determined by prospective spouses under Polish law by way of the so-called prenuptial agreement. The analysis of the norms of Polish law regulating the separation of property and seeking corresponding norms in canon law are intended to answer whether a prenuptial agreement made before marriage can constitute an exclusion of one of the aspects of the community of life and thus may have a probative value in a nullity case. The present analysis affords the conclusion that it is not the prenuptial agreement, but rather the intention with which the prospective spouses concluded it that determines the validity of canonical marriage. Indeed, signing such an agreement may sometimes be objectively justified, legitimate or even advisable. However, if it demonstrates a party's unwillingness to build marital unity, it will be a reason for declaring the marriage invalid on at least three counts: 1) as exclusion of conjugal indissolubility (*bonum sacramentum*), 2) as incapacity to assume the essential obligations of marriage, and 3) as exclusion of the good of the spouses (*bonum coniugum*).

Keywords: prenuptial agreement, marital unity, simulation of marriage, *bonum coniugum*, nullity of marriage

Introduction

Marriage is a community of the whole life extending over all areas shared by the spouses, including the area of finance. Thus, according to the Catholic idea of marriage, it would seem that prospective spouses, by giving themselves to each other in the act of marital consent, share everything they have and take responsibility for each other. The question is, however, is it always the case? Polish law provides that the area of joint marital property can be divided between the spouses, and their property

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liability can be limited. This is possible because (prospective) spouses can establish a separation of property, both before and after marriage. However, this otherwise obvious practice should invite reflection on marital unity. For there arises a question that is crucial in light of canon law: do prospective spouses contract marriage validly when they sign a property separation agreement before marriage?

Our deliberations seek to answer the question stated above. To this end, the norms of Polish law governing property separation will be cited first, and an attempt will be made to identify corresponding norms of canon law, followed by a reflection on whether the practice of prenuptial agreements can affect the validity of a canonical marriage.

1. Property regime in Polish civil law

Polish law derives certain rights and obligations of spouses from marriage. They relate to various areas of marital life and have either non-property or property character.[1]

Leaving aside all complexities of this issue, it should be noted that property obligations between spouses can be of two types. First, they may follow from contracts entered into by one spouse in connection with the running of a household[2] and those concerning the satisfaction of ordinary needs of the family.[3] Second, they can involve spouses' liabilities related to property existing before the marriage and property acquired afterwards.

In the first case – property obligations arising from the running of the household and satisfying the ordinary needs of the family – the spouses

[1] The rights and duties of spouses concern without being limited to the following: marital cohabitation, mutual fidelity and loyalty, respect, assistance and support, joint management and administration of property matters, joint decision-making regarding important family matters, children's upbringing, finances and other property matters, choice of surname.

[2] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 9, item 59, as amended [henceforth: FGC], Article 27: "Both spouses are obliged, each according to their capabilities, earning and financial capacity, to contribute towards meeting the needs of the family they established by their marriage. Meeting this obligation may also partly or completely consist in their personal efforts to bring up their children and work in a shared household."

[3] See Article 30 § 1 FGC: "Both spouses are jointly and severally liable for obligations incurred by one of them in matters resulting from meeting the ordinary needs of the family."

are jointly and severally liable (but only against the joint property). In other words, a creditor may assert his claims against either spouse, whichever of them incurred the debt or the obligation of a tort nature (such as compensation for damage caused). In contrast, in the second case – obligations arising from property existing before and acquired after the marriage was contracted, the scope of property obligations is regulated by the FGC, depending on the type of property regime that the spouses may choose.

The Polish legislator provided for two kinds of regime: statutory joint property regime (Article 31) and contractual property regime (Article 47).

1.1. Statutory joint property regime

This sort of joint property regime arises by operation of law when marriage is contracted, if the spouses have not previously entered into a property agreement. It serves as a model and is preferred by the legislator, who considers it optimal for a typical and average family, supported by the spouses' employment work and having primarily consumer goods at their disposal [Smyczyński 2005, 78].

