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THE NORMATIVE CHARACTER OF THE INSTITUTION OF CUMULATIVE JUDGEMENT IN CIVIL TRIAL: A COMPARATIVE STUDY

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Abstract

The aim of this study is to show how the institution of consolidated cases in Polish civil proceedings was shaped in the context of Polish criminal procedure and canon law. A comparative analysis *de lege lata* will help to determine the nature of the procedure aimed at issuing a sentence in cases that have been combined into one trial considering their subject matter, and thus answer the question whether there is a cumulative judgement in each of the procedures and how it is understood by the legislator in civil, criminal and canon law. The analysis is an important novelty in research on the institution of cumulative judgement because it enables a comparison of the institution not only within the framework of the state system of law, but also within the autonomous normative system created by canon law.

Keywords: cumulative judgement, civil trial, criminal trial, canon law

Introduction

Dealing with civil cases cumulatively invites a reflection on the normative nature of the proceedings in question (leading to the issuance of a cumulative judgement) and then a reflection on the research problem that essentially involves asking about the essence and procedural effects of a cumulative judgement, as well as determining to what extent it interferes with the basis of the claims asserted?

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Therefore, the purpose of the present analysis is to show how the institution of consolidated cases in the Polish civil trial is shaped as opposed to Polish penal procedure and canon law. This will serve to determine the nature of the procedure leading to a judgement in cases that have been merged due to the affinity of their subject matters, and thus answer the question of whether cumulative judgements exist in each procedure and how they are construed by the legislator in civil, criminal and canon law? To answer the question posed in the paper's title, we shall employ a comparative legal method, which will enable an assessment of the normative regulations underpinning the institution of cumulative judgement and the respective proceedings leading to its issuance in two legal orders: state order (Polish, with respect to civil and criminal proceedings) and canonical (ecclesiastical) order. A comparative analysis along these lines will hopefully make it possible to pinpoint the similarities and differences between the two legal orders with regard to cumulative judgements and prove the claim that – despite the fact that each of the described procedures apply normative regulations on aggregating cases – the normative nature of the cumulative judgement has been shaped differently in each of them.

Our analysis of the issue in question is, therefore, intended to answer the following: Does the implementation of the *connexorum idem est iudicium* principle applied in civil trial, criminal trial, and canon law contravene the *entia non sunt multiplicanda praeter necessitatem* principle? Does the outcome (i.e. cumulative judgement or concurrent sentence) not exemplify a *fallacia aequivocationis* committed by the legislator in the context of the directives stemming from § 10 of the Order of the Prime Minister of 20 June 2002 on the Principles of Legislative Drafting, according to which equal terms must be used to designate equal concepts, and different concepts are not to be rendered with the same terms?[1]

1. Cumulative judgement in civil proceedings

The maintenance of special procedural economy, which amounts to the joint examination of several cases and the subsequent issuance

[1] Announcement of the President of the Council of Ministers of 29 February 2016 on the Uniform Text of the Regulation of the President of the Council of Ministers on "Principles of Legislative Drafting," Journal of Laws, item 283.

of a joint decision, is Article 219 of the Code of Civil Procedure.[2] This is but one example of an extended, joint examination of cases in civil procedure, in addition to, for instance, the possibility of joining the main suit with a counterclaim, as provided *a contrario* in Article 218 CCP. The effect of such joint examination of cases and, as a result, combined judgements, by virtue of Article 219 CCP, is called a cumulative judgement in the literature [Góra-Błaszczykowska 2016, 656; Gudowski 2020, 669-74; Rutkowska and Rutkowski 2020, 652; Wiśniewski 2013, 283-92]. The term has become so entrenched in litigation literature that it is also invoked in judicial case law, although it still has not found its normative confirmation *expressis verbis*.[3]

By virtue of Article 219 CCP the court may order a consolidation of several separate cases pending before it to be heard or settled in aggregate as long as they are related to each other or it was possible to initiate them by a single action.[4] The solution in question is also generally permissible in non-litigious proceedings, pursuant to Article 13 § 2 CCP. A joint examination of the case is justified by the connection existing between the facts in which each claim is grounded.[5]

The court's decision to consolidate cases does not give rise to an accumulation of claims referred to in Article 191 CCP. The connection between individual claims should be understood as a common factual basis or a connection between the facts constituting the basis for the requests for applications, which allows the same evidence to be used in a joint examination.[6] Speaking of the accumulation of claims, it is worth stressing that the civil court is not competent *a contrario* Article 219 CCP to verify

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[2] Act of 17 November 1964 – The Code of Civil Procedure, Journal of Laws No. 2023, item 2760, as amended [henceforth: CCP].

[3] See, e.g., Order of the Supreme Court of 2 July 2009, III PZ 5/09, Lex no. 551888; Judgement of the Court of Appeal in Gdańsk of 30 December 2019, V ACa 80/19, Lex no. 2946480; Judgement of the Court of Appeal in Szczecin of 21 January 2021, I ACa 542/20, Lex no. 3164507.

[4] Since the procedural codification became effective, this provision has not undergone legislative changes and is in force in its original wording, which is extremely peculiar considering the various amendments of this procedure.

[5] Order of the Supreme Court (7) of 1 December 2011, I CSK 83/11, Lex no. 1102835.

[6] Judgement of the Court of Appeal in Katowice of 24 May 2016, III AUa 667/16, Lex no. 2333803; Judgement of the Court of Appeal in Łódź of 22 January 2021, I Aga 222/20, Lex no. 3171187.

the accumulation of claims in question made by the claimant in the statement of claim, when the consolidation complies with the norm under Article 191 CCP. However, it is still possible to separate the principal claim from the examination of the counterclaim by virtue of Article 218 CCP and issue a partial judgement based on Article 317 CCP.[7]

It follows from the literal wording of the provision that it is a procedural solution that the court may apply freely, being in essence facultative. This means, therefore, that the non-application of Article 219 CCP cannot form the grounds of the objection formulated. Only in some proceedings, by virtue of *lex specialis*, is it required that specific types of cases be examined and adjudicated cumulatively. This concerns, for example, Article 445 CCP, which provides that during divorce and separation proceedings, cases for the satisfaction of family needs and maintenance allowance between spouses or between them and their minor children regarding benefits due from the beginning of the lawsuit may not be separately examined. This does not apply to the provisions on proceedings to secure claims. Article 618 CCP, for example, bears some resemblance. It provides that in proceedings concerning the dissolution of joint property ownership the court can jointly recognize litigations for the right to demand the dissolution of joint property ownership and for the right to property, or for mutual claims of co-owners on the grounds of possessing a thing. When making the decision *ex officio*, the court issues an order that is not appealable by complaint.[8] Nevertheless, this rigour is mitigated in some measure by the fact that a decision to consolidate cases is reversible [Manowska 2022].

As emphasized in the case law involving the provision in question, consolidating several cases does not constitute a new civil case, but is only a technical operation. This fact is reflected not only in the handing down of cumulative judgements, but also in keeping files jointly under a single file reference (or the file reference of the earliest files).[9] This assumption underlies the fact that the judgement in question should contain separate resolutions of each of the combined cases, and each can be contested

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[7] Judgement of the Court of Appeal in Gdańsk of 23 June 2016, I ACa 79/16, Lex no. 2152460.

[8] Order of the Supreme Court of 25 July 1978, IV CZ 115/78, Lex no. 2337.

[9] § 39 of the Ordinance of the Minister of Justice of 19 June 2019, on the Organization and Scope of Court Secretariats and Other Departments of Court Administration, Dz. Urz. MS. of 2019, item 138.

individually.[10] In this sense, also, the calculation of the matter in dispute (and the contested matter at the control stage) is performed separately for each of the combined cases, which for the admissibility of a cassation appeal requires meeting the statutory threshold for the value of the object of appeal of each case separately.[11] Moreover, under Article 219 CCP, even the issuance of a judgment as to only one of the cases combined for joint examination does not have the nature of a partial judgement.[12] The separateness and substantive independence of the combined cases is also reflected at the stage of joint examination and adjudication on the reimbursement of litigation costs, since in this aspect a party is still entitled to a separate decision in each of the combined cases.[13]

If we are talking about merely a technical consolidation of examined cases for joint adjudication, then there is no question of some special kind of joint participation, although one can speak of multi-subjectivity on either sides of the litigation.[14] Nor does the institution in question produce effects regarding the court's competence, whether or not the combined cases could have been based on a single action.[15] Since Article 219 CCP deals with the joint examination and adjudication of cases, it will be inadmissible to consolidate cases pending in different courts, even if they could be subsumed under a single lawsuit.[16]

The institution referred to in Article 219 is thought mainly to be capable of accelerating the course of examination proceedings in combined cases

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[10] Orders of the Supreme Court: of 29 January 2014, II UZ 69/13, Lex no. 1424854; of 12 September 2013, II CSK 105/13, Lex no. 1375146; of 28 February 2013, IV CSK 719/12, Lex no. 1314439.

[11] Decision of the Supreme Court of 2 July 2009, III PZ 5/09, Lex no. 551888; Orders of the Supreme Court: of 7 December 2017, V CZ 82/17, Lex no. 2428821; of 6 June 2019, II CSK 624/18, Lex no. 2688852.

[12] Judgement of the Court of Appeal in Katowice of 24 May 2016, III AUa 667/16, Lex no. 2333803.

[13] Judgement of the Court of Appeal in Białystok of 16 July 2018, I ACa 191/18, Lex no. 2572274.

[14] Judgement of the Court of Appeal in Gdańsk of 30 December 2019, V ACa 80/19, Lex no. 2946480.

[15] Order of the Supreme Court of 6 December 1973, I PZ 71/73, Lex no. 7351.

[16] Judgement of the Supreme Court of 4 May 1978, IV PR 95/78, Lex no. 2290. For a contrary position see Judgement of the Supreme Court of 1 June 1967, I PR 169/67, Lex no. 4599.

(procedural economy), especially if the court can utilise the same factual and evidentiary material. As a procedural institution, a cumulative judgement contributes to a comprehensive, multifaceted resolution of the entire conflict in a single civil trial [Gapska and Studzińska 2020]. This *ratio legis* of this institution was indicated in one resolution of the Supreme Court containing recommendations on further streamlining judicial proceedings.[17] Such an understanding of this provision, then, does not permit an extensive or teleological interpretation.[18]

The cumulative judgement in a civil trial is only a procedural possibility, created when the cases are examined, and is also a natural extension of their combined examination before the same procedural authority. Apart from aggregating the hearing at a trial or a session and the conflation of the decisions in a single combined ruling, this institution does not produce further effects under substantive law, while the procedural effects are limited to a common forum for recognition and adjudication. The incorporation of resolutions in a single judgement does not rule out the independence of the combined cases.[19] What remains common here is the recognition forum – a court that separately adjudicates these matters – and the official location where the rulings will be posted. We cannot say, then, that this is a supplementary or executive proceeding. A cumulative judgement is handed down in the course of combined examination proceedings, before any issue to be adjudicated becomes final, so the result of the adjudication of consolidated cases is included in a joint procedural judgement, referred to in the literature and case law as a cumulative judgement.

2. Cumulative sentence in criminal trial

Due to the fact that the procedure for issuing a cumulative sentence is not exhaustively regulated in chapter 60 of the Code of Penal Procedure,[20] by virtue of Article 574 sentence 1, in matters not regulated

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[17] Resolution of the Supreme Court of 15 July 1974, Lex no. 1730.

[18] Order of the Supreme Court of 1 December 2011, I CSK 83/11, Lex no. 11002835; Judgement of the Supreme Court of 22 September 1967, I CR 158/67, Lex no. 678.

[19] Judgement of the Supreme Court of 22 September 1967, I CR 158/67, OSNCP 1968, no. 6, item 105.

[20] Act of 6 June 1997 – The Code of Penal Procedure, Journal of Laws of 2024, item 37, as amended [henceforth: CPP].

by the provisions of chapter 60, the procedure leading to the handing down of a cumulative sentence are governed by the provisions on ordinary proceedings before the court of first instance. It is rightly noted in scholarship that while adjudicating in cumulative sentence proceedings, the court must first determine whether or not the matter at hand is autonomously regulated in chapter 60. If the answer is negative – if the issue at hand is not resolved by applying the provisions of Articles 568a-577 CPP, the provisions on ordinary proceedings before the court of first instance, and, if necessary, the provisions of the general part of the Code are to be applied as required [Świecki 2015, 673].[21]

Scholarship, however, is far from agreeing about the cumulative sentence proceedings and its constitutive elements. In the literature, basically, we encounter three different groups of opinions on the connection between the procedure leading to a cumulative sentence and a certain kind of judicial proceedings. This kind of proceedings was viewed as a phase of judicial proceedings, a stage of executive proceedings, or proceedings of a supplementary nature.

The first approach assumes that proceedings leading to a cumulative sentence are a consecutive stage that ends the jurisdictional proceedings, and do not constitute enforcement proceedings. To justify this position, it was once indicated that the provision on a cumulative sentence was opportunistic and necessary, and its purpose was to apply the disposition of Articles 31-33 of the 1932 Penal Code,[22] where it was impossible to award a cumulative penalty in one sentence for all crimes for reasons of fact or those related to the economy of the proceedings [Peiper 1933, 517].[23] However, even if legal authors point out that the procedure leading to a cumulative sentence is part of the jurisdictional stage, they also noted that there might exist cases where cumulative sentencing occurs when the proceedings reach the executive stage, for example, when the perpetrator

[21] Order of the Court of Appeal in Kraków of 28 August 1997, II AKz 147/97, Lex no. 30504; Order of the Court of Appeal in Katowice of 6 July 2005, II AKz 378/05, Lex no. 175066.

[22] Order of the President of the Republic of Poland of 11 July 1932 – The Penal Code, Journal of Laws No. 60, item 571.

[23] See also Śliwiński 1948, 211. This view can also be encountered in scholarship [Kowalski 2017, 75] despite the amendments of the provisions on cumulative penalties and proceedings leading to cumulative sentences.

has already served the sentence imposed by one of the final sentences [Lipczyńska and Ponikowski 1986, 359].

The second opinion regarding the nature of proceedings leading to a cumulative sentence is that it is an executive stage, because it takes place when the proper proceedings are complete and the sentences handed down are now enforceable, while the convicted person, not the accused, remains party to these proceedings [Sztejnman 1933, 51].

The most prevalent view – both in doctrine and jurisprudence – is that proceedings leading a cumulative sentence are supplementary.[24] It has been pointed out that it is neither an executive procedure leading to the execution of a ruling on matters settled in ordinary or special proceedings, nor is it a jurisdictional proceeding that begins with the filing of an indictment and ends with the sentence becoming final, and leads to the determination of the defendant's guilt or innocence. However, cumulative sentence proceedings are justified only when an accumulated penalty is imposed on a perpetrator convicted by final sentences [Kwiatkowski 1988, 99-100]. Analysing the view that proceedings leading to a cumulative sentence have a supplementary character, we must not ignore opinions that it also has a subsidiary, and therefore accessory, nature. It is emphasised that their non-autonomous character is due to the circumstances under which this procedure is initiated. This is possible only if two convictions have been issued imposing penalties subject to aggregation, and for various reasons the combined penalty has not been awarded in the jurisdictional proceedings, and the issue must be dealt with in separate proceedings. The above premises supported the subsidiary nature of the proceedings leading to a cumulative sentence [Kala 2003, 51-52; Kwiatkowski 1988, 101].

At the same time, it should be noted that some authors put supplementary proceedings on a par with separate proceedings [Kala 2003, 53].

[24] It was already during the interwar period that the highest judicial instance drew attention to that fact that failure to award a cumulative penalty in the sentence can be addressed independently by a supplementary sentence (Decision of the Supreme Court of 17 January 1936, 1 K 1328/35, Lex no. 373501). This view was also supported under the previous law on penal procedure, see Daszkiewicz 1976, 54-57; Krauze 1969, 273; Marszał 1982, 20. See also in the relevant case law: Judgement of the Court of Appeal in Białystok of 12 December 1997, II AKz 305/97, Lex no. 34852. This is not an isolated view, also in the currently applicable CPP, see Wędrychowski 1999, 457; Światłowski 2015, 1351.

Others point out that separate proceedings should be called follow-up proceedings [Gaberle 2004, 195-96]. With respect to previous codifications, it was also indicated that the term "separate proceedings" should cover only proceedings that are governed by provisions separate to the Code of Penal Procedure [Kalinowski 1972, 25].[25]

Currently, however, follow-up proceedings should be understood as proceedings conducted after the sentence becomes final in order to resolve issues revealed after the judgment becomes final [Waltoś and Hofmański 2023, 49]. Supplementary proceedings, on the other hand, are understood in the literature to mean additional proceedings conducted alongside the main proceedings to deal with matters that were not resolved at an earlier stage, either because of an oversight or the occurrence of specific circumstances after the ruling was handed down. It is important to note in this context that the supplementary proceedings must be explicitly sanctioned by law, while in other cases it is possible to supplement or adjust the ruling only by ordinary or extraordinary means of appeal [Cieślak 2011, 58]. On the face of it, the semantic overlap between the definition of follow-up and supplementary proceedings might lead us to believe that they are synonymous and can be used interchangeably in criminal process. For this reason, it is important to analyse the reasons for incorporating supplementary proceedings into the law on criminal proceedings.

This was dictated by practical considerations, as one might want to avoid the necessity to initiate appellate proceedings in each case in order to supplement the ruling with resolutions regarded as having an accessory character [Rogoziński 2016].[26] Under the 1969 Code of Penal Procedure[27] and by virtue of its Article 368, supplementary proceedings were only possible if the ruling did not contain one of the resolutions indicated

[25] This "separateness" may not only result from the location of a particular procedure within or outside the Code. It may stem from the separateness of the subject matter of the trial, if one assumes it to be a responsibility for proscribed acts, but other than offences [Światłowski 2008, 89].

[26] Interestingly, the only proceeding that is overtly called a "supplementary proceeding" is the institution regulated by the currently effective Article 420 CPP. Under the current codification, it can involve the recognition of provisional custody, remanding or applied preventive measures listed in Article 276 CPP, or material evidence, including forfeiture. A sentence is supplemented by an order, which is subject to complaint.

[27] Act of 19 April 1969 – The Code of Penal Procedure, Journal of Laws No. 13, item 96.

in the Code. In contrast, if the decision was incomplete, the ruling could be modified only using ordinary or extraordinary means of appeal.[28] In the current Code, under Article 420 § 2, if the court incorrectly credits, for example, the period of provisional custody against the sentence imposed, there is a procedural possibility of supplementing the sentence specified in § 1 of the provision in question. At the same time, it is important to remember that § 1 regulates supplementing proceedings, and § 2 regulates the adjustment of a sentence by order [ibid.].

At this point, it is important to underscore that the amendment of the substantive criminal law and penal process of 1 July 2015 changed the opinions of jurists on the character of proceedings leading to a cumulative sentence. Following this amendment, it was pointed out that this proceeding could not be classified as a jurisdictional proceeding, let alone speaking of its supplementary and subsidiary character. Apparently, the character of proceedings leading to a cumulative sentence has become closer to the executive function; this is demonstrated by the fact that, after the amendment, it was possible to apply a cumulative penalty to cover individual sentences imposed by convictions for offences that the perpetrator committed between the dates of the individual sentences, and such a penalty can encompass not only individual penalties, but also previously imposed cumulative sentences (awarded by both a conviction and a cumulative sentence) [Kala and Klubińska 2017, 5-6].[29]

The three concepts we have discussed above with respect to the nature of proceedings leading to a cumulative sentence, albeit prevailing in scholarship and case law, are not the only ones available. Proceedings held after a judicial decision becomes final can also be divided into corrective and follow-up proceedings, and the adjudication of a cumulative penalty in a cumulative sentence is considered to be the latter [Waltoś and Hofmański 2023, 49].

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[28] This is the case with the crediting of pretrial detention [Grajewski and Skrętowicz 1996, 266]. See also: Order of the Supreme Court of 27 March 1972, Z 14/72, Lex no. 18436; Resolution of the Supreme Court (7) of 12 October 1972, VI KZP 26/72, Lex no. 18506; Judgement of the Supreme Court of 4 May 1988, V KRN 76/88, Lex no. 17880.

[29] In this, however, Dariusz Kala departs from his view that the proceedings leading to a cumulative sentence are supplementary in nature [Kala 2003, 55].

Proceedings leading to a cumulative sentence are also referred to in the literature as extra- instance proceedings due to the fact that their subject matter pertains to final sentences, which cannot be challenged by ordinary means of appeal. Therefore, the activities carried out in these proceedings will have an extra-instance character [Mierzejewski 2010, 371]. It should be pointed out in this regard that the idea of proceedings being instance-based is that there exists a procedural mechanism allowing a court of higher instance to review the decision of the court of first instance, when initiated by an appellate measure [Marszał 2000, 704].

Since the ordinary course of proceedings leading to a cumulative sentence is modified on account of their subject matter – which entails the problem of how to explicitly classify these proceedings as either the jurisdictional or the executive phase – we come across the designation *sui generis* describing this kind of proceedings [Kala 2003, 52-55].[30] It follows that these proceedings differ fundamentally from ordinary proceedings before the court of first instance, even though the directive described in Article 574 CPP prescribing that the provisions governing first-instance proceedings be applied *mutatis mutandis* to the proceedings leading to a cumulative sentence might imply, at first glance, something quite different. The appropriate application of regulations in proceedings leading to a cumulative sentence entails an overhaul of the entire procedure, including the initiation of proceedings, their course, and the options of challenging the decision rendered. If the procedure leading to a cumulative sentence is referred to as *sui generis* proceedings due to its unique features, then also the outcome of the proceedings so shaped must demonstrate its "peculiarity" in relation to the conviction pronounced in the main proceedings, which is why a cumulative sentence can be called a *sui generis* sentence in Polish criminal process.

3. The concurrent sentence in canonical process

A complaint enables the petitioner to assert his or her rights if they formulate a demand, while the respondent has the option to see the submitted

[30] Following Kala, Cieślak and Woźniewski 2012, 321 consider proceedings leading to a cumulative sentence to be *sui generis* proceedings. On the proceedings leading to a cumulative sentence as a generic stage of trial, see Kwiatkowski 1988, 101.

demand, and the judge has the opportunity to adjudicate the matter in dispute. Therefore, canonical doctrine emphasises that complaint is necessary both for the benefit of the litigants and the arbiter of this dispute – the judge [Sztychmiler 2003, 43-46]. The literature offers three interpretations of the term "complaint". In the substantive sense, "it is the judicial assertion of one's rights against another physical or legal person." Procedurally, complaint is "a procedural act whereby a party seeks protection of his or her rights before a court." A complaint is also understood as "a pleading containing a request for legal protection (*libellus* or *libellus introductorius*)" [Sztychmiler 2000, 137]. The complaint is vital not only in that it initiates canonical process, but primarily because its proper formulation allows the process to be accepted by a judge or the presiding judge of a collegial court.

A canonical trial commences only when a decree accepting the petitioner's complaint introducing the suit (*libellus*) is issued, not when the complaint is filed. The earlier stage is called a case, and the dispute is assigned to a judge, given an appropriate reference, and registered in the court file. It is important to highlight here that whether the court will adjudicate the case is not yet certain at this stage [Greszata 2007, 136]. A complaint is seen not only as a pre-condition for canonical process but is also a manifestation of respect for human rights as a person can follow a judicial route and make use of a canonical trial [Sztychmiler 2000, 44-46].

It is important to note that a multiple and aggregate complaint can be presented as one when several actions occur between the same group of persons, or when matter in dispute of several complaints is combined, and also if a single court has jurisdiction over each of these complaints [Greszata 2007, 140]. In accordance with Canon 1414 of the 1983 Code of Canon Law, in principle, one and the same tribunal can hear interconnected cases "by reason of connection".[31] This means that in ordinary trial the principle of *connexorum idem est iudicium* operates, whereby interconnected cases pertain to one process, causing the same court to have jurisdiction to combine different cases. The purpose of the canon in question is sought in the principles of procedural economy and harmony, in order not only to

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[31] *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.

avoid wasting time and money, but also to save the parties the inconvenience of having to appear before different courts at the same time, and prevent the possibility of different rulings handed down in related cases [Carmen Peña 2007, 845]. The connection between cases thus relates to the objective relationship associated with the believer's right to request an ecclesiastical judge to adjudicate and the causal relationship – that is, the reasons for demanding such services. However, the grounds for the interconnectedness of cases are not the subjective relationship between different cases involving the same petitioner or respondent [Krukowski 2007, 27-28].

On the other hand, in annulment process, according to Article 15 of the instruction *Dignitas connubii*, when a marriage has been challenged on different grounds of nullity is to take place, "those grounds, by reason of connection, are to be considered by one and the same tribunal in the same process."[32] By this norm, all cases concerning one marriage must be brought and heard in one court, which should accept and adjudicate them for the sake of procedural economy and uniformity of jurisprudence, and so that several courts will not deal with the same case [Sztychmiler 2007b, 49-50]. This rule means that nullity cases that could be brought simultaneously by either spouse before another court will be examined together in a single trial [Carmen Peña 2007, 845]. The interconnectedness of cases is a duty that rests not only on the judge, but also on the parties, both before and during the joinder of the issue [Del Amo 2011, 1057]. Even if the parties to a nullity case do not take into account the directives of the norm in question, it is incumbent on the court to proceed in such a way that it is applied in the trial [Sztychmiler 2007b, 49]. Were the interconnection between cases not obligatory, it would be difficult to obtain a just sentence and, in a nullity case, also to discover the objective truth about the validity or invalidity of the marriage [Carmen Peña 2007, 850].

Considering the essence of the process in question, it seems pertinent to call it "aggregate proceedings", because the court is required to examine several cases together. Hence the question, what is the result of these proceedings? To answer that, we need to analyse the types of sentences

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[32] Pontifical Council for Legislative Texts, Instruction to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage *Dignitatis connubi*, https://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html [henceforth: DC].

handed down in canonical process and, first and foremost, define the term "sentence".

A sentence concludes the legal proceedings pending in the canonical forum before an ecclesiastical tribunal, in which judges respond to the various *dubia* presented in the judge's decree introducing litigation [Rozkrut 2019, 3048]. A sentence, in contrast, is a ruling given by a judge who examines the dispute referred to him by the contending parties, as required by law, and resolves it accordingly [Szafrański 1963, 275]. It should be noted that the ecclesiastical legislator distinguishes between two types of sentences, referred to in Canon 1607: definitive sentences (*sententia definitiva*) and interlocutory sentences (*sententia interlocutoria*). A definitive sentence is a motivated act that resolves the subject of controversy, responding to all doubts identified in the *dubium* and, as a result, it defines the rights and obligations of the parties arising from the process, as well as the manner in which they are to be performed. In contrast, an interlocutory sentence is pronounced to resolve incidental cases arising during the trial [Cenalmor and Miras 2022, 485]. The doctrine of canon law also envisages a different division of sentences – into constitutive sentences combining absolving and convicting ones [Szafrański 1963, 280] and declaratory sentences (e.g. in nullity cases), which provide that during the marriage there was a cause that made it invalid. Put differently, a constitutive sentence modifies the current legal status; that is, it creates, alters or dissolves a legal relationship or right, while a declaratory sentence merely confirms the existence of a specific legal status.

Another division is into sentences handed down in criminal trials whose object, according to Canon 1400 § 1, are offences involving the imposition or declaration of a penalty (2°), judgements in controversies involving "the pursuit or vindication of the rights of physical or juridic persons, or the declaration of juridic facts" (1°), and sentences in "cases to declare the nullity of marriage" that find the truth about the parties' marriage in order to ascertain whether the marriage, which was raised by Christ the Lord to the dignity of a sacrament, was contracted validly or invalidly [Sztychmiler 2007a, 266].

There is also a division into sentences given in first, second and further instance [ibid.]. The first tier is occupied by the diocesan, inter-diocesan or regional tribunal; at the second tier, there is the tribunal of appeal,

against the tribunal of the suffragan diocese; finally, there are the Holy See tribunals [Greszata 2007, 110].

Thus, our analysis here shows that, fundamentally, the science of canon law, either in its legal language or legislation, does not use the concept of a cumulative judgement, but this, nonetheless, does not resolve the question of what to call a ruling made in "aggregated proceedings", in which the tribunal is required to examine several cases jointly, as mentioned above. No doubt, this is a sentence that can also be pronounced when cases are related to one another and will be examined in a single trial before the same tribunal; similarly, when a party brings a multiple, combined complaint based on several actions.

Summary

Overall, it transpires from our analysis so far that in both state and canon law, the *ratio legis* of aggregating cases should be sought in procedural economy serving to save resources and reduce the duration of proceedings when implementing the principle of *connexorum idem est iudicium*. It also seems that in the context of Ockham's ban on unnecessary multiplication of entities and the principles of rational legislative drafting, the norms of state and canon law on the consolidation of cases implement the associated principle of *simplicitas legibus amica*.

In state law, in civil procedure, the concept of cumulative judgement is not normative (statutory) in nature, so it does not function in legal language; however, it should be used in legal parlance, where both in the scholarship and case law there is no doubt that the outcome of ordering the consolidation of cases for joint examination in accordance with Article 219 CCP is the issuance of a cumulative judgement. Under criminal procedural law, the concept of a cumulative sentence is not only part of legal jargon, but also of penal legislation. It follows that in accordance with Article 568a § 1 CPP, a cumulative penalty may be imposed by a sentence that is not cumulative when the defendant has been convicted of more than one offence by a single verdict, and penalties of one kind or other penalties liable to aggregation have been imposed for these offences, or in a cumulative sentence in all other cases. In canon law, on the other hand, there is no concept of cumulative judgement. It also seems that in the literature and judicial case law this concept is not used, because no canonical tradition has

developed, according to which recognition by one and the same tribunal thanks to case aggregation results in the issuance of a concurrent sentence.

The nature of the cumulative judgement in civil proceedings boils down to a mere technical merger of cases, which does not constitute a new civil case, while in Polish procedural criminal law the cumulative sentence is, *sui generis*, a quasi-ruling on the merits of the case and a quasi-constitutive ruling, which does not fit into the traditional division of judgements due to the major differences in the procedure aimed at its issuance, the subject of which is a separate legal issue: a sentence imposing a cumulative penalty based on final sentences imputing an offence to the perpetrator and imposing a penalty. In canon law, however, in processes for the annulment of marriage, the sentence rendered by the ecclesiastical court is declaratory, not constitutive, while it is a resolution of the case as to its merits, since the sentence is an answer to the doubts (*dubium*).

Considering the functioning of the concepts of cumulative judgement and cumulative sentence in civil and criminal law, respectively, and given that the normative nature of the two rulings differs, it should be indicated that the principle of terminological consistency of legal language stipulated in § 10 of the Principles of Legal Drafting, in line with the jurisprudence of the Constitutional Court, should be applied in individual normative acts, but also, within specific fields of law, and as far as possible and purposeful within the system of law as a whole.[33] The general legislative directives cited above can be derogated by way of exception, for example when formulating provisions forming part of different branches of law.[34]

De lege ferenda, I would venture to postulate that the concept of cumulative judgement be incorporated in the legal language of Polish civil procedure, as this idea has been well-entrenched in the doctrine and case law. At the same time, it is important to keep in mind the constitutional court's jurisprudence, according to which, when a term with the same wording is used in different legal acts, it is mandatory that each legal act contain a precise definition of it.[35] This is because the legislator, when creating laws, observes the maxim *lege non distinguente nec nostrum est distinguere!*

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[33] Judgement of the Constitutional Tribunal of 6 May 2008, K 18/05, Lex no. 372375.

[34] Resolution of the Constitutional Tribunal of 8 March 1995, W 13/94, Lex no. 25544.

[35] Judgement of the Constitutional Tribunal of 14 September 2001, SK 11/00, Lex no. 49155.

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NORM AND A SINGULAR ADMINISTRATIVE ACT

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Abstract

Due to the terminological confusion and dispute in contemporary doctrine regarding the nature of singular administrative acts (Canons 35-95), the paper examines the interdependence between the canonical norm and this category of acts. The research goal is set in a broader context, as the issue of canonical norms and the normative system of the canonical legal order are examined synthetically. The author expresses the view that in relation to individual administrative acts it is inappropriate to use the term "norm", but he considers it appropriate to use the category of "acts" in the sense of legal acts. This position is based on the following arguments: first, during the codification work, consultors did not use the category of "norm" but the category "singular administrative act"; secondly, the first chapter of the Code's fourth title is "Common Norms" (*Normae communes*); in the name of the fourth title, "Singular Administrative Acts", we find the term "acts"; thirdly, in the canonical system some acts (dispensations, privileges) are issued against or in addition to the law, being exceptions to general norm.

Keywords: norm, canonical norm, singular administrative act, law, administrative norm

Introduction

The current codification includes a new category of acts, which are singular administrative acts (Canons 35-95).[1] Its introduction triggered some interpretation problems, one of them related to the nature of administrative acts. This is because in modern doctrine we observe some terminological confusion involving, for example, the use of the term "norm" in this regard. This state of affairs has largely determined the aim of this research, which

[1] *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; legal state as of 18 May 2022 [henceforth: CIC/83].

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can be captured by the question: What is the nature of the various administrative acts addressed by the legislator in the CIC/83, Book One, Title Four, "General Provisions"?

A reflection on this rather complex subject would be impossible without putting it in broader context. This calls for a synthetic presentation of the concept of canonical norm, but we also need to discuss the normative system of the canonical legal order.

1. Canonical norm

In doctrine, the term "norm" has many meanings [D'Ors 1979, 816-21; Sobański 1991, 142; Sobański 2001, 69]. We will take one as relevant for our considerations: the rule of behaviour that is the measure of human actions [Hervada 2000, 320; Baura 2012b, 570]. In the opinion of Remigiusz Sobański, a norm is a legal rule encoded in the law [Sobański 2001, 69]. As noted by Javier Hervada, a norm is constituted by its relationship to the law. A norm is a legal norm because it has a certain function in relation to the law [Hervada 2000, 320]. Its role is to determine what the law is, and consequently, what human behaviour or behaviours are appropriate. The declarative function of the norm is articulated in the norm of natural law, which in the canonical system, is closely linked to the positive human norm, whose efficient cause is a human act [Baura 2012a, 570].

Speaking of the norm, its anthropological dimension cannot be ignored, because it embraces man to protect him in the sense that not only his rights and duties are protected but also his subjectivity in the legal order. It is true that the norm does not exist by itself, just as the human being does not exist by itself [Lo Castro 1993, 165].

For this study, one aspect of the norm will be crucial, related to the nature of its content, manifested in such attributes as generality and abstractness, which Pedro Lombardía considered the natural characteristics of the canonical norm [Lombardía 2004, 156]. Generality is seen in that the norm addresses a certain category of objects, defined in general categories, and endowed with certain desirable generic characteristics; sometimes the content also indicates the conditions and circumstances of the addressees [Sobański 2001, 70]. In fact, the disposition of the norm accommodates all cases that fulfil the criteria of abstract situations captured therein [Miras, Canosa, and Baura 2001, 79].

Considering another of its attributes – abstractness – Sobański contends: “The abstractness of a legal norm lies in the fact that the regulated behaviour is identified by generic, typical features that occur in all cases. Based on experience, one constructs certain factual states that can predictably happen, disregarding specific individual characteristics that are irrelevant to the occurrence of the case” [Sobański 2001, 70-71]. The fundamental difficulty involved in making law is that the legislator must deal with the tension existing between abstractness and concreteness.

2. The normative system of the canonical legal order

2.1. The law

In the system of legal act hierarchization utilised by the canonical legal order, the overarching role is played by the law (statute). In Sobański’s opinion, it is a normative act serving to introduce legal norms in the Church [ibid., 52]. As regards its content, this act has a general and abstract nature. Its generality lies in the fact that its disposition does not address a specific subject or case, but subjects and cases at large that fall under its disposition. In other words, the law is not addressed to specific physical or moral persons, but to categories of persons conceived generically [Hervada 2000, 383]. Now, the abstractness of the law stems from its generality. In this case, we speak of a legislative principle serving the idea of generality. The act in question does not refer to a single case. For this reason, we do not typically find here references to special situations, as it only specifies universal requirements for a community [De Paolis, D’Auria 2008, 95].

In sum, we should note that the generality and abstractness of the law is manifested in that it does not regulate detailed hypotheses (or a hypothesis), but it applies to as many cases as possible [De Paolis and D’Auria 2008, 96].

2.2. Administrative norms

Another category of norms found in ecclesiastical law are administrative norms. They are a new category. When considering this problem, we should recall that traditional doctrine identified a norm with an act of the legislative power [Labandeira 1994, 228; Hervada 2000, 304]. Interestingly, the original term was not *norma* but *lex*. In canon studies the term “norm” did not prevail until the mid-19th century [ibid.]. This was reflected in the title

of the first book of the Pio-Benedictine Code, called "Normae generales" (Canons 1-86)[2] [Baura 2012b, 572]. Things changed under the influence of the Second Vatican Council, whose teaching led to the devolution of ecclesiastical authority. It should be explained that the incorporation of a category of administrative acts into the system, which would not be laws, but acts of the executive power, was already proposed during the codification work.[3] Now this is the case, being reflected, as expected, in Book One, Title Four of the CIC/83, "Singular Administrative Acts" (*De actibus administrativis singularis*) (Canons 35-95).

Considering the current legal state, it is possible to legislate administrative norms of a general and abstract nature [Baura 2012a, 568]. It was aptly noted by Valesio De Paolis that distinguishing between legislative and administrative norms is rather difficult, as in most cases they are created by renowned authorities equipped with both legislative and administrative powers. Therefore, when evaluating an act, it is wrong to refer to its author because the canonical concept of power lacks an explicit distinction between these areas. De Paolis believes the difference between values of norms must be inferred from the criterion expressed thus: "those resulting from decisions made by the legislative power and those produced by administration" [De Paolis 2001, 125-26]. Elaborating on the issue of administrative norms, Eduardo Baura stated that these are dispositions intended to enforce the law [Baura 2002, 64]. Thanks to the system solutions, the competent authority may issue general executive decrees (Canons 31-33), instructions (Canon 34), statutes (Canon 94) and rules of order (Canon 95). In this case, such decisions are issued *infra legem*, because they may not contravene the legality principle [Baura 2012a, 568].[4] The first group (general executive decrees and instructions) is intended to introduce norms related to the application of the law to certain conditions; however, the second group (statutes and rules of order) can sometimes be independent, when areas not regulated by laws are subject to regulation, within the limits and according to the rules provided by law [idem, 2002, 65]. Consequently,

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[2] *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: CIC/17].

[3] Pontifical Commission for the Revision of the Code of Canon Law, *Synthesis laboris "De normis generalibus*", "Communicationes" 3 (1971), p. 82; idem, *Synthesis laboris "De normis generalibus" 2*, "Communicationes" 6 (1974), p. 53.

[4] For more on the principle of legality, see Serra 2018.

doctrine distinguishes between executive administrative norms and independent administrative norms [Labandeira 1994, 247].

In light of the above, we can enquire about the value and characteristics of this type of legal acts. Considering this theme, it is worth underlining that they are secondary to a law. Regarding their value, the first thing to point out is their content and substance. The norms of a law may include provisions creating the opportunity to enact norms of an executive character. This may be reflected in general executive decrees [Dzierżon 2005, 191-92] and instructions [Dzierżon, 2017, 21]. Incidentally, the issuance of independent administrative norms is not ruled out, and these may be certain types of statutes [Dzierżon, 2021, 75-76] and rules of order [Labandeira 1994, 252-54; Dzierżon 2022, 90].

However, the lack of link between legislative norms and administrative norms should not be viewed in terms of principal norms. Given the special status of the latter, they cannot be auxiliary norms, either, because, as we have demonstrated, there is a possibility of introducing independent norms that are subordinate to a law and non-complementary to it [De Paolis 2001, 126].

With this context at hand, we are ready to address the key issue by asking as follows: Is a singular administrative act a norm or a legal act?

3. Is a singular administrative act a norm or a legal act?

3.1. Characteristics of a singular administrative act

Although Book One of the CIC/83 now contains Title Four ("Singular Administrative Acts"), the legislator, following the rule that "in law, it is dangerous to create definitions", did not implement a legal definition of this category of acts [Amann 1997, 4], which meant leaving that to doctrine.[5] Józef Krukowski defined this category of acts thus: "The administrative act is an act placed by a competent body of executive power, characterized by concreteness, based on a legislative act, directly aimed at achieving the public good of the Church" [Krukowski 1984, 118]. Other canon law scholars, in contrast, have defined the singular administrative act as a unilateral legal act placed by an executive authority and addressed to a physical

[5] For more on this, see Miziński 2011, 109-42.

or legal person, relevant to a concrete and singular case [Barbero 2014, 69; Kukla 2012, 1120]. Finally, Francesco D'Ostilio offered a definition in the broad and the strict sense. In the former sense, he believes, one speaks of any act of public administration that produces legal effects. In the latter sense, one deals with a declaration of will made by a public administrative body in the area of administrative authority dedicated to individuals or legal persons of a specific community, in a concrete and singular case [D'Ostilio 1996, 295].

It is highlighted in doctrine that the normative term "singular" should not be used to refer only to a particular physical person, since, in accordance with the system solutions, dispensations can also be granted to legal persons, such as parishes. It follows that singular administrative acts can be addressed to both individuals and legal entities. Their characteristic property is concreteness, which is linked to their effectiveness with regard to a specific case or a specific time period. What is more, the content of singular administrative acts is more detailed in comparison with the acts of general and abstract nature (a law, administrative norms) discussed earlier. It should be added that concreteness and singularity are not synonymous, however. Singularity refers to addressees, but concreteness relates to a case [Miras, Canosa, and Baura 2001, 79].

In view of our considerations above, let us ask: What is the difference between administrative norms and singular administrative acts? An attempt to answer this question was made by the authors of the *Compendio de derecho administrativo canónico*, who noted that the difference is visible in dichotomies like particularity–generality and concreteness–abstractness. Clarifying this point, they argue that, unlike a singular administrative act, an administrative norm is legislated for the entire community, but it is introduced, as already shown, to regulate a situation of an abstract nature [ibid., 78].

In this context, the commentators ask a question that is essential for our considerations: Is a singular administrative act a norm or a legal act? Opinions of canon law scholars are divided here.

3.2. A singular norm

Coming back to the definition of norm conceived as a rule of human behaviour, but also considering the purpose of this paper, we can treat singular administrative acts as singular norms – in the sense that they constitute

the application of the law or the dispositions contained in administrative norms in individual cases. Hervada defined this act as a legal norm or rule placed by a public authority in a specific case, addressed to a specific physical person or a specific community [Hervada 2000, 393].[6] Note that with system solutions in place such a hypothesis could be confirmed in the case of singular decrees (Canon 48) and singular precepts (Canon 49). However, this – as we shall see – does capture the whole complexity of the issue. Therefore, the term "singular law" (*ius singulare*) has also emerged in modern doctrine.

3.3. A singular law (*ius singulare*)?

Currently, in reflecting on the category of individual administrative acts, some canonists also employ the term *ius singulare* [Baura 2012b, 572]. One possible meaning of this term is "regulations that apply by way of exception" [Sondel 1997, 547]. It seems that the use of this term is fully justified, due to the fact that in the case of dispensations (Canon 85) and privileges (Canon 76 § 1) the legislator allows addressees to act against or "in parallel to" the law. The issuance of this category of rescripts should therefore be regarded as an exception to the general norm.

As a result, since such are the system solutions, which are not homogenous in this area of administrative law, a further question should be asked: Is a singular administrative act a norm or a legal act?

3.4. A singular administrative act as a legal act

Our analysis shows that in contemporary legal doctrine, besides the term "singular norm" referring to the category of singular administrative acts, the term "special norm" has been introduced. Given such a divergence it is pertinent to ask: Is the use of such terminology appropriate? Does it correspond to the legislator's intent? It seems that the questions should be answered in the negative for the following reasons. First, looking at the codification work, it should be noted that at that time the consultants did not operate with the category of norm, but with the category

[6] "Por tal entendemos la norma o regla de derecho dada por el poder público con un supuesto de hecho singular (no generall), esto es, la norma dirigida a una persona física concreta o a una comunidad menor (esto es, que no forma parte de la estructura pública y orgánica de la societas perfecta) también concreta."

of individual administrative act;[7] second, the first chapter of the fourth title of the 1983 Code was titled "Common norms" (*Normae communes*), and the fourth title itself, "De actibus administrativis singularibus", contains the word "act". In this way, as argued by Javier Otaduy, the legislator contrasted the generality of the law with the singularity of the administrative act [Otaduy 2002, 67]. For this reason, one would have to favour the thesis that a singular administrative act, in keeping with the legislator's intent, is not a norm but a legal act.

Conclusion

As we have noted in the introduction, there is terminological ambiguity in contemporary doctrine on the nature of singular administrative acts. Some commentators use the term "singular norm", but scholarship also uses the concept of *ius singulare*.

Our analysis proves that the use of the word "norm" is imbued with normativism; however, this is not what the legislator intended. To prove that, let me refer to an opinion expressed by Janusz K. Bodzon, who claims that the legislator's intent was that the category of act should be used whenever a reference is made to a singular administrative act, since "norm" is reserved for acts characterized by generality and abstractness. Besides, he pointed out that individual administrative acts are not characterized by innovation, which is true for acts of a general nature [Bodzon 1997, 105]. It should be clarified that when we speak of an administrative act as an act, we mean a legal act [Dzierżon 2002, 25-60; Pawicki 2023]. This understanding organically endorsed by a group of canonists who define a singular administrative act as a unilateral legal act of executive authority [Labandeira 1994, 297-306; Barbero 2014, 69; Kukla 2012, 1120]. Another argument in favour of this mode of interpretation is that, as shown, some acts (dispensations, privileges) are placed against or parallel to the law, thus being exceptions to general norm. Hence, in such hypotheses, it would be unfounded to employ the term "norm", but it is legitimate to speak of a dispensation or privilege as an act.

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[7] Pontifical Commission for the Revision of the Code of Canon Law, *Liber I – De normis generalibus – Sessio II, 13–17.11.1967*, "Communicationes" 17 (1985), p. 43-44.

In conclusion, the position on the question of whether a singular administrative act is a norm or a legal act depends on the interpretative option adopted. Including them in the category of norms follows from a normativist approach. The second direction is grounded in the theory of general acts, which, notably, highlights the mechanism through which an act emerges – the fact that the will of the person placing the act aligns with the legislator's intent [Dzierżon 2002, 28]. It follows from the wording of Canon 17 that an interpretation of the law should also take into account the idea envisaged by the legislator. Our study has demonstrated that the legislator's intent was to use the category of act in reference to singular administrative acts, and this is chiefly the reason why we should come in favour of this option.

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ERROR IN PERSONA (CANON 1097 § 1 CIC/83) IN LIGHT OF DOCTRINE AND JURISPRUDENCE

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Abstract

Canon 1097 of the 1983 Code of Canon Law, like Canon 1083 § 1 of the 1917 Code of Canon Law declares that error of person (*error in persona*, rendered as *error circa personam* in the previous Code) nullifies a marriage. Traditionally understood 'person' is about physical identity, but in the broader sense, adopted especially after the judgement of the Roman Rota c. Canals of 21 April 1970, the identity of a person consists of her qualities: ethical, moral, social, etc.

The aim of the present study is to show error of person (as the reason for the nullity of a marriage) as construed by doctrine and jurisprudence; in particular, it concerns the notion of the person as the object of error. In the first part, the position of doctrine is discussed; the second part deals with the position of the judiciary. Both in doctrine and jurisprudence, the dominant view is that the person identifies herself in her physical dimension.

Error in persona, a title of nullity of marriage, which is rare, should be used in accordance with the intention of the legislator, who made significant changes in the post-Conciliar Code of Canon Law, abolishing the legal figure of *error redundans in errorem personae* and introducing *error qualitatis directe et principaliter intentae* and *deceptio dolosa.*

Keywords: marriage, nullity of marriage, error of person, quality of person

Introduction

Among titles of nullity of marriage that are associated with error – as to fact or law (Canons 1097-1099 of the 1983 Code of Canon Law[1]) – we

[1] *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.

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find error concerning the person (*error in persona*) regulated by Canon 1097 § 1 of the 1983 Code of Canon Law,[2] similarly to Canon 1083 § 1 of the 1917 Code of Canon Law. This error renders a marriage invalid.[3] This disposition reflects the traditional principle concerning the invalidating power of error concerning the substance of the act (Canon 126 CIC/83) [Teti 2006, 43-44]. *Error in persona* (called error *circa personam* in CIC/17), and therefore *error facti*, refers to the material object of the marriage act (the contractants themselves), the invalidity of marriage, therefore, stems

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

[3] Referring to the origins and rich history of the legal figure of *error facti*, as well as rotal jurisprudence, Grzegorz Erlebach reminds us that it was Emperor Gratian who already distinguished between *error personae*, *fortunae, condicionis* and *qualitatis*, and attributed marriage-nullifying power only to error concerning the person and error as to the condition. As regards *error personae*, he claimed that this error occurs when a woman believes she is marrying Virgil, but in fact she is marrying Plato. The aforementioned father of canon science did not accept the voiding capacity of error concerning a quality, except for error concerning slaves. The issue of *error facti* with regard to marital consent was first accentuated by Peter Lombard, whose findings were the same as Gratian's, but he distinguished *error circa qualitatem* (concerning nobility) as a quality also intended. He defined the state of the contracting party in error with the verb *putare* 'to judge, think', and the state of having an intention with the verb *petere* 'aim at something'. In the latter case, the absence of a specific quality also nullified marital consent. Saint Thomas Aquinas introduced the phrase *error redundans in errorem personae*, but the relevant text did not make it certain whether he meant an individuating quality or not ("a specific son of the king" or "son of the king").

Much later, Thomas Sánchez exerted a major influence on the development of doctrine by asking when *error qualitatis* is reduced to *error personae*, saying that this was the case only in the case of an identifying quality (*qualità individuante*). This stance became a point of reference for the further development of canon science.

Saint Alphonsus Liguori assumed that error about a quality of the contractant (*error causam dans contractui*) is immaterial, which supports the well-established opinion that error concerning a quality of the person has a nullifying capacity if the quality pertains to the substance. He formulates three rules: the first concerns a condition, the second concerns an identifying quality, and the third speaks of nullity of a marriage in the case of error about a quality of the person, intended directly and principally. Over time, the third rule was commonly accepted.

The doctrine of error about the person made its way into rotal jurisprudence, starting with the following sentences: c. Mori dated 30 November 1910, c. Sincero of 27 May 1911, and c. Perathoner dated 2 January 1913, undergoing a natural evolution [Erlebach 2009, 62-63].

from natural law [Viladrich 1998, 128]. The invalidating effect of this error is attributed to the nature of marriage as a juridic act placed vis-a-vis a person as marriage is founded on union of persons.

Error facti can also apply to qualities of the person (*error in qualitate personae*). In contrast, Canon 1083 § 2 CIC/17 granted invalidating capacity to error about a quality of the person only if it could be reduced to error about the person (*error redundans*) [Coronata 1957, 134], or involved enslavement *sensu stricto*, while Canon 1097 § 2 CIC/83 attributes this capacity to error about a quality of a person, intended directly and principally, and to error caused by deception about a quality that may seriously disrupt the "partnership of conjugal life" (Canon 1098).

Now, when we think about *error in persona* (Canon 1097 § 1), this error persists when one of the parties shows a prior intention to marry a certain person, but it turns out that the party, unknowingly, enters into this union with another person [Gasparri 1932, 17-18]. A substantial error, as already mentioned, concerns the substance of the act and nullifies a marriage, because the consensual will is directed towards a person other than the one intended (there is no exchange of marital consent, hence the contract is devoid of substance).

The goal of the present study is to show error concerning the person (as a title of nullity of marriage) as construed in doctrine and jurisprudence. We are concerned here, in particular, with the notion of the person as the object of error.

1. The concept of person in respect of *error in persona* in doctrine

The first authors who commented on Canon 1083 § 1 of the 1917 Code of Canon Law unanimously held that error about the person could be verified if and only if someone intended to contract marriage with a specific person whom they in fact did not know, while in the meantime another person stood before the priest, and they, being thus misled, tied the knot with this party. Of essence, then, was solely the notion of a person in here physical identity, hence in the strict sense [ibid.].

This "classical" interpretation of error concerning the person is invariably recognized by the vast majority of representatives of doctrine, who, after the new Code was promulgated, commented on Canon 1097 § 1 of that

codification [Giacchi 1973, 48; Franceschi 1994, 593-95]. In their opinion, 'person' means the same thing in both Codes – a physical person – thus making it impossible to assume that there has been a cultural evolution of the concept of person, as presumed by some canonists. It goes without saying, as the former underscore, that if the legislators wanted to attribute a broader meaning to the notion of person, they would not use the phrase *error in persona*, but the phrase *error in personalitate*. Besides, they made a clear distinction between *persona* (§ 1) and *qualitas* (§ 2) in the cited canon [Bonnet 1985, 69-70].

Arturo C. Jemolo concluded that Canon 1083 § 1 CIC/17 may be applied extremely rarely (when marriage is concluded by proxy or in the case of extraordinary similarity of people) [Jemolo 1993, 87]; a similar interpretation was proposed by Pietro Gasparri [Gasparri 1932, 19] or Franciscus X. Wernz and Petrus Vidal [Wernz and Vidal 1946, 600].

This stance was reaffirmed, years later, by Pope John Paul II in an address to the Roman Rota on 29 January 1993, stating that it would be something arbitrary and even entirely inappropriate and gravely culpable to attribute the wrong meaning to the wording used by the legislator, sometimes suggested by disciplines distinct from canon law. The pope added that in interpreting the CIC/83 "one cannot hypothesise about a break with the past as in 1983 there had been a leap into a totally new reality"; especially regarding error about the person (Canon 1097 § 1 CIC/83). He also added that as regards terms introduced by the legislator, they cannot be attributed meanings that are "alien to canonical tradition". Thus, the term 'person' used in Canon 1097 § 1 can have one and only meaning with respect to marriage.[4]

However, doctrine had earlier asked whether the interpretation of Canon 1097 § 1 CIC/83 regarding error as to the person should be narrowed down solely to the physical identity criterion, and whether this norm should not be construed in keeping with a more global and holistic vision

[4] John Paul II, Allocutio ad Rotam Romanam diei 29 ianuarii 1993, AAS 85 (1993), p. 1259-260; English text available at: https://www.vatican.va/content/john-paul-ii/en/speeches/1993/january/documents/hf_jp-ii_spe_19930130_roman-rota.html. Jose M. Serrano Ruiz notes that canonical tradition does not differ substantively in respect of the concept of person, but rather on the attribute identifying a person [Serrano Ruiz 2000, 155]. See also D'Auria 2007, 284-85, or Funghini 2003, 159-61.

of the human person, considering that the legal concept of person is somewhat different in the new Code [D'Auria 2001, 266; Moneta 1970, 46]. This issue gained prominence mainly in the context of the novel, personalistic concept of marriage, delineated by the Second Vatican Council and adopted by the post-conciliar Code in 1983. This is because 'person' could no longer be understood, as was claimed, as solely a physical being, but one constituted by physical, legal, moral and social qualities [Gullo 1986, 363-64].

It should be noted that representatives of this new doctrinal direction [Mostaza Rodríguez 1988, 322], albeit definitely in the minority (represented by Gualtiero Ricciardi, Manuel Calvo Tojo, Paolo Moneta, Enrico Vitali, Salvatore Berlingò), raise objections to the term 'physical person', stressing that the human person is not "composed" only and predominantly of the physical, or somatic, element; granted, it "extends" to all the qualities that radically and decisively impact the subject's personality, making him or her morally and existentially an individual who is substantially different from the one appearing while giving marital consent [Moneta 1994, 148].

One of the prominent representatives of the circles favouring a wide interpretation of the term 'person' (Gualtiero Ricciardi) maintains that error concerning the person, which invalidates a marriage, should be interpreted in light of *Vatican II*'s construal of the person and marriage; therefore, it must not be limited to error about the prospective spouse's physical identity, but should be extended to the essential elements that identify him or her in their totality. Treating the person here as the subject of the marriage contract, error about the person should therefore be understood as error concerning the object (*error in obiecto*), and should not be limited to error about the identity of the object (*error in identitate obiecti*) or, as specified by Roman law, error about the body (*error in corpore*). The error in question is also error about the substance of the object (*error in substantia obiecti*), i.e. error concerning the essential qualities of a person in her spiritual, moral and social dimensions [Ricciardi 1986, 68-69; Góralski 2014, 219-20].

The French canonist Gaston Candelier assumes that nowadays the person should be understood substantively as personality. Error about personality entails error concerning the material object of the marriage contract, that is, error as to what constitutes the substance of the act – in the application of Canon 104 CIC/17 a marriage contracted under such an error is invalid. Marriage invalidity is due to natural law, since the contracting

party's error about a constitutive quality of personality (the party marries a person who differs substantially from the one he intends to marry) [Candelier 1984, 121; Franceschi 1996, 254].

Many representatives of doctrine do not accept the position advocated by the above-mentioned circles favouring the extensive interpretation of 'person', pose this fundamental question: Was Canon 1083 § 1 CIC/17 not altered by Canon 1097 § 1 CIC/83? One of them, Héctor Franceschi replies it is obvious that only a favourable terminological alteration was made in the new canon – if a broad interpretation of the term 'person' was allowed previously, this cannot be done now, especially if one considers the motives for which a preposition was changed (from *circa personam* to *in persona*). When in doubt about extending the meaning, one should adhere to a strict interpretation (according to Canon 18 CIC/83) [Franceschi 1994, 593-94].

For this purpose, Canon 96 was referenced: "By baptism one is incorporated into the Church of Christ and is constituted a person in it with the duties and rights which are proper to Christians in keeping with their condition, insofar as they are in ecclesiastical communion and unless a legitimately issued sanction stands in the way." Mario F. Pompedda, considering this disposition of the canon, asks whether the theoretical equivalence between the concept of person and the concept of personality is tenable. His reply is that a person remains the same also if, at some point in her life, she becomes ill or commits an act (e.g., a serious offence), and such circumstances clearly do not affect the person's further existence. At the same time, Pompedda (being critical of the view of this "innovative" option) reminds us that the new direction in doctrine and jurisprudence – definitely in the minority – opposes the term 'physical person' and emphasizes that the human person is not exclusively and primarily constituted in a dominant way by the physical (somatic) element, but extends to all those qualities that radically and determinately affect her personality, so that they make the person inherently different – morally and existentially – from the one appearing to the environment while giving marital consent. Pompedda states unambiguously that *error in persona* can only be verified with regard to the physical identity of the other party [Pompedda 1984, 56].

As observed by Andrea D'Auria, who seems to uphold the traditional understanding of the concept of person, if *error in persona* might have occurred from time to time, it seems that now it may occur extremely

rarely: when marrying by proxy, when there is a significant similarity between persons, or when one of the parties has never been seen by the other contractant [D'Auria 2007, 278; Pompedda 1984, 56]. D'Auria asks whether it is possible to make a theoretical proposition about the equivalence between the concepts of person and personality. His answer is similar to the above-cited Pompedda [D'Auria 2007, 290].

In the discussion of the understanding of 'person', the majority camp is represented also by Urbano Navarrete. Considering Canon 96 CIC/83 ("By baptism one is incorporated into the Church of Christ"), and Canons 97 § 1, 98 § 1-2 and 100, an eminent Spanish canonist (later a cardinal) makes it clear that if the term 'person' throughout the Code of Canon Law has the meaning […] of the subject to whom we attribute the duties and rights proper to a Christian in his individual identity, leaving aside any other quality […], there are no grounds for assigning different meanings to the same term ('person') in Canon 1097, considering that the legislator does not provide any element that could support a different interpretation of the same noun" [Navarrete 1998, 371; Navarette 1993, 648].

Antoni Stankiewicz notes that the attempt to expand the "figure" of the physical person with respect to marriage is unacceptable if one takes into account the principles underlying interpretation of ecclesiastical law (Canon 17 CIC/83).[5]

2. The concept of person in respect of *error in persona* in jurisprudence

Regarding case law, the traditional concept of person, or in the strict sense (in her physical identity) was already found in the judgement c. Sincero dated 27 May 1911 in the matter of an error that occurred as a result of "substituting" one person for another when the marriage was contracted.[6] Such an interpretation of *error in persona* was applied in subsequent rotal rulings. They emphasize that the phrase *in persona*, used in Canon 1097 § 1 CIC/83, should be interpreted in the traditional spirit (the prevailing opinion).

[5] Decision c. Stankiewicz dated 22 July 1993, "Ius Ecclesiae" 6 (1994), p. 6. See also Ricciardi 1986, 81.

[6] Decision c. Sincero dated 17 May 1911, SRRD 3 (1911), p. 178, no. 14.

The problem of the lack of invalidating capacity of error about a quality of the person with regard to the so-called common qualities, which are proper to many people (under the 1917 Code), troubled canonists when more and more cases of error as to a quality of the person took place, fall outside the limited scope of Canon 1083 § 2 CIC/17. At that time, just like in doctrine, the scope was gradually extended with a new interpretation of the notion of person, understood as "something more" (equivalent to personality) than ordinary physical identity.

Of crucial importance was the judgement of the Roman Rota c. Canals dated 21 April 1970. The error of a woman who entered into a marriage without knowing that the other party had previously entered into a civil union with another woman and had three children with her was qualified as *error redundans*. The rotal turnus criticised the traditional interpretation of *error redundans*, considering that it was impossible to retain the restrictive traditional concept of person, who should be treated more holistically and integrally, rather than solely in her physical identity. The ruling paved the way for the formulation of the new Canon 1097 § 2 in the post-conciliar 1983 Code [Catozzella and Sabbarese 2021, 165, 205, 718; Góralski 2001, 185-97].

As regards tribunals of lower jurisdiction, we can cite here the judgement of the Regional Ecclesiastical Tribunal Trivento c. Mazzoni dated 20 October 1992.[7] The ruling sought to "reduce" error concerning a quality of a person to error as to the person. It was stated that in the case of an objectively essential quality, it is necessary to cite not Canon 1097 § 2 CIC/83, but Canon 1097 § 1, § 2 would apply only to the qualities intended *directe et principaliter*. The distinction between the two paragraphs of the canon would not concern error about the person's physical identity (§1) and error as to qualities (§2), but error as to an essential quality would be covered by §1, and error about secondary qualities by §2. In the first case, the objective meaning of the quality entailing an invalidating error would be fundamental, but in the second case, such would be only the subjective intention of the person in error, which can possibly invalidate a marriage.[8]

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[7] Decision c. Mazzoni dated 20 October 1992, "Il Diritto Ecclesiastico" 104 (1993), no. 2, p. 295-99.

[8] Ibid., p. 296.

As for rotal jurisprudence, we find sentences favouring a broader interpretation of the concept of person, in which equivalence can be seen between a person's quality and identity, which individualise the person – they define and distinguish them from any other. To illustrate, only some rulings can be cited here.

In the case *Kabgayen* (Rwanda), both in diocesan instance and before the Roman Rota (turnus c. Davino), a sentence was passed on 26 March 1987 declaring the nullity of a marriage *ob errorem in persona*, when the object of the man's error was the woman's virginity. The rotal judges assumed that the woman's virginity (quality), which constitutes an important value, especially in African peoples, in the eyes of the petitioner identified the respondent (he thought she had become a different person than the one he intended to marry).[9]

Sentence c. Defilippi dated 6 March 1998 finds that a person as the subject of rights and duties is not identified only by a physical criterion, but also by other elements, i.e., qualities that are highly important in the 1983 Code (e.g., regarding rights and obligations, baptised and unbaptised persons or clerics and lay people are defined differently). As for marriage, considering its very unique nature and the fundamental relevance of the prospective spouses' consent, which no human authority can make complete, it cannot be denied that the mutual identification between the contractants occurs not so much based on physical reality, but rather according to the image that one has of the other on the basis of the qualities that set them apart. Some of these qualities are of secondary importance and common to all, while others are crucial – whether for the assessment of the party or in objective terms – for judging the prospective spouse. The petitioner, who "identified" her future husband based on his personal qualification as a physician, was unconscionably sensitive to any physical ailment, so she found in him the assurance of being healthy. She requested marriage annulment by virtue of *incapacitas assumendi* (Canon 1095, 3° CIC/83) and by reason of error about the person (Canon 1097 § 1 CIC/83). The ruling was positive only for error concerning the person. We find the following statement: "Unquestionably, according to the jurisprudence of our Apostolic Tribunal, it is not only a subjective but also a common recognition that for the realisation

[9] Decision c. Davino dated 26 March 1987, RRD 79 (1987), p. 153-59; Góralski 2000, p. 195-206.

of the community of marital life, the medical profession and consequently an appropriate complex of other male qualities are highly important, whereby a woman intends to individualize her future husband.”[10]

Marriage nullity by reason of *error in persona* was recognized in the *Baren* case c. Bartolacci, dated 14 July 2016.[11] Let us discuss this ruling in some more detail.

This union, concluded after four years of acquaintance, lasted only five months, because the spouses’ life together proved unhappy from the outset due to a sudden change in the woman’s disposition – from gentle and obedient to gruff and even life-threatening. The man filed a complaint on account of both parties excluding indissolubility of marriage and the woman’s incapacity to assume the essential obligation of marriage. After the meandering course of the case in previous instances, the rotal turnus ruled that the petitioner had incurred error of person with regard to the defendant, since before the marriage his fiancée appeared to him completely different from what she proved to be immediately after the marriage – in all spheres of life that were very important to him.

In the *In iure* part of the judgement, it was stated that the error about the person concerned material identity, that is, the mental identity of the person. It follows that the prospective spouse expressed consent to marry a third party, who was utterly different from the one he intended to marry.[12] If marital consent should be addressed to the person who one is marrying, then it is something obvious that error concerning the physical identity of that person invalidates the marriage, and this happens

[10] “Sine dubio, iuxta N.A.T. iurisprudentiam non tantum subiectiva, sed etiam ex communi hominum aestimatione magni momento sunt per perducenda comunione vitae coniugalis condicio medici et consequenter complexus aliarum qualitatum viri, quibus mulier contendit a se individuantem esse personam futuri mariti.” Decision c. Defilippi dated 6 March 1998, RRD 90 (1998), p. 165, no. 24. See also Ricciardi 1986, 81. The position assumed by the rotal turnus c. Defilippi was criticised by Charles J. Scicluna, who expressed his belief that saying that error in some aspect identifying a person can be reduced to error of person specified in the code norm would be too radical a departure from the legislator’s intent; it would be something highly inappropriate to ignore the just autonomy of the two titles of nullity, referred to in Canon 1097 CIC/83 [Scicluna 2001, 15].

[11] Decision c. Bartolaci dated 14 July 2016, RRD 108 (2016), p. 185-90.

[12] Here, the ponens (relator) cited the decision c. Funghini of 23 November 1988, RRD 80 (1988), p. 641, no. 8.

by natural law alone, since the very object of consent is lacking. We also find the following statement (taken from the sentence c. Defilippi dated 8 March 1998, RRD 90 (1998), p. 155, no. 10: "The person, as commonly accepted, is something physically defined, which is individualised on the basis of her physical identity. However, when we view this in light of canon law, the person, as the subject of rights and obligations, is not identified only according to the physical criterion, but also on the basis of other elements, that is, qualities […]. As for marital covenant, considering its very unique nature and the fundamental relevance of the prospective spouses' consent, which no human authority can make complete, it is unquestionable that the mutual identification between the contractants occurs not so much based on physical reality, but rather according to the image that one cherishes of the other based on the qualities that define them."[13]

It was noted in the "In facto" section that the petitioner "fell in love" with the respondent, captivated by her numerous moral qualities, and this is what led him to marry her. Those qualities individualised her as a future wife of the man (he wanted to marry her as a person possessing these qualities), which was also unanimously confirmed by witnesses.

After their marriage was celebrated, the respondent's behaviour towards her husband changed completely. She was no longer a quiet and shy person as her disposition changed radically: she became aggressive, forbidding her husband to take care of his father. Living in community with his wife for about five months, the petitioner was going through a spell of great anguish, unable to understand this sudden change in his wife's temperament, who had become an entirely different person relative to the one she was during the three years of engagement. On numerous occasions, she stayed out without a reasonable excuse; at other times, she gave incoherent

[13] "Persona iuxta communem omnium sensum interpretationem est quid physice definitum, quod scil. individuatur ex eius physica identitate. Attamen, si sistimus in ipso campo iuridico-canonistico, persona utpote subiectum iurium et obligationum non identificatur tantum criterio physico, sed etiam ex aliis elementis seu qualitatibus […]. Quod attinet ad foedus coniugale, sive attenta eius peculiarissima natura, sive prae occulis habito fundamentali momento consensus personalis nubentium qui a nulla humana auctoritate suppleri potest, negari nequit mutuam identificationem inter contrahentes fieri non tantum iiuxta utriusque realitatem physicam, sed potius iuxta imaginem, quam unusquisque de altro recipit ex qualitatibus quibus ille se ornatum probat." Decision c. Bartolaci dated 14 July 2016, RRD 90 (1998), p. 187, no. 3.

answers; however, the most alarming thing was her aggressive and impetuous behaviour, neglect for her household chores, unfair accusations against her husband having an affair with a family friend who provided nursing assistance to his father. This change was so obvious that the petitioner was under the impression that he was dealing with a different person. He would not sleep at night because his wife tried to injure him with a knife. In addition, she claimed that she was having visions that someone wanted to "charm" her. When the man woke up at night, he saw her standing and watching him; he felt completely terrorized. There were also times when the respondent wished him a fatal accident, saying that she would not bury him in the cemetery, but would bury him under separate trees, "split into pieces." It would happen that she threw his belongings onto the pavement and even attempted to attack him with a knife.

The petitioner's testimony was confirmed by all witnesses, and the judges found that at stake were facts demonstrating the woman's mental state. They also concluded that almost from the beginning of their marital union "the man saw that the respondent had no complex of moral qualities which would enable him to identify her."[14] That was why, having verified these personality traits he found essential, he first asked for a separation and marriage annulment.[15]

The ruling contains a significant statement that there are plenty of rotal decisions that, under the 1983 Code, recognize that nowadays people should be more fully evaluated not only in the physical aspect, but also in existentially, in accordance with ethical, moral, social, and religious qualities, or a quality that is inherently necessary for the exercise of the essential rights and obligations of the marriage contract.[16]

The ponens emphasises that the petitioner did not marry the respondent merely as a physical person, but as having a personality with qualities that he himself considered essential for a successful married life to attain *bonum coniugum*, for a happy relationship for himself, the woman and children. The woman, instead, lacked that personality which was naturally needed to exercise the rights and obligations essential to marriage. The case at hand

[14] "Fere ab initio convictus coniugalis vir perspexit mulierem haud praeditam esse illo moralium dotum complexu per quem identificavit Convantae personam." Ibid., p. 189, no. 6.
[15] Ibid.
[16] Ibid.

involved not just a mere change in the woman's character in relation to her previous conduct, but also facts demonstrating her specific mental state and allowing her to be individualised by the man as a person.[17]

The final disposition of the judgement reads: "Quapropter, si prae oculis habeantur facta adducta ab Actore, confirmata a testibus, confestim, moralis certitudo Actorem inductum fuisse in errorem" *circa personam* [my emphasis]. Conventae, nam ipsa ante matrimonium Actori apparebat alia ac diversa prorsus a muliere qualem, immediate post celebratum vinculum, se ostendit in omnibus rationibus agendi, quae summi momenti erant pro viro."[18]

However, the vast majority of rotal jurisprudence speaks against "broadening" the scope of the concept of person to include moral, social, intellectual qualities and characteristics, etc.

The sentence c. López Illana of 8 May 2002 concerned, among other things, the *error in persona* title of nullity with regard to a marriage contracted under the CIC/17. Citing the work of Gommar Michiels [Michiels 1955, 5], the ponens elucidates the concept of person, saying that legally the human being is referred to as *persona* as a subject capable of having rights and duties. Thus, legal personality is a legal state, that is, the capability of acquiring and possessing certain subjective rights; legally, a human being is a person insofar as he is capable of assuming rights and obligations. He or she is an active subject of rights and a passive subject of obligations determined by objective law and stemming from other subjective rights. For this reason, the person with regard to whom an error can arise can be no other than a natural person (Canon 96ff. CIC/83). The *ius connubii*, which is the natural right of the prospective spouses, is proper only to the human person – the physical person – not the person "framed" by thought and mind or some moral and social or particular identity of a person.[19]

The rotal judge adds that the currently applicable Canon 1097 § 1 replicates the previous Canon 1083 § 1. However, the two use different formulations: *error circa personam* versus *error in persona*, both referring

[17] Ibid., p. 190, no. 7.
[18] Ibid.
[19] Decision c. López Illana dated 8 May 2002, RRD 92 (2002), p. 299, no. 11.

to the physical person (the subject of rights and obligations).[20] According to the ponens, former Canon 1083 § 2 has now been supplanted by Canon 1097 § 2 together with Canon 1098.[21]

A similar stance was assumed by the rotal turnus c. Stankiewicz in the ruling of 22 July 1993. It states that the concept of "person" who can be erroneously perceived has no other meaning than "physical person."[22] "For it cannot be supposed," the relator stresses, "that the canonical legislator intended, contrary to canonical tradition (Canon 6 § 2), to also ascribe legal significance to a person perceived also as an individual possessing moral qualities, or in terms of his internal structure, or even attributed power to error about the personality of the other contractant."[23]

An extensive explication of the word 'person' occurring in Canon 1097 § 1 CIC/83 (meaning only physical identity) and polemics with authors advocating an opposite view were found in the sentence c. Funghini dated 5 April 1997.[24]

The case at hand (heard in third instance) involved the alleged *error in persona* of a woman who stated that during her married life she noticed that her husband utterly lacked in qualities she believed he had had before their marriage (seriousness, maturity, responsibility, desire to bear offspring). In her opinion, the respondent turned out to be a totally different person vis-a-vis the one he was during the period of their engagement.

The rotal turnus fully shared the position of the judges of second instance, who expressed the belief that the petitioner did not see her "dream

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[20] The work of Navarrete 1998, 365 was referenced here. According to Pompedda, examination of the phrases *error circa personam* and *error personae* makes it clear that the latter wording, used in the 1983 Code, narrows down the phrase *error circa personam* (it indicates the person in her physical aspect more clearly). See Góralski 2001, 192-93.

[21] This claim can hardly be agreed with, for Canon 1097 § 2 stipulates that the quality of the person must be intended.