Under this regime, the right and duty of management and responsibility for debts are associated with the joint property acquired by both spouses or one of them under the joint property regime. Joint property includes, for example, accumulated salary for work and income from other gainful activity of each spouse, income from both the joint and personal property of each spouse, funds accumulated in the account of an open or worker's pension fund of each spouse, etc.

However, joint property does not comprise property acquired before statutory community arose (i.e., typically before marriage) and certain property rights acquired during the joint property regime, listed in Article 33(1-10) FGC, for example, possessions acquired by inheritance, bequest, or donation, items obtained as compensation for bodily injury or health disorder, copyrights, etc.[4]

[4] The personal property of each spouse includes: 1) items acquired prior to statutory community; 2) items acquired by inheritance, bequest, or donation, unless the testator or donor decides otherwise; 3) joint property rights arising from joint ownership governed by separate provisions; 4) possessions used exclusively to satisfy the personal needs of one of the spouses; 5) non-transferable rights that may be vested in only one person; 6) items

1.2. Contractual regime

The regime of contractual joint property is not the only and obligatory system in Polish law governing the ownership of joint property. This is because spouses can enter into an agreement whereby they will normalize their property relations differently. An agreement like this is called a prenuptial agreement (prenup), and it can be established either before or after the marriage. The prenuptial agreement specifies which possessions are joint and which remain the personal property of each spouse. Under Polish law, a prenuptial agreement also specifies the extent of one spouse's property liability for the debts of the other, and governs other property issues, such as inheritance. By signing a prenup, spouses can extend, limit and exclude the statutory joint property – in so doing, they will keep their property separate.[5]

A prenuptial agreement must be notarized. It can be concluded before or after marriage, but the one entered into before marriage becomes effective only after marriage is contracted.

1.2.1. Extension of statutory joint property

By extending statutory joint property, spouses include in their joint property items and property rights that previously were part of their personal property, such as those acquired before marriage, or those used to serve their personal and occupational purposes. However, according to Article 49 § 1 FGC, spouses may not extend the community of property to: 1) possessions that either spouse will acquire as an inheritance, bequest,

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obtained by way of compensation for bodily injury, a health disorder, or harm suffered; this, however, does not apply to disability benefit due to an injured spouse through a partial or total loss of earning capacity, or an increase in the person's needs or a decrease in their prospects for the future; 7) amounts due concerning remuneration for work or other gainful activity of one of the spouses; 8) possessions obtained as a reward for the personal achievements of one of the spouses; 9) copyrights and related rights, industrial property rights and other rights of the creator; 10) possessions acquired in exchange for elements of separate property, unless particular provisions state otherwise.

[5] Article 47 § 1 FGC: "Spouses may, through an agreement concluded in the form of a notarial deed, limit or expand the statutory joint property regime, or establish a separation of property or a separation of property with compensation for possessions gained (property agreement). This agreement may precede the marriage."

or donation;[6] 2) property rights that arise from joint ownership under separate regulations; 3) non-transferable rights that may be exercised by only one person; 4) claims for compensation for bodily injury or a health disorder, as long as they are not part of statutory joint property, as well as claims for compensation for moral loss suffered; 5) claims for remuneration for work or other gainful activity of each spouse that have not yet become mature.

1.2.2. Limitation of statutory joint property

By limiting statutory community of property, spouses exclude from the shared property certain types of possessions and rights, such as remuneration for work, income from personal property, etc. Exclusion from the community of property can be for the future, but may also refer to items of property already covered by community. In this case, each spouse's personal property includes a fractional share of co-ownership in these items. The limitation of such community cannot lead to its complete abolition [ibid., 97].

1.2.3. Separate property regime

In addition to extending and limiting the statutory community of property, spouses can also establish a separate property regime by way of agreement. Such regime can be of two types: full and permanent separation and separation with compensation of possessions.