[22] Decision c. Stankiewicz dated 22 July 1993, "Ius Ecclesiae" (1994), p. 613, no. 6. See also decision c. Caberletti of 25 October 2002, "Ius Ecclesiae" 16 (2004), p. 189, no. 6.

[23] "[C]um nullum ad rem cogi potest argumentum Legislatorem contra traditionem canonicam (Canon 6 § 2) significationem iuridicam personae tribuere voluisse etiam individuo qualitatibus moralibus ornato, vel eius intimae structurae, vel immo intendisse vim erroris in personalitate alterius contrahentis." Decision c. Stankiewicz dated 22 July 1993, p. 614, no. 6.

[24] Decision c. Funghini dated 5 April 1997, "Periodica" 88 (1999), no. 2, p. 391-434.

husband" in the respondent, with whom she wanted to establish marital community, which had "nothing to do" with *error in persona.*

Of special interest to us is the very extensive argument in the *in iure* section, where the concept of person (the subject of rights and obligations) is presented, canonical tradition and rotal jurisprudence ("person" in the physical sense) are cited, where the judges engage in a polemic against "novel" views (recognizing the legal relevancy of a contractant's "moral physiognomy"), and where the position of the Roman Rota (reflecting tradition) is presented [Góralski 2001, 184-95].

In the ponens' conclusions we also read that if in Canon 1097 § 1 of the 1983 Code the noun "person" had a broader meaning (comprising also the mental, moral and intellectual qualities of the subject), the second paragraph would be redundant, since it would not stipulate error of any other kind. Besides, it would make Canon 1098 CIC/83 on deceitful misrepresentation unnecessary. For in both cases, the manner of error about the person (Canon 1097 § 1 CIC/83) would be fully exhausted by a simple error about a common quality affecting somehow a personality of some kind [ibid., 196].

Conclusion

The outcome of the work of the Pontifical Commission for the Revision of the Code of Canon Law, supported by the *De matrimonio* Team of Consultors, was, for example, a substantial reform of the area of the impact of error on the validity of marital consent. Canon 1097 § 1 CIC/83 reproduces from 1083 § 1 CIC/17 only the disposition that error about the person causes the invalidity of a marriage (only the specification of error was modified: *error circa personam* was replaced by a more appropriate phrase, *error in persona*).

As Navarrete notes, the term *persona* in the 1983 Code refers only to physical persons (not legal persons) and technically denotes a human being who through baptism becomes a subject of rights and obligations in the Church. However, pursuant to Canon 17 CIC/83, "ecclesiastical laws must be understood in accord with the proper meaning of the words considered in their text and context. If the meaning remains doubtful and obscure, recourse must be made to parallel places, if there are such, to the purpose and circumstances of the law, and to the mind of the legislator." The word

'person,' occurring more than a hundred times in the 1983 Code, in each case denotes the subject of rights and duties in his or her identity [Navarrete 1993, 662].

Marriage-wise, the word 'person' appears six times (Canons 1073, 1086, 1090, 1097, 1124, 1149 § 3). In all these places, the noun was used in the same sense (subject of rights and obligations captured by its identity). The meaning of 'person' is the same in Canon 1097, just as in Canon 1083 § 1 of the 1917 Code [Funghini 2003, 147]. This was recalled by Pope John Paul II on 29 January 1993, precisely with respect to the phrase *error in persona* in particular, emphasizing the significance of canonical tradition, as mentioned above; it is also emphasized by renowned representatives of doctrine. The same is also suggested by the position of the consultants of the *De matrimonio* Team of the Pontifical Commission for the Revision of the Code of Canon Law (the phrase *error in persona* was unanimously adopted) [Catozzella and Sabbarese 2021, 205].

If the noun 'person' were to have a wider meaning in Canon 1097 § 1, the noun 'person' would be broader, encompassing also the mental, moral and intellectual qualities of the subject, the second paragraph of this canon would be superfluous, since it would not stipulate error of any other kind. Moreover, it would render Canon 1098 (deceitful misrepresentation) unnecessary.

Error in persona, a title for nullity of marriage that seldom occurs, should therefore be applied in keeping with the legislator's intention, who made significant changes in the post-conciliar Code of 1983, suppressing the legal figure of *error redundans in errorem personae* and introducing *error qualitatis directe et principaliter intentae* and *deceptio dolosa*.

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SUBJECTION OF RELIGIOUS INSTITUTES TO THE HOLY SEE

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Abstract

The ecclesiastical legislator grants religious institutes just autonomy so that they can carry out their mission, but this autonomy is not unlimited. This article explains the essence of this autonomy of religious institutes – both of pontifical right and diocesan institutes – while indicating and discussing their subjection to the Holy See. This interdependence is realised in such aspects as the approval of religious authorities, changes to constitutions and statutes, issues concerning the management of goods or broadly interpreted formation. An analysis of this research problem must factor in ecclesiological, juridical and teleological aspects of the subjection of religious institutes to the Holy See.

Keywords: religious institutes, autonomy, Holy See, subjection, supervision

Introduction

Religious institutes enjoy autonomy recognized by the highest ecclesiastical authority. This freedom is exercised in various areas of their functioning, such as practising the evangelical counsels, community life, realising the institute's proper charism, or broadly understood administration of goods. Religious institutes have the right of self-determination. What is more, the ecclesiastical legislator not only stipulates that it is their inherent right, but also codifies the duty of other entities to protect this right, which does not imply, however, that religious institutes function completely independently of ecclesiastical authority. This derives from the fact that this autonomy should be exercised in keeping with the Church's teaching, having regard to its good and the well-being of the faithful.

This article seeks to present the nature of the subjection of religious institutes to the Holy See. Using the theological-legal and the dogmatic-legal

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method, I will present the essence of this relationship, pointing out its ecclesiological and juridical grounding, as well as its purpose. In the next section, I will discuss the question of the subjection of religious institutes to the Holy See, with respect to the criteria of their approval, hoping to show the different nature of this dependence in the case of institutes of both pontifical and diocesan right. Finally, we will look at specific areas of the subjection and discuss the resultant obligations, taking into account acts reserved for the Holy See, as well as the need to submit reports to highest ecclesiastical authority.

1. The nature of subjection

In our analysis of the very idea of subjection of religious institutes to the Holy See we must first elucidate the concept itself. The term "religious institutes" in ecclesiastical legislation refers to a community whose members – in accordance with its proper law – take public vows, both perpetual and temporary, and undertake life in community.[1] Importantly, the term includes religious orders and congregations, but not secular institutes and associations of apostolic life [Daniluk and Kluza 1994, 142-43].

1.1. Ecclesiological and legal grounding

As regards the need for and the nature of the subjection of religious institutes to the Holy See, they are motivated, importantly, by the fact that the Church is, as it were, a sacrament in Christ, and therefore a visible sign of unity.[2] For this reason, however, the operation of religious institutes, which enjoy their own autonomy, must be considered from the ecclesial perspective. This is because the effectiveness of the apostolic works

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[1] *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. Canon 607 § 2: "A religious institute is a society in which members, according to proper law, pronounce public vows, either perpetual or temporary which are to be renewed, however, when the period of time has elapsed, and lead a life of brothers or sisters in common."

[2] Vatican II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-71; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html; John Paul II [henceforth: LG], no. 26.

they embark on is closely linked to the need to maintain unity with ecclesiastical hierarchy. Thanks to that the charisms of religious life reveal the nature of the Church, especially its communion with God and the unity of the whole human family springing therefrom.[3]

At this point, we should underscore the existence of a special bond between religious institutes and the Roman Pontiff. The successor to St. Peter is "the guarantor of the identity of religious life, the structure of which is often linked to the universal Church – based on the Petrine ministry" [Skorupa 2002, 79]. The existence of religious institutes is a wonderful gift to the Church, and their importance makes it necessary, as it seems, to normatively define their dependence on ecclesiastical authority, in particular on the Holy See. Notably, after all, it belongs solely to the Holy See to approve new forms of consecrated life.[4]

In Canon 590, the ecclesiastical legislator provides clearly that institutes of consecrated life are subordinated to the highest ecclesiastical authority. Additionally, every member of such an institute is obliged to show submission to the Roman Pontiff as the highest superior. The pope's supreme authority over the institutes and their individual members stems, therefore, from the characteristics of the mission that these institutes pursue in their service to God and the whole Church, as well as from the bonds of obedience accepted by institute members [Zubert 1990, 23]. Worth mentioning is the fact that the dependence of religious on the pope is total and personal – this results from the primacy of St. Peter's successor and the aforementioned character of the vow of obedience. In practice, the Roman Pontiff does not exercise his authority over religious institutes personally, but through the various dicasteries of the Roman Curia, especially the Dicastery for Institutes of Consecrated Life and Societies of Apostolic Life, the Dicastery for Evangelisation, the Dicastery for the Doctrine of Faith, or the Dicastery for Divine Worship and the Discipline of the Sacraments.

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[3] John Paul II, Adhortatio apostolica post-synodalis *Vita consecrata*, (25.03.1996), AAS 88 (1996), p. 377-486; English text at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_25031996_vita-consecrata.html [henceforth: VC], no. 46.

[4] Canon 605: "The approval of new forms of consecrated life is reserved only to the Apostolic See. Diocesan bishops, however, are to strive to discern new gifts of consecrated life granted to the Church by the Holy Spirit and are to assist promoters so that these can express their proposals as well as possible and protect them by appropriate statutes; the general norms contained in this section are especially to be utilized."

1.2. Why religious institutes are subordinated to the Holy See

According to universal law, religious institutes carry out their works while retaining their dependence on the supreme ecclesiastical authority, without prejudice to Canon 586, in which the ecclesiastical legislator recognizes the principle of autonomy of each institute and, at the same time, sets a limit to it. This subjection has a purpose. The idea behind it is to minimize the likelihood of any negative consequences of misunderstandings that may arise, especially in the area of broadly perceived governance [Skorupa 2002, 111].

Moreover, their dependence on the Holy See makes it possible to demarcate the authority of the superior governing a particular institution. It follows that in exercising the office entrusted to him (or her), the superior always remains in a kind of subjection to the highest ecclesiastical authority, even when matters of internal authority in the institute are involved. The ecclesiastical legislator explicitly obligates superiors to exercise their function and power in accordance with the norms of the law, not only their proper law but, above all, universal law (Canon 617 CIC/83). Thus, dependence on the Holy See is intended to limit cases of insubordination among superiors, and to protect members of institutes against arbitrary decisions of those in authority. There is another fact that we must consider. The role of the dependence we are discussing here is also to reinforce the sense of community and ties between religious institutes and the Holy See. This is achieved, for example, by sending reports on the status of institutes, a requirement discussed in detail in what follows.

2. Subjects subordinated to the highest ecclesiastical authority

As well as enjoying autonomy, all religious institutes subsist in some degree of subjection to the Holy See. However, it will be instructive to outline the scope and subject of this dependence in respect of criteria for approving such institutes. Therefore, we need to show how the question of this subjection to the highest ecclesiastical authority presents itself in the case of institutes of pontifical right and those erected by a diocesan bishop.

2.1. Religious institutes of pontifical right

The ecclesiastical legislator precisely indicates that "an institute of consecrated life is said to be of pontifical right if the Apostolic See has erected it or approved it through a formal decree. It is said to be of diocesan right, however, if it has been erected by a diocesan bishop but has not obtained a decree of approval from the Apostolic See" (Canon 589). For that reason, the Holy See exercises external, direct and exclusive authority over such institutes [Rincón-Pérez 2023, 396]. The necessary implication of the notion of "exclusive subjection" is that no other ecclesiastical authority can interfere in the matters of the religious institutes in question. In practice, this means that issues related to the governance or discipline of the institute are within the jurisdiction of the Holy See in this case. This is embodied in, among other things, the recognition and approval procedure for the constitution of a particular religious order. Furthermore, religious institutes of pontifical right are exempt from the right to be visitated by the diocesan bishop.[5]

Practice shows that a religious institute of diocesan right can become an institute of pontifical right. This happens when an institute gradually widens the scope of its activity, in which case the next step is to obtain papal approval. Historically, with a *decretum laudis* (decree of praise), a diocesan right institute would become, as it were, an institute of pontifical right; then, a decree of approval was issued, whereby the institute obtained a definitive approval of the Holy See [Majer 2013, 342-43]. As of today, the law does not provide for the issuance of a decretum laudis. The ecclesiastical legislator refers only to formal decree that approves a particular institute. As a result of this approval, the institute's status changes to that of a papal right institute, and thus gains greater permanence in the Church, enjoys broader autonomy, but it is also a kind of confirmation that its activities are beneficial not only for the particular Church, but also for the universal

[5] Canon 683: "§1. At the time of pastoral visitation and also in the case of necessity, the diocesan bishop, either personally or through another, can visit churches and oratories which the Christian faithful habitually attend, schools, and other works of religion or charity, whether spiritual or temporal, entrusted to religious, but not schools which are open exclusively to the institute's own students. § 2. "If by chance he has discovered abuses and the religious superior has been warned in vain, he himself can make provision on his own authority."

Church. As Majer points out: "the transformation of an institute of diocesan right into one of pontifical right occurs when requested by the superior general, who, together with his council, submits to the Holy Father a request for pontifical approval" [ibid., 343].

What distinguishes institutes of pontifical right from those erected by a diocesan bishop – besides the fact that the Holy See approves the constitution of the institute – is that the major superiors of clerical institutes of consecrated life of pontifical right are ordinaries. This means that apart from the ordinary power they have being religious superiors over their subordinate members they gain power of governance in the Church (Canon 596 § 2). Also, Canon 397 § 2 contains a disposition that the diocesan bishop may not visit members of religious institutes of pontifical right and their houses, except in cases prescribed by law. Moreover, a clear difference can be noticed in asset management. It is precisely the role of the proper law of religious institutes of pontifical right to determine what actions should be considered acts of extraordinary governance.[6] In the case of alienation of goods whose value exceeds the so-called maximum sum (currently €1,700,000) determined by the bishops' conference,[7] the authorities of an institute of pontifical right ask the permission of the Holy See, rather than the diocesan bishop. The property matters of a congregation of pontifical right are not the concern of the diocesan bishop. He may not demand reports on how the temporal goods of such an institute are managed, as opposed to institutes of diocesan right and autonomous monasteries [ibid., 345].

Religious institutes of pontifical right are not exclusively subject to the Holy See, and thus remain completely outside the authority of the diocesan bishop of the place. The ecclesiastical legislator provides for specific cases where the bishop may intervene in the affairs of such an institute. This issue should be signalled, but we will not discuss it here.

[6] In the case of religious institutes of diocesan right, it is the bishop who decides which acts are of extraordinary administration, the placement of which requires the permission of the ordinary (Canons 638 § 1 and 1281).

[7] Polish Bishops', *Dekret ogólny Konferencji Episkopatu Polski z dnia 11 marca 2021 r. w sprawie podwyższenia sumy maksymalnej alienacji* (19.04.2021), "Akta Konferencji Episkopatu Polski" 33 (2021), p. 72.

2.2. Diocesan institutes

Institutes of consecrated life are understood to be of diocesan right if they have been approved by the diocesan bishop but have not obtained a decree of approval from the Holy See (can. 589 CIC/83). The definition itself shows that the special competence regarding such religious institutes belongs to the diocesan bishop. However, although he alone has the right to erect institutes in question, he is to consult with the Holy See before establishing them. With this requirement in place the erection of institutes of similar charism, nature, purpose, character or spiritual heritage can be avoided. Thus, the diocesan bishop is bound by law to obtain a *nihil obstat* from the highest ecclesiastical authority before he erects an institute [Skorupa 2002, 95]. The rationale for this requirement can be found in the indications of the Second Vatican Council: "When the question of founding new religious communities arises, their necessity or at least the many useful services they promise must be seriously weighed. Otherwise communities may be needlessly brought into being which are useless or which lack sufficient resources."[8] It is of note that the first draft amendments of the 1983 Code contained proposals to make consultation with the bishops' conference mandatory, without which the diocesan bishop could not erect a religious institute. Ultimately, however, it was decided that the most objective assessment of the necessity and utility of a new institute would have to come from the highest ecclesiastical authority. A subsequent amendment to the canon, which took place in 2020, does not require consultation with the Holy See only, but explicitly requires that it gives written permission, without which the erection of an institute by a diocesan bishop would be invalid [Rincón-Pérez 2023, 392].

Institutes of diocesan right with respect to religious discipline are obviously subject to the diocesan bishop, but his competence is limited by the authority of the Holy See. The ecclesiastical legislator provides that diocesan right institutes can deal with matters that have been approved by the Holy See. No other ecclesiastical authority can change them without the approval of the Holy See [Skorupa 2002, 117]. For example, it can

[8] Vatican II, Decretum de accommodata renovatione vitae religiosae *Perfectae caritatis* (28.10.1965), AAS 58 (1966), p. 702-12; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_perfectae-caritatis_en.html, no. 19.

happen that the dicastery has issued some guidelines of its own or requested certain modifications in regard to the constitution of a particular religious institute, in which case, as emphasised earlier, content that has been approved by the Holy See cannot be altered without its approval (Canon 583 CIC/83).

We also need to keep in mind the legal norm of Canon 591, whereby "in order to provide better for the good of institutes and the needs of the apostolate, the Supreme Pontiff, by reason of his primacy in the universal Church and with a view to common advantage, can exempt institutes of consecrated life from the governance of local ordinaries and subject them to himself alone or to another ecclesiastical authority." This exemption relates mainly to the internal order of religious institutes, since their public activity is subjected to the jurisdiction of the local ordinary.

3. Areas of subjection and the resulting duties

The Second Vatican Council teaches that the Church is a sacramental community, being both a sign and an instrument of unity.[9] Religious institutes, which constitute the wealth of this Church, serve the entire people of God. Proper supervision of ecclesiastical authority is necessary so that their goals may be achieved. As we have seen earlier, religious institutes are subordinate to the Holy See in various areas of their functioning. In what follows, we will discuss selected aspects of this subordination, and the closely related obligations.

3.1. Selected acts proper to the Holy See

The above-presented entities are distinguished, importantly, according to the entity that erected them. If a religious institute was erected by the Holy See or approved by its decree, it is an institute of pontifical right; if the erection was effected by a diocesan bishop but no decree of approval was obtained from the Holy See, then we speak of an institute of diocesan right. When discussing the issue of calling individual institutes

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[9] Vatican II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (7.12.1965), AAS 58 (1966), p. 1025-120; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html, no. 42.

to life, we should look at a requirement the fulfilment of which lies solely within the discretion of the Holy See – the erection of a monastery of nuns. In this case, the permission of the Holy See is required for validity.[10] However, the legal norm does not specify what form of consent is involved. According to Canon 616 § 4, it also belongs to the Holy See to suppress such a monastery. It should be noted at this point that the Holy See does not only erect individual religious institutes or issue requisite permissions, but it is within its exclusive competence to approve new forms of consecrated life (Canon 605).

The ecclesiastical legislator also stipulates in Canon 584 that only the Holy See is competent to suppress a religious institute, and the decision concerning temporal goods of the institute is also reserved to the Holy See. Other provisions, too, are reserved to the supreme ecclesiastical authority; for example, those governing mergers or unions of institutes or creation of confederations or federations (Canons 582-584). If it becomes necessary to suppress the only house of a particular religious institute, this can be done solely by the Holy See. It also belongs to the Holy See to make all decisions regarding its property (Canon 616 § 2).

It is important to note that Canon 632 of the 1917 Code of Canon Law[11] provided a norm prohibiting religious from transferring to another order without permission from the Holy See. In the current Code, the legislator only requires the authorization of the highest ecclesiastical authority when a person has resolved to transfer from a religious institute to a secular institute or association of apostolic life and vice versa [Rincón-Pérez 2023, 442].

It is also reserved for the Holy See to grant an indult of exclaustration to a religious who is a member of an institute of pontifical right. We are speaking here, among other things, of cases where such an indult is granted for a period exceeding five years or where an indult granted earlier is extended (Canon 686 § 1). But, with respect to Canon 691 § 2, it may occur that a perpetually professed religious resolves, after serious deliberation, to request an indult of departure. In this case, the indult is reserved to the Holy See.

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[10] Canon 609 § 2: "In addition, the permission of the Apostolic See is required to erect a monastery of nuns."

[11] *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.

3.2. The obligation to submit reports and their content

In Canon 592, the ecclesiastical legislator obligates the superiors to send reports of the state and life of the institute to the Holy See. The *ratio legis* of this legal norm is to strengthen the bonds between the institutes and the Holy See. Besides, considering that religious institutes are an important part of the Church's mission and Christ's mission (VC 9), we are not surprised that a custom has emerged – which later became a requirement – to send such reports to the Holy See. "In addition to supplying useful, factual information, an attentive reading of these reports enhances the theological, juridical and pastoral reflections of this Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, thus helping to concretise the service which this Dicastery is called to offer to consecrated life in these times of social and cultural complexity."[12]

In line with the Guidelines of the Dicastery (formerly the Congregation) for Institutes of Consecrated Life and Societies of Apostolic Life, this report is to include a brief description of the institute, its charism and mission. Also, some statistical data must be supplied, including the number of houses, the number of institute members, plus the number of aspirants, postulants, novices, including the number of those leaving the institute. The report is also to include information on proper legislation, issues of community life, the mission and the pastoral care of vocations and formation, the economic situation. Also, attention must be paid to the challenges addressed, difficulties encountered, or projects for the future.[13]

The legal requirement to submit to the highest ecclesiastical authority an account of the life, status and activities of religious institutes has evolved over time for historical reasons and owing to the emergence of newer forms of living the evangelical counsels [Kałowski 1990, 98]. Nevertheless, the Guidelines, now issued by the Dicastery, are an effective instrument used by the superiors of religious institutes; they also further specify the legal norm contained in Canon 592).

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[12] Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, *Suggested Guidelines for the Preparation of Periodic Reports on the Status and Life of Institutes of Consecrated Life and Societies of Apostolic Life (cf. CIC can. 592 § 1)*, Attachment to Prot. n. SpR 640/2008, https://www.vatican.va/roman_curia/congregations/ccscrlife/documents/rc_con_ccscrlife_doc_20080511_relazione-periodica_en.html.

[13] Ibid.

In this context, it is also worth looking more closely at the provision in Canon 636 § 2.[14] The legislator also notes the obligation to submit reports to internal superiors. Their content and frequency may vary, which is regulated by provisions of proper law. On the other hand, they usually deal not only with strictly economic matters, but also expenses related to cultural activities, journalism, accumulating library collections, apostolic works, and associations, commissions or institutes if there are any [Zubert 1990, 103]. Such reported information is undoubtedly used later to draw up a record that is sent to the Holy See.

Conclusion

The purpose of this article was to present and discuss the issue of subjection of religious institutes to the Holy See. Our scholarly reflection, based on ecclesiastical documents and the available literature, made it possible to identify the essence of and the reason why the ecclesiastical legislator has introduced specific regulations governing this subjection. The correlation differs slightly between pontifical right institutes and the ones of diocesan right. At any rate, the subordination of religious institutes to the Holy See is fully justified, and relevant arguments can be found both in ecclesiology and jurisprudence.

In the teaching of Vatican II, the *ratio legis* for this subjection of religious institutes to the supreme ecclesiastical authority can be found in many documents, without prejudice to their right to legitimate autonomy. This chiefly stems from the fact that the operation of individual institutes "undeniably belongs to [the Church's] life and holiness" (LG 44). For the reasons presented above, we are looking at a wealth of various issues pertinent to the relationship in question, which this article barely touches on. This confirms that religious institutes have a special place in the Church, and the need to ensure the proper fulfilment of their charisms and apostolic works calls for concrete legal regulations.

[14] Canon 636 § 2: "At the time and in the manner established by proper law, Finance officers and other administrators are to render an account of their administration to the competent authority."

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THE HOLY SEE'S CHARTER OF RIGHTS OF THE FAMILY AND THE FAMILY LAW OF CONTEMPORARY EUROPEAN STATES

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Abstract

After presenting the main provisions of the Charter of the Rights of the Family, announced by the Holy See on 22 October 1983, the paper discusses the key directions of changes taking place in almost all modern European states in the last three decades. Solutions concerning so-called same-sex marriages or partnerships, adoption of children by homosexual couples, and surrogacy are included. The manner in which the solutions in individual European countries are implemented is examined to illustrate the corresponding changes chronologically.

The paper also touches on the following: the evolution of the ECtHR jurisprudence in cases concerning relationships between homosexual persons, hate speech by reason of sexual orientation and gender identity, and the age of legal sexual intercourse. The ECtHR jurisprudence is illustrated with representative examples of judgements, and the latter two issues are highlighted on the basis of the adopted statutory solutions. Finally, the responses of the Polish legislator to the described changes are discussed, followed by conclusions.

Keywords: human rights, marriage, family, sex, homosexuality

Introduction

First, I will present the essential provisions of the Charter of the Rights of the Family, announced by the Holy See on 22 October 1983.[1] Next, we

[1] Pontifical Council for the Family, *Charter of the Rights of the Family* (22.10.1983), https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html [henceforth: CRF]. The document was commissioned by Pope John Paul II, who, in his apostolic exhortation *Familiaris consortio* attended to the wish expressed by the 1980 synod of bishops held in Rome devoted to the tasks of the Christian family

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will look at the key changes occurring in the family law of contemporary European states over the last three decades,[2] which I take to include solutions concerning so-called same-sex marriage, same-sex civil partnerships, adoption of children by same-sex couples, and surrogacy. Additionally, I address the following issues: the evolution of the case law of the European Court of Human Rights (ECtHR) in cases involving relationships between homosexual persons, hate speech based on sexual orientation and gender identity, and the age of consent. Finally, I discuss the measures taken by the Polish legislature with respect to the described changes, provide a summary, formulate conclusions.

1. Charter of the Rights of the Family

The CRF contains a preamble and twelve articles. Its footnotes reference the following encyclicals as the sources: *Rerum Novarum*,[3] *Pacem in terries*,[4] *Humane vitae*,[5] *Laborem exercens*,[6] *Populorum progression*,[7]

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in the modern world. John Paul II. II, Adhortatio apostolica *Familiaris consortio* de familiae christianae muneribus in mundo huius temporis (22.11.1981), AAS 74 (1982), p. 81-191; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html.

[2] By family law I understand (similarly to Maciej Andrzejewski) the norms regulating the basic aspects of family functioning: concluding marriage, parents–children relations, determining the origin of the child, exercising parental authority, maintenance, the normalization of the possible (temporary or permanent) placement of the child outside the family [Andrzejewski 2004, 6].

[3] Leo XIII, Litterae encyclicae de conditione opificium *Rerum novarum* (15.05.1891), *ASS 23* (*1890/91*), p. 641-70; English text available at: https://www.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html.

[4] John XXIII, Litterae encyclicae de pace omnium gentium in veritate, iustitia, caritate, libertate constituenda *Pacem in terris* (11.04.1963), AAS 55 (1963), p. 257-304; English text available at: https://www.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem.html.

[5] Paul VI, Litterae encyclicae de propagation humanae prolis recte ordinanda *Humane vitae* (25.07.1968), AAS 60 (1968), p. 481-503; English text available at: https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae.html.

[6] John Paul II, Litterae encyclicae de labore humano, LXXXX expleto anno ab editis litteris encyclicis "Rerum novarum" *Laborem exercens* (14.09.1981), AAS 73 (1981), p. 577-647; English text available at: https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens.html.

[7] Paul VI, Litterae encyclicae de populorum progressione promovenda *Populorum progressio*

Divini illius Magistri,[8] exhortation *Familiaris consortio*; and other documents of the Catholic Church, including the 1983 Code of Canon Law,[9] and the essential documents issued by international organizations, including: Universal Declaration of Human Rights,[10] Declaration on the Rights of the Child,[11] International Covenant on Civil and Political Rights,[12] International Covenant on Economic, Social and Cultural Rights,[13] and European Social Charter.[14]

It can be seen that the CRF cites principles that are found not only in other ecclesiastical documents but also in documents of the international community. Considering that human rights are expressed "innately and vitally in the family", the document mentions in the first place that (1) the family is based on marriage – an intimate and complementary union between a man and a woman, founded upon the indissoluble bond of matrimony contracted voluntarily and publicly and oriented towards the transmission of life; and that (2) marriage is recognised as a natural institution, exclusively entrusted with the mission of transmitting life, the family being a natural union, primary to the state or any other community, and enjoying its inherent and inalienable rights.

The CRF highlights the immense value of the family for societies and states as a community of solidarity and love, where cultural, spiritual ethical and economic values are transmitted, where life wisdom is achieved

(26.03.1967), AAS 59 (1967), p. 257-99; English text available at: https://www.vatican.va/content/paul-vi/en/encyclicals/documents/hf_p-vi_enc_26031967_populorum.html.

8 Pius XI, Litterae encyclicae de christiana iuventutis educatione *Divini illius Magistri* (31.12.1929), AAS 22 (1930), p. 49-86; English text available at: https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_31121929_divini-illius-magistri.html.

9 *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.

10 Universal Declaration of Human Rights, adopted by the UN General Assembly by Resolution 217/III/A of 10 December 1948 in Paris.

11 The Declaration of the Rights of the Child was adopted by the UN General Assembly on 20 November 1959.

12 See, e.g., *The Core International Rights Treaties*, New York–Geneva 2006, which is a collection of documents published by the Human Rights Council (UNHRC).

13 Ibid.

14 European Social Charter, open for signature on 18 October 1961 in Turin, ratified by Poland on 10 June 1997, Journal of Laws of 1999, No. 8, item 67.

and the rights of individuals are reconciled with the demands of social life. The document recognises the considerable role of the family for preserving and fostering social cohesion by linking the family and society together with vital and organic ties. The two complement each other in the protection and development of the well-being of humanity and every person.

Considering the above, the CRF urges states and international organizations to do their utmost to secure all possible assistance – political, economic, social, and legal – which is necessary to reinforce and maintain family stability.

The authors of the document note, however, that the rights, basic needs, the success and values of the family are often less accepted – worse still, they are threatened by various legal acts, institutions and socio-economic programmes, and poverty directly impacting the family. Therefore, they call on all states and international organisations, institutions and individuals to respect the rights of the family and ensure that they are truly recognised and respected.

In the specific part, the charter lays emphasis on the fundamental rights and freedoms of people that are crucial to the family and family life. At stake here is the right to freely choose one's way of life, including marriage and setting up a family, as well as the prospect of ensuring such conditions so that those intending to marry and have a family can consciously and responsibly exercise their rights to marriage. In this context, we find an important provision obliging public authorities to uphold the institutional value of marriage in such a way that other (non-married) couples may not enjoy the same status as marriages contracted properly (Article 1).

Further, our attention is drawn to the voluntary nature of marriage and mutual consent needed for it, respect for the spouses' religious freedom, their equal rights and dignity, and the complementary nature of man and woman (Article 2). Spouses are granted the inalienable right to start a family and determine the time of birth and the number of offspring, excluding contraception, sterilisation and abortion. The activities of public authorities or private organizations aimed at limiting the freedom of spouses to make such decisions are considered a grave insult to human dignity and justice (Article 3). It is underscored here that from the very beginning human life should be protected unconditionally; in keeping with the Declaration of the Rights of the Child, it is asserted that children, both before

and after birth, have the right to protection and special care; the same goes for women who are pregnant and after they give birth. Special care is provided to orphans and children deprived of their parents, as well as those with disabilities. The CRF grants equal rights to children born of married parents and those born out of wedlock with respect to social welfare and concern for their complete personality development. It considers abortion to be a violation of the right to life and excludes any experimental manipulation of the human embryo; any intervention in genetic heritage aimed at correcting anomalies is treated as a violation of the right to bodily integrity and contrary to the good of the family (Article 4).

Just like the later Convention on the Rights of the Child,[15] the CRF recognizes in Article 5 that it is the parents who have the inalienable right to educate their offspring and are the first and main educators of their children. This right encompasses the parents' freedom to educate their children in compliance with their moral and religious beliefs, cultural traditions of the family, and their unimpeded choice of the schools or other means necessary for their education. Public authorities are to lend appropriate assistance and support to parents so that they can act as educators.

In this respect, the authors of the CRF emphasise that sexual education is inherent in the parents' fundamental right to educate their children and should always take place under their close supervision and must not be violated, also when religious formation is excluded from the compulsory education system. Also, parents are naturally entitled to demand that they be allowed to participate in the activities of the school and determine and pursue an educational policy. In this context, the family has the right to protect its youngest members from negative influences and abuse from the media.

The CRF is aware of the diversity of forms of family life and uses sociological terms such as "extended family" and "nuclear family", families whose functioning has been disrupted by divorce, and family associations (Articles 6, 7, 8). Each form is endowed with natural rights related to the promotion of its dignity, rightful independence, the intimacy of integrity and stability. It is essential that the family contributes socially and politically to the building of society, the development and implementation of social, economic, legal, and cultural programmes that impact family life. The following articles

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[15] Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989; Journal of Laws of 1991, No. 120, item 526 [henceforth: CRC].

extend the catalogue of family rights to include rights to economic conditions that guarantee a decent standard of living and full development, to assistance in extraordinary situations (such as premature death, abandonment by one spouse, disability, illness, unemployment, disability, and even difficulties in raising children or those resulting from old age, etc.).

The CRF also points to the problem of children of detainees, demanding that the rights and needs of the family (the worth of family unity) be respected in political life and penal legislator. It proposes legislative changes to allow prisoners to stay in touch with their families during their detention (Article 9 letter d).

It further highlights the right to such social and economic systems that the work done by family members enables them to live together and does not threaten the unity, prosperity and stability of the family, and gives them access to healthy recreation. Remuneration for work should be sufficient to establish and support a family with dignity; other forms of support are stipulated, such as: "family wage", family allowances or remuneration for work at home (Article 10 letter a). In this respect, the document speaks of the obligation to recognise and respect the work of the mother, according to the benefit it brings to the family and society (Article 10 letter b). Further, the family's right to housing that is "fitting for family life", in accordance with the number of family members and ensuring services that are necessary for its life (Article 11). The last, twelfth article was devoted to migrant families, who have the same rights as other families, but it is essential to observe their right to respect for their own culture, necessary support and care, the right to have their families united with them as soon as possible, and the assistance of public authorities and international organizations.

In the introduction to the Italian edition of the CRF we read that the purpose of the charter is "to present to all contemporary Christians and non-Christians a perspective [...] of the fundamental rights vested in the family as a natural and universal community. The document is addressed, among others, to all those who share responsibility for the common good, so that they have a model and a point of reference for the development of family legislation and policy, and guidance for action plans".[16]

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[16] Pontificio Consiglio per la Famiglia, *Carta dei diritti della famiglia* (22.10.1983), w: *Enchiridion della Famiglia. Documenti Magisteriali e Pastorali su Famiglia e Vita 1965-2004*, red. Pontificio Consiglio per la Famiglia, EDB, Bologna 2004, p. 1489-506.

Further, in the document in question, the Holy See points to violations of family rights in the modern world and makes a very strong point that nothing can replace the family in its mission, and that all to whom the CRF is addressed should strive to provide families and parents with the necessary support and assistance in fulfilling the tasks entrusted to them by God (ibid.).

Considering that three decades have passed since the presentation of the charter, it will be fitting to review the changes that have occurred in the legislation of European states over those years. Understandably, their law-making activities have also been influenced by other acts of international law, especially those with the force of law. Of particular importance here will be those enacted by the UN and the Council of Europe as many European countries belong to those. Therefore, there is no doubt the content of legislated legal norms is influenced by new philosophical trends, ideologies, political views, etc.

Considering the considerable importance of norms of international law for national legislation, we should recall that the UN adopted the Convention on the Right of the Child in as early as in 1989.[17] Importantly, this document reiterated the wording of the 1959 Declaration of the Rights of the Child in regard of special care and protection of children both before and after birth. It defines the child as "every human being below the age of eighteen years unless under the law applicable to the child" (Article 1). But the lack of specification of the lower age limit at which an entity starts as a human being caused some states to make declarations.[18] A number of important references can be found in the CRC, from which stem the child's right to a family (upbringing in a family) and the right to be responsible as a parent. Article 5 is notable as it obliges states parties to respect

[17] The CRC was adopted by the UN General Assembly on 20 November 1989, by Resolution 44/25, it entered into force on 2 October 1990. Poland ratified this convention on 30 April 1991, but submitted two objections and two declarations on the document. In the following years, the objections were withdrawn.

[18] Argentina declared that Article 1 should be "construed bearing in mind that the term 'child' encompasses every human being from the moment of conception until the age of eighteen". A similar declaration was made by Guatemala, which stated that it guarantees and protects human life from the moment of conception. The Holy See, in contrast, declared that it recognizes the CRC as an instrument that safeguards the protection of the child both before and after birth. The declarations can be found in UN Doc. CRC/C/Z 1991.

the responsibilities, rights, and duties of parents to provide, in a manner consistent with the child's development, appropriate direction and guidance in the exercise of the child of the rights recognised in the convention. Article 7 mentions the child's right to know his or her parents and be under their care. Article 8 recognizes the child's right to preserve his or her identity, including the nationality, name, and family relations. Article 9 obliges states to ensure that children are not separated from their parents against their will, unless such separation is necessary in the child's best interests and the right to receive relevant information about the whereabouts of his or her parents in the event of measures undertaken by the state (detention, imprisonment, exile, deportation or death of one or both parents). Article 10 lists the child's right to maintain regular, personal and direct contact with his or her parents residing in different countries except in extraordinary circumstances. Worth highlighting are the provisions of Article 14 as they recognise the rights and duties of parents to guide the child in his or her exercise of the right to freedom of thought, conscience, and religion. Moreover, it is stated in Article 18 that parents and legal guardians bear the primary responsibility for the upbringing and development of the child. Article 29.1.c says that the states parties agree to develop in the child respect for his or her parents, cultural identity, the language, and national values of the country in which he or she lives, the country of origin, and cultures other than his or her own. We should also refer to Article 22, which is important since it recognises the right of a refugee child to seek his or her parents. These and other provisions of the CRC make it possible to conclude that the convention is the most family-oriented and at the same time pro-social instrument of international law enacted after 1983.

Another UN initiative to embrace family values was to proclaim the year 1994 as the International Year of the Family. Speaking of these European initiatives, we should mention the European Convention on the Exercise of Children's Rights, adopted in 1996 by the Council of Europe.[19] Further developments in the area of family life protection were helped by the African Charter on the Rights and Welfare of the Child, adopted by the Organisation

[19] Journal of Laws of 2000, No. 107, item 1128. Poland was the second state to sign and then ratify it in 1997. The convention entered into force after a third country ratified it and has been in effect since 1 July 2000.

of African Unity in 1990.[20] This charter draws on the CRC, recognising the same rights, but it foregrounds values that are important to Africa, such as the child's privileged position in the family and the child's duties vis-à-vis the family community and the nation [Jabłoński 2003, 253-56]. It is also important to note that after the Charter of the Rights of the Family was presented, a number of legal acts were legislated by international organizations aimed at protecting family life, which deal with specific spheres of this life, being crucial for the proper functioning of the family. We must underscore in this context that three more additional protocols were adopted for the CRC: Optional Protocol on the Involvement of Children in Armed Conflict and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (both passed on 25 May 2000[21]), and the Optional Protocol on a Communications Procedure, passed on 19 December 2011.

Similarly, in the CoE area the following documents have been adopted: Convention on Cybercrime (23.11.2001),[22] Convention on Contact with Children (15 May 2003),[23] or Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (25 October 2007).[24] It should also be noted that these acts of international law are not the only ones adopted by international organisations. In addition to these binding documents, others that have the nature of recommendations, declarations or guidelines have been adopted, for example Recommendation No. R (98) 8 of the Committee of Ministers to Member States on Children's Participation in Family and Social Life, CoE Parliamentary Assembly's Recommendation 1501 (2001) on Parents' and Teachers' Responsibilities in Children's Education, or the Committee of Ministers' Guidelines on Child-Friendly Justice. The instruments of international law presented above, as a matter of principle, implement the demands of the CRF, but none of them refers to the family in a comprehensive manner, addressing only some spheres of the family specified therein, or even of family members alone.

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[20] M. Gose, *African Charter on the Rights and Welfare of Child*, Community Law Centre – University of the Western Cape, Belleville 2002, Anexes II-IXX.

[21] Journal of Laws No. 2007, No. 91, item 608, and Journal of Laws of 2007, No. 76, item 494.

[22] European Treaty Series (ETS No. 185).

[23] European Treaty Series (ETS No. 192). The convention was ratified by Poland, published in the Journal of Laws No. 2009, No. 68, item 576.

[24] European Treaty Series (ETS No. 201), the convention ratified by Poland.

As noted above, both the CRF and the above-mentioned documents of international law, plus above all the axiological foundations of these documents, have started to influence the domestic legislation of individual European states.

2. So-called same-sex marriage and same sex-union[25]

This approach, however, with its underpinnings in the CRF catalogue of axiological values, already started to change in the late 20th century. At that time, same-sex civil unions were legalized in several European countries. Some allowed different-sex civil unions (partnerships). The first European state to do so was Denmark (in 1989). The chronology is as follows:

- Denmark (1989-2012, same-sex only),
- Norway (1993-2009, same-sex only),
- Sweden (1995-2009, same-sex only),
- Iceland (1996-2010, same-sex only),
- The Netherlands (1998, no gender distinction),
- France (1999, no gender distinction),
- Belgium (2000, no gender distinction),
- Germany (2001-2017, same-sex only),
- Finland (2002-2017, same-sex only),
- Luxembourg (2004, no gender distinction),
- Andorra (2005, no gender distinction),
- United Kingdom (2005, same-sex only; from 2019 no gender distinction in England and Wales; from 2020 no gender distinction in Northern Ireland; from 2021 in Scotland),
- Czech Republic (2006, same-sex only),
- Slovenia (2006, same-sex only),
- Switzerland (2007-2022, same-sex only),
- Greece (2008, initially only opposite sex; from 2015 no gender distinction),
- Hungary (2009, same-sex only),
- Austria (2010, same-sex only; from 2019 no gender distinction),
- Ireland (2011-2015, same-sex only),
- Liechtenstein (2011, same-sex only),

[25] In what follows, I shall address the term "same-sex marriage."

- Malta (2014, no gender distinction),
- Croatia (2014, same-sex only),
- Andorra (2014, same-sex only),
- Cyprus (2015, no gender distinction),
- Estonia (2016, no gender distinction),
- Italy (2016, same-sex only),
- San Marino (2018, no gender distinction),
- Monaco (2020, no gender distinction),
- Montenegro (2021, same-sex only).

A look into the past, however, reveals that for many states, legalizing civil unions was only the first step before further changes were made to family law, namely, the legalization of so-called same-sex marriages. Chronologically, below are presented European states that have legalized same-sex marriage (as of 2023):

- The Netherlands (2001),
- Belgium (2003),
- Spain (2005),
- Norway, Sweden (2009),
- Portugal, Iceland (2010),
- Denmark (2012),
- France (2013),
- England and Wales, Scotland (2014),
- Luxembourg, Ireland (2015),
- Finland, Malta, Germany (2017),
- Austria (2019),
- United Kingdom (2020),
- Switzerland, Slovenia (2022),
- Andorra (2023).

As we can see, the overwhelming majority of countries preceded the legalization of so-called same-sex marriages with the legalization of same-sex unions. Paths to achieve that were diverse. Austria, for example, granted gay and lesbian couples the right to enter into civil partnerships in 2010, but in 2017 the Austrian Supreme Court ruled that these unions are discriminatory by nature. The court argued gay men and lesbians should be granted the option to marry until 1 January 2019.[26] The Austrian legisla-

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[26] *Same-sex marriage. Distinction between marriage and registered partnership violates ban*

ture did not act to oppose the ruling, which led to the first same-sex marriages being "performed" in early 2019. In contrast, the Spanish parliament legalized same-sex "marriage" in 2005, guaranteeing equal rights to all married couples, regardless of sexual orientation, without prior legalization of civil unions.[27]

In sum, as many as thirty European countries provide for the legal possibility of entering into a so-called same-sex marriage or partnership. The first country to introduce legislation permitting same-sex couples to marry was the Netherlands, in effect since 1 April 2001 [Pawliczak 2014, 265]. Subsequently, the right to marry was guaranteed for homosexual persons in: Belgium, Spain, Norway, Sweden, Portugal, Iceland, Denmark, France, England and Wales, Scotland, Luxembourg, Ireland, Malta, Finland, Germany, Austria, Switzerland, Slovenia and Andorra.[28]

These countries are both EU member states and those outside of it, such as Norway and Iceland. Of the twenty-seven EU member states, the above-mentioned options (so-called same-sex marriages and civil partnerships of such persons) are excluded in only six: Poland, Lithuania, Latvia, Romania, Slovakia and Bulgaria. However, this state of affairs may soon change, due to scheduled parliamentary debates in some of them.

3. Evolution of the ECtHR judicial practice regarding the legalization of unions of same-sex couples

It needs to be emphasized that the European systems of human rights protection lack general solutions that explicitly mandate or prohibit states from introducing legal regulations allowing homosexual couples to marry on the same terms and conditions as heterosexual couples.

The Convention for the Protection of Human Rights and Fundamental Freedoms[29] adopts the traditional, that is, monogamous and heterosexual

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on discrimination, www.vfgh.gv.at [accessed: 09.03.2023].

[27] *Same-Sex Marriage Around the World*, https://www.pewresearch.org/religion/fact-sheet/gay-marriage-around-the-world [accessed: 09.03.2023].

[28] *Same-sex relationship*, https://en.wikipedia.org/wiki/Same-sex_relationship [accessed: 09.03.2023].

[29] Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2; (Polish) Journal of Laws No. 1993, No. 61, item 284 [henceforth: ECHR].

model of marriage. In compliance with Article 12, "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Within the meaning of the ECHR, marriage is a union between two people of different sexes, contracted in accordance with the requirements of the applicable national law. When the ECHR was adopted (4 November 1950), this model of marriage was taken for granted. For a long time to come, its provisions were interpreted in such a way that the introduction of the legal possibility for same-sex couples to marry depends on the state's vision of marriage and family. The ECtHR underscored in its rulings[30] that states possess a wide margin of discretion in this regard, which was grounded in the recognition that national authorities are best informed about the customs and traditions functioning in a particular society. However, as can be seen over the years, this approach has undergone major changes. Let me outline the direction of this evolution, which will be illustrated by the several cases that follow.

3.1. Schalk and Kopf v. Austria

In its judgement of 24 June 2010, the ECtHR dismissed an application concerning the institutionalization of same-sex unions in domestic law.[31]

The applicants argued that they were discriminated against based on their sexual orientation because they were denied the right to marry and – until the law on registered partnerships came into force – were unable to legally recognise their relationship.

The Court did not find that the lack of institutionalized same-sex partnerships in Austrian law was an infringement of the ECHR. When stating the reasons, the Court held that there had been no violation of Article 12 (right to marry), or Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life). It explicitly indicated in § 101 that "Article 12 does not impose an obligation to extend the regulation of marriage to same-sex unions", recognising that such an obligation could not be inferred from Article 14 in conjunction with Article 8 either. However, in § 108 of the reasons, the Court highlighted that "it is up to the signatory states, which are not hindered the provisions of Article

[30] The ECtHR rulings are available at https://etpcz.ms.gov.pl/searchetpc and https://hudoc.echr.coe.int/eng#{"documentcollectionid2":["GRANDCHAMBER","CHAMBER"]}.

[31] ECtHR judgement of 24 June 2010, application no. 30141/04.

12, as well as Article 14 in conjunction with Article 8 of the ECHR, to restrict access to marriage for same-sex unions. Not only did the Court not order the state to grant access to marriage for same-sex couples, but also explicitly refuted the argument that states that institutionalize homosexual unions in different form should do so in a way that follows the legal framing of marriage, arguing that states have been given a lot of leeway in such matters.

3.2. Gas and Dubuis v. France

Here the Court passed an almost identical ruling as in the above-cited case,[32] reasoning that the right to same-sex marriage does not follow from the ECHR. Regulation in this respect belongs to individual states. In addition, the Court made clear in § 66 of its assessment that "Article 12 of the Convention does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage," and the right to same-sex marriage cannot be derived from Article 14 in conjunction with Article 8 ECHR. It reiterated that states exercise a certain scope of discretion in this regard.

3.3. Hämäläinen v. Finland

The applicant, who was born male, married a woman in 1996. After that she underwent sex reassignment surgery in September 2009. In June 2006, the applicant changed her first names, but was unable to get her identification number changed to a number indicating female gender on public documents, due to her wife's lack of consent to convert their marriage into a registered same-sex partnership. Since the relevant office refused to register the applicant as a woman, she argued that full official recognition of her new gender could only become effective after her marriage was transformed into a registered same-sex partnership, and on this basis she brought a complaint.

The Court, which ruled as a Grand Chamber, found in its 16 July 2014 judgement that there was no interference with Article 8 ECHR.[33] The Court reasoned that the civil partnership is a genuine alternative that provides

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[32] ECtHR judgement of 15 March 2010, application no. 25951/07.
[33] ECtHR judgement of 16 July 2014, application no. 37359/09.

legal protection for same-sex couples to almost the same extent as the protection of married couples. The slight differences between these institutions do not imply the deficiency of the Finnish legal system with respect to the positive obligation arising from Article 8 ECHR. Moreover, it found that the transformation of the union would not have any repercussions for the applicant's family life, as it would not affect parental relations or responsibility for the custody and maintenance of the child. The Court's position was that no other problems arose under Article 12 ECHR, and that there was no infringement of Article 14 in conjunction with Articles 8 and 12.

3.4. Chapin and Charpentier v. France

The case concerns an application lodged by a marriage of two men, contracted before the mayor of Bègles and later declared invalid by the courts. The applicants claimed that limiting access to marriage only to heterosexual couples constitutes discriminatory violations of the right to marry. They also alleged that they were discriminated against based on their sexual orientation when exercising their right to respect for family life.

In its judgement of 9 June 2016, the Court found there was no interference with Article 12 in conjunction with Article 14 or a violation of Article 8 in conjunction with Article 14 ECHR.[34] It reiterated the conclusions made in *Schalk and Kopf v. Austria* (see above) that neither Article 12 nor Article 8 in conjunction with Article 14 can be construed as obliging states to grant same-sex couples access to marriage. The Court underscored that it had ruled along the same lines in the cases *Hämäläinen v. Finland* (see above) and *Oliari and Others v. Italy*, and considering the short time that has elapsed since their issuance, it cannot but give the same reasons for its ruling.

3.5. Orlandi and Others v. Italy

This case involves an application lodged by six same-sex couples (eleven Italian citizens and one Canadian citizen) about the impossibility of registering or recognizing their marriages contracted abroad in Italy as any

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[34] ECtHR judgement of 9 June 2016, application no. 40183/07.

kind of union. They also claimed they were subject to discrimination based on sexual orientation.

The Court, in its judgement of 14 December 2017, reasoned that there had been a violation of Article 8 of the ECHR because the state had not properly balanced competitive interests and owing to violations of the rights of couples.[35] In the Court's opinion, although the states had a wide discretion concerning the admission or registration of same-sex marriages, there were violations of the rights of those couples after they had married abroad. Moreover, Italy's failure to recognize same-sex marriages contracted abroad infringed the right to respect for the spouses' family life.

3.6. Fedotova and Others v. Russia

In the judgement of 17 January 2023, the ECtHR Grand Chamber ruled on the case *Fedotova and Others v. Russia*, which involved applications by three same-sex couples whose marriage applications had been rejected because Russian law stipulates that only a woman and a man can marry.[36] Alleging violations of Article 8 and Article 14 in conjunction with Article 8 ECHR, the applicants claimed that they could not in any way legalize their relationships in Russia, which constitutes discrimination on the basis of sexual orientation. The case was referred to the Grand Chamber after Russia requested that it hear the case after its ruling of 13 July 2021 that Article 8 ECHR had been violated. The Court took into account the apparent trend towards legalizing same-sex unions in CoE member states (§ 166–177 of the statement of reasons) and stated that Article 8 ECHR imposes a positive obligation to ensure a legal framework allowing same-sex couples to adequately recognize and protect their relationships (§ 178), but it rests with the states to decide in what form they will provide this (§ 189).

Notably, the Court did not accept the Russian government's arguments about the protection of the traditional family, since legalizing same-sex unions does not diminish the rights of heterosexual couples (§ 212), and about the beliefs of the majority of Russians, since the rights of a minority cannot depend on whether or not the majority agrees (§ 218), and on the protection of minors against the promotion of homosexuality, pointing out that by adopting laws prohibiting

[35] ECtHR judgement of 14 December 2017, application no. 26431/12.

[36] ECtHR judgement of 17 January 2023, applications nos. 40792/10, 30538/14, 43439/14.

the promotion of homosexuality, "the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society" (§ 222). The Grand Chamber ruled by a majority of 14 to 3 that Article 8 ECHR had been violated in the case. At the same time, the Chamber found it unnecessary to examine the allegation of interference with Article 8 in conjunction with Article 14 ECHR. Four dissenting opinions were filed with the verdict: 1) Judge Dariana Pavli of Albania and Judge Iulia Antoanella Motoc of Romania gave partially dissenting opinions, in which they criticized the lack of a ruling on the substantive issue regarding the allegation of a violation of Article 14 in conjunction with Article 8 ECHR; 2) Judge Krzysztof Wojtyczek, who opined that the ECtHR's law-making role is very limited, and that new rights can be made by concluding new treaties, as done in the past by the Member States. When the ECHR was ratified, Russia could not have foreseen such an interpretation of Article 8 as the Grand Chamber did. In addition, he observed that Russia, which is no longer a CoE member, is not bound by the ECHR, so this judgement and any other issued against Russia after September 16, 2022 should not have effect *erga omnes*; 3) Judge Alena Poláčkova of Slovakia argued that the composition of the Grand Chamber was unlawful due to the participation of a Russian judge in the ruling; 4) Judge Mikhail Lobov of Russia, who noted that there is no consensus within Europe on the legalization of same-sex unions, and that the Grand Chamber used the phrase "evident trend" illegitimately intending to ignore the fact that the population of countries where such unions have not been legalized constitutes almost half of the population of the CoE member states. He believes the ECtHR should not induce social change by means of judgements.

It should be noted that this ruling was made after Russia had been excluded from the CoE, but the Grand Chamber nonetheless determined that the ECtHR is competent to hear the case with respect to events prior to 16 September 2022.

Now, turning to a brief discussion of the ECtHR's evolving case law, the cited rulings allow us to observe that the Court's position evolved from granting the right to marry solely to heterosexual couples to thinking that the granting of such a right also to same-sex couples does not contravene the ECHR provisions. Also, the creation of opportunities for other forms of institutionalization of cohabitation for same-sex couples within

the internal legal order of states-parties to the ECHR was not considered by the Court as incompatible with the provisions of the Convention [Jaros 2015, 90]. This position, however, changed radically after the *Fedotova and Others v. Russia* judgement, in which it was considered that from Article 8 ECHR arises a positive obligation to ensure a legal framework for same-sex couples to have their relationship properly recognized and protected, and states have the discretion to determine how to achieve that.

To sum, the change in the ECtHR jurisprudence goes hand in hand with the dynamics of changes in the family legislation of European states that allow so-called same-sex marriages or introduce registration of civil unions.

4. Adoption of children by homosexual couples and surrogacy

Further changes in the area of family law that have been undertaken in many European countries have involved legalizing the adoption of children by homosexual couples. Currently, this option in available in twenty-one countries: Andorra, Austria, Belgium, Croatia, Denmark, Finland, France, Germany, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Switzerland and the United Kingdom.[37] In these countries, as well as in Czechia, Estonia and Greece, same-sex couples can be appointed as foster families, while in San Marino and Estonia a homosexual partner can apply to adopt the other partner's child.[38]

In Europe, too, the law on substitute maternity (surrogacy) has been amended. Regulations on surrogacy vary in countries that permit it. Despite the provision of Article 3 of the Charter of Fundamental Rights of the European Union[39] that "in the fields of medicine and biology, the following must be respected in particular: […] c) the prohibition on making the human body and its parts as such a source of financial gain" and Article 21 of the Oviedo Convention,[40] ratified by twenty-nine countries, stipulating

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[37] Based on *Same-sex adoption*, https://en.wikipedia.org/wiki/Same-sex_adoption [accessed: 20.03.2023].

[38] Ibid.

[39] *Charter of Fundamental Rights of the European Union* (2021/C 326/02) of 26 October 2012, OJ C 326/321.

[40] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Human Rights

a prohibition of financial gain, namely that "the human body and its parts shall not, as such, give rise to financial gain," some states do allow commercial surrogacy.

My inquiry into the legislation of selected European states permits the following conclusions:

Austria

Surrogacy is prohibited by Austrian law.[41]

Belgium

Only paid surrogacy is prohibited in Belgium.[42]

Czechia

In the Czech Republic surrogacy is only mentioned in § 804 of Law no. 89/2012, which provides an exception to the prohibition on adoption by immediate relatives and siblings. However, this does concern surrogacy [Svatoć and Konećna 2019, 200].

Finland

All surrogacy arrangements (both commercial and altruistic) are illegal.[43]

France

In France, since 1994, any surrogacy arrangement that is commercial or altruistic in character is illegal or unlawful and not sanctioned by law (Article 16-7 of the French Civil Code). The French Court of Cassation adopted this point of view in 1991. It ruled that if any couple agrees or arranges with another person that she is to give birth to the husband's child and hand over the baby after birth to that couple, and that she will decide not to keep the child, the couple entering into such an agreement cannot adopt the child. The court reasoned that such an arrangement is illegal pursuant to Articles 6, 353 and 1128 of the French Civil Code.[44]

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and Biomedicine), done at Oviedo on 4 April 1997. Available at https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=164.

[41] *Surrogacy*, https://www.bmeia.gv.at/en/austrian-consulate-general-new-york/service-for-citizens/civil-status-family/surrogacy [accessed: 20.03.2023].

[42] *International Surrogacy Laws*, http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=69&Itemid=99&lang=en [accessed: 20.03.2023].

[43] *Surrogacy abroad*, https://um.fi/surrogacy-abroad [accessed: 20.03.2023].

[44] *Cass., Ass. plén., May 31, 1991*, https://www.casebooks.eu/contractLaw1/chapter3/excerpt.php?excerptId=2663 [accessed: 20.03.2023].

Greece

Greece is the only European Union country with a comprehensive framework for regulating and enforcing surrogacy, according to the explanatory memorandum to Article 17 of Law L. 4272/2014. This option is now also extended to applicants or surrogate mothers whose permanent residence is outside Greece.[45]

Netherlands

Altruistic surrogacy is legal in the Netherlands. Only commercial surrogacy is illegal in both Belgium and the Netherlands.[46]

Spain

While surrogacy is not allowed in Spain (the biological mother's arrangement to give up her right to the baby is legally void), surrogacy is legal in the country where it is recognized as long as the mother has citizenship of the same country.[47]

Iceland

All forms of possible surrogacy are criminalized.[48]

Germany

All surrogacy arrangements (both commercial and altruistic) are illegal.[49]

Sweden

Surrogacy is illegal in Swedish health care, but it has no surrogacy regulations.[50]

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45 *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

46 *Legal and illegal aspects of surrogacy*, https://www.government.nl/topics/surrogate-mothers/surrogacy-legal-aspects [accessed: 20.03.2023].

47 *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

48 Ibid.

49 *Germany: Federal Court of Justice Rules on Legal Motherhood of Surrogate*, https://www.loc.gov/item/global-legal-monitor/2019-04-29/germany-federal-court-of-justice-rules-on-legal-motherhood-of-surrogate [accessed: 20.03.2023].

50 *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

Switzerland

Surrogacy is regulated in the Bundesgesetz über die medizinisch unterstützte Fortpflanzung (Fortpflanzungsmedizingesetz, 18 December 1998) and is illegal. The law prohibits surrogacy, and Article 31 provides for the punishment of physicians who perform in vitro fertilization for surrogacy or those who arrange surrogacy. A surrogate mother is not punished by law.[51]

Ukraine

As of 2002, surrogacy and surrogacy combined with cell donation have been legal in Ukraine. There are surrogacy clinics in Kiev and Lviv. According to the law, the donor or surrogate mother has no parental rights to the born child, and it is legally the child of the intended parents.

Surrogacy is regulated by Article 123 of the Family Code of Ukraine and the Order of the Ministry of Health of Ukraine on Approval of the Use of Assisted Reproductive Technologies in Ukraine dated 9 September 2013, no. 787. No special authorisation from any regulatory authority is required for this. Written informed consent of all parties (the prospective parents and the surrogate mother) participating in the surrogacy programme is mandatory. The prospective mother is to prove that there is a medical reason preventing her from becoming pregnant.

However, Ukraine does not support surrogacy for same-sex couples.

Ukrainian legislation allows the names of prospective parents to be stated, from the very beginning, in the birth certificate of a baby born as a result of a surrogacy programme. The surrogate's name, in contrast, is not mentioned in it. The baby is treated as legally "belonging" to the prospective parents from the very conception. A surrogate mother cannot keep a child after birth. Even if a donation programme has been followed and there is no biological relationship between a child and a future mother, their names will be indicated in the birth certificate (clause 3 of Article 123 of the Ukrainian Family Code).

Ukrainian law also permits research and commercial donation of gametes and embryos.[52]

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[51] Ibid.

[52] Ibid.

United Kingdom

Altruistic surrogacy is legal in the UK, but commercial surrogacy arrangements are prohibited under Section 2 of the Surrogacy Arrangements Act 1985. In addition, surrogacy advertising has been criminalized under Section 3 of the Surrogacy Act, while the Human Fertilization and Embryology Act 2008 adds an exception allowing non-profit agencies to advertise their services. Regardless of contractual or financial compensation for expenses, surrogacy arrangements are not legally enforceable by virtue of Section 1A of the Surrogacy Arrangements Act; therefore, the surrogate mother retains the statutory right to determine the "status" of the child, even if the two are not genetically related. Unless a parental or an adoption order is issued, the surrogate mother remains the legal mother of the child.[53]

Italy

According to the provisions of Law No. 40 approved by the Italian Parliament on 19 February 2004 (provisions on medically assisted procreation), the sale in any form of gametes or embryos, as well as surrogacy, is banned and punishable by imprisonment between three months and two years and a fine from 600,000 to one million euros (Article 12(6)). This ban was further supported by a judgement issued in 2017 by the Italian Constitutional Court (No. 272), which stated that "the practice of surrogacy constitutes an unbearable attack on women's dignity and deeply undermines human relations."[54]

Poland

As regards Polish law, the Family and Guardianship Code,[55] in Article 61[9] states explicitly that the mother of a child is the woman who gave birth to it. This provision is related to Article 189a of the Penal Code,[56] pursuant to which criminal liability for human trafficking can be incurred if a surrogacy arrangement is discovered. It is also worth citing Article 211a, which

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[53] *International Surrogacy Laws*, http://www.familylaw.com.ua/index.php?option=com_content&view=article&id=69&Itemid=99&lang=en [accessed: 20.03.2023].

[54] *Surrogacy laws by country*, https://en.wikipedia.org/wiki/Surrogacy_laws_by_country [accessed: 20.03.2023].

[55] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 2020, item 1359, as amended [henceforth: FGC].

[56] Act of 6 June 1997 – The Penal Code, Journal of Laws No. 2022, item 1138, as amended [henceforth: PC].

criminalizes both the giving up a child for adoption by a person with parental authority over the child and the adoption of a child by a person from whom the child is not descended and who is not the child's biological parent. Liability under § 1 arises if a person acts "for the purpose of obtaining a financial gain," or under § 2 if a person acts "for the purpose of obtaining a financial or personal gain, concealing this purpose from the court."

The summary laid out above makes it clear that surrogacy is prohibited in the vast majority of the countries listed. This applies to both altruistic and commercial surrogacy. In contrast, commercial surrogacy is illegal in Belgium, the Netherlands, the UK and Greece, while in Ukraine it is not legally regulated as commercial, being more akin to altruistic.

5. Hate speech in Europe vs. sexual orientation and gender identity in selected European countries

Austria (as amended in 2020)

Public incitement of violence or hatred on the basis of such aspects as cultural gender or sexual orientation is punishable by imprisonment for up to two years (Article 283 of the Austrian Penal Code).[57]

Croatia (as amended in 2019)

"Persecution of organizations or individuals promoting equality between people" is punishable by imprisonment for a term between six months to five years under Article 174 of the Croatian Penal Code.

It is punishable by imprisonment for up to three years to incite or make available material that incites violence or hatred based on such aspects as cultural gender, gender identification or sexual orientation through the press, radio, television, an information system or network, a public assembly, or otherwise in public.

Committing a hate crime on the basis of, among other things, cultural gender, gender identification or sexual orientation is an aggravating circumstance (Article 87 of the Croatian Penal Code).

[57] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:4,page:1 [accessed: 21.03.2023].

Nine offences have qualified forms if they were motivated by hatred with respect to the above aspects, among other things.[58]

France (as amended in 2022)

If a crime is accompanied, preceded or followed by words, written materials, images, objects or conduct in any way offensive to the honour or dignity of the victim or the group to which the victim belongs, based on, for example, gender, sexual orientation or gender identification, the upper limit of penalty is increased according to seven categories depending on the upper limit of penalty of the basic form (Article 132-77 of the French Penal Code).

It is punishable by up to three years' imprisonment and a fine to refuse to provide a service, deliver goods, rent out premises, obstruct business on the basis of, for example, gender, customs, sexual orientation or gender identification, as well as to make employment, admission to an internship, etc., dependent on these aspects (Articles 225-1 and 225-2 of the French Penal Code).

Practices, conduct and repeated proposals aimed at changing or suppressing sexual orientation are punishable by imprisonment for two years and a fine.

In qualified types, such as when an act is committed against a minor, a descendant, or a person under parental authority, the perpetrator faces a penalty of up to 3 years in prison and a higher fine (Article 225-4-13 of the French Penal Code).

Moreover, the court may deprive the perpetrator of parental authority or restrict it.[59]

Greece

Committing a crime by reason of such things as the sexual orientation or gender identification of the victim is an aggravating circumstance, resulting in an increase in the lower and upper limits of the penal sanction, ruling out a suspended sentence (Articles 79 and 81A of the Greek Criminal Code).[60]

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58 https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost_read_first%2Ccountry%3A110%2Cpage%3A1 [accessed: 21.03.2023].

59 https://www.legifrance.gouv.fr/codes/id/LEGITEXT000006070719 [accessed: 21.03.2023].

60 https://legislationline.org/search?q=lang:en,sort:most_read_first,country:100,page:1

Spain (as amended in 2022)

Committing a crime because of, for example, gender, gender identification, sexual orientation and the perpetrator's gender role bias is an aggravating circumstance (Article 22 of the Spanish Penal Code).

It is punishable by imprisonment for a term between one year to four years to provoke hatred, hostility, discrimination or violence on the basis of, among other things, gender, gender identification or sexual orientation, and to produce, develop, possess for the purpose of distribution, make available, distribute and sell written material and other materials that can be used directly or indirectly to incite hatred, hostility, discrimination or violence for the aforementioned reasons (Article 510(1) of the Spanish Penal Code).

The following are punishable by one to four years in prison and a fine: infringement of a person's dignity by engaging in activities leading to humiliation, disparagement, discrediting of such persons, on the basis of such qualities as gender, gender identification or sexual orientation; production, development, possession for the purposes of distributing, sharing, disseminating and selling written and other materials that can be used directly or indirectly to inflict such humiliation, disparagement and discrediting. If the said acts promote or foster an atmosphere of hatred, hostility, discrimination or violence against the listed categories of persons (Article 510(2) of the Spanish Penal Code).

It is punishable to deny access to a public service on the basis of, among other things, gender, gender identification and sexual orientation – the sanction being from 6 months to 2 years of imprisonment, a fine and a ban on practising a profession or holding office from one to three years (Article 511 of the Spanish Penal Code).

It is punishable to refuse, in the course of a professional activity or enterprise, to perform a service because of such aspects as gender, gender identification and sexual orientation – the penalties being a ban on holding office, practicing a profession or business for a period of one to four years.[61]

[accessed: 21.03.2023].

[61] *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444 [accessed: 21.03.2023].

Ireland

It is punishable to publish or distribute written materials, use words, behave, show written material, distribute, show, play audio or video recording, if these words, conduct or material can threaten, hurt, offend, incite hatred intentionally, or, given the circumstances, are likely to incite hatred against a group of people based on things like sexual orientation. The punishment is a fine or imprisonment for up to 2 years (Articles 1 and 2 of the Hate Crimes Act).[62]

Iceland (as amended in 2015)

It is punishable to ridicule, slander, insult, threaten and otherwise attack a person or group of people on the basis of, among other things, sexual orientation or gender identification – the punishment being a fine or imprisonment for up to 2 years (Article 233a of the Icelandic Penal Code); to refuse to sell goods or provide a service, or to deny access to a public place or assembly to a person on the basis of such aspects as sexual inclination – the punishment being a fine or imprisonment for up to 6 months (Article 180 of the Icelandic Penal Code).[63]

Malta

Committing a crime motivated by hatred on the basis of, for example, gender, gender identification or sexual orientation, increases the punishment by one or two degrees (Article 83B of the Maltese Penal Code).

Some chapters of the Penal Code additionally provide for an increase in punishment by one or two degrees if the crime is motivated by gender, gender identification or sexual orientation.

It is punishable to publish or distribute written material, use words, behave, show written material, distribute, show, play audio or video recording, if these words, conduct or material can threaten, hurt, offend, incite hatred intentionally, or, given the circumstances, are likely to incite hatred against a group of people based on things like sexual orientation. The punishment

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[62] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:96,page:1 [accessed: 21.03.2023].

[63] https://legislationline.org/search?q=lang%3Aen%2Csort%3Amost_read_first%2Ccountry%3A97%2Cpage%3A1 [accessed: 21.03.2023].

is a fine or imprisonment for a term between 6 and 18 months (Article 82a of the Maltese Penal Code).[64]

Monaco

It is punishable to provoke hatred or violence against persons or groups of people on the basis of such aspects as sexual orientation – the punishment being up to 5 years' imprisonment (Article 16 of the Law on Freedom of Expression).[65]

Portugal (as amended in 2017)

It is punishable to establish and organise organisations and develop organised propaganda activities that incite discrimination, hatred and violence on the basis of, among other things, gender, sexual orientation and gender identification, and to participate in such organisation and activities. In these cases the punishment is up to 8 years' imprisonment (Article 240 § 1 of the Portuguese Penal Code).

It is punishable to provoke acts, violence, defame or insult a person or a group of people, threaten a person or a group of people, incite violence or hatred based on, among other things, gender, sexual orientation and gender identification. The punishment ranges from 6 months to 5 years in prison (Article 240 § 2 of the Portuguese Penal Code).

Murder and grievous bodily harm have qualified forms if they are motivated by hatred based on things like gender, sexual orientation and gender identification (Articles 132 and 145 of the Portuguese Penal Code).[66]

Germany

It is punishable by imprisonment of up to 2 years or a fine to allow content that may violate the dignity of others by insulting, maliciously denigrating or defaming, among others, groups with a specific sexual orientation or a member of such a group, to reach the consciousness of a person belonging to such a group who does not wish that.

It is punishable to 1) incite – "in a manner suited to causing a disturbance of the public peace" – hatred against a national, racial, religious

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[64] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:88,page:1 [accessed: 21.03.2023].

[65] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:86,page:1 [accessed: 21.03.2023].

[66] *Código Penal*, https://www.codigopenal.pt/ [accessed: 21.03.2023].

group or group defined by ethnic origin, against sections of the population or individuals on account of their belonging to one of the aforementioned groups or sections of the population, or incite violent or arbitrary measures against them; 2) violate – "in a manner suited to causing a disturbance of the public peace" – the dignity of others by insulting, maliciously denigrating or defaming the said groups or sections of society, or persons belonging to one of the aforementioned groups or sections of the population. Such acts give rise to imprisonment of 3 months to 5 years (Section 130 (1) of the German Penal Code).[67]

Romania

Committing a crime on account of such aspects as the sexual orientation of the victim is an aggravating circumstance that may justify the extraordinary aggravation of the penalty – the imposition of a punishment above the upper limit of the sanction (Articles 77 and 78 of the Romanian Penal Code).

There is no crime of "hate speech" on the grounds of sexual orientation *sensu stricto*, but it is punishable to incite the public to hatred or discrimination against a certain category of persons, which is punishable by 6 months to 3 years of imprisonment or a fine (Article 369 of the Romanian Penal Code).[68]

San Marino (as amended in 2016)

It is punishable to commit or incite acts of discrimination or violence based on, among other things, sexual orientation; the sanction being second-degree imprisonment (Article 179 bis of the Penal Code of San Marino).

Committing a crime by reason of sexual orientation is an aggravating circumstance (Article 90 of the Penal Code).[69]

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[67] *German Criminal Code*, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [accessed: 21.03.2023].

[68] https://legislatie.just.ro/Public/DetaliiDocumentAfis/24810 [accessed: 21.03.2023].

[69] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:79,page:1 [accessed: 21.03.2023].

Slovakia

Several dozen types of offences have qualified forms if they were committed out of hatred motivated by, for example, gender or sexual orientation (§ 140 e of the Slovakian Penal Code).[70]

Slovenia

It is punishable to publicly provoke or incite hatred, conflict, intolerance or "cause" inequality on the grounds of such aspects as sexual orientation; the penalty is imprisonment for up to 2 years (Article 297 of the Slovenian Penal Code).[71]

Switzerland (as amended in 2018)

It is punishable to 1) publicly arouse discrimination or hatred against persons or groups of people on the basis of, for example, their sexual orientation; 2) publicly promote an ideology that discredits or denigrates such persons or groups; 3) publicly – by words, written materials, images, gestures, acts or in any other way that violates human dignity – to discredit or discriminate against such a person or group; 4) refuse a publicly offered benefit on the basis of, for example, sexual orientation. These offences are punishable by imprisonment for up to 3 years or a fine (Article 261 bis of the Swiss Penal Code).[72]

Sweden (as amended in 2018)

Motivation aimed at offending a person or a group of people on the grounds of, among other things, sexual orientation, gender identification or for similar reasons, is particularly noteworthy as an aggravating circumstance (Chapter 29 § 2 of the Swedish Penal Code).[73]

United Kingdom

If an offence is motivated by hostility towards persons of a specific sexual orientation, or if the offender – prior to, immediately before or after

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[70] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:77,page:1 [accessed: 21.03.2023].

[71] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:76,page:1 [accessed: 21.03.2023].