When establishing a full and permanent separation of property before marriage, spouses retain not only their existing possessions, but each spouse's personal property will also include assets acquired later. Such an agreement enables each spouse to manage their property individually (Articles 51 and 51[1] FGC). If, in contrast, spouses have contractually excluded community of property during the marriage, the community ceases at the time specified in the prenuptial agreement, at which moment the joint property is divided, and the possessions and property rights came to each spouse are included in their personal property, just as the assets acquired by each of them after the community of property ceases.

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[6] Any expansion of the circle of persons eligible to receive inheritance or donated property should be determined by the testator or donor, not by the heir or donee.

Despite the regime of property separation, spouses may be co-owners of property under the provisions of the Civil Code, or co-owners of a cooperative flat.[7]

In addition to full and permanent property separation, the Polish legislator introduced in 2004 so-called property separation with compensation for possessions. The idea is that during the property separation regime spouses have only personal property, but when it ceases, for example when the marriage ceases, there arises the obligation to make even out the possessions of both spouses. In this way, the interest is protected of the spouse whose property gained was less (for various reasons) than that of their spouse (e.g., one of the spouses did not have gainful employment as they brought up their children). Not in every case, though, is the demand for compensation morally justified and desirable. It appears that there may be circumstances that justify a reduction in the duty to compensate for property gained, such as the reprehensible attitude of the spouse demanding compensation manifested in his or her reluctance to work or other culpable failure to utilise their opportunities to earn, squandering of assets, alcoholism or drug addiction [ibid., 98].

2. Property of spouses in canon law

Canon law offers no solutions for the joint property of spouses unlike Polish law. There is no provision that would explicitly regulate property matters between spouses. But does canon law really ignore this issue?

The norm governing the mutual relationship of spouses regarding financial matters is to be sought in the concept of *bonum coniugum*, which, along with *bonum prolis*, constitutes one of the two essential goals of Christian marriage. This concept – deeply entrenched in the Catholic theology of marriage – was used by the conciliar fathers in the constitution *Gaudium et spes*,[8] to emphasize the personalistic dimension of marriage.

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[7] Act of 23 April 1964 – The Civil Code, Journal of Laws No. 16, item 93, as amended [henceforth: CC], Article 680(1).

[8] Vatican II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (7.12.1965), AAS 58 (1966), p. 1025-115; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html.

The broadest concept from which stems the understanding and specification of *bonum coniugum* is the community of all life.[9] In keeping with the Vatican II's vision of marriage, reflected in the 1983 redaction of the Code of Canon Law,[10] a man and a woman, by entering into the marriage covenant, form together "a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring" (Canon 1055), and both spouses enjoy equal rights and duties with respect "to those things which belong to the partnership of conjugal life" (Canon 1135).

Without going into the details of issues of *bonum coniugum*,[11] suffice it to say that doctrine assumes that the marital covenant, which constitutes a "community of all life", involves all areas of human life.[12] We speak here not only of the intimate (sexual) sphere shared by spouses, but also other areas of their life: social, economic, cultural or spiritual [Góralski 2011, 129]. In a judgement of the Court of the Roman Rota, we read that the community of spouses' entire life is represented by *bonum coniugum*, which is the totality of all the essential goods that constitute married life in the aggregate, and which belongs to the essential elements of the marital covenant.[13] Prospective spouses, therefore, by giving themselves to each other in the act of marital consent, enter into a deep mutual relationship based on love, giving everything to each other – who they are and what they have. Thus, it is obvious that on such a view of marriage, the community of the whole life of spouses must also include the financial and property ownership spheres. They are among the essential elements that married life entails, and are built primarily on the basis of Christian values such as love, solidarity, community, and concern for others.

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[9] Decision c. Huot dated 2 October 1986, RRDec. 78 (1986), p. 503; decision c. Giannecchini dated 26 June 1984, RRDec. 76 (1984), p. 392; decision c. Pinto dated 6 February 1987, RRDec. 79 (1987), p. 33.