[72] *Codice penale svizzero del 21 dicembre 1937 (Stato 1° agosto 2023)*, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/it#fn-d6e10045 [accessed: 21.03.2023].

[73] https://legislationline.org/search?q=lang:en,sort:most_read_first,country:74,page:1 [accessed: 21.03.2023].

committing the offence – demonstrated hostility towards the victim because of his or her sexual orientation, this is an aggravating circumstance that the court is obliged to take into account ex officio (Article 146 of the UK Criminal Justice Act 2003).[74]

Italy

Currently, the Italian Penal Code does not contain provisions regulating hate crimes based on sexual orientation or transgenderism. Article 604-bis provides for punishability unless a given behaviour constitutes a more serious crime: 1) the proliferation of ideas related to the concepts of racial or ethnic superiority, or racial or ethnic hatred, incitement to discrimination or discrimination on racial, ethnic, national or religious grounds; these are punishable by a fine; 2) incitement to violence and acts of violence on racial, ethnic, national or religious grounds – punishable by up to 4 years of imprisonment.

According to Article 604-ter, when other crimes are committed for the purpose of discrimination or out of hatred for racial, ethnic, national or religious reasons, a penalty is to be imposed within the limits of the sanction increased by half. Membership in an organization whose purpose is to incite hatred or violence on racial, ethnic, national or religious grounds is punishable by 6 months to 4 years in prison.[75]

Summing up the results of our review of the laws implemented by the European countries shown above, it appears that most of them have typified in their penal legislation the crime involving the use of various forms of violence or hatred against people based on their sexual orientation. It is noteworthy that until recently most of them (e.g. England, Ireland) criminalized homosexual intercourse. Countries like Greece, Romania and Sweden have not typified a hate crime against homosexuals, but such offences provide grounds for aggravating the penalty. Only Italy does not explicitly address hate crimes against persons based on their sexual orientation, but a careful reading of Italian penal regulations warrants a conclusion that such acts would be considered by the courts as an aggravating circumstance. Regarding Poland, the Penal Code does not provide for a separate criminal qualification of hate crime based on sexual orientation. However,

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[74] https://www.legislation.gov.uk/ukpga/2003/44/section/146/enacted [accessed: 21.03.2023].

[75] *Dei delitti contro la persona*, https://www.altalex.com/documents/news/2014/10/28/dei-delitti-contro-la-persona [accessed: 21.03.2023].

considering the general provisions, the court, when examining a specific case, is obligated to take into account the motivation of the perpetrator, and therefore motivation based on hatred of homosexuals can be treated as an aggravating circumstance and exacerbate the penal sanction.

6. Age for legal expression of consent to sexual intercourse in Europe[76]

Our review of the regulations concerning the provision of conditions favouring the creation and functioning of the family in European countries will be more complete if we supply some information on the age when sexual intercourse becomes legal, or put differently – the age from which consent to sexual intercourse does not give rise to criminal liability.

6.1. Countries where the age of consent is 14 years old

Albania

Andorra

This age limit is raised to 18 years if there occurs an abuse of trust or dependency, or a coercive situation (Articles 147, 148).[77]

Austria

In a situation where the person is not mature enough to understand the meaning of the act, the limit is raised to 16 years.

The act is justifiable if the age difference between the parties is no more than 3 years.

It is also punishable to initiate sexual contact with a minor via the Internet.

Bosnia and Herzegovina

Bulgaria

The limit is raised to 18 years if the wronged party is one who does not understand the essence and meaning of the act.

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[76] The main sources of information are: the U.S. online database – www.ageofconsent.net and https://en.wikipedia.org/wiki/Ages_of_consent_in_Europe [both accessed: 22.03.2023]. If other sources are used, they will be referenced in respective footnotes.

[77] *Llei 9/2005, del 21 de febrer, qualificada del Codi penal*, https://www.bopa.ad/bopa/017025/Pagines/3BE2E.aspx [accessed: 22.03.2023].

Montenegro

In cases where the perpetrator is a teacher, guardian, adoptive parent, stepfather, stepmother, or other person abusing authority or power over a minor, the limit is 18 years. It is punishable to persist in cohabitation with a minor. It is also punishable for a legal guardian to consent to the cohabitation of a minor.

Lichtenstein

Macedonia

Cohabitation of an adult with a minor (under 18) is punishable.

Germany

A penalty may be waived if the age difference between the parties is slight and the perpetrator did not exploit the other party's lack of capacity for sexual self-determination. It is also punishable for a person over 21 to have intercourse with a person under 16 if the older person has taken advantage of the other's lack of capacity for sexual self-determination. As a rule, this act is prosecuted if requested, and the court may desist from applying a penalty if, given the victim's behaviour, the harm was minor. It is punishable to have intercourse with a person under the age of 18 by exploiting the coercive situation of such a person (Sections 176 and 182).[78]

Portugal

The age limit is increased to 18 years for offenders who exercise parental authority over the victim, who have been entrusted with the education or care of the victim. It is also punishable to use prostitution of persons under the age of 18. The limit is raised to 16 years if a minor's inexperience is exploited. It is also prohibited to encourage persons under 14 to engage in sexual activity (Articles 171, 172, 173, 174).[79]

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[78] *German Penal Code*, https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1771 [accessed: 22.03.2023].

[79] *Código Penal*, https://diariodarepublica.pt/dr/legislacao-consolidada/decreto-lei/1995-34437675 [accessed: 22.03.2023].

San Marino

Serbia

If the offender is responsible for the education, upbringing, supervision or care of a minor, the limit is raised to 18 years. Cohabitation with a minor is also prohibited.

Hungary

Here, the age of 12 to 18 is a mitigating circumstance.

Italy

In the case of prostitution, the limit is raised to 18 years and to 16 years in certain situations (trusted persons), the justification being the age difference of less than 4 years and the fact that the partners are at least 13 years old but under 18. Indecent acts performed in the presence of a minor are punishable. Public praise of paedophilia is also punishable (Articles 414-bis, 519, 530, 600-bis, 609-quater).[80]

6.2. Countries where the age of consent is 15 years old

Croatia

The act is justifiable if the age difference between the parties is no more than 3 years.

Czech Republic

The limit is raised to 18 years if intercourse occurs in exchange for payment, benefit, privilege or promises thereof.

Denmark

The limit is increased to 18 years when the perpetrator is an adoptive parent, foster parent, stepfather, stepmother, teacher or other person entrusted with the education and upbringing of a minor.

France

The limit is raised to 18 years if the perpetrator is an ascendant or has legal or de facto authority over the victim or abuses the authority of his

[80] *Dei delitti contro la moralità pubblica e il buon costume*, https://www.altalex.com/documents/news/2014/12/23/dei-delitti-contro-la-moralita-pubblica-e-il-buon-costume [accessed: 21/03/2023]; *Dei delitti contro la persona*, https://www.altalex.com/documents/news/2014/10/28/dei-delitti-contro-la-persona [accessed: 21.03.2023].

or her position. As of 2021, intercourse with a person under 15 is regarded as rape, unless there is an age difference of less than 5 years between the parties. It is also punishable to organize encounters involving indecent acts or sexual intercourse with minors present or participating (Articles 222-22, 222-25, 222-27).[81]

Greece

Until 2015, the limit was raised to 17 years in the case of sexual intercourse between an adult male and a minor male.

The act is justifiable if the age difference between the parties is less than 3 years.

Iceland

Monaco

Poland

Slovakia

Slovenia

Sweden

This limit is raised to 18 years if the victim is a descendant of the perpetrator, is under the guardianship of the perpetrator or a similar relationship, or is under the guardianship of the perpetrator by decision of a government agency.

It is justifiable when "it is obvious that due to the small age difference between the parties and other circumstances, no rape occurred."

6.3. Countries where the age of consent is 16 years old

Armenia

Azerbaijan

Belgium

The act is justifiable if the age difference between the parties is less than 3 years.

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[81] *Code pénal*, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000043405084/#LEGISCTA000043405084 [accessed: 21.03.2023].

Belarus

Estonia

In June 2022, the age limit was increased from 14 years.

The act is justifiable if the victim is at least 14 years old and the age difference between the parties is no more than 5 years.

Finland

This limit is increased to 18 years if the victim is a subordinate of the perpetrator. A penalty can be waived if the age difference is not significant or if there is a difference in the mental and psychological maturity of those involved.

Georgia

Spain

The limit is raised from 13 years in 2015, which is further raised to 18 years if the position, trust, power or influence has been abused.

The act is justifiable if the parties are of a similar age or stage of development and the intercourse is consensual. It is also punishable to contact a minor under the age of 16 for sexual purposes via the Internet and other means of distance communication, and to present sexual acts to a minor (Articles 181, 182, 183, 183 bis).[82]

Kazakhstan

Lithuania

Luxembourg

Latvia

Malta

In 2018, the age of consent was lowered from 18. The sanction varies depending on the age of the parties.

Moldova

The act is justifiable if parties are of similar age or maturity (Article 174 of the Moldovan Penal Code).[83]

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[82] *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*, https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444 [accessed: 21.03.2023].

[83] *Codul Penal al Republicii Moldova*, https://www.legis.md/cautare/getResults?doc_id=122429&lang=ro [accessed: 21.03.2023].

The Netherlands

There is a justifying context for minors differing slightly in age and who have a relationship that is consistent with social and ethical norms.

Norway

The court may waive a penalty if the parties are of a similar age or level of maturity.

Russia

Only a person who has reached the age of 18 bears liability. Intercourse with a person under 12 is treated as rape and incurs much harsher penalties than "ordinary" paedophilia does.

Romania

In 2020, the age of consent was increased from 15. The limit is raised to 18 years if the older party abuses his or her power or influence to gain sexual access to the victim.

The act is justifiable if the age difference between the parties is less than 3 years. It is also punishable to engage in sexual intercourse in the presence of a minor under the age of 13 to present pornographic content to such a minor, and to seek to meet a minor for sexual purposes (Articles 220, 221, 222).[84]

Switzerland

The act is justifiable if the age difference between the parties is 3 years or less. If the perpetrator is under 20 and there are special circumstances or the parties have entered into a marriage or registered partnership, prosecution or punishment may be waived. The limit is increased to 18 years when the perpetrator abuses a relationship of dependence based on teaching, trust, employment or still other dependence (Articles 187 and 188 of the Swiss Criminal Code).[85]

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[84] *Codul Penal*, https://lege5.ro/gratuit/gezdmnrzgi/cuprins-codul-penal?dp=gqytsojshe4do [accessed: 21.03.2023].

[85] *Codice penale svizzero*, https://www.fedlex.admin.ch/eli/cc/54/757_781_799/it#book_2 [accessed: 21.03.2023].

Ukraine

It is also punishable to propose an encounter with a minor for sexual purposes, also by means of remote communication (Articles 156, 156-1).[86]

United Kingdom

6.4. Countries where the age of consent is 17 years old

Cyprus

Ireland

Not applicable to married persons.

The act is justifiable if the victim is at least 15 years old and the age gap between the parties is no more than 5 years. However, this does not apply to cases of abuse of trust or coercive situations.

6.5. Countries where the age of consent is 18 years old

Turkey

If the minor is at least 15 years old, the crime is prosecuted only when requested.

Vatican

The limit is lowered to 14 years for women and 16 for men regarding cohabitation with a spouse.

Moving on to discuss the necessary age for lawful consent to sexual intercourse, it should be noted that there is no uniform age limit across Europe. The most countries (21) have an age limit of 16 years. The fewest countries at the limit at 17 (Cyprus and Ireland) and at 18 (Turkey and the Vatican). Poland, along with 10 other countries, opted for an age limit of 15. The remaining 15 European countries have an age limit of 14. The above data, apparently, demonstrates a wide discrepancy between the age of majority, which is specified in Article 1 CRC as the upper limit of childhood, and the age from which sexual intercourse can be legally consented to. Only two countries, Turkey and the Vatican (but with notable exceptions), stipulate the limit at 18 years.

[86] Кримінальний кодекс України (Kryminal'nyy kodeks Ukrayiny), https://zakon.rada.gov.ua/laws/show/2341-14#Text [accessed: 21.03.2023].

Conclusions

Now it becomes necessary to explain the reasons why I have used the expression "so-called same-sex marriages" throughout the paper. Apparently, the very strong emphasis on the institutionalization of same-sex unions in the CoE member states as well as in others, as presented in this study, and the corresponding evolving case law of the ECtHR, exert a very strong influence on the potential need to redefine the concept of family – which is fundamental to the Polish Family and Guardianship Code – also in the Polish legal system. This necessity has become very pronounced after a draft law on registered partnerships for same-sex couples was tabled in the Polish Parliament already in 2003.[87] The presentation of subsequent legislative initiatives has been accompanied by a debate on the legalization of so-called same-sex marriage or same-sex partnerships [Jaros 2015, 91].

At the same time, the literature demonstrates a contradiction inherent in the possible institutionalization of such a union and highlights that labelling it as marriage will render the latter meaningless [Banaszkiewicz 2004, 386; Sobański 2003, 226ff.]. Jerzy Słyk believes the institutionalization of such unions is unnecessary because the absence of regulation does not entail their discrimination [Słyk 2004, 13]. It has been pointed out that, in the case of Poland, the potential equation of homosexual marriage with heterosexual marriage would constitute an attempt to circumvent the Polish Constitution,[88] since it would contradict the well-established values in society, the centuries-old tradition of European culture, Christian culture and other religions, plus it will compromise the prospects for population growth, which guarantees social, economic, cultural and all other kinds of development that nurtures human rights [Wiśniewski 2009, 157]. In contrast, in the opinion of the Supreme Court President, the correct interpretation of Article 18 of the Constitution leads to the recognition that same-sex unions cannot be marriages, nor can they be equated with marriages. Similarly, a union of persons of different sexes who have not contracted marriage cannot produce the same effects as marriage, or effects

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[87] It was submitted to the Senate on 21 November 2003 (Senate Paper no. 548 of 10 December 2003). Another draft law on civil partnership agreements was filed on 19 May 2011 (Sejm Paper no. 4418).

[88] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended [henceforth: Constitution].

similar to those of marriage.[89] Aude Markovic took a similar stance, arguing that the introduction of marriage for same-sex couples is equal to denying its procreative potential, which would lead to the annihilation of the social dimension of marriage. In his view, demanding that a union that is not a marriage be granted marital rights stems from the failure to see what marriage is [Markovic 2019, 14]. Since the above-mentioned opinions overlap with mine, I use the term "so-called same-sex marriage" here.

Nevertheless, in order to formulate final conclusions we need to reference some representative but opposed opinions. In this context, the opinion held by Ryszard Piotrowski is of the essence, as he believes the assumption that granting rights to some parties means taking them away from others is unfounded. Also, one must take into account the mutability of legal culture and the concomitant changes in the catalogue of rights considered natural. In his view, Article 18 of the Constitution is not about banning the establishment of unions other than marriage, and a defence of marriage reduced to banning civil partnership unions would be a disproportionate interference in the sphere of freedom to choose a way of life, which forms the basis of individual freedom [Piotrowski 2012]. Also, of note are the demands addressed to states and included in a private document titled *Yogyakarta Principles* (2006).[90] The authors demand that states take all necessary legal measures to ensure the right to set up a family, also by having access to adoption or assisted procreation (including artificial insemination), without discrimination by reason of sexual orientation or gender identity.[91] Another opinion that goes even further is presented in a recent document titled *The 8 March 8 Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty.*[92] To illustrate the character of the document

[89] Comments of the Supreme Court to the parliamentary draft law on the civil partnership agreements for the Sejm Paper no. 4418 (6th term), p. 10.

[90] The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity; the original document can be found at https://data.unaids.org/pub/manual/2007/070517_yogyakarta_principles_en.pdf.

[91] Ibid., Principle 24.

[92] *The 8 March Principles for a Human Rights-Based Approach to Criminal Law Proscribing Conduct Associated with Sex, Reproduction, Drug Use, HIV, Homelessness and Poverty*, issued by the International Commission of Jurists in March 2023. The commission has consultative status with the UN Economic and Social Council, UNESCO, as well as the Council of Europe and the Organization of African Unity.

it will be sufficient to look at Principle 16 at length. It states: "Consensual sexual conduct, irrespective of the type of sexual activity, the sex/gender, sexual orientation, gender identity or gender expression of the people involved or their marital status, may not be criminalized in any circumstances. Consensual same-sex, as well as consensual different-sex sexual relations, or consensual sexual relations with or between trans, non-binary and other gender-diverse people, or outside marriage – whether premarital or extramarital – may, therefore, never be criminalized. With respect to the enforcement of criminal law, any prescribed minimum age of consent to sex must be applied in a non-discriminatory manner. Enforcement may not be linked to the sex/gender of participants or age of consent to marriage. Moreover, sexual conduct involving persons below the domestically prescribed minimum age of consent to sex may be consensual in fact, if not in law. In this context, the enforcement of criminal law should reflect the rights and capacity of persons under 18 years of age to make decisions about engaging in consensual sexual conduct and their right to be heard in matters concerning them. Pursuant to their evolving capacities and progressive autonomy, persons under 18 years of age should participate in decisions affecting them, with due regard to their age, maturity and best interests, and with specific attention to non-discrimination guarantees."

This kind of recommendation no doubt greatly interferes with cultural and religious norms still endorsed by the vast majority of the human population. What we find alarming, however, is that the document seeks to relax the requirements specifically for sexual relations with persons under the age limit imposed domestically for consent to sexual intercourse. Recommendations such as those presented above, even if they do not attain the force of law in the near future, will erode the already heavily impaired family, and render the protection of children against depravity or even paedophilia illusory.

As for the reactions of the Polish legislature to the changes discussed in most European countries, it should be noted that they have generally not met with acceptance. The Polish Family and Guardianship Code does not provide for the possibility of so-called same-sex marriages or homosexual unions in any other form. Neither does it provide for the adoption of children by same-sex couples. The situation looks somewhat different regarding the criminalization of so-called hate speech against homosexual persons. In this case, the provisions of the Penal Code come into play, but the Polish

legislator has not expressed a desire to set apart hate crimes against homosexual persons. It seems that this state of affairs is based on the view that such a separation would result in unnecessary casuistry and unreasonably individual treatment of LGBTQ people, who in this regard should be treated and protected in the same way as other citizens. It is pointed out, however, that by virtue of Article 53 of the Penal Code (general directives for sentencing), the court (in addition to other circumstances listed in this provision) takes into account in particular the motivation and conduct of the perpetrator. On the other hand, Article 53 § 2a point 5, lists as an aggravating circumstance the commission of a crime resulting from a particularly culpable motivation, which increases the penal sanction.

Since the position of the Polish legislator with regard to the age for lawful consent to sexual intercourse, surrogacy and the evolution of ECtHR case law has been discussed in specific parts of this article, there is no need to do so again.

Due to a very fast-paced progress, which is inducing increasing degradation of the role of the family founded on marriage, I propose that legislative measures be taken so that family relations can be reinforced. In the area of Polish family law, it is necessary to overhaul the Family and Guardianship Code, which has been in effect since the 1960s, and to seriously consider the family code developed by the Family Law Codification Commission appointed by the Ombudsman for Children, along with the institution of parental responsibility envisaged therein. In regard to international law, I believe it would be desirable to take action to call for a Convention on the Protection of the Rights of the Family. I have developed a draft of such a convention based on my compilation of excerpts from certain provisions: the so-called Istanbul Convention (which is not biased ideologically), the draft Convention on Family Rights developed by experts of the Ordo Iuris association, the abovementioned draft of the Family Code, and my own reflections. To close, I would like to thank the employees of the International Procedures of Human Rights Protection Division of the Ministry of Justice Department of International Cooperation: Justyna Semenović-Yasina, Barbara Ubowska, Maciej Delijewski and Piotr Mioduszewski for their assistance in collecting statistical data and information about the ECtHR rulings presented in this paper.

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DOGMATIC AND LEGAL GROUNDS FOR THE ADMINISTRATION OF MASS INTENTIONS BY THE PARTICULAR CHURCH LEGISLATOR

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Abstract

Benedict XVI distinguishes between *munus* and *potestas* as useful concepts in understanding the authority of the diocesan bishop. While the concept of *potestas* goes back to the Roman law of jurisdiction, the *munus* terminology is relatively new, since it stems from the theology of Dietrich von Hildebrand, who distinguished between *munus sanctificandi*, *munus docendi* and *munus regendi*. As highlighted by Pope Benedict XVI, thanks to the orders of the episcopate, the bishop shares in the *munus*, which is not equal to *potestas*; therefore only the diocesan bishop, who persists not only in *communio* but also in *communio hierarchica* with the Catholic Church, enjoys legislative power, which he exercises directly; however, his sacred power of the sacraments can be exercised through sacred ministers, and in the case of the executive power also through the lay faithful, by virtue of *missio canonica*. The bishop implements that by administering Mass intentions and offerings donated in the diocese.

Keywords: bishop, power in the Church, intentions, offering, stipend, Mass, *potestas*, jurisdiction, *munus*

Introduction

The Eucharist is considered the greatest treasure of the Church, both the source and the culmination of all evangelization, since its purpose is to unite people with Christ and in Him with the Father and the Holy Spirit.[1] As Pope Francis said, "The bishop who does not pray, the bishop who does

[1] John Paul II, Litterae encyclicae *Ecclesia de Eucharistia* (17.04.2003), AAS 95 (2003), p. 433-75; English text available at: https://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/hf_jp-ii_enc_20030417_eccl-de-euch.html.

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not listen to the Word of God, who does not celebrate every day, who does not regularly confess – and the same for the priest who does not do these things – in the long run lose their union with Jesus and becomes so mediocre that they do not benefit the Church."[2] On this account, the priest should celebrate Holy Mass daily, with a clean heart that is free from attachment to sin, even with no faithful attending. Legislators of particular Churches emphasize that due to the holiness of the sacrament, the priest is obliged to firmly eschew the temptation either to "abuse" the gift of the Eucharist by celebrating Mass unreasonably frequently solely by virtue of accepted Mass intentions, or to too easily abstain from celebrating in the absence of intentions [Lewandowski 2019, 208].

1. Authority to celebrate the Eucharist

Ministerial priests (*sacerdotes ministeriales*) enjoy *potestas sacra*, whereby they build up (*efformare*) the priestly people and govern them (*regere*) [Skonieczny 2013, 19-20]. At this point, it will be instructive to cite the decree *Presbyterorum ordinis*, in which the conciliar fathers underscore that all presbyters in general participate in *potestas sacra* as "co-workers of the episcopal order" (*Ordinis episcopalis cooperatores*).[3] As regards those who empowered with *munus sanctificandi*, the 1983 Code of Canon Law[4] uses the term 'sacred pastors' (*sacri pastores*), whenever it refers to bishops or other persons endowed with episcopal authority (Canon 212 § 1), pastors (*pastores*) when other pastoral workers are mentioned, such as pastors in the sense of *parochus* (Canon 519) and sacred ministers (*sacri ministri*), when clergy are meant (Canon 207 § 1), that is, bishops, presbyters and deacons (Canon 1009 § 1) [Kołodziej 2019, 119].

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[2] Francis, General audience of 26 March 2014; https://www.vatican.va/content/francesco/en/audiences/2014/documents/papa-francesco_20140326_udienza-generale.html.

[3] Vatican II, Decretum de presbyterorum ministerio et vita *Presbyterorum ordinis* (7.12.1965), AAS 58 (1966), p. 991-1024, no. 3; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651207_presbyterorum-ordinis_en.html [henceforth: PO].

[4] *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.

Universal canonical doctrine does not question the fact that *sacra potestas* has existed since the beginning of Christianity. As Belda J. Iniesta underscores, it derives from the Roman law of jurisdiction [Iniesta 2015, 12-13].

In the early Church a distinction was made between law and the exercise of law, the acceptance of holy orders and having the power of orders. Literature cites the case of Saint Jerome, a cardinal and secretary to Pope Damasus, who was ordained to the presbyterate, but, as tradition has it, he would not celebrate Mass at all. While such situations occurred in the early centuries of ecclesiastical practice, they were not reflected in doctrine [Stickler 2018, 54-67; Kowalczyk and Kuska 2023].

Saint Thomas Aquinas held that claiming that a priest who does not hold a pastoral office is not obligated to celebrate Mass makes no sense, as everyone is obligated to exercise the grace granted to them, which agrees with the teaching of Apostle Paul, who noted that divine grace must not be received in vain (2 Corinthians 6:1). Aquinas argues that a priest who is not a pastor of souls cannot refrain entirely from celebrating Mass. It appears that he should celebrate Mass at least on major feasts, especially when the lay faithful are accustomed to receiving Holy Communion.[5]

The Middle Ages and the emergence of the concept of benefice led to the splitting of holders of sacred authority into those administering sacraments and those holding offices, albeit not in doctrine but in practice [Garroté 1999, 260-64].

In the *Roman Catechism* (1566),[6] the separation of the power of orders from the power of governance became fully apparent. For while the power of orders pertained to the real Body of Christ in the Most Holy Eucharist, the power of governance was linked to the Church as the Mystical Body of Christ [Skonieczny 2013, 25].

A significant contribution regarding the nature of the powers to govern souls and administer the Eucharist was made by Alvaro d'Ors, who distinguished between *auctoritas* and *potestas*. Although both concepts concur in practice, their social functions differ slightly, so it is possible

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[5] Aquinas, *Summa Theologica*, III, q. 82, a. 10; English translation by Fathers of the English Dominican Province, available online at: https://www.newadvent.org/summa.

[6] Pius V, Clemens XIII, *Catechismus ex decreto Concilii Tridentini ad parochos*, Rome 1566.

to distinguish between *auctoritas*, or a socially accepted truth, and *potestas*, the socially recognized will of the legislator [d'Ors 1973, 23-35].

As Pope Benedict XVI explained, episcopal consecration enables one to participate "ontologically" in *sacra munera* 'sacred tasks', which is not tantamount to possessing *potestas sacra*.[7] *Munera sacra* should be actualized or determined through the *missio canonica* of the competent hierarchical authority – only in this way do they become *potetas sacra*. Therefore, *communio* through the sacra received is not sufficient; one needs *communio hierarchica* with a head and a college of bishops by virtue of a canonical mission, so the bishop's share in *munus docendi*, *sanctificandi* and *regendi* follows from his ordinations, but not in *potestas sacra*, which belongs only to the Roman Pontiff and local bishops[8] [Skonieczny 2013, 31-34].

The distinctions between *potestas sacra* and *sacra munera*, as well as *communio* and *communio hierarchica*, carry concrete legal consequences. Within their particular Churches, bishops play the roles of good fathers and caring shepherds. They are in charge of instruction, sanctification and direction of the people of God entrusted to them, providing advice, encouragement, and good example. It should be noted that they also exercise their legislative power if necessitated by the good of the diocesan community. The legislative power, besides the executive and judicial powers, is a vital element of the ecclesiastical power of governance. Indisputably, the ecclesiastical legal order, which inheres in the life of the Church as an organized community, presupposes the existence of a legislative power in it. The exercise of legislative power by the diocesan bishop is a highly responsible task, which is confirmed by the legal stipulation that the bishop can only exercise this power in person (Canon 391 § 2) [Pawluk 1991, 34-35].

The terms *auctoritas* and *communio hierarchica*, used by d'Ors and Benedict XVI, respectively, emphasize the third dimension of the unity of the Catholic Church – the so-called social bond, known as hierarchical (*vinculum sociale seu hierarchicum*). Let us recall that according to Roberto Bellarmino's theory, Catholics are united by three bonds of unity, *vinculum symbolicum*

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[7] Benedict XVI, Allocutio *Expergiscere homo ad Romanam Curiam ob omina natalicia* (22.12.2005), AAS 98 (2006), p. 46.

[8] Cf. Benedict XVI, Address to the Newly Ordained Bishops (21.09.2006), https://www.vatican.va/content/benedict-xvi/en/speeches/2006/september/documents/hf_ben-xvi_spe_20060921_convegno-vescovi.html.

(profession of faith), *vinculum liturgicum* (liturgy – sacraments), and *vinculum sociale seu hierarch* mentioned above [Pawlowski 2015, 192].

With this in mind, one might conclude that *potestas sacra* has a dualistic sacred-jurisdictional character. The sacred dimension would involve *vinculum symbolicum* and *vinculum liturgicum*, and the jurisdictional dimension would be comprised of *vinculum sociale seu hierarchicum*. Piotr Skonieczny believes the two "natures" of *potestas sacra* – the (sacramental) power of orders and the (jurisdictional) power of governance – are intertwined, intrinsically and inseparably linked, but can only be differentiated conceptually [Skonieczny 2013, 30-37].

According to Klaus Mörsdorf, the Second Vatican Council was able to unite the two powers, ending the separation between consecration and office. This unity follows from both having the same source: the sacrament of holy orders. On this account, Mörsdorf claims, the risk of instrumentalization of power was avoided. However, he argues that the power of the orders and the power of jurisdiction are not identical, even though they are part of *potestas sacra*. The difference between the two is functional and is visible in strong coordination and full complementarity. In this way, the power of jurisdiction appears as a principle regulating the exercise of the power of orders. Since the power of orders – inalienable and permanently effective – can be abused, it must, then, be controlled by ecclesiastical authority. Thus, the function of the power of jurisdiction will be to order the life of the Church by means of law. For Mörsdorf, all authority in the Church is sacred since its source lies in episcopal consecration. However, this sole source of power has two channels through which it grants *potestas*: ministerial consecration and canonical mission. So, he argues, *missio canonica* involves delegating a specific *munus* (i.e., a particular task) to or entrusting one with a specific group of the faithful/territory. Canonical mission, therefore, has a separating role that serves to emanate universal episcopal power, sacramentally transmitted and with a solid foundation. However, this is not incidental to *potestas iurisdictionis*, because the outward structure – the personal element – is an essential element of human communion, and therefore also of the Church; *potestas iurisdictionis* cannot be validly constituted until a canonical mission is assigned to it [Mörsdorf 2008, 235-79].

So understood, *potestas sacra* can be exercised within the communion of the Church. Thus, *potestas sacra* is neither the authority of the people

of God nor the power over them – rather, it is authority among the people of God. *Communio* and the derived term *excommunicatio* are prevalent in old Christian literature. Both concepts refer to the legal situation of the baptised. Thus, not only *excommunicatio*, but also *communio* were used purposefully as a legal concept. *Communio* is a "sacramental institution" with specific membership conditions, the discipline and organisation. The ancient Church consciously calls itself *communio sacramentorum* – a community of people united by sacraments [Sobański 1987, 6-19].

It would be correct to say, then, that the priest, by the power of his orders, is "authorised" to celebrate Mass [Janczewski 2007, 102-107], but cannot legitimately do that without incardination and canonical mission [Krawczyk 1980, 3-5], granted by a specific administrative act, whose purpose in the canonical legal order remains closely related to the good of the Church interpreted as *communio* [Dzierżon 2012, 278]. It follows that the presbyter enjoys jurisdiction to celebrate Holy Mass, since the law does not require him to have *authorisation* to do that, as in the case of confession [Skonieczny 2017, 69-72]. Therefore, one can hardly speak of "authorisation to celebrate Mass" granted by an external act *vis-à-vis* the power of orders. Zbigniew Janczewski correctly notes that *facultas* (authority) has the nature of a power of attorney and is a constitutive element of the act; in contrast, the priest celebrates Mass validly by virtue of his ordination alone – the important thing is, above all, the subjective element for the act of ordination to be valid, while for sacramental legitimacy and effectiveness (having the legal effect of *communio*) incardination and canonical mission are necessary [Janczewski 2011, 251-57]. Likewise, the possibility of celebrating Mass cannot be treated as a privilege, because a privilege as such is permanent, but it can expire; in contrast, the power of orders never ceases, so treating (unfavourably) the celebration of Holy Mass as a privilege is wrong [Dzierżon 2012, 25-29]. Moreover, the authority to celebrate Mass cannot always be treated as an obligation. At no point does the CIC/83 obligate priests to celebrate Mass daily, but only recommends that (Canon 904) [Pérez Marín 2018, 108; Lewandowski 2021, 181-84]. However, although the legislator does not explicitly prescribe the daily celebration of the Eucharist, it does so implicitly by imposing an obligation to pursue holiness[9] on two accounts: baptism (Canon 217) and ordination (Canon

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[9] For more on this, see Lewandowski 2019, 393-403; Lewandowski 2021, 181-91; Lewandowski

276). In documents other than the 1983 Code[10] the universal legislator adds that the pursuit of holiness is realized, above all, through the celebration of the Eucharistic sacrifice, since the purpose of the priest's life is the bond with Jesus and the Church, and this flows from Holy Mass, in which the life of the presbyter is immersed. Moreover, as Pope Paul VI noted, graces cannot be obtained by means of Communion alone in equal abundance, so the practice of receiving Communion without celebrating the Eucharist would mean that the obligation to strive for holiness is not realised in full. Paul VI also spoke against critical appraisals of private Mass. In his opinion, a privately celebrated Mass can be considered fruitful but only – as ecclesiastical regulations and legitimate traditions require – with one acolyte serving and another responding, for Mass celebrated in this way offers many special graces for the salvation of the priest himself and the faithful, the whole Church and the world.[11]

Additionally, Holy Mass becomes an obligation in the strict sense in positive law (Canons 948-949) and natural law when a priest accepts an offering with the intention of celebrating the Eucharist for a specific intention [Lewandowski 2019, 135-39], as well as when, by virtue of his office, the presbyter is obliged to apply a Mass for the people (Canons 388 and 534) [Sitarz 2006, 99-101] and also to observe Canons 222 § 1 and 1246 § 1 mandating participation in the Eucharist on Sundays and prescribed holidays [Mazur 2021, 95-101]. Finally, it is obligatory to celebrate Mass also in the case of bination when there is a shortage of priests and a just cause (*iusta causa*) is present, and when trination occurs on Sundays and prescribed holidays when there are not enough presbyters and there is a pastoral necessity [Kodzia 2013, 157-58]. However, the obligation of daily Mass can occur not only under an ecclesiastical law, but also by legal custom [Lewandowski 2017, 132-34]. Church history mentions priests who celebrated seven to nine Masses on a single day, for example, Pope Leo III, who lived at the turn of the 8th and 9th centuries. Pope Paschalis I (817-824) says openly that Mass can be celebrated every day, "for every day we

2022, 27-36.

[10] John Paul II, Adhortatio apostolica postsynodalis de Sacerdotum formatione in aetatis nostrae rerum condicione *Pastores dabo vobis* (25.03.1992), AAS 84 (1992), p. 657-804, no. 16; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_25031992_pastores-dabo-vobis.html; see also *PO* 14.

[11] Paul VI, Litterae encyclicae *Mysterium Fidei* (3.09.1965), AAS 57 (1965), p. 753-74, no. 3.

sin, slightly at least", therefore Christ the Lord gives Himself up mystically for us every day [Pastuszko 1994, 104]. These practices bear witness not so much to a duty but rather a custom that enables the daily celebration of Mass. In a specific case, the legal custom concerning the daily celebration of the Eucharist is no longer a possibility but a duty with regard to so-called Gregorian Masses [Bejda 2020, 9-67].

2. Authority required by law to administer Mass offerings

Over time, *communio* became a technical term for the Eucharist. So in practice the referents of *communio* and *potestas sacra* ceased to overlap, as *communio* was replaced by a new term – *societas cristiana* – where *communio* should be practised. Authority in the Church thus came to be conceived as authority in a perfect community (*societas perfecta*), following the example of state authority and state community, leading to the 1917 codification, which was the first in the history of the Catholic Church [Sobański 1987, 6-19].

In the 1917 Code of Canon Law[12] only clerics could exercise the power of orders and jurisdiction. The precept of Canon 118 CIC/17, whose wording reflected a distinction between two types of power – by holy orders and jurisdiction – took account of the sources of each power: the power of orders was vested only in those clerics who received the presbyterate by divine law. In contrast, the power of jurisdiction – albeit possessed only by the clergy – originated from ecclesiastical law in accordance with doctrine. Authors like Mörsdorf, for example, interpreted the Second Vatican Council as the abolition of the separation between the power of orders and the power of jurisdiction. For them, the constitution *Lumen gentium*[13] (no. 21) put the two powers on equal footing, thus reviving the idea of power functioning in the first millennium, whereby the separation – standard in the second millennium – did not exist [García-Nieto Barón 2023, 210].

For Bertrams, the exercise of jurisdictional power necessarily involves having the sacrament of holy orders, so under no circumstances can

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[12] *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: CIC/17].

[13] Vatican II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-75; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html.

a layperson perform an act that implies authority. In fact, he contends that whenever history presents cases of lay persons exercising such authority, they should always be classified as abuses. However, he posits that the lay faithful are capable of exercising public authority in the Church in some cases, because not all public authority implies power of jurisdiction. Other authors, however, did not see it that way; this distinction led to the confrontation of divergent positions in the CIC/83 codification work [Bertrams 1972, 526-27].

Eugenio Correcco, for his part, believes that the problem of authority must be resolved theologically – it is not the question of legal technique. In fact, he confirms that the 1983 Code addresses this issue in positivist terms, as it adopts, at least formally, the division of powers implemented by state legislation, distinguishing between legislative, administrative and judicial powers [Correco 1984, 198-201].

According to Remigiusz Sobański, a consistent result of the legislator moving away from the *ius* of naturalism and adopting a positivist concept is the interpretation followed by Canons 130-144 CIC/83 of the model of the power of governance, without recourse to jurisdiction or an equivalent concept. This is particularly apparent, Sobański argues, in the law regulating the sacraments. The administration of sacraments, as prescribed by the 1983 Code, is not an act placed by the power of orders and jurisdiction, but only power of orders – so it is not intrinsically linked to the power of governance. Besides faith and sacraments, other secondary factors were accounted for: those determining the status of a community member [Sobański 1987, 16-19]. They are objective and subjective, as some of the requirements are easily verifiable in objective terms, such as technical or vocational education. Others are more subjective, for example, the candidate's good reputation, his moral integrity, or his appropriate testimony of life. These conditions show that the Church cannot be likened to a bureaucratic or employment structure, but that there exists some supernatural logic transcending the governing function itself and presupposing certain requirements [García-Nieto Barón 2023, 223].

The principal question was how to determine the source of authority and whether *munus* and *potestas* are equivalent. The issue of different interpretations may seem theoretical, with no practical implications. However, this is not the case, because for all practical purposes we are interested in how the authority of the pope and the diocesan bishop is understood,

whether the lay faithful in the Church can take possession of offices that involve the power of governance [ibid., 258].

The first group of canonists believed that authority, given by Christ, issues from episcopal consecration, and canonical mission establishes the manner in which it is to be exercised, but does not impact authority. The second group was of the opinion that authority is conferred partly by ordination and partly by canonical mission, both elements being indispensable. For the last group, episcopal orders form the ontological foundation of the power of governance, which is conveyed by *missio canonica*; for them, decentralization and delegation of authority are possible [García-Nieto Barón 2023, 207].

According to María García-Nieto Barón, the stance of the third group turned out to be binding on the universal legislator [ibid., 216]. Javier Hervada was a notable representative of the third group of canonists. He argues that in accordance with the tripartite division of the *munus* made at Vatican II, a distinction must be drawn between the power of orders and the power of jurisdiction. The power of orders is obtained through the sacrament and enables the recipient to administer sacraments. The power of jurisdiction, in contrast, refers to the ability to organize, direct and manage the life of the Church. For Hervada, the latter power is fully vested in those who were ordained to the episcopate; it permits a broad devolution, which is accomplished through canonical mission. Although this deconcentration typically affects the ordained faithful, we are reminded by Hervada that the continuous practice of secondary bodies makes it clear that ordination is not necessary for that because they do not act *in nomine Christi*, but in any case *in nomine Papae* or *in nomine episcopi* as the sources of jurisdiction. On this account, there is no need for "Christo-conformation" (*cristoconformación*), as these offices are not ones for which ordination is required, so Canon 129 § 2 CIC/83 does not apply [Hervada 2014, 224-28].

This is supported, as Gianfranco Ghirlanda holds, by no. 5 of the principles and criteria for the functioning of the Roman Curia laid down in the Apostolic Constitution *Praedicate Evangelium* as well as by Article 15 of the Apostolic Constitution *Praedicate Evangelium*,[14] both resolving the question

[14] "Each curial institution carries out its proper mission by virtue of the power it has received from the Roman Pontiff, in whose name it operates with vicarious power in the exercise of his primatial *munus*. For this reason, any member of the faithful can preside over

concerning the ability of the laity to accept offices and imply the exercise of the power of governance in the Church by the laity, provided that they do not require priestly ordination and indirectly confirm that the power of governance in the Church does not flow from the sacrament of holy orders, but from the canonical mission; otherwise the provisions of the constitution would not be valid [Ghirlanda 2022].

Umberto Betti explains that the members of the Commission for the Drafting of the Code of Canon Law would discuss various opinions of doctrine on the exercise of power of governance by the laity. In fact, the first proposed wording of the canon used the term 'participation' to describe the action of the laity holding offices of authority. While some endorsed this interpretation, others favoured the view that the non-ordained laity could by no means exercise *potestas*. A more radical group demanded that the second part of Canon 129 should be deleted to avoid any reference to the laity having the power of governance. Others suggested that the verb 'cooperate' should be restated as 'help'. Eventually, it was agreed to replace 'participate' with 'cooperate', hence the prescript – perhaps not persuasively enough – articulates the legislator's intent [Betti 1983, 628-47].

Such an idea of authority in matters of diocesan financial management, for example, was implemented in the norms of the Spanish Bishops' Conference, which do not exclude the laity from management, while emphasizing their – more often than not – professional qualifications.[15]

3. From the iusnaturalism to legal positivism in the law on mass offerings

In the first instance, we should appreciate the value of research based on the theory of naturalistic theories of *ius*. Following Hervada's definition

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a Dicastery or Office, depending on the power of governance the power of governance and the specific competence and functions of the Dicastery or Office in question." Francis, Constitutio apostolica *Praedicate Evangelium* de Curia Romana eiusque servitio pro Ecclesia in mundo (19.03.2022), "Communicationes" 54 (2022), p. 161-93; English text available at: https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html [accessed: 15.02.2024].

[15] Conferencia Episcopal Española, *Una casa de cristal El camino de la transparencia y el buen gobierno en la Iglesia* (9.03.2021), /https://www.conferenciaepiscopal.es/wp-content/uploads/2021/03/Una-casa-de-cristal-Resumen.pdf [accessed: 15.02.2024], p. 25.

of justice in the context of Mass offerings, we see that the obligation to ensure a thing (Mass), and the simultaneous obligation to give a Mass offering, are not based solely on justice conceived as a virtue of the priest or a lay person (morality). This is so because the central element is not the virtue of justice, but the law (*lex*) that determines the thing due. In the case of Mass offerings, what matters is the well-established custom of making offerings when placing Mass intentions. This custom legally sanctions the title under which a thing is due, and it is attached not to persons but to things. What is just precisely corresponds to what is due to someone – neither in excess nor below what is due, according to Hervada's precise formulation. One who gives less does not fulfil his or her obligation, does not provide the other party with what they deserve, what is due to them – and this constitutes an act of injustice. In contrast, one who gives in excess is offering something he or she is not entitled to – and this is generosity; therefore, what is just is what is due to someone. For a faithful person who requests a Mass to be applied for a specific intention, what they are entitled to is the specific Mass they are asking for. As for the priest, what he is to expect from the believer is a specific offering that he or she will make [Hervada 2011, 22-42].

Robert Kantor notes that the existence of law gives rise to the virtue of justice, and not the other way round [Kantor 2017, 149]. In other words, law (*ius*), or the thing – in this case the offering – obliges the priest to deliver on the agreement, whether he is an inherently just or unjust. If a believer requests the application of an intention, it is of secondary importance whether he or she is righteous or a person of low morality.

Paweł Lewandowski holds that a just compensation for a priest who performs a sacred service is due not only by custom, but also by natural law. As provided by Canon 948, the acceptance of any offering from a believer obliges the priest to apply his or her intention in accordance with the agreement, since this situation creates the so-called "knot of justice". The legal grounds for entering into this type of contract can be found in the long-lived custom sanctioned by Canon 945 [Lewandowski 2019, 171].

Pio Vito Pinto, referring to the general principle formulated in Canon 848, points out that priests should take care that needy people are not deprived of sacramental assistance because of poverty. He believes the very fact of their membership in the Church guarantees them the right to access

sacramental graces, and not merely a title resulting from the offering they have made [Pinto 2001, 575].

On the other hand, we should appreciate the achievements of canon legal science in the development of the concept of positive law governing the temporal goods of the Church, and especially the evolution of understanding the concept of ownership, which in the case of the faithful called to hold offices in the Church cannot be limited to the capitalization of property for private purposes, unrelated to or even contrary to the mission of soul salvation. Michel Villey traces the beginnings of the revolutionary understanding of property rights in the Church's canonical doctrine while discussing the medieval dispute between the Franciscan order and the papacy [Villey 1976, 44-81]. Saint Francis of Assisi, the founder of the Franciscan order, established a rule of poverty for his friars, but in fact the Franciscans, like other orders, owned a lot of land and property. Attempts were made to resolve this apparent contradiction by resorting to *fictio iuris*, whereby the ownership of property was actually endorsed by the Holy See, which ceded its "use" to the Franciscans, who would relinquish the option of becoming its owners. However, the papacy – represented by Pope John XXII – tried to underscore this legal fiction inherent in this situation where a distinction was drawn between ownership and permanent use of property, thus confronting the Franciscans with the alternative of assuming the status of owners or illegal users of goods. Some Franciscans – the Spiritual Franciscans – opposed the pope, wanting to defend the purity of the principle of poverty to the very end. One of them was William of Ockham, who contested the decisions of John XXII, leading a movement that confronted the papacy. Ockham maintained that the pope abused the concept of *ius*, which was a good that he enjoyed, while for Ockham it was the power over that good, made inaccessible to the public. In this way, he distinguished between *ius poli*, the right to use property, and *ius fori*, the right to claim ownership of property, thinking that *ius poli* – the Franciscans' right to use property – was in full accord with the vow of poverty they had taken, because *ius fori* – the condition of ownership – was alien to them. In this way, a distinction was made between the status of the possessor of secular property held under an ownership title, with full power of disposal and the right of recourse, and the position enjoyed vis-a-vis ecclesiastical property, which was held only for the purpose of holding offices as administrators of a divine purpose. This, in essence, encapsulates law in a subjective sense,

detached from its object. This understanding of law exceeded the one advanced by William of Ockham and was later adopted by prominent representatives of the Spanish school of natural law, such as Luis de Molina and Francisco Suarez, as the power to freely use and dispose of a thing [Skomiał 2019, 171-99; Villey 1976, 44-81].

Fernando Cuevillas states that Molina's theory of law speaks of reason and will as the formative elements in its genesis, attempting to overcome the antagonism between intellectualism and voluntarism with regard to political prudence. Law would be a prudent, political and permanent act placed by those who exercise supreme authority. The requirement that law's purpose is the common good can be found in Molina's stipulation that the common good be announced to all community members [Cuevillas 1954, 103-16].

According to Manuel Calvillo, Suarez opts for the middle course, between intellectuals and voluntarists. He advocates a third way, whereby law in general consists of an act that is on a par with intellect and will. Law is an intellectual act as long as it includes rational determinants serving to order the activities of beings endowed with reason; however, the law contemplated in the lawmaker's mind presupposes, in addition to the intellectual moment, an act of will by virtue of which law is binding on those to whom it is addressed [Calvillo 1945, 107-14].

These opinions are supported by Sobański, who notes that the science of canon law, until modern times, was considerably influenced by Francisco Suarez. His thinking opposes that of Aquinas. Suarez does not depart from behaviour oriented towards the common good but starts with the common good oriented towards the conduct of individuals, because in his view, concern for the common good lies primarily with the legislator. Further, Sobański notes, Suarez introduced a distinction between the proximate cause of legislated law, which for him was the consent of the community, and the primary cause, which he saw as the consent of the legislator. The former typically gives rise to a custom of fact (factual state), and the latter – a custom of law (legal state). Suarez's view has been widely accepted in canon science and is also highly regarded by contemporary authors. As Sobański writes, he "is unmistakably echoed in both Codes of 1917 and 1983" [Sobański 2001, 132].

Sobański's opinion is supported by other canonists, too. As Munier writes, despite the apparent constancy of definitions and comments on *proprietas*, church writers do not, in the main, advocate the absolute rule of property, without restrictions or control. Their references to natural law and their concern for the norms of morality impart a new orientation to their expositions; at stake here is no longer the abstract ideal of quiritarian ownership (*ius*), native to Roman law, which was principally individualistic [Munier 1962, 478]. In addition, experts in the doctrine of Aquinas point out that he did not advocate the absolute immutability of natural law but considered only its *principia* as inviolable; as Andrzej Andrzejuk underscores, natural entitlements are not the same as natural law, but they express some natural justice, which is quite commonly felt by people. Aquinas links it to the "nature of things" (*natura rei*), but in this particular instance he does not equate it with the immutable essence of being but understands it more colloquially. This is corroborated by his belief that natural entitlements are not immutable and absolute [Andrzejuk 2019, 17-18].

The position, describing the theoretical and legal foundation of the norms regulating the use of Mass offerings for the purposes of the particular and universal Church, is not espoused by Pastuszko, who maintains that in the case of the law on Mass offerings, the legislator ultimately opted for iusnaturalism. The 1917 Code contained no statement that the giving of Mass offerings contributes to the good of the ecclesial community. However, this truth had existed in the minds of the faithful for a long time. Therefore, Pastuszko opines, an attempt was made to use the opportunity and include that element in the norm. The 1972 issue of "Communicationes"[16] did anticipate such a norm, and the 1975 schema of the law on the holy sacraments included the text of the proposed canon. It was stipulated in § 1 that the faithful who make a Mass offering for the application of the fruits of the Mass according to their intention contribute to the good of the Church, participate in the organization of worship, perform obligations, and support various works of the Church. § 2 adds that the ecclesiastical authority, especially the diocesan bishop, whose task is to take care of the needs of the Church and the upkeep of the clergy, has the right to issue regulations that respect the will of the donors.[17] These

[16] "Communicationes" 4 (1972) 58, p. 9-13.

[17] W. Onclin (relator), *De oblata ad missae celebrationem stipe*, p. 57-59; M. De Nicolò (relator),

regulations were designed to specify the purposes for which Mass offerings were to be used, or to determine whether priests who accepted them could retain them, on condition that only one offering per day can be retained. The main idea is that a Mass offering is made not only for the benefit of a particular priest, but also for the Church community. This fully agrees with the canonical spirit and values. By contrast, what is less clear is the thesis that diocesan bishop is to administer all Mass offerings in two ways: by determining the purposes for which Mass offerings will be used, or by giving all or some of the accepted Mass offerings to those priests who accepted them. Both entitlements were intended to allow bishops to take over Mass offerings for the benefit of the particular Church, which was advantageous [Pastuszko 1986, 118-19; Lewandowski 2021, 184-91].

However, both competences have their downsides, too. In needs to be noted that if the bishop determines the ecclesiastical purposes for the attainment of which all Mass offerings must be given in full, then who will be obliged to apply the fruits of Masses on account of the Mass offerings accepted? In other words, who will bear the responsibility for discharging such obligations? Is it the priest who promised to apply the fruits of the Mass upon receiving an offering, or the bishop who ultimately determines the manner in which Mass offerings accepted by the priest are to be used? The question is legitimate because previously the priest was obligated to apply the fruits of the Mass, but he – as the recipient of Mass offerings – had the right to dispose of them. If the entitlement to dispose of Mass offerings is transferred from the priest to the diocesan bishop, will the priest still be obligated? As for the second competence, we might ask: why should the diocesan bishop issue a legal act for the priest to accept a Mass offering, apply the fruits of the Mass in accordance with the donor's intention, and then dispose of the offering? Previous practice allowed priests to perform these acts without the local bishop intervening directly. Also, how to reconcile the bishop's administration of Mass offerings with the wishes of the donors, who usually want the priest to retain the offering for himself? According to Pastuszko, this way of resolving the issue of distributing Mass offerings would not be foreign to the Church, because its possible application within the universal Church has already been contemplated.

De oblata ad missae celebrationem stipe, p. 430-39.

Ultimately, though, the legislator opted out of this and followed quite a different route [Pastuszko 1986, 120].

In practice, however, we find examples from particular law where legal justice prevails over natural justice understood personalistically, as legislators oscillate between the two positions. In one approach, ecclesiastical law helps to build, consolidate, and intensify the community of the Church by guaranteeing the authenticity of the elements safeguarding salvation: the Divine Word and the sacraments. Another goal of law is to protect the community of faith. On the other model, church law fulfils its function by guaranteeing and promoting the realisation of subjective rights in the Church. It is intended to actualise, protect, and support the Church as a freedom-based institution, enabling and supporting the life of the faithful, which is grounded in faith lived out responsibly [Sobański 2003, 97-98].

In the context of Mass offerings, particular Church legislators have a strong preference for joint accounting of Mass offerings among parish pastoral workers, consistently with iusnaturalism. This happens through cumulation. As a rule, offerings are deposited in a common treasury, recording respective amounts in the book of Mass intentions. After a specified time, usually a month, the offerings for Masses celebrated are split equally between the pastor and vicars. The exception is the Diocese of Tarnów, where Mass offerings are deposited in the "common fund," 25% of which is given to the pastor as his functional allowance[18] [Lewandowski 2019, 223].

From the perspective of the top-down regulation of the right of ownership, a corresponding example is provided be a provision of the particular law applicable in the Diocese of Częstochowa. It stipulates that of the total income received from Mass offerings 10% is deducted for the organist and 5% for the sexton[19] [ibid., 224].

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[18] *IV Synod Diecezji Tarnowskiej. Ad imaginem ecclesiae universalis (Lumen Gentium 23)* (13.03.1986), Kuria Diecezjalna, Tarnów 1990, statute 424 § 2, 1; Bishop of Tarnów, *Dekret wprowadzający całkowitą wspólnotę dochodów kapłańskich w diecezji tarnowskiej* (27.08.1994), "Currenda" 144 (1994), no. 4, Articles 1-4; Bishop of Tarnów, *Zarządzenie* (28.08.2000), "Currenda" 150 (2000), no. 4, Articles 2-3. The 5th Synod of the Diocese of Tarnów does not directly address this issue, while the particular legislator announces the promulgation of a separate decree on the management of Mass offerings. *V Synod Diecezji Tarnowskiej. Statuty*, Biblos, Tarnów 2024, statute 601.

[19] Archbishop Metropolitan of Częstochowa, *Statut Organisty w Archidiecezji Częstochowskiej* (27.11.2009), "Wiadomości Archidiecezji Częstochowskiej" no. 3-4 (2010), p. 115-16, Article 40.

If we look at these regulations strictly *vis-à-vis* iusnaturalism, these provisions interfere with the individual right of ownership; however, according to positivist doctrine, they are lawful, since it cannot be implied that the norm is unjust. The manner in which equality can be warranted is through legal justice, based on the premise that a person incurs a debt to the community, so the latter can demand that the former contribute to the common good through property redistribution. The difference between the naturalist theory of *ius* and legal positivism, however, is in the former model, only the member of the faithful who is making a Mass offering might heed the priest's status, abilities, contribution to society and needs, and give a higher offering. In the case of these norms, it is the legislator who – in accordance with the doctrine going back to the time of Suarez and having in mind the common good – lays down that the pastor will receive more than the other priests, and the organist and sexton will receive part of the income obtained by the presbyters, although this is not directly dependent on the will of the faithful [Sobański 1991, 45; Hervada 2011, 22-36]. Another example is the legislation of the bishops of the Province of Madrid, who by virtue of Canon 952 § 1 stipulate in point 1 that the stipend set for the dioceses of the Ecclesiastical Province of Madrid for the celebration and celebration of Mass is a minimum of 8 euros. Also, point 2 provides that the stipend for celebrating and celebrating Gregorian Masses is a minimum of 300 euros.[20] This exemplifies how a universal norm in positive law has been adapted for local conditions, which, however, does not rule out the principle of canonical equity. As Sobański argues, in keeping with Suarez's legal doctrine, the application of equity is possible in three cases: first, when the law has lost its purpose – its observance would bring about grave harm in a particular case; second, when there is a conflict of laws; and third, when observance of the law would entail considerable difficulties, not reflecting the legislator's intent [Sobański 2001, 132-33].

Thus, it is possible to apply – in the body of canon law concerning Mass offerings – not only norms based on natural law, but also norms derived from positive law, which by no means contravene the principle of justice, if one respects the general rules and goals following from the nature of canon law. What is even more, these norms embody the idea of distributive

[20] Provincia Eclesiástica de Madrid, *Decreto sobre Estipendios* (23.06.2008), "Boletín oficial de las Diócesis de la Provincia eclesiástica de Madrid" no. 6 (2008), p. 524.

justice, that is, equality that does not follow from the title under which a thing is possessed (*ius*), but equality that is based on the proportion between things and persons [Hervada 2011, 22-36]. An example of a positivist regulation of the norm in the law on Mass offerings, which implements the demands mentioned above, is the 2014 decree issued by the Archbishop of Łódź, where no. 26 provides that "Offerings from binated and trinated Masses are to be handed over to the Finance Department of the Metropolitan Curia of Łódź. They will be used by the Archbishop Metropolitan of Łódź to fund Mass stipends for priests who do not have them (e.g., old-age or disability pensioners, those working in missionary countries or in parishes where the faithful do not make donations for Mass stipends)."[21] As commented by Tomasz Gałkowski, this applies quite often to situations in which the priest does not receive stipends for Masses except on feast days. On such days, through bination or trination, he lawfully applies the requirement of satisfying the requirement of justice associated with his livelihood, retaining the stipends he could have received during the week. The solution here is the literal application of the provision contained in no. 26 of the decree at hand, whereby stipends for binated or trinated Masses should be given to the metropolitan curia. They will be used "to fund […] Mass stipends for priests who do not have them," so the literal application of positive law instead of custom solutions based on arbitrary interpretations of natural law appears here as a way to normalise the situation and eliminate abuse, since the priest who donates an offering to the Financial Department of the Metropolitan Curia of Łódź having no Mass intentions during the week becomes the addressee of the norm in question stipulated in the decree of the Archbishop of Łódź and becomes eligible to "receive" the Mass offering, and does not have to "grant it to himself" [Gałkowski 2014, 86].

As summarised by Lewandowski, the universal legislator calls on bishops to put in practice the requirements of distributive justice in respect of material issues related to presbyters, in keeping with the teaching of the conciliar fathers and the recommendations of the Holy See.[22] The compensation

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[21] Archbishop Metropolitan of Łódź, *Dekret w sprawie zezwoleń na binację i trynację oraz składanych stypendiów mszalnych* (9.01.2014), https://www.archidiecezja.lodz.pl/aktualnosci/2014/01/dekret-metropolity-lodzkiego-w-sprawie-zezwolen-na-binacje-i-trynacje [accessed: 15.02.2024], no. 26.

[22] Provided in Vatican II, Decretum de pastorali episcoporum munere in Ecclesia *Christus*

provided to the clergy should be equal for all clerics working in the same conditions and, having regard for the evangelical spirit of poverty, sufficiently secure a decent support for presbyters, protect the necessary apostolic freedom, and enable them to personally assist the needy. The Dicastery for Bishops obliges the legislators of particular Churches to remind their entire diocesan communities, church institutions and presbyters themselves included, of the obligation resting on all to fulfil this need. The exercise of the clerical right to a decent support also depends on priestly solidarity, which should be manifested in the organization of mutual assistance, the establishment of certain banks or associations that grant loans at a low interest rate, and, above all, the establishment of special institutions for the material support of the clergy [Lewandowski 2019, 94].

Moreover, from the perspective of the penal law of the Church, the establishment of a central intention fund in the diocese would exclude the possibility of committing an offence under Canon 1383, in which the legislator envisages a situation where a priest unlawfully retains for himself the offerings or combines intentions offered for a single Mass, but the said offence does not occur. This is because by observing the rule of obligatory participation in the diocesan fund of Mass offerings but being unable to retain offerings, the presbyter does the satisfy the hypothesis contained in the said canon ("who unlawfully traffics in Mass offerings") as he does not derive profit in this case but receives compensation indirectly, with the consent, at least impliedly, of the diocesan legislator. Only if the second circumstance occurs, which is combining Mass intentions in a single celebration, the priest may face disapproval of the faithful, but does not commit a canonical offence by not drawing illegal profits from Mass offerings [Sánchez-Girón Renedo 2021, 654-55]. The Archbishop of the Diocese of Burgos serves as an example here: he is authorized to obligate the priests of the diocese to celebrate Masses for a specific compensation which he determines, including binated and trinated Masses, as laid down in the particular law

Dominus (28.10.1965), AAS 58 (1966), p. 673-96, no. 16; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html; see also *PO* 20-21; Paul VI, Litterae apostolicae motu proprio datae *Ecclesiae Sanctae*. Normae de quaedam exsequenda SS. Concilii Vaticani II decreta statuuntur (6.08.1966), AAS 58 (1966), pp. 757-87, I, 8; English text available at: https://www.vatican.va/content/paul-vi/en/motu_proprio/documents/hf_p-vi_motu-proprio_19660806_ecclesiae-sanctae.html.

of that diocese, by virtue of the 1986 rescript of the Dicastery for the Clergy, Prot. N. 166890/1, as the excess of parish intentions accepted should be given to the *Colecturia de Misas de Curia Diocesana*.[23] As Pastuszko explains, in some cases the local ordinaries hold such an indult, which permits a priest to collect a Mass offering to apply a second or third Mass for the donor's intention, but with the obligation to transfer the offering to the diocesan curia [Pastuszko 1986, 124-28; Janczewski 2006, 281-87].

Conclusion

People are greatly attached to prayers said by priests and often ask them to pray for them or their family members. Just before her death, Saint Monica told her son, Saint Augustine not to worry about her burial in Ostia, far from her homeland. "Lay […] this body any where; let not the care for that any way disquiet you: this only I request, that you remember me at the Lord's altar, wherever you be."[24] She understood the value of priestly prayers. As regards the management of Mass intentions, however, all that goes against the Ten Commandments and the commandment to love God and neighbour must be avoided [Saj 2021]. For that reason, the idea of *communio* is very important. It is actualised every time during a Mass celebrated by a priest who is in ecclesial communion with the Catholic Church. Besides, the celebration of the Eucharist is important as it pertains to the legal obligation vested in bishops and priests to sanctify themselves. This unique imperative of *communio* is visible not only in spiritual unity, but also in the source whence ecclesiastical authority issues – the authority of the diocesan bishop and the pope, transmitted for the common good through the sacrament of ordination and canonical mission. It follows that from the perspective of souls' salvation, considering that the diocesan bishop is the sole law-giver in the diocese, in the first place, we must not make downplay his concern for the implementation and adaptation of the universal norms governing Mass offerings directly for situations and customs unique to a particular diocese, and for the management of Mass offerings

[23] Archbishop of Burgos, *Normas Canonicas Vigentes sobre Estipendios de Misas* (22.09.2019), https://www.archiburgos.es/wp-content/uploads/2018/09/2-2-5-normas-canonicas-vigentes-sobre-estipendios-de-misas.pdf [accessed: 17.02.2024].

[24] Augustine, *The Confessions of Saint Augustine*, trans. Edward B. Pussey, Project Gutenberg ebook, 2001, https://www.gutenberg.org/files/3296/3296-h/3296-h.htm.

directly in terms of legislation and indirectly through the delegation of executive power – for the common good.

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THE PRINCIPLE OF THE HEALTHY COOPERATION BETWEEN THE STATE AND THE CHURCH FOR THE BENEFIT OF THE INSTITUTION OF MARRIAGE AND THE FAMILY: AN INTRODUCTION TO THE ISSUE*

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Abstract

The article deals with two themes that are of fundamental importance for the present and the future of the relations between the state, the Church and the nation. The first issue concerns the principle of Church–state cooperation with respect to the paradigm of religious-political dualism that emerged in European culture following Jesus Christ's commandment, "So give back to Cesar what is Cesar's, and to God what is God's" (Matt. 22:21), with respect to two legal systems – canon law and Polish law – in the context of social and political transformations leading from the communist totalitarianism to democracy. The second issue relates to the application of the principle of Church–state cooperation to benefit the institution of marriage and the family, in keeping with Article 18 of the Polish Constitution and Article 11 of the Concordat between the Holy See and Poland.

Keywords: system of law, Polish law, canon law, concordat, constitution, common good, Holy See

Introduction

The article examines two themes of fundamental importance for the present and future of the Polish state, the Church, and the nation.

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The first is related to the evaluation of the principle of interaction between the state and the Church in respect of the basic principles underlying the Church–state relationship, considering two systems of law – canon law and Polish law – operative during the socio-political transition from communist totalitarianism to democracy.

The second theme concerns the application of this principle to the cooperation of the institution of marriage and the family in light of the *Charter of the Rights of the Family*,[1] the Polish Constitution,[2] and the Concordat between the Holy See and the Republic of Poland.[3]

1. The principle of sound cooperation between the state and the Church

The Second Vatican Council, in its pastoral constitution *Gaudium et spes* – defining the Catholic Church's position on the relationship between the state and the Church – proclaimed that: "The Church and the political community [the state] in their own fields are autonomous and independent from each other. Yet both, under different titles, are devoted to the personal and social vocation of the same men. The more that both foster sounder cooperation between themselves with due consideration for the circumstances of time and place, the more effective will their service be exercised for the good of all."[4]

In terms of legal axiology, the following elements can be distinguished in this proclamation: 1) the universal principle that, in fact, the same territory is home to human communities of different types (religious and political), each autonomous and independent in its order (in its own domain)

[1] Pontifical Council for the Family, *Charter of the Rights of the Family* (22.10.1983), https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html [henceforth: *Charter*].

[2] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended [henceforth: Constitution].

[3] Concordat between the Holy See and the Republic of Poland of 28 July 1993, Journal of Laws No. 1998, No. 51, item 318 [henceforth: Concordat].

[4] Vatican II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), 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, no. 76 [henceforth: *GS*].

is autonomous and independent – that is, each of them has its own value; 2) the fact that these communities serve "the individual and social vocation of the same people," which is the common good; 3) these communities will better achieve their goal if they engage in "sound cooperation" which takes into account the "circumstances of place and time."

By way of historical retrospection, we must say that the above-cited principle of sound interaction between the Church and the state is the core element of the paradigm of religious-political dualism, which is the original contribution of the Christian religion to European and universal culture. This paradigm follows from Christ's commandment "So give back to Caesar what is Caesar's, and to God what is God's" (Matthew 22:21),[5] given in reply to Pharisees who asked Him whether it is appropriate to pay taxes to the emperor. The commandment has a universal nature, and it transcends the Pharisaic mentality. To be sure, the novelty of this order is the duality of obligations: the same group of people are subject to two powers: political (human) and religious (divine).

In pagan antiquity, there was religious-political monism between politics and religion. The monarch was both the head of state and the head of the religious community at the same time; more than that – in ancient Rome the emperor was revered as a god.

The above-mentioned commandment of Christ became the basis of the paradigm of religious-political dualism, the interpretation of which has evolved in keeping with the changes that have occurred in the ideological and political regimes of the countries in the territory of which the Church carries out its mission.

This principle can be viewed on two planes: 1) the vertical plane, manifested in relations holding between two powers: the state and the ecclesiastical authority – each enjoying supremacy (sovereignty) in its own domain; and 2) the horizontal plane, visible in the relationship between two distinct communities: the political community (the state), and the religious community – the Church.

The principle of religious-political dualism found its way into public life in the early fourth century, when Roman Emperor Constantine the Great

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[5] *New International Version*, Bible Gateway, https://www.biblegateway.com/passage/?search=Matthew+22%3A21&version=NIV.

proclaimed "freedom to profess the Christian faith" [Lombardi 1985, 23-87; Krukowski 1993, 18-19]. He recognised the operation of the Church exercising its mission in the Roman state as equal to other pagan religions and safeguarded its legal protection.

The significance of this principle in practice is attested by Ivo of Chartres, a prominent medieval canonist (1040-1116): *cum regnum et sacerdotium inter se conveniunt, bene regitur mundus, floret et fructificat Ecclesia* – when secular authority (*regnum*) and ecclesiastical authority (*sacerdotium*) go hand in hand, the world is governed well, the Church flourishes and bears fruit. This statement implies that the cooperation between the state and the Church, if agreed upon, is beneficial for both. However, it was not easy to establish a working relationship between the two subjects: the one exercising supreme state authority and the other having supreme ecclesiastical authority. It follows that in the "Holy Roman Empire" popes and emperors struggled for hegemony. To ensure peace between the two domains, the institution of concordat was created – a bilateral agreement between the subject of the highest state authority (the emperor) and the highest ecclesiastical authority (the pope) in the same Christian community [Krukowski 2013, 22-36].

When at the outset of the modern era, in the late 18th century, secular states arose, the principle of cooperation between the state and the Church was challenged. Under the influence of liberal ideology, there was a return to ideological and political monism [ibid., 53-59, 72-76]. This monism solidified in the 20th century, because totalitarian communist states introduced a radical Church–state separation, consisting in subordinating the Church to the interests of the communist party – and widespread secularization by imposing atheist ideology on society at large in lieu of religion [ibid., 59-64, 76-80; Hemperek 1985, 79-100; Krukowski 1992, 25].

The Holy See took a critical stance towards religious-political monism, and – in compliance with the tenets of religious-political dualism – despite the difficulties stemming from disparate ideological assumptions – it sought interaction between the state and the Church vertically and horizontally, for the benefit of the same people, who are both members of the Church and citizens of the state. The Second Vatican Council, in its pastoral constitution *Gaudium et spes*, proclaimed the requirement that the cooperation between the state and the Church be sound. The question then arises: What are the principles underlying a healthy cooperation between the state

and the Church in Poland today? To answer that, we should turn our attention to principles of these relations that were negotiated at the stage of socio-political and political transformation, which led from communist totalitarianism to democracy – through dialogue between representatives of various political parties and the Polish bishops in the late 20th century. These are set forth in two fundamental, normative acts: the 1997 Constitution and the Concordat signed in July 1993 and ratified early in 1998.

Of particular relevance is the fact that on the threshold of socio-political and political transformation, the Polish Bishops' Conference called attention to the necessity of revising those assumptions imposed by the communist regime. In a letter addressed to the Constitutional Commission of the National Assembly dated 16 June 1990, titled *On the Axiological Assumptions of the New Constitution*,[6] the Conference pointed out two issues.

The first relates to the axiological assumptions of the future Constitution of the Republic of Poland. The Conference proposed that the Constitution be grounded in values fundamental to all humanity – rooted in the innate dignity of the human person – and the human freedoms and rights issuing therefrom, as well as in those historical values that are "the most precious to the Polish Nation […], related to the history of the evangelization of society."

The other issue concerns the institutional relationship between the state and the Church. The Conference proposed as follows:

1) "We are convinced that the time has come to reject the flawed and harmful simplification, unfortunately well-established in the public consciousness, that the secularism of the state is presented as the essential and almost the only guarantee of freedom and equality of citizens."
2) "The constitutional regulation of relations between the state and the Catholic Church should rest on the principles of mutual respect, sovereignty and independence, as well as healthy cooperation for the common good, that is, the creation of conditions of social life thanks to which the person, the family and associations can more easily attain their excellence."
3) "The formula on the separation of the Catholic Church from the State should be excluded from the Constitution. It evokes negative associations

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[6] The *Position of the Polish Bishops' Conference on the Axiological Premises of the New Constitution*, in: Krukowski 1993, 229-83.

with the time when totalitarian regime dominated, and it was employed by the state to subdue the Church. What is more, it is inaccurate, as it can bring about disregard for the values in question."

On the other hand, the position of the state party on determining new rules for mutual relations depended on the ideologies followed by the various political parties. This was because the era of political pluralism had commenced. A special situation emerged in the parliament elected in the elections of 8 September 1993, in which representatives of post-communist parties won a majority. It was largely due to the fact that society was being intimidated with the Concordat signed on 28 July 1993. Significantly, the debate in the Constitutional Commission of the National Assembly over the draft Constitution for the Third Republic was being held in parallel with a debate on the proposal to ratify the Concordat. As it happened, the proposal was blocked by left-wing politicians (Democratic Left Alliance and Labour Party) on ideological grounds.

Politicians of the post-communist parties tabled an objection that Article 1 of the Concordat was incompatible with the principle of "Church–state separation" inscribed in the 1950 Constitution of the Polish People's Republic and retained temporarily in the so-called "Small Constitution" of 1992. Left-wing party politicians interpreted it line with the tenets of communist ideology, from the perspective of the state's supremacy over the Church. The incompatibility, they argued, was that the Concordat did not respect the principle of "Church–state separation", included in the so-called "Small Constitution" and inherited from the communist regime [Krukowski 2019, 160-69].

The following principle was inscribed in Article 1 of the Concordat signed on 28 July 1993: "The State and the Church are autonomous and independent in their own domains, and they are fully committed to respecting this principle in mutual relations and in co-operating for the individual and common good."

The meetings of the Constitutional Commission of the National Assembly concerning the preparation of the draft Constitution were attended by a representative of the Polish Bishops' Conference as an observer with the right to speak.[7]

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[7] The Conference was represented in the sessions of the Constitutional Commission of the National Assembly by Bp. Tadeusz Pieronek (1990-1993), Rev. Prof. Remigiusz Sobański (1994), and Rev. Prof. Józef Krukowski (1994-1997).

Representatives of the post-communist and liberal parties proposed including the following principles in the draft Constitution: "secular character of the state," "separation of the Church from state," "neutrality of the state towards religious beliefs," and the principle of regulation of relations between the Catholic Church and other Catholic organisations only by way of legislation (excluding the Concordat). They also motivated their opposition to the ratification proposal with their objection that it contravened the principle of equality of Churches and thus giving the Catholic Church a privileged status. At the time, the representative of the Polish Bishops' Conference in the meetings of the Constitutional Commission explained that the conclusion of the Concordat does not infringe the principle of equal rights of churches if the freedom guarantees that had been included in the Concordat were extended to other churches and religious organisations by way of legislation and using analogy. The position of the Conference representative at the meetings of the Constitutional Commission was the subject of fierce polemics sparked by left-wing representatives, and initially by representatives of minority churches.[8]

The debate over the rules underpinning the relations between the state and the Catholic Church and other religious organisations has been one of the most important constitutional dilemmas. Following the dialogue between the representative of the Polish Bishops' Conference and politicians at successive sessions of the Constitutional Commission of the National Assembly, the solution to this dilemma came with Article 25 of the Polish Constitution, enacted on 2 April 1997. The article takes into account the demands made by the Conference representative. The article has the following wording: "1. Churches and religious organizations shall have equal rights. 2. Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life. 3. The relationship between the State and churches and other religious organizations shall be based on the principle of respect for their autonomy and the mutual independence of each in its own sphere, as well as on the principle of cooperation for the individual and the common good. 4. The relations between the Republic of Poland and the Roman

[8] Constitutional Commission of the National Assembly, Bulletin, X, p. 148-59; XIV, p. 92-93, 107-108; XVI, p. 78-84, 107-108; Krukowski 2023, 470-79.