[10] *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.

[11] For more on this, see Góralski 1996, 77-88; Góralski 2000, 43-62; Leszczyński 2003, 101-15; Góralski 2011, 127-43; Kraiński 2011, 99-116; Pastwa 2016; Pastwa 2018, 111-41.

[12] Decision c. Jarawan of 10 March 1989, RRDec 31 (1989), p. 194-95.

[13] Decision c. Giannecchini dated 26 June 1984, RRDec. 26 (1984), p. 392-93.

It follows that by committing to an indivisible community of the whole life, spouses undertake to, among other things, offer support and solidarity to each other in the material sphere as well. This means that they should take care of the well-being of their spouse and family by providing for their livelihood. They should try to manage their budget together. Decisions regarding spending, investment and savings should be made together, by mutual agreement. They should take all measures necessary to ensure adequate living and educational conditions for their children. The financial responsibilities of spouses should be based on the principle of equality and respect, which means that each spouse should have their say on financial issues and property matters. Finally, spouses, in a spirit of solidarity and love, should be open to helping those in financial difficulties by sharing their resources with them.

Thus, notwithstanding that the 1983 Code does not contain prescripts that would explicitly obligate the prospective spouses to establish property community and reciprocal property liability, canon doctrine leaves no doubt that the economic and material sphere of the spouses is one of the important ones that are covered by the concept of *bonum coniugum*. Hence the question: can their decision to establish property separation before concluding marriage (which, as demonstrated above, is possible under Polish law) imply reluctance to build marital unity? Does the exclusion of marital community of property exclude one aspect of the community of life as a whole, and should it be viewed as an exclusion of an essential element of marital consent – *bonum coniugum*? So, can the fact of signing a prenuptial agreement have probative value in annulment proceedings and affect the final outcome?

3. Separation of spouses' property and its implications under canon law

There is no brief and clear answer to the last of the questions posed above. Obviously, there is a multitude and diversity of possible cases, and this paper is not about answering that. We can address this theme in our analysis by stating that not every action that leads to the establishment of property separation before marriage is an argument for marriage nullity. Signing a prenup can sometimes be objectively reasonable, justifiable, or even advisable. For example, it can be a reasonable method of securing

the assets of a family that is being formed in a situation where one party is engaged in a high-risk financial business, is in consumer bankruptcy, is making investments, or is engaged in a profession that requires the involvement of considerable financial resources, etc. In such a case, property separation may indicate a well-meant concern to immunize the spouse from economic problems when threatened by a fiasco.

However, the situation looks different when there are no objective reasons in the case that, at the time of the marriage, the signing of a prenuptial agreement could justify, or, even if such reasons objectively existed when the marriage was concluded, they were not the reason for property separation, but rather concern for one's own economic interest (typically, that of the economically stronger spouse). In such a case, the explicit exclusion of the spouses' financial community by means of a prenuptial agreement may imply reluctance to build marital unity and thus can be an indication for declaring the marriage invalid, at least on three grounds: 1) as the exclusion of marital indissolubility (*bonum sacramentum*), 2) as the inability to assume the essential obligations of marriage, 3) as the exclusion of conjugal good (*bonum coniugum*).

3.1. Exclusion of *bonum sacramentum* (Canon 1101 § 2)

Without engaging in excessive casuistry or perpetuating the well-established position of jurisprudence and doctrine on the grounds just indicated, it should only be noted here that we can no doubt speak of an invalid marital agreement when the prenuptial agreement is assumed (and this is expressed more or less explicitly) to regulate and secure the property interests of the spouse or spouses in the event of divorce. This is because the prenup makes it possible, as we have shown above, to regulate the division of joint marital property in the event of divorce or other situations in a more personalised manner. Thus, signing the agreement before marriage can indicate that the prospective spouses did not intend to commit themselves to each other for a lifetime, retaining the right to break the community should any problems arise. In this case we are dealing with the exclusion of indissolubility of marriage (Canon 1101 § 2).