Catholic Church shall be determined by international treaty with the Holy See, and by statute. 5. The relations between the Republic of Poland and other churches and religious organizations shall be determined by statutes adopted pursuant to agreements concluded between their representatives and the Council of Ministers."

These principles form a certain logical whole, so they should be interpreted and applied in combination. Then, the cooperation between the state and the Church in Poland – as advocated by the Second Vatican Council – will be "healthy."

It is noteworthy that the principles underlying the Church–state relations – enshrined in Article 25 of the Constitution – are original because thanks to them the coexistence of the state and the Church in contemporary Poland entered the phase of renewed respect for the Christian religious-political dualism so much ingrained in European culture. This is because they do not contain – as proposed by left-wing politicians – ideological formulas that inhere in religious-political monism, for example: "secularism of the state," "separation of church and state" and "neutrality of civil authority towards religious beliefs and world-views." These formulas were marked with ambiguity and imbued with hostility toward religion and the Catholic Church in particular.

Putting law into practice depends on politicians' goodwill. Consequently, from a logical point of view, it should have been supposed that after the enactment of a constitution that did not enshrine the church–state separation principle, the path was open for the ratification of the Concordat. Regrettably, post-communist politicians, who formed a majority in the Sejm at the time, still would not ratify the Concordat. Consent was given in early 1998 by the Sejm (and the Senate) of the next term, elected in new elections, in which the opponents of the Concordat (post-communists) lost their majority [ibid., 167-69].

2. Application of the constitutional and concordat principle of cooperation between the state and the Church for the sake of marriage and the family

It is essential to establish a goal towards which cooperation between the Church and the state must strive. Article 25 of the Constitution and Article 1 of the Concordat provide that the purpose of this interaction

is the good of man and the common good, hence the question: What is the common good as the goal of this cooperation? Well, it can be interpreted in either ethical or legal terms.

From the ethical perspective, the common good – viewed as the purpose of interaction between the Church and the state – comprises three components: the good of man, the good of the family, and the good of the nation [Krukowski 1982, 53-66]. Legally, it implies respect for the rights of those. To clarify, the Church and the state are obligated and empowered to work together so as to assist people in general, the family, and the nation (which is a family of families) in pursuance of their due rights and freedoms.

The first component of the common good – as the goal of interaction between the Church and the state – is therefore the welfare of man, who ranks first in the hierarchy of all beings on Earth. This primacy is construed on ontological, ethical, and legal planes. Ontologically, man is a person, or a being endowed with inalienable dignity, the essential attributes of which are reason, freedom, and conscience [Mazurek 1991, 302]. Man, therefore, cannot be assigned to any community. Conversely, all forms of social life, including the Church and the state, are subordinate to man to serve him.

The second essential component of the common good, viewed as the purpose of Church–state cooperation, is the good of marriage and the family. Marriage as a union between two people is grounded in natural law. Marriage is the foundation of the family. The family is the subject of fundamental rights and duties – just as the human person is – springing from human nature (*GS* 42).

These rights were specified by John Paul II in his exhortation *Familiaris consortio*[9] and in the Holy See's *Charter of the Rights of the Family* [Paglia 2013]. The Holy See is the author of the Charter as the supreme authority in the Church, possessing public law personality in international relations. For that reason, the Charter was addressed to state authorities and international organizations – governmental and non-governmental alike – and to all Christians and their families. Notably, the promulgation

[9] John Paul II, Adhortatio apostolica *Familiaris consortio* de familiae christianae muneribus in mundo huius temporis (22.11.1981), AAS 74 (1982), p. 81-191; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html [henceforth: *FC*].

of the Charter came when a major assault on the family was launched by proponents of "sexual revolution," rampant in the West, and educational confusion brought about by "gender ideology."

It is also significant that the preamble to the Charter contains a firm statement: "The family is based on marriage, that intimate union of life in complementarity between a man and a woman which is constituted in the freely contracted and publicly expressed indissoluble bond of matrimony and is open to the transmission of life."

The Charter's catalogue comprises twelve articles concerning individual rights and community rights. These are: 1) the rights due to every human being, springing from the innate dignity of the human person; 2) the rights of spouses to contract marriage and establish a family; 3) the rights of the family, which include the rights of parents and the rights of children.

Put synthetically, this catalogue stipulates as follows. 1) "All persons have the right to the free choice of their state of life and thus to marry and establish a family or to remain single" (Article 1); "The institutional value of marriage should be upheld by the public authorities; the situation of non-married couples must not be placed on the same level as marriage duly contracted" (Article 1c); 2) "The spouses, in the natural complementarity which exists between man and woman, enjoy the same dignity and equal rights regarding the marriage" (Article 2c); 3) "The spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born" (Article 3); and "Those who wish to marry and establish a family have the right to expect from society the moral, educational, social and economic conditions which will enable them to exercise their right to marry in all maturity and responsibility" (Article 1); 4) "The future spouses have the right to their religious liberty. Therefore to impose as a prior condition for marriage a denial of faith or a profession of faith which is contrary to conscience, constitutes a violation of this right" (Article 2b); 5) "The spouses have the inalienable right to found a family and to decide on the spacing of births and the number of children to be born […], in accordance with the objective moral order which excludes recourse to contraception, sterilization and abortion" (Article 3); 6) "The family has a right to assistance by society in the bearing and rearing of children" (Article 3c); 7) "Children, both before and after birth, have the right to special protection and assistance, as do their mothers during pregnancy and for a reasonable period of time after childbirth"

(Article 4d); 8) "Since [parents] have conferred life on their children, [they] have the original, primary and inalienable right to educate them; hence they must be acknowledged as the first and foremost educators of their children" (Article 5); 9) "Parents have the right to educate their children in conformity with their moral and religious convictions, taking into account the cultural traditions of the family [...] [having] the necessary aid and assistance to perform their educational role properly" (Article 5a); 10) "The primary right of parents to educate their children must be upheld in all forms of collaboration between parents, teachers and school authorities, and particularly in forms of participation designed to give citizens a voice in the functioning of schools and in the formulation and implementation of educational policies" (Article 5e); 11) "The family has the right to exist and to progress as a family" (Article 6); at the same time, the Charter states that "divorce attacks the very institution of marriage and of the family" (Article 6b); 12) "Every family has the right to live freely its own domestic religious life under the guidance of the parents, as well as the right to profess publicly and to propagate the faith, to take part in public worship and in freely chosen programs of religious instruction, without suffering discrimination" (Article 7); 13) "The family has the right to exercise its social and political function in the construction of society" (Article 8); in particular: "Families have the right to form associations with other families and institutions, in order to fulfil the family's role suitably and effectively, as well as to protect the rights, foster the good and represent the interests of the family" (Article 8a); 14) "Families have the right to be able to rely on an adequate family policy on the part of public authorities in the juridical, economic, social and fiscal domains, without any discrimination whatsoever" (Article 9); 15) "Families have a right to a social and economic order in which the organization of work permits the members to live together, and does not hinder the unity, well-being, health and the stability of the family, while offering also the possibility of wholesome recreation" (Article 10). This requirement applies in particular to remuneration for work which should be sufficient to meet the needs of the family; 16) "The family has the right to decent housing, fitting for family life and commensurate to the number of the members, in a physical environment that provides the basic services for the life of the family and the community" (Article 11); 17) "The families of migrants have the right to the same protection as that accorded other families" (Article 12).

This catalogue mentions "rights of the family," "rights of children," and "rights of parents" who represent the families they have established. These rights have a social dimension, which means that all forms of social life should be geared towards the family – in other words, they should help the family exercise its proper rights and duties. This is because the family is incapable of securing its interests entirely on its own, without the help of larger social groups, especially the Church and the state.

What are, therefore, the tasks of the Church and the state vis-a-vis the family? The Church's task is to provide assistance to the family through pastoral work, which involves preparing young people for marriage and caring for marriage and the family, especially in the religious and moral education of children in a well-organised manner (*FC* 65–85). The current tasks of the Church in Poland with regard to the family are formulated by the Polish Bishops' Conference in the *Directory for the Pastoral Care of Families*.[10]

The state, on the other hand, is to secure the assistance for the family in the economic, social, educational, political and cultural spheres, which are necessary for families "to face all their responsibilities in a human way" (*FC* 45).

The Church is committed to safeguarding rights of the family by reason of threats presented by various institutions and ideologies. The Church also engages in criticism of state and local government entities for their sluggishness in respecting family rights, particularly because of the dangers posed by anti-family ideology (gender, LBGTQ+).

The state is to positively assist the family in fulfilling its roles, especially to ensure the permanence of marriage. However, except when necessary, the state should not take over the family's proper tasks imposed on it by natural law, but assist it in accordance with the principle of subsidiarity.

Cooperation between the Church and the state for the sake of the family takes place in two areas. The first is to work for the respect and protection of human life from the conception until natural death. The second is to work together to educate children and young people, as parents alone

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[10] Polish Bishops' Conference, *Dyrektorium Duszpasterstwa Rodzin*, Redakcja *Głos Katolicki*, Warszawa 2003, p. 58-59. The document was adopted during the 322nd Plenary Meeting of the Polish Bishops' Conference in Warsaw on 1 May 2003.

are unable to ensure the proper formation and education of their offspring. The state should secure adequate resources for the family, also material, and effective aids to assist the family in fulfilling its roles.

3. The principle of cooperation between the state and the Church for the sake of marriage and the family

The principle of cooperation between the state and the Church for the benefit of marriage and the family in Poland today is safeguarded chiefly by two high-level normative acts: the 1997 Constitution of the Republic of Poland and the 1993 Concordat.

For the matters at hand, of crucial importance is Article 18 of the Constitution: "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."

Three elements are crucial in this article: 1) the notion of marriage as "a union of a man and a woman"; 2) the definition of its essential functions, which are "motherhood" and "parenthood" (parenthood obviously including being a father); 3) the assurance of "protection and care" of state authorities.

The fact that these provisions were placed in Chapter 1 of the Constitution titled "The Republic" puts them among the cardinal principles defining the political system of the modern Polish state. We may now ask, what is the significance of this fact?

The answer is to be sought in the fact that the need to include the definition of marriage as "a union between a man and a woman" in the 1997 Polish Constitution emerged mainly in response to threats posed by left-wing parties and Polish and international NGOs operating under the inspiration of gender and LBGTQ ideology.

At this point, we should note that including the words about marriage being "a union between a man and a woman" in a constitution passed by the Constitutional Commission of the National Assembly was not easy, as the majority of its members were supporters of leftist ideologies. Indeed, supporters of gender ideology sought to inscribe in the Polish Constitution a principle that would pave the way for the legalization of homosexual unions in Poland. The constitutional definition of marriage implies a ban on same-sex marriages.

The inclusion of a definition of marriage as a union between a man and a woman is of tremendous formal importance since the constitutional principle of the hierarchy of normative acts constituting the Polish legal system must be complied with, as this guarantees the primacy of the Polish Constitution over all normative acts (Article 8(1) of the Constitution). As a result, the possibility of redefining marriage by statute is ruled out; in other words, same-sex marriages or so-called civil unions possessing the right to adopt offspring are prohibited by law.

Article 53(3) of the Constitution is of special note here. It ensures parents' right to decide about the religious instruction their children receive in public schools in accordance with their own beliefs.

Second in the hierarchy is the normative act on the implementation of the principle of cooperation between the state and the Church for the benefit of marriage and the family – the Concordat of 1993. Its Article 11 states: "The Contracting Parties declare their will to co-operate to protect and respect the institutions of marriage and the family, which are the foundation of society. They emphasise the value of the family, and the Holy See for its part, reaffirms the Catholic teaching on the dignity and indissolubility of marriage."

This article contains two declarations: 1) a joint declaration of the contracting parties and 2) a unilateral declaration of the Holy See.

In the first, the contracting parties commit to co-operate "for the purposes of protecting and respecting the institution of marriage and the family, which are the foundation of society." This declaration is based on the recognition of values that are common to both parties, represented by the institutions of marriage and the family. Both parties undertake to work together for their own good since they constitute the "foundation of society." From their perspective marriage represents a fundamental value as a union of two people of opposite sexes, aimed at mutual assistance, producing and educating children in an environment conducive to their psychological and personal development. To be sure, the declaration bodes well for the cooperation between the state and the Church in the face of the crisis of marriage and the family in the era of consumerism. Both Parties are committed to defending marriage as a monogamous union between a man and a woman.

In the second declaration, the Holy See, on behalf of the Catholic Church, reaffirmed its commitment to defending marriage as a natural union between a man and a woman elevated by Christ to the dignity of a supernatural sacrament [Krukowski 1995, 317].

The Polish Constitution provides that "marriage" is a "union of a man and a woman" (Article 18). From this provision issues a prohibition on same-sex marriage in Poland. In this way, the Polish constitutional legislator distances itself from recognising same-sex marriages, which is being forced by the pressure groups of extreme liberals.[11]

Note that there is a difference between canon law and Polish law regarding the degree of permanence of marriage. The Church, for its part, based on theological premises, defends the position that marriage between baptised persons is endowed with the attribute of sacramentality and indissolubility.

By contrast, the modern Polish state, being secular, does not respect the theological premises regarding the sacramentality and indissolubility of Christian marriage in its legal system. Therefore, Polish law supports the permanence of marriage, but admits divorce between spouses, also between baptised spouses. Conversely, ecclesiastical legislation does not recognise the institution of divorce, while respecting the state's competence for marriage between baptised persons as regards its civil effects.

The modern Polish state respects the right to freedom of conscience and religion, which involves the freedom to choose the form of civil marriage – that is, the possibility of contracting civil marriage before the registrar or a canonical marriage before a cleric, observing a procedure defined by Article 10 of the Concordat and the Act of 245 July 1998 amending the Family and Guardianship Code.[12]

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[11] In the legal literature, we come across an opinion that Article 18 of the Constitution, by explicitly defining marriage "as a union of a man and a woman", does not preclude legitimate marriages with a different legal subjectivity and structure – that is, between people of the same sex [Łętowska and Woleński 2013, 15-40]. This, however, cannot be endorsed for logical and formal reasons.

[12] Act of 24 July 1998 Amending the Acts: The Family and Guardianship Code, the Code of Civil Procedure, the Law on Civil Status Records, the Act on State Relations with the Catholic Church in the Republic of Poland, and Some Other Acts, Journal of Laws No. 1998, No. 117, item 42. See Krukowski 2019, 268-313; Bucoń 2022, 112-24.

In the second part of Article 11 of the Concordat, the Holy See – in view of the institution of divorce in Polish law – "reaffirms Catholic teaching on the dignity and indissolubility of marriage." The state, on the other hand, acknowledges this position of the Church.

The use of the principle of healthy cooperation between the state and the Church for the sake of marriage and the family involves respect and protection of the two basic roles of the family: procreation and education.

The protection of the procreative function of marriage and the family should, by its very nature, involve respect for the fundamental human right to life from the moment of conception until natural death. On this account, there is controversy over the extent to which Polish legislation protects the family's procreative function. This protection should exist in various branches of law, so not only in constitutional law, but also in family law, provision of administrative law governing education and upbringing, labour law (family allowances), and criminal law (protection of conceived life).

As far as the educational function of the family is concerned, the interaction between the state and the Church concerns the protection of the right of parents to the religious and moral education of their children, in accordance with their beliefs, not only in the family home, but also at school with respect to religious and ethical instruction. To achieve that, parents are guaranteed respect for their decisions concerning the religious instruction of their children in public schools, too; they have the right to review the school programme of children's sex education, they can choose either a public or a private school for their children. Also, governmental subsidies are assured for private schools.

Respect for the rights of parents in the Third Republic is laid out more specifically in ordinary laws.

4. Obstacles to cooperation between the state and the Church for the benefit of marriage and the family

When we speak about the interaction between the state and the Church in Poland for the sake of marriage and the family, we must not overlook existing difficulties and even serious impediments to the implementation of this principle. They occur for a number of reasons, but first and foremost,

they are due to the ideological assumptions endorsed by left-wing parties, which during parliamentary elections seek to gain a majority in the supreme bodies of legislative power (the Sejm and Senate), organs of executive power (the Government), and in local government bodies with a view to legislating legal norms conforming to their ideology, or sometimes even undermining the system of Christian values.

At the same time, it is important to realize that modern Poland is a democratic secular state that respects religious and world-view pluralism existing among its citizens. Generally speaking, the positive law of a democratic state is the result of a compromise between divergent ideological assumptions subscribed to by political parties and associations that operate as pressure groups (e.g., an association of feminists). These assumptions are not only incompatible with those of the Catholic Church, but contradictory and openly hostile to religion in general, especially the Christian vision of marriage and the family.

To conclude, it must be said that the principle of interaction between the state and the Church incorporated in the Polish Constitution and the Concordat, being as broad as possible, lays the groundwork upon which laws and other implementing acts need to be built.

Law-making in a democratic state is carried out as a result of ideological struggle. Positive law is often born out of a compromise between different competitive parties and interest groups that advocate different systems of values. In this situation, the Church, as a transmitter of Christian values, should influence society through its pastoral activity. Catholics, for their part – as citizens – are expected to exert influence on their representatives, who have a direct share in the exercise of state power, to ensure that the state pursues a pro-family policy.

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PARENTHOOD AS THE NATURAL AND SOCIO-LEGAL TITLE TO RAISE OFFSPRING IN ACCORDANCE WITH THE NORM OF CANON 1136 OF THE 1983 CODE OF CANON LAW

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Abstract

The article offers a description and characterization of the special right of parents to raise their offspring on two counts: from the act of becoming a parent and from the fact that arises from the relationship and bond of the parents and their offspring with society. This relationship exists in particular with the Church and the State, for which the family is a fundamental social component. Consequently, both institutions have a vital interest in educating the offspring, with the institutions of foster family and adoption playing a special role.

Keywords: parenthood, education, Church, State, foster family, adoption

Introduction

When we undertake to reflect on the essential parental duties and rights with respect to their children, which the ecclesiastical legislator codified in the 1983 Code of Canon Law,[1] it is necessary first to highlight those features and aspects of them that are grounded in natural law, the fact of which we are reminded by the Catechism of the Catholic Church.[2]

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[1] *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, Canon 1136.

[2] *Catechismus Catholicae Ecclesiae*, Libreria Editrice Vaticana, Città del Vaticano 1997; English text available at: https://www.vatican.va/archive/ENG0015/_INDEX.HTM, no. 1901:

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Inspired by the teaching of the Second Vatican Council, these requirements gained special recognition from the legislator, who states: “Parents have the most grave duty and the primary right [*officium gravissimum et ius primarium*] to take care as best they can for the physical, social, cultural, moral, and religious education of their offspring” (Canon 1136). It follows that the legislator considered their mission to be primary to others, recognising its importance and the unique role of parents, in matters of raising offspring, sanctioning their parental – natural status, which is also recalled by the Charter of the Rights of the Family.[3] However, the following should be noted: if the expression *officium gravissimum* fully captures this uniqueness of parental rights and duties, the expression *ius primarium*, apparently, does not fully reflect the meaning of the legislator’s intent, as it does not imply this special and unique vocation and mission of parents, vested in them by virtue of giving birth to offspring, which John Paul II highlights in the apostolic exhortation *Familiaris consortio*.[4]

1. Parenthood as a title of special priority in the education of offspring

In our consideration of the issue of raising and educating offspring, the point of departure will be Part II of the constitution *Gaudium et spes*,[5] bearing the significant title “Some problems of special urgency”,

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“If authority belongs to the order established by God, ‘the choice of the political regime and the appointment of rulers are left to the free decision of the citizens’ [GS 74 sent. 3]. The diversity of political regimes is morally acceptable, provided they serve the legitimate good of the communities that adopt them. Regimes whose nature is contrary to the natural law, to the public order, and to the fundamental rights of persons cannot achieve the common good of the nations on which they have been imposed.”

[3] Pontifical Council for the Family, *Charter of the Rights of the Family* (22.10.1983); English text available at: https://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_19831022_family-rights_en.html.

[4] John Paul II, Adhortatio apostolica *Familiaris consortio* de familiae christianae muneribus in mundo huius temporis (22.11.1981), AAS 74 (1982), p. 81-191; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio.html [henceforth: FC], no. 39.

[5] 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, no. 52.

in conjunction with the indications of *Familiaris consortio*. In this connection, it is worth recalling Cardinal Karol Wojtyła speaking at the Second Vatican Council on the issue of parental education: "Spouses know that in fulfilling the duty of transmitting life and educating offspring, a duty that must be considered their primary mission, they are colaborators with God the Creator and, as it were, its exponents" [Wojtyła 2003, 255; my translation]. This excerpt highlights a profound theological truth about the special and unique dignity of the mission of parents in the work of raising and educating their own children.

In the same vein, we should underscore the fact that, for both parents and born human beings, the act of giving birth to offspring is a momentous event that gives the legal spouses the title of parents by God's will. It is the kind of nomination that, strictly speaking, cannot be alienated, and it obligates them to raise and educate their children. The Second Vatican Council prescribes: "Since parents have given children their life, they are bound by the most serious obligation to educate their offspring and therefore must be recognized as the primary and principal educators."[6] Recognising the need to constantly raise parents' awareness of their educational responsibilities, John Paul II devoted his *Letter to Families* to this issue, in which he asked the following question to underscore the importance of parental education: What is involved in raising children?[7] "In answering this question two fundamental truths should be kept in mind: first, that man is called to live in truth and love; and second, that everyone finds fulfilment through the sincere gift of self. This is true both for the educator and for the one being educated" (Letter 16). Then, elaborating on the essence of the parental education, he said: "From this point of view, *raising children can be considered a genuine apostolate*. […] [It] not only creates a profound relationship between the educator and the one being educated, but also makes them both sharers in truth and love, that

[6] Vatican II, Declaratio de educatione christiana *Gravissimum educationis* (28.10.1965), AAS 58 (1966), p. 728-39; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html [henceforth: GE], no. 3

[7] John Paul II, Litterae *Gratissimam sane* familiis datae ipso volvente sacro Familiae anno MCMXCIV (02.02.1994), *AAS* 86 (1994), p. 868-925; English text available at: https://www.vatican.va/content/john-paul-ii/en/letters/1994/documents/hf_jp-ii_let_02021994_families.html [henceforth: Letter].

final goal to which everyone is called by God the Father, Son and Holy Spirit. […] *Parents are the first and most important educators* of their own children, and they also possess a *fundamental competence* in this area: they are *educators because they are parents*" (Letter 16). Regarding the indications of *Gravissimum educationis*, he explained: "They share their educational mission with other individuals or institutions, such as the Church and the State. But the mission of education must always be carried out in accordance with a proper application of the *principle of subsidiarity*. […] Parents by themselves are not capable of satisfying every requirement of the whole process of raising children, especially in matters concerning their schooling and the entire gamut of socialization" (Letter 16), so John Paul II concluded these statements thus: "all other participants in the process of education are only able to carry out their responsibilities *in the name of the parents*, *with their consent* and, to a certain degree, *with their authorization*" (Letter 16).

From our analysis of the issue of education of children for life in the family and society – regardless of who acts as the educator, parent or, for example, legal custodian – it follows that a kind of "canon" should be adopted and implemented, addressing essential, permanent values and principles, which the education of children should adhere to. Focusing on the dignity and uniqueness of each human person, this education concerns both the educators and the educated. In conclusion, it must be said that spouses who are parents "have an equal duty and right to those things which belong to the partnership of conjugal life" (Canon 1135). When they become parents, they "must trustingly and courageously train their children in the essential values of human life […] being fully convinced that 'man is more precious for what he is than for what he has.' [GS 35]" (FC 37). Children, on the other hand, while under their authority, undergo education until they reach the age of majority, when they can actively participate in social, cultural, moral and religious life. Since the principles and requirements mentioned by the legislator converge in the entire process of parental education, parents must be guaranteed adequate preparation so that they can truly fulfil their responsibilities towards their children [Pawluk 1996, 212-15].

2. Special duties, rights and tasks of the Church and the State in the work of educating offspring

As taught by the Church, "the family is the primary but not the only and exclusive educating community" (FC 40). So John Paul II justifies and explains: "Man's community aspect itself – both civil and ecclesial – demands and leads to a broader and more articulated activity resulting from well-ordered collaboration between the various agents of education" (FC 40) [Sitarz 2017, 78-80], which is why the following was added: "All these agents are necessary, even though each can and should play its part in accordance with the special competence and contribution proper to itself" (FC 40).

The ecclesiastical and civil legislators, as history shows, by making an important contribution to the building up and development of marriage and the family – first of all by enacting appropriate laws, and then by providing adequate means (which is an important, constitutive contribution, when it comes to matters of education) – plays, so to speak, a complementary role. In this fundamental area, *Gravissimum educationis* teaches: "In addition, therefore, to the rights of parents and others to whom the parents entrust a share in the work of education, certain rights and duties belong indeed to civil society, whose role is to direct what is required for the common temporal good. Its function is to promote the education of youth in many ways, namely: to protect the duties and rights of parents and others who share in education and to give them aid; according to the principle of subsidiarity, when the endeavours of parents and other societies are lacking, to carry out the work of education in accordance with the wishes of the parents; and, moreover, as the common good demands, to build schools and institutions. Finally, in a special way, the duty of educating belongs to the Church, not merely because she must be recognized as a human society capable of educating, but especially because she has the responsibility of announcing the way of salvation to all men, of communicating the life of Christ to those who believe, and, in her unfailing solicitude, of assisting men to be able to come to the fullness of this life" (GE 3).

Keeping constantly in mind that parents are the first educators of their children, it should be recognised, first and foremost, that in accordance with natural law no legal power has no right (except in special cases) to deprive them of their parental rights and duties. It is therefore obvious that

all that has been said, in principle, in the matter of parental education applies *mutatis mutandis* also to persons and institutions that provide care – in whole or in part – in the field of education (Canon 793 § 1) [Pawluk 1996, 215]. This particular issue of taking over the education – if the parents (or the parent) are unable to raise the offspring – was give special emphasis by John Paul II: "The family is thus, as the Synod Fathers recalled, the place of origin and the most effective means for humanizing and personalizing society: it makes an original contribution in depth to building up the world, by making possible a life that is properly speaking human [...]. In the family 'the various generations come together and help one another to grow wiser and to harmonize personal rights with the other requirements of social living.' [GS 52]" (FC 43).

3. Foster families and the institution of adoption

When considering the issue of foster families and the institution of adoption from our perspective, we should note that the ecclesiastical legislator does not establish its own separate regulations in this regard, but adopts the principles and norms of civil laws, with the proviso that the principles of divine natural law is observed.

John Paul II's call to the family, "Family, become what you are" (FC 17), has a great deal of relevance in our time, especially when alarming tendencies appear to appropriate the place and role of the family in the life of the Church and the nation.

When we address foster family issues and the institution of adoption, we must expect – if not firmly demand – that John Paul II's appeal to the family be also applied to individuals and institutions that assume educational roles of parents. After all, one speaks of the condition, circumstances and abilities of the foster family or adopters that meet the criteria of a natural family as best as possible. This raises the following questions. Do the current provisions on foster care of the Polish Family and Guardianship Code[8] (Article 112) correspond to the provision of Article 87 thereof? It is worth noting that in the literature, when talking about the foster

[8] Act of 25 February 1964 – The Family and Guardianship Code, Journal of Laws No. 2020, item 1359, as amended [henceforth: FGC].

family, we encounter "strict"[9] and "broad"[10] definitions of it [Banach 2017, 107-108]. It is also important that a child who is placed in the educational care of a foster family find due and proper care, characteristic of the natural family, which is happily facilitated by the norm of the current FGC.

A similar role played by the foster family with respect to education is also fulfilled by the institution of adoption, already known in Roman law. Adoption, being fundamental for the good of society at large – and, above all, the family as such – also has an important pro-social role to play in modern times. The FGC contains relevant provisions in this regard in Chapter II titled "Adoption", defining the relevant criteria, various forms and conditions of the act of adoption, taking into account the diversity of circumstances and needs of adopters and adoptees in our time. As it seems, the crucial motive for adoption is, as defined and stipulated by the FGC, the welfare of the adopted minor (Article 114 § 1), subject to the proviso contained in § 2: "The minority requirement must be satisfied on the day of submitting an application for adoption." The act of adoption, giving rise to a legal relationship between the adopter and adoptee, arises only from the will of the persons involved; not as a natural consequence of the legal effects of parenthood [Kasprzyk 2012, 798-99].

Conclusion

In this article, we have tried to highlight parents' principal right (*ius primarium*) to raise their children, which also gives rise to obligations – it is also their most serious duty in life (*officium gravissimum*). This right with regard to offspring – as the formula of the norm dictates – is of special nature and significance. This was explicitly stated and highlighted, for the first time, by the ecclesiastical legislator in Canon 226 § 2. Considering that the family and the offspring it produces is a cornerstone of the nation, the Church and the State, the three have a vital interest in educating children. For this, they commit – each according to its nature, character and mission – to participate in the work of educating children.

[9] In the strict sense, foster family means the care of individuals (foster parents), or even one such person, intended to raise a child until adulthood, on the basis of an agreement with the biological parents or often a contract concluded for a decision of public authority.

[10] In a broad sense, foster family means any form of foster care through which care and educational support is provided to an orphaned child.

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CANON LAW ASPECTS OF THE OFFICE OF PROVINCIAL SUPERIOR IN A RELIGIOUS INSTITUTE: A LOOK AT THE LAW OF THE ORDER OF PREACHERS

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Abstract

The study presents the office of provincial superior, starting with ordinaries and major superiors of religious orders. The office of prior provincial is characterised here on the basis of the law of the Order of Preachers (Dominicans). The following topics are covered: the relationship between the prior provincial and the ordinary of the place, authority in the Dominican Order, the basic powers of the prior provincial, requirements for a prior provincial candidate, and the functioning of the provincial during the provincial chapter.

Keywords: prior provincial, ordinariate, ecclesiastical superior, religious law, Dominicans

Introduction

The office of provincial superior in a religious institute may be variously designated depending on the tradition followed by a particular institute. However, all institutes will share certain properties of the office, which derive from the universal law of the Church stipulating the existence of major superiors in religious institutes, who are also ordinaries for clerical institutes. An exhaustive presentation of canon law aspects of the office of provincial superior is not possible if we examine solely the regulations issued for the entire Church. The abundance of institutes and their respective traditions, including legal ones, makes each institute unique and meriting separate research. For this reason, in order to characterise the office of provincial superior as accurately as possible, this study will focus specifically on the Order of Preachers (Dominicans). In terms of its structure, the article begins with the basic terminology concerning the ordinary and the major

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religious superior with a view to discussing the law of the Order of Preachers and presenting the specific solutions used in this institute with regard to the office of provincial superior. Although this issue could benefit from an analysis of greater depth, for example at the level of a particular province, this study is limited to the law common to the entire Order. This is because the legal solutions adopted by the individual provinces of the Order strictly follow from competence norms, which apply uniformly in the entire Order. It is sufficient, then, to at the level of the entire Order, governed by its proper law, which is the *Book of Constitutions and Ordinations of the Friars of the Order of Preachers*.[1]

1. The provincial superior as an ordinary within the meaning of Canon 134 of the 1983 Code of Canon Law

For the ecclesiastical system of governance, the concept of "ordinary" is crucial. Canon 134 of the 1983 Code of Canon Law[2] does not essentially differ from the corresponding Canon 198 of the 1917 Code of Canon Law[3] [Jone 1950, 198-99]. Here, the most important elements of this concept are having ordinary power (*potestas ordinaria*) at least in the executive function and being in relation to "subordinates" [Sobański 2003, 219]. Each of the three paragraphs of Canon 134 CIC/83 provides for a concrete understanding related to power in the Church: 1) Canon 134 § 1 CIC/83 defines the notion of ordinary (*ordinarius*; 2) Canon 134 § 2 CIC/83 defines the notion of local ordinary (*ordinarius loci*); and 3) Canon 134 § 3 CIC/83 defines the notion of diocesan bishop (*episcopus dioecesanus*) [Pawluk 1985, 294-95].

The competences of ordinaries as bodies of authority are determined by the personal and territorial (also material) aspects [Krukowski 1985, 63-64; Lewandowski 2015, 15-16]. The ordinary of the place has jurisdiction

[1] *Liber Constitutionum et Ordinationum Fraturum Ordinis Praedicatorum*; several English translations are present, for example one available at https://www.friarly.com/uploads/1/2/7/2/127250680/the_book_of_constitutions_and_ordinations_-_2012.pdf [henceforth: BCO].

[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] *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: CIC/17].

over a specific territory (*aspectus primarius*) over Catholics (*christifideles – aspectus secundarius*) only, usually only of his Church *sui iuris* – and while he is also to take care of other persons, baptised and unbaptised, they do not fall under his jurisdiction. The jurisdiction of a major religious superior, such as a provincial, can be considered in a similar way. He has authority determined, first and foremost, by persons, typically by the members of his religious institute, but also by the territory of his province. The provincial superior, just like the local ordinary, is also tasked with the care of other faithful who are not under his jurisdiction, for example, regular visitors to religious churches. The authority of the provincial may extend to the entire province (territorial aspect) and those who belong to it (personal aspect) [Ruf 1983, 160].

Both the local ordinary and the provincial superior also have competence over things that are most often associated with persons or the territory. In this way they enjoy specific powers and responsibilities to take action [Krukowski 1985, 64; Lewandowski 2015, 15-16].

A clergy member is subordinate to the ordinary who holds his office within the structure to which the former is incardinated. Lay persons[4] are subordinate to ordinaries who have jurisdiction over them by reason of their domicile or temporary residence, their state of life in the Church,

[4] In this context, it is worth mentioning the problem of how the term 'secular' is understood. The Code's definition of lay persons shows only that they are non-clerical – that is, ones who are not consecrated (cf. Canon 207 § 1). Canon 207 § 2 includes in the laity also consecrated persons who have not been ordained. However, Catholic ecclesiology is different and richer, because it speaks of three estates in the Church: clergy, consecrated persons, and laity. This understanding is grounded in Canon 399 of the Code of Canons of the Eastern Churches, no. 31 of the Dogmatic Constitution on the Church *Lumen Gentium*, and no. 31 of the apostolic exhortation *Vita Consecrata*. *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045-363; English text available at https://www.intratext.com/IXT/ENG1199/_INDEX.HTM [henceforth: CCEO]; Vatican II, Constitutio dogmatica de Ecclesia *Lumen gentium* (21.11.1964), AAS 57 (1965), p. 5-71; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html; John Paul II, Adhortatio Apostolica Post-synodalis *Vita Consecrata* Episcopis et Clero, Ordinibus Congregationibusque religiosis, Societatibus vitae apostolicae, Institutis saecularibus et cunctis fidelibus de vita consecrata eiusque missione in Ecclesia ac Mundo (25.03.1996), AAS 88 (1996), p. 377-486; English text available at: https://www.vatican.va/content/john-paul-ii/en/apost_exhortations/documents/hf_jp-ii_exh_25031996_vita-consecrata.html.

or their affiliation with a particular church structure that has its proper ordinary.

The broadest competences related to the exercise of ecclesiastical authority are vested in the Roman Pontiff. Of all the ordinaries, he is mentioned by Canon 134 CIC/83 as the highest-ranking, for he is the ordinary for all those affiliated with each particular Church, and, as provided by Canon 590 § 2, the highest superior for all religious institutes and societies of apostolic life [García Martín 2015, 647].

The territorial hierarchical structures of the Church are headed by ordinaries of the place listed in Canon 134 § 2, of whom the diocesan bishop is the first. Next are all those who – being made equivalent to him – are even temporarily superiors of a particular Church or a community equivalent to it. Canons 392 § 2 and 368 provide that these are: vicars, prelates and territorial abbots, prefects and apostolic administrators [Aymans and Mörsdorf 1991, 409-10]. Canon 134 § 3 clarifies the understanding of the diocesan bishop.

The aforementioned ordinaries of specific persons (personal ordinaries) are as follows: the ordinary of a military or field ordinariate,[5] the Apostolic Administrator of the Personal Apostolic Administration of Saint John Mary Vianney,[6] the ordinary of the personal ordinariate for former Anglicans as well as their deputies and associates[7] [Socha 1985, 134; Lewandowski 2015, 17-18].

Another group of personal ordinaries are the superiors of societies and communities that incardinate their members. Personal ordinaries are therefore the prelates of the personal prelature [Chiappetta 2011, 184; Sobański 2003, 220]. The next and the most relevant case for our study implementing the said disposition are the major superiors of clerical religious institutes of pontifical right and clerical societies of apostolic life of pontifical

[5] John Paul II, II, Constitutio apostolica *Spirituali militum curae* qua nova canonica ordinatio pro spirituali militum curae datur (21.04.1986), AAS 78 (1986), p. 481-86, no. II § 1.

[6] Congregation for Bishops, Decretum *Animarum bonum* de Administratione Apostolica personali "Sancti Ioannis Mariae Vianney" condenda (18.01.2002), AAS 94 (2002), p. 305-308.