3.2. Inability to assume the essential obligations of marriage (Canon 1095, 3º)

The signing of a prenuptial agreement by prospective spouses can provide grounds for nullity under Canon 1095, 3º. It can happen that one party is so greatly self-centred that, for psychological reasons, he or she is incapable of sharing their possessions with anyone, even the spouse. As a side note, it should be noted that psychiatry is familiar with so-called hoarding disorder, which involves the pathological collection of things but also excessive attachment to one's property. Occasionally, cases of extreme stinginess are also diagnosed.

3.3. Exclusion of *bonum coniugium* (Canon 1101 § 2)

Establishing property separation can also be indicative of distrust of the other party and an attempt to reject responsibility for the spouse. In this case, the exclusion of *bonum coniugium* occurs (Canon 1101 § 2). In fact, the concretisation of this conjugal good (*bonum coniugum*) should be manifested by the mutual giving of gifts and the establishment of a permanent and exclusive interpersonal relationship in which the spouses will assist each other with advice and support in their spiritual, material and social development [Colantonio 1996, 235].[14] Such a relationship can hardly exist without deep mutual trust – and without taking responsibility for each other in matters of property and finance. If prospective spouses conclude a prenuptial agreement before marriage only because they want to decide about their earnings, possessions, how to acquire them and how to spend them exclusively on their own, without having to reckon with the opinion of the spouse, and if they assume they will not pay debts for each other, reasonable doubt appears whether these spouses have really given themselves fully to each other, whether they have really shown their willingness to care for each other and the community they were supposed to build in the act of marital consent? Does this approach not illustrate the rejection of what we mean precisely by *bonum coniugum* in the doctrine of canon law?

This third aspect – the prenuptial agreement as a strict manifestation of the rejection of *bonum coniugum* – should be specially highlighted. Indeed, the concept of *bonum coniugum* in the aspect of marriage nullity

[14] Decision c. Bruno dated 6 December 1996, RRDec. 38 (1996), p. 240.

remains, as it were, the legendary "fern flower" in the study of canon law: many have talked and written about it, but few have seen it. It seems that the economic community of the spouses, a point raised in this paper, can be – especially today – a concrete example illustrating the invalidity of marriage caused by the exclusion of *bonum coniugum* in practice.

In place of a conclusion

To better illustrate our view presented here, the following example can be adduced. Two young doctors filed a petition for annulment of marriage. The evidence in the case did not imply that by concluding marriage, the prospective spouses ruled out indissolubility or having children, or that they were incapable of marrying for psychological reasons. What was only found in the case that just before the marriage, the prospective spouses concluded a notarized prenuptial agreement, in which they established total property separation. It followed from the prenup that the couple agreed that after the marriage they would both manage their property fully independently, they would accrue all property items and rights only to their personal estates, they would hold separate bank accounts and would not be liable for each other's property debts. To maintain the household (rent, fees, food), both declared a monthly contribution of equal amount. Other expenses, for example when eating out or on holiday, would be shared equally. At the time, when the agreement was signed, the couple had no businesses of their own, were not in bankruptcy, came from families with a similar financial status, and they had a similar property status (they both worked at the same hospital and received similar remuneration). They knew and understood the Church's teaching on the essential rights and duties of marriage. The prenuptial agreement, as they stated, was supposed to ensure their independence and autonomy in all financial matters, enable them to use their own resources at will, eliminate the need to ask for each other's consent to spend money, whatever the amount. The lack of consent to bear responsibility for each other's debts was regarded by the spouses as a natural consequence of the autonomy they assumed to manage their own assets, in keeping with the principle that "everyone works and pays for themselves."

The question is: did the spouses intend to create a community of the whole life, did they give themselves fully to each other, were they

focused on achieving the end of their marriage, and did they therefore enter into a valid marriage? We shall leave this question unanswered so that everyone has the opportunity and pleasure of seeking the "fern flower" on their own.

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