[7] Benedict XVI, Constitutio apostolica *Anglicanorum coetibus* qua Personales Ordinariatus pro Anglicanis conduntur qui plenam communionem cum Catholica Ecclesia ineunt (4.11.2009), AAS 101 (2009), p. 985-90; English text available at: https://www.vatican.va/content/benedict-xvi/en/apost_constitutions/documents/hf_ben-xvi_apc_20091104_anglicanorum-coetibus.html.

right, who at least have ordinary executive power [De Paolis and D'Auria 2008, 434; Dudziak 2002, 97]. A note should be made here: although Canon 134 § 1 provides that a religious ordinary is the ordinary for his members (*pro suis sodalibus*), the latest documents of the Holy See indicate that the major superior of a clerical religious institute of pontifical right can also be an ordinary for those who are not members of his institute. This applies to situations where this superior, according to the norm of Canon 614, is the ordinary for nuns living in associated monasteries.[8]

Thus, a provincial can be an ordinary, but this applies only to institutes of a clerical character of pontifical right [Skorupa 2019, 2357]. The provincial, who heads a part of a religious institute of pontifical right (a province), is a major superior and therefore an ordinary too [García Martín 2015, 649]. In line with no. 75, 2° of the instruction *Cor orans*, the provincial of such an institute is to meet the requirements to also be an ordinary for nuns living in associated monasteries. From what we have said so far, it follows that the provincial of the Order of Preachers (Dominicans), is an ordinary. The institute is, after all, a clerical order of pontifical right.

2. The provincial as a major superior of a religious institute

As we have shown earlier, the major superior of a clerical religious institute is an ordinary under Canon 134 § 1 of the 1983 Code. The superior is a physical person who is legally and morally responsible for his actions. The office itself is not a subject of rights and obligations; more specifically, it cannot constitute an ecclesiastical juridical person [Żurowski 1984, 194-95]. The status of the major superior of such an institute is regulated by Canon 620. In this way, the ecclesiastical legislator merely enumerates those who are major religious superiors without specifying the term. At the same time, despite the lack of a legal definition of a major religious superior, ecclesiastical law alone sufficiently regulates this office. The authority of the superior is provided for in Canon 596, and the manner of its exercise is stipulated under Canon 617, whereas the general rules for the exercise of the office

[8] Congregation for Institutes of Consecrated Life and Societies of Apostolic Life, Instructio applicationis *Cor orans* Constitutionis Apostolicae *Vultum Dei quaerere* de vita contemplativa feminarum, 1.04.2018, AAS 110 (2018) p. 814-64, no. 75, 2°; English text available at https://www.vatican.va/roman_curia/congregations/ccscrlife/documents/rc_con_ccscrlife_doc_20180401_cor-orans_en.html.

based on the institute's proper regulations are stipulated in Canons 618, 619 and 622 [Syryjczyk 1984, 95-96]. The authority of the major superior encompasses the entire institute or province and their members [Ruf 1983, 160].

Every superior in a religious order, major or local, is a physical person who has the power of religious governance by virtue of their office. It follows that the superior is part of the internal hierarchy of the institute and governs it in whole or in part. The power of this superior is ordinary and attached to the office. So, those whose power is only delegated are not superiors. Nor are those who govern only a part of a religious house or just one category of its members. Those who have power in a religious order but are not part of its hierarchy are not superiors, either [Bar and Kałowski 1985, 71; Bar 1986, 93; Primetshofer 2003, 95]. Even though a superior is typically a physical person, religious chapters, by analogy, could also be called superiors since they are collegial organs [Sebott 1995, 100-101].

The constitutive element of the office of provincial is his or her relationship with persons subordinate to them by virtue of their vows of obedience. A particularly important manifestation of this relationship is the authority of the provincial as a religious ordinary, who instructs religious to reside in a particular monastery, as provided for in Canon 103 [Chiappetta 2011, 124; Aymans and Mörsdorf 1991, 365-66; Pinto 2001, 65]. Religious and member of the clergy, bound by ecclesiastical obedience, acquire the necessary (legal) domicile in the place (parish and diocese) to which they are lawfully assigned. The assignment is by a decree of the provincial superior.[9] Besides determining the domicile of subordinates, the provincial, as an ecclesiastical superior, is also responsible for: 1) determining the scope of their duties, the filling of offices, as provided by Canon 626 [Chiappetta 2011, 748]; 2) making sure discipline and obedience are maintained, as mentioned in Canon 619 [ibid., 742]; 3) granting permissions and dispensations, as mentioned in Canons 14, 59 § 1, 85, 87 § 2, 91, 180 § 1 [Pinto 2001, 55; Gerosa 1999, 108]; 4) canonical visitation, stipulated in Canons 199, 7°, and 628 § 1.

The provincial, as a superior, is also responsible for the issuance of acts vis-a-vis individuals and for actions concerning the administration of material

[9] In the law of the Dominican Order, affiliation with a particular monastery is by assignment (cf. no. 270 BCO); for a critical analysis of the necessary domicile of monks under the 1983 Code, see Skonieczny 2018, 101, 106.

goods [Michowicz 2019, 69-70]. In the exercise of their power, provincial superiors consult their councils, whose verdicts, depending on the subject matter, can be binding or advisory. The need to obtain the council's approval is provided for, for example, in Canon 638 § 3 (cf. Canon 127 § 2, 1°).

Although the maintenance of individual religious is the responsibility of individual religious houses and their local superiors, in unusual situations this duty rests directly on the provincial superior. Depending on the institute's proper law, the provincial may undertake to support a religious who legally resides outside his religious house,[10] which may happen for various reasons such as supplementary studies, medical leave, or looking after ill parents. This obligation corresponds to the diocesan bishop's duty to maintain a clerical person. As duly noted by Paweł Lewandowski, "The diocesan bishop's obligation and the cleric's right are legally sanctioned by the fact of incardination, whereby the incardinating superior incurs the obligation of overall responsibility and concern for the cleric in terms of his spiritual good and livelihood, and the cleric acquires a certain entitlement in this regard" [Lewandowski 2016, 60]. By analogy, in regard to religious who are not members of the clergy, this obligation should be understood as stemming from membership in an institute and a vow of poverty.[11] The provincial's care of subordinate monks derives from the fact that he is an organ of the province who acts its behalf. Therefore, religious who belong to the province fall under its care. This is particularly evident in Canon 670. The superior is expected to take into account various issues, for example, the social insurance mandatory in a particular state [Sebott 1991, 197-98].

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[10] In the Polish Province of the Order of Preachers, according to its proper regulations, the upkeep of individual friars, even those who are legally outside the monastery, falls to the monastery to which they are legally assigned. However, in exceptional cases, the prior provincial is obliged to apply other special solutions – no. 56 § III of the Statute. *Statut Prowincji Polskiej Zakonu Kaznodziejskiego stan prawny z 29.06.2022 r. (wydanie 12. poprawione i uzupełnione)*, in: *Akta Zwyczajnej Kapituły Prowincjalnej Polskiej Prowincji Zakonu Kaznodziejskiego, Statut Ekonomiczny Polskiej Prowincji Zakonu Kaznodziejskiego, Statut Ekonomiczny Wikariatu Ukrainy*, Prowincja Polska Zakonu Kaznodziejskiego, Warszawa 2022, p. 71-136.

[11] The vow of poverty (Canon 600) is linked to the profession of the evangelical counsels and obliges one to be radical in the use of material goods so that they do not obscure the pursuit of unity with Christ and the realisation of the institute's mission. The merit of this vow and its apostolic nature are underscored by the fact that diocesan clergy, who are not bound by the vow, are also encouraged to practice poverty individually [Lewandowski 2022, 30].

3. Relationship between religious major superiors and local ordinaries

The relationship between the ordinary of the place and the major religious superior is closely related to the legitimate autonomy of the religious institute. The currently applicable source of law that provides for the autonomy of the institute is Canon 586 CIC/83. The contemporary understanding of the institute's legitimate autonomy derives from no. 35, 3º and 4º of the conciliar decree *Christus Dominus* [12] [Rincón-Pérez 2023a, 394]. This autonomy relates to, in particular, the protection and preservation of heritage [Sebott 1995, 46]. It provides that all religious depend on the local ordinary for public worship, that is, pastoral work. Specifically, these issues are the proclamation of holy doctrine, the religious and moral education of the Christian faithful, especially of children, catechetical instruction and liturgical formation, and the lifestyle pursued in the clerical state (cf. no. 35, 4° CD). Canon 678 § 1 mandates that, in keeping with CD, religious are subject to the authority of bishops in matters of pastoral care, the public performance of divine worship and other works of the apostolate, without prejudice to Canon 678 § 2-3. § 2 indicates that in the exercise of the external apostolate, religious are also subject to their proper superiors and should obey the institute's discipline. § 3 stipulates an agreement between diocesan bishops and religious superiors on the matter. Moreover, the continuation of the institute's mission and works is prescribed in Canon 677 § 1, which is the institute's proper work (*opus proprium*), which can, after all, be pertinent to the exercise of the apostolate. It follows that any act intended to banish a religious from the reality grounded in his unique vocation (also apostolic) is unlawful [Rincón-Pérez 2023b, 438]. This proper work, however, lies within the responsibility and indirect competence of the local ordinary by virtue of the norms contained in Canons 611 and 612. The norm of Canon 611, 2° stipulates that the diocesan bishop's consent to the erection of a house of a religious institute implies permission for the institute to exercise its proper works (*opera propria*) according to the norm of law. Further, Canon 612 contains a disposition requiring the diocesan bishop

[12] Vatican II, Decretum de pastorali episcoporum munere in Ecclesia *Christus Dominus* (28.10.1965), AAS 58 (1966), p. 673-701; English text available at https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19651028_christus-dominus_en.html [henceforth: CD].

to give consent to the conversion of a religious house to apostolic works different from those for which it was established. The institute's character and operation are therefore restrictively protected by the law. As noted by Piotr Skonieczny, in line with no. 35, 2° CD, it is not without reason that the diocesan bishop entrusts a parish to a "religious institute", considering that it will be run precisely in a "religious" manner that is specific to this institute [Skonieczny 2014b, 287; Skonieczny 2014a, 67]. Given such an understanding of the distinctness of religious institutes from diocesan structures, both the authority of the diocesan bishop and those made equivalent to him, and the charism of the institute are in no way compromised.

As we have already demonstrated, the major superior of a clerical institute of consecrated life of pontifical right is the personal ordinary for the members of this institute, as mentioned in Canon 134 § 1. The members of such an institute are directly subordinate to him and, being bound by the internal religious discipline, are not subject to the ordinary of the place. However, if they reside in a diocese or other unit made equivalent to it, it is necessary for the major superior to cooperate with the local ordinary. The diocesan bishop (within the meaning of Canon 376) is in charge of his diocese, so he has an influence on the particular Church entrusted to his care. Although the autonomy of houses of religious institutes may vary, this autonomy, in keeping with Canon 586, concerns mainly governance (*praesertim regiminis*). Diocesan bishops are obliged to take care of the consecrated life under their jurisdiction. They are supposed to foster and safeguard it [Socha 1983, 523]. Thus, the ordinary of the place has no jurisdiction over matters concerning the internal life of the religious community. He may not determine the personal composition of the monastery. This rests with the major superior of the institute in question, such as the provincial.

4. The office of provincial superior in the law of the Dominican Order

4.1. Authority in the Order, in particular the core competences of the provincial

We should start our reflections on authority by highlighting that all power comes from God [Calabrese 2011, 98]. Only if conceived in this way, does power appear as a means of helping the faithful to attain salvation – both subordinates and superiors. There is only one and only power in the Church,

and it comes from Christ. This power, under Canon 135, is distinguished as legislative, executive, and judicial. All shepherds of the Church, including the superiors of religious institutes, partake in this one power.

Today, it is essential to identify those who hold ecclesiastical authority (*potestas regiminis*) with the clergy, as prescribed by Canon 129 § 1, and to identify the authority of religious superiors in the case of non-clergy in the 1917 codification called *potestas dominativa* (cf. Canon 501 § 1 CIC/17). The possibility of appointing non-clerical superiors in clerical religious institutes of pontifical right, according to the rescript of 2022 on the derogation of Canon 588 § 2, is not compatible with that.[13] A similar problem arises when non-clergy are appointed as ecclesiastical judges (cf. Canon 1421 § 2). By virtue of Article 1 of the motu proprio *Mitis iudex Dominus Iesus*[14] concerning Canon 1673 § 3 and point 1° of the motu proprio *Mitis et misericors Iesus*[15] concerning Canon 1359 § 3 CCEO, non-clergy can even dominate the senate of an ecclesiastical tribunal. The office of judge (*officium sensu stricto*) unquestionably involves the exercise of ecclesiastical jurisdiction, but it can be exercised by a lay person. To give another example, lay persons can exercise ecclesiastical authority (*potestas regiminis*) by virtue of changes introduced by Pope Francis in his reform of the Roman Curia. For example, the Pope indicated in Article 14 § 3 of the Apostolic Constitution *Praedicate Evangelium*[16] that the appointment

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[13] Dicastery for Institutes of Consecrated Life and Societies of Apostolic Life, *Rescriptum ex Audientia SS.mi* del Santo Padre Francesco circa la deroga al can. 588 § 2 CIC (18.05.2022), "Communicationes" 54 (2022), p. 194-95.

[14] Francis, Litterae apostolicae motu proprio *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 958-70; English text available at https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html.

[15] Francis, Littera Apostolica motu proprio data *Mitis et misericors Iesus* quibus canones Codicis Canonum Ecclesiarum Orientalium de Causis ad Matrimonii nullitatem declarandam reformantur (15.08.2015), AAS 107 (2015), p. 946-57; English text available at https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-et-misericors-iesus.html.

[16] Francis, Constitutio apostolica *Praedicate Evangelium* de Curia Romana eiusque servitio pro Ecclesia in mundo (19.03.2022), "Communicationes" 54 (2022), p. 161-93; English text available at https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html.

of the Roman Curia officials should reflect the universality of the Church and the candidates' experience, who can be either clergy, consecrated persons or lay faithful. Thus, the lay faithful can hold offices in the Roman Curia, and thus, in some measure, depending on their position, can be part of ecclesiastical authority.

Superiors in religious institutes enjoy authority, defined by universal law and constitutions, as Canon 501 § 1 of the 1917 Code called dominative power (*potestas dominativa*), as mentioned above. This phrase is omitted from the current wording of the CIC/83, and no other has been introduced in its place. Religious superiors and chapters therefore do not have the power of governance in the proper sense (*in sensu proprio*). But they somehow have ecclesiastical authority [Krukowski 2011, 160-61]. It is called the power of jurisdiction, which in the most general sense can be understood as power of governance seen holistically, typical of a church community [Żurowski 1984, 45; Gambari 1998, 594-600]. The literature of the subject contains attempts at defining it. One of them states that it is "public authority of divine origin, serving to regulate the social structure of the Church, the position and activities of its members in order to a supernatural end" [Labandeira 1994, 71; Krukowski 2011, 160-61].

In the power structure of institutes of consecrated life the basic relationship is based on the superior–subordinate connection. It is the formal-legal system of interconnections that obtains between bodies of authority and the members of a specific institute [Chrapkowski and Krzywda 2006, 28-30]. The one who holds authority over a subordinate is a superior. Institutes of consecrated life employ a collegial mode of governance through chapters.

Governance in the Order of Preachers is characterised by a community dimension, because it finds its unique embodiment in provincial chapters. During such a chapter, key decisions for the province are made and a new provincial superior is elected. Authority in the Order of Preachers is a broad issue. For our deliberations, it is essential to analyze the authority the provincial enjoys, so it will be instructive to refer to no. 338 § I BCO. It provides that the prior provincial has similar authority in the province in his care to that of the Master in the entire Order and a prior in his convent.

The authority superiors exercise over their subordinates is: 1) lawful, because it exists independently of the will of the superior; 2) public, because

religious orders in the Church are public, not private associations; 3) full, because it encompasses all human activity [Bar and Kałowski 1985, 73].

Therefore, the power of the prior, provincial and general of the order is – in compliance with the 1917 Code (Canon 501 § 1 CIC/17) – dominative (*potestas dominativa*). In light of this, they can command their subjects by virtue of the latter's vow of obedience. Novices and friar candidates are not exempt from their power. Although they have not yet taken the vow of obedience, they stay at the monastery of their own accord intending to live their vows. Based on that, they are called to obedience to religious superiors. The religious superior's power is also authority over all those who, for various reasons, reside in a religious house day and night by virtue of service, education, hospitality or illness [ibid.]

In accordance with No. 338 § I BCO, the prior provincial is a major superior and the proper ordinary of the brothers (religious), which follows from the disposition of Canon 134 § 1. The Dominican notion of the office of provincial aligns with the concept of the major superior stipulated in Canon 620. The provincial superior is the head of a province [Pawluk 2010, 272]. He is also the proper (personal) ordinary of religious who belong to a specific religious province, which corresponds to the concept of ordinary under the aforementioned Canon 134 § 1 [Primetshofer 2003, 97-98].

The provincial superior holds his office for a term. He takes possession of his office for four years by canonical election approved by the highest superior, that is, the general of the order. He may be elected for a second term. He cannot be directly elected for another term of four years, unless he has a dispensation for the requisite interval, as provided for in no. 343 BCO in conjunction with Canon 624 § 2. After this time, he may be re-elected. This restriction is intended to prevent cases of uninterrupted and unlimited exercise of the office by one person [Andrés 1984, 105].

The prior provincial, as a superior, can fulfil his tasks under Canon 617 in keeping with the norms of universal law of the Church and the Order's proper law. The BCO specifies a great many concrete competences that are vested in the office of provincial in the Dominican Order. At this point, however, we need to indicate some of its tasks. In accordance with no. 339 BCO the prior's provincial duties include the following: "1. he should strive to do his utmost to promote in his province the spirit and authentic life

of the Order […]; 2. he should have the common good of the Order very much at heart. He should willingly report to the Master of the Order about the life of the brothers and their apostolate, and he should encourage collaboration between the provinces of the Order; 3. he should promote cooperation between the province and the hierarchy and between the province and other religious families […].”

Nos. 340 and 341 BCO provide that a) the prior provincial is to visitate brothers twice in four years, but the convents of the formation must be visited yearly, and at the end of a visitation, he is obliged to convey to the brothers his observations and ordinations in writing; b) after a visitation, the prior provincial must convey a report to the Master of the Order; c) within three months of his leaving office, he is to send a report on the state of the province to the Master of the Order.

Now, the duty to safeguard discipline and obedience must be mentioned. It results from the disposition in Canon 1341 (and 619). This provision requires the ordinary to react to a law violation. It may happen that a superior’s inadequate response can provide grounds for holding him accountable [Przytulski 2023, 241-43].

4.2. Legal personal requirements *vis-à-vis* a provincial superior candidate

In order for a candidate to be elected prior provincial, it is necessary that he meet the requirements strictly defined by the universal law of the Church and the Order. Since the Order of Preachers is a clerical institute, it must be led by clerical persons [Andrés 1984, 36; De Paolis 2010, 317; Gerosa 1999, 318]. This order, by definition, undertakes the performance of holy orders and as such is recognized by the Church [Pawluk 2010, 268]. No. 443 § II, 1° BCO also mandates that candidates for superiors be presbyters. This applies to all kinds of superiors in the Order – the Master, the provincial, the prior, and those made equivalent to them. At this point, we should note the fact (already mentioned) that by virtue of the rescript *Ex audientia Ss.mi* on the institutes of consecrated life and societies of apostolic life of 18 May 2022 it was made possible – by derogation of Canon 588 § 2 CIC/83 – that non-ordained persons could be superiors, both local, major and supreme, in clerical institutes. However, admission to the office of major superior is to be made with the special approval of the Dicastery for Institutes

of Consecrated Life and Apostolic Life [Rincón-Pérez and Majer 2023, 395-96]. Since this option is fairly novel, the relevant amendments have not yet been included in the Dominican law.

Another criterion regarding the provincial is the passage of a specified time after the (solemn) perpetual profession of a candidate for superior, as required by Canon 623. This time is necessary for the validity of the election of a superior [Pawluk 2010, 272]. No. 443 § II, 2° BCO, addressing all kinds of superiors, provides that three years must elapse from the solemn profession before someone is elected or postulated. "For anyone to be eligible for the office of prior provincial […], it is required that […] he be thirty years old and ten years from first profession," which is grounded in no. 505 § 1 BCO. The lapse of ten years from the first profession is an allusion to Canon 504 of the 1917 Code, which also stipulated the necessity of reaching the age of forty. In the current universal legislation of the Church (Canon 623 CIC/83), the provisions of Canon 504 CIC/17 were not reiterated. Instead, a reference is made to the institute's proper law [Primetshofer 1983, 492-93; Chrapkowski and Krzywda 2006, 54-55; Calabrese 2011, 100]. For a candidate to be elected prior provincial, it is also essential that he has not been the provincial of the province for the two four-year terms immediately preceding (No. 505 § I, 2° BCO). This is linked to the abovementioned safeguard against the office being held by one person for too long [Andrés 1984, 105]. The next restriction under the Order's proper law, no. 505 § I, 3° BCO, is that the candidate for the office of prior provincial is not currently a visitator general in that province. Such a limitation is intended to ensure the objectivity of the visitator general during the canonical visitation of the province. He is expected to be a person from outside the province, someone who does not participate in its life, but only observes it.

A candidate for provincial (as for any superior in the Order) must also have a current religious approval (mandate) to hear confessions, as set forth in no. 443 § II, 3° BCO. Despite gaining such a faculty from the mere fact of assuming the office, as provided for in Canon 968 § 2, it is nonetheless unbefitting for him to have had it. As prescribed by Canon 969 § 2, the provincial, as a religious superior, will be able to grant such authorization to all subordinate presbyters, which is indispensable for hearing the confessions of his subordinates and others living in the religious houses in his charge

day and night [Pastuszko 1999, 230-35; Bar and Kałowski 1985, 74-75; Bogdan 1977, 48-50; Gambari 1998, 598].

The office of prior provincial is assumed when the candidate is sworn in by making a profession of faith (cf. Canon 833, 8°), preceded by the approval of the election or postulation by the Master of the Order. On account of the vow of obedience, a monk designated to be a provincial is not entitled to assume this office. He will be when his superior approves the election (*ius ad rem*) [Dzierżon 2012, 125-32].

4.3. Limited power of the provincial superior during the provincial chapter

Although universal ecclesiastical law does not specify the manner in which provincial chapters should be conducted, their organisation must be subject to the definition and rules stipulated in provisions on general chapters (Canon 631). On this analogy, a provincial assembly gathers qualified provincial representatives who act as a college at a specific time. The existence of provincial chapters is well-established practice, so most institutes hold such meetings [Bogdan 1988, 142-43].

The time when a provincial chapter is held in the Order of Preachers is unique considering the functioning of the provincial as an ordinary with the power of governance in the executive function. The provincial chapter is the most important time in the life of the province and therefore has special powers in its governance of the province. The moment the provincial chapter commences, the incumbent provincial steps down. The province is now governed by the provincial vicar, who also presides over the meetings of the chapter until the election or postulation of a new provincial, as set forth in no. 349 BCO. For the whole duration of the provincial chapter, both the provincial vicar and the newly elected provincial superior have a limited ability to exercise the power of governance in the executive function. No other body but the chapter makes all the decisions. The Order's self-determination is closely associated with its autonomy [Henseler and Meier 1985, 586]. This need not apply to external influences on the Order's governance but is manifested in the communal formation of its law, rather than reliance on the decisions of a single person – the superior. In the Order of Preachers, this is particularly noticeable in the work of the capitular

diffinitorium, which assumes the functions of the ordinary.[17] Although diffinitors are not ordinaries within the meaning of Canon 134 as they make up a collegial body, they possess extensive powers in the Order's law. The diffinitorium also handles all matters that pertained to the chapter. It prepares all kinds of admonitions, ordinations, declarations and petitions. It also fills provincial offices and, if necessary, issues decrees transferring monks from one monastery to another, according to no. 358 § V BCO.

When the provincial chapter is over, the provincial superior is now free to exercise the power of governance in the executive function. Such a constraint on the authority of the Dominican provincial underscores the communal nature of government in the Order. This also demonstrates the importance of the chapter for the life and law of the province. Due to its size and presence on different continents, the Order of Preachers does not regulate in detail all aspects of provincial life in a top-down fashion. Each province is competent to legislate only at a particular level. The document containing the law of each province is the provincial statute. It is where each province lays down its proper law concerning issues that are not sufficiently regulated by the general law of the Order or where it gives individual provinces leeway to normalize them [Przytulski 2022, 195].

Conclusion

The present study shows the office of provincial superior in a clerical religious institute of pontifical right as an ordinary, as provided for in Canon 134 § 1 of the 1983 Code of Canon Law, and as the major superior in a religious order referred to in Canon 620. Our analysis of this issue hinges on the identification of these two elements, which serves as the point of departure when examining concrete issues that specific institutes of consecrated life or associations of apostolic life have implemented in their legislation. Our presentation of selected and most relevant elements of the Dominican law pertaining to the said office has made it possible to outline how the Order of Preachers sees the office. The manner in which the Domicans govern themselves and, in particular, the deliberations of the provincial chapter,

[17] "The diffinitors of a provincial chapter are the brothers who are elected by all the voters of a provincial chapter to decide, together with the president, the more important affairs of the chapter" (no. 513 BCO).

highlight that although the provincial is the elected to exercise his executive power, the Order's system of governance is grounded in their sense of community.

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REASONS FOR A TOTAL SIMULATION OF MARITAL CONSENT IN JUDGEMENTS *PRO NULLITATE* OF THE METROPOLITAN TRIBUNAL IN KRAKÓW PASSED BETWEEN 2010 AND 2020

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Abstract

The article deals with the important element inherent in proving the invalidity of marriage on the grounds of total simulation of marital consent (Canon 1101 § 1), which is the reason for simulation. I analyse all the decisions *pro nullitate matrimonii* of the Metropolitan Tribunal in Kraków handed down in the years 2010-2020. In the first part, the importance of *causa simulationis* at the instruction stage in the canonical process is presented. The essential part of this study is devoted to *causa celebrandi* and *causa simulandi* occurring in the presented jurisprudence. I also propose some legal and pastoral measures that may help to eliminate instances of invalid marriages, concluding that the *causa simulandi* is an important aid for judges to achieve moral certitude about the nullity of a marriage for the reasons stated above.

Keywords: procedural canon law, canon law process, *causa celebrandi*, *causa simulandi*, Metropolitan Tribunal in Kraków

Introduction

Our life experiences and judicial practice show that there are situations where during a wedding ceremony the contractants verbalise their marital consent, but in fact the nuptial knot is not tied. This occurs when the prospective spouses only say the words of the marriage vows, but internally (i.e., factually) they exclude marital consent. In so doing, they give rise to a dissonance between the externally manifested acts and the attitude of their will. Canonical doctrine refers to such an exclusion as simulation, as there is an intended insincerity between what the prospective spouse

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demonstrates when he or she expresses an act of will to marry and what they actually desire.

This article presents the issue of total simulation of marital consent (Canon 1101 § 2). Such a simulation involves the awareness of the invalidity of the marriage contracted by the simulating person only ostensibly, who in so doing wanted to achieve a different goal, alien to the marriage itself. In order to prove the invalidity of such a marriage two requirements must be fulfilled: the presumption of marriage validity has to be refuted (Canon 1060) and the presumption of the concert between "the internal consent of the mind" (actual will) and the words or signs actually expressed (Canon 1101 § 1).

The present paper examines all judgements *pro nullitate matrimonii* that were passed between 2010 and 2020 by the Metropolitan Tribunal in Kraków on the grounds of total simulation of marital consent. The article aims to outline the reasons why prospective spouses resolve to simulate and the motives why judges attain moral certitude about the invalidity of a particular marriage. For reasons of space I find it impossible to provide more information on the marriages in question, and the present synthesis can contribute to further reflection in the milieu of canonists.

As the vast majority of the judgements analysed here pertain to the cases of people who are still alive, only the essential information on the processes in question will be provided. This decision is dictated by the need to protect the identity of the parties involved by making it as difficult as possible to link the facts established during the trial and later cited in the sentence to the identity of the participants.

1. The significance of a reason for proving a total simulation of marital consent

A marriage can be found invalid on the grounds of total simulation if two reasons are ascertained. One is the so-called *causa celebrandi vel contrahendi* – a sufficiently grave reason for which someone wants to have a wedding ceremony to enter into a marriage of convenience, or "for show" only, which he or she does not really want. *Causa contrahendi* is translated as the reason for concluding a marriage, while *causa celebrandi* denotes the reason for the external expression of marital consent during the wedding ceremony. It seems that it is more appropriate to use the phrase *causa*

celebrandi, since the true intention of the simulating person is the "ceremony" of marriage, or its "celebration". The person does not intend to actually "conclude" marriage, as the formula *causa contrahendi* might falsely indicate.

The other is the so-called *causa simulandi* – a reason for which someone simulates, that is, does not actually want the marriage to which he or she has overtly consented. The existence of this reason and its superiority to the *causa celebrandi* constitute a serious premise for the invalidity of a marriage. However, proving only the reason for simulation is not sufficient to pronounce a marriage invalid if the existence of a positive act of will excluding the marriage itself is not proven. The judges of the Tribunal of the Roman Rota point out that these two causes "always compete with each other" and that *causa celebrandi* "is in opposition" to *causa simulandi* [Glinkowski 2004, 55-56].

It may happen that for some the same circumstance or fact will sufficiently justify externalised marital consent, while for others it will justify simulation – that is, exclusion of marriage. This will be the case, for example, when some prospective spouses by reason of fear simulate their marital consent, so fear is taken to be the *causa simulandi*, but others are driven by fear into giving marital consent, so fear occurs in them as the *causa celebrandi* and is an autonomous cause of nullity of marriage. In conclusion, we can say that the same reason(s) can prompt prospective spouses so that one time they actually enter into marriage, and another time they simulate it [ibid., 56].

As one judge of the Rota notes, it may happen that when the prospective spouse's goal becomes the chief purpose of "concluding" marriage, and getting married only serves their goal, the reasons for expressing marital consent and for simulation can merge into one cause.[1]

What is more, canon doctrine and jurisprudence point to the connection between personal goals (*finesoperantis*) and the ends of the work(*fines operis*) on the one hand and the reason for expressing marital consent and the reason for a complete simulation of marital consent. In processes concerning nullity by reason of *simulationis totalis*, special attention should be paid to the prospective spouse's intention (*finis operantis*), i.e., the reason

1 Sent. c. Bruno of 3 July 1976, SRRD 68 (1976), p. 269.

for which he or she wants to articulate marital consent (*causa celebrandi*). If this intention goes against the end of the work (*finis operis*), i.e. marriage, this intention becomes the reason for marital consent simulation (*causa simulandi*). The ends of the work (marriage) – are regulated in Canon 1055 § 1: the welfare of the spouses and "the procreation and education of offspring" (the good of the offspring). A person who only wants to achieve a goal that is totally incompatible with the essence of marriage and performs a positive act of will excluding the ends of marriage cannot validly enter into such a marriage [Góralski 2016, 127-28].

2. *Causa celebrandi* in the judgements of the Metropolitan Tribunal of Kraków

2.1. Inability to withdraw from a plan to marry

The first case of this kind involves parties whose premarital acquaintance lasted a year, during which the parties met once a week. After a brief acquaintance, the parties started a sexual relationship, as a result of which the woman (the petitioner) became pregnant. The subject of marriage cropped up only by reason of the woman's pregnancy. Wedding preparations were hasty, she was little involved in them, but in preparation for the wedding she received the sacrament of confirmation. The parties were married when the petitioner was 19 and the respondent was 23. Afterwards they moved into the petitioner's parents' house. For two years they lived in one room, and after renovating part of the house, the husband moved to that part, but she stayed in the part previously occupied by them. Five years after the marriage, the man went to Scotland for work, and his wife was also with him for some time. Formally, their marital bond lasted seven years. The parties obtained a divorce without adjudication of guilt. The petitioner admitted to simulating and justified here express marital consent as resulting from her desire to save her face and avoid suspicion (which was legitimate, anyway) that she had engaged in sexual intercourse and become pregnant with a man to whom she had no deeper emotional attachment.[2]

Another case involves parties whose premarital acquaintance lasted five years. The parties met in the woman's (respondent's) hometown, which is

[2] Sent. c. Molendys dated 17 February 2010, ref. L.I.N.194/06, Wyroki Sądu Metropolitalnego w Krakowie [hereinafter WSMK] 2010 (unpublished).

also where the petitioner's family came from. Before the wedding, the couple were seen as normal young people in love. They were married when the man was 24 and the woman was 25. After the marriage, for about a year the parties lived and worked in their hometowns, meeting at weekends when the husband came to the respondent's family home. When he found a job closer to his wife's town, he moved there. The woman's parents decided to build a house for the couple in their town. After a dozen or so months of cohabitation, the respondent became involved with a married man. Formally, the parties' conjugal life lasted four years. The parties obtained a divorce without adjudication of guilt. The respondent admitted to having simulated and she indicated the reason for her express marital consent: "The reason I was meeting with the petitioner was because everything was set for the wedding, and I didn't want to hurt him or my family."[3]

The next case involves parties whose premarital acquaintance lasted two years. A year after they met, they moved in together in a flat owned by the woman (petitioner). Both parties worked at different pharmaceutical companies. A few months before the wedding, the woman changed jobs, where she began dating another man. The parties were married when the petitioner was 25 years old and the respondent was 28. Formally, the parties' marital bond lasted five years. The parties obtained a divorce without adjudication of guilt. The woman admitted to having committed a simulation, and indicated the reason for her express marital consent, which was her inability to withdraw from her arrangements to marry the respondent in the time when she was emotionally involved with another man.[4]

Another case involves parties whose pre-marital acquaintance lasted only a few months, at which time the parties engaged in sexual intercourse, and then two months before the wedding they moved in together, into the woman's (respondent's) family home. The man was much in love with the respondent and insisted that their relationship be concluded with the sacrament of marriage as soon as possible. The parties were married when the man was 24 and she was 29. Shortly after the marriage (about two months), the petitioner moved out of their home. Formally, the parties'

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[3] Sent. c. Bogdał dated 5 May 2010, file ref. no. L.I.N.147/07, WSMK 2010 (unpublished).

[4] Sent. c. Molendys dated 3 November 2010, file ref. no. L.I.N.41/07, WSMK 2010 (unpublished).

marital life lasted a year. The parties obtained a divorce without adjudication of guilt. The respondent admitted to having committed a simulation and indicated the reason for her express marital consent, which was fear of the consequences of withdrawing from the promise to marry, especially that her parents approved of both her plans to marry and the petitioner himself as an ideal candidate for her husband.[5]

The next case involves parties whose pre-marital acquaintance lasted two years. From the beginning, the parties engaged in sexual intercourse, as a result of which the woman (respondent) became pregnant. The parties were married when the man was 23 and she was 20. Formally, their marital bond lasted two years. The parties obtained a divorce without adjudication of guilt. The respondent admitted to having committed a simulation and indicated the reason for her express marital consent, which was the desire to meet the expectations of her relatives, the inability to resist their pressure and the attempt to defend the good image of her family in the local community.[6]

The next case involves parties whose pre-marital acquaintance lasted ten years. They did not live together before marriage, although from the second year of their acquaintance they undertook sexual intercourse. They started discussing marriage after about four years of their acquaintance. A year before the wedding, their became formally engaged. Although the two families, having good friendly relations, wanted the couple to legalize their long acquaintance, no one urged them to marry. The woman (petitioner) was very much in love with the man and convinced that he loved her back. However, as it turned out shortly before the wedding, the respondent had already established an intimate relationship with another woman. The parties married when they were both 26 years old. Formally, their marital life lasted two years. They obtained a divorce with an adjudication of guilt of the respondent. He admitted to having committed a simulation and indicated the reason for his express marital consent: "I met another woman when preparations for the wedding with the petitioner were very well underway. My acquaintance with the petitioner had already lasted for many years, and that's why I couldn't get to telling her I didn't want to marry her."[7]

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[5] Sent. c. Molendys dated 10 November 2010, file ref. no. L.I.N.134/08, WSMK 2010 (unpublished).

[6] Sent. c. Molendys dated 5 October 2011, file ref. no. L.I.N.180/06, WSMK 2011 (unpublished).

[7] Sent. c. Rapacz dated 16 January 2013, file ref. no. L.I.N.110/08, WSMK 2013 (unpublished).

Next is a case involving a couple whose pre-marital acquaintance lasted three years. From the beginning, the parties engaged in sexual intercourse. The woman (petitioner) also cohabited with the man in his flat. In this time, there were only sporadic and minor disagreements between them. They decided to marry about a year in advance. However, a few weeks before the scheduled wedding, the petitioner met another man with whom she also engaged in sexual intercourse. She tried to somehow deal with the situation she found difficult, too, but she was prevented by the advanced stage of wedding preparations. The parties were married when she was 24 and he was 33. Formally, the parties' marital bond lasted a year. They obtained a divorce without adjudication of guilt. The petitioner admitted to having feigned marital consent and confessed why she did that: "I regret to confess that I did not say the words of the marriage vow sincerely; I said them for the peace of mind, not for the sake of marriage."[8]

Another case relates to a couple whose pre-marital acquaintance lasted several months. The parties met at a time when the woman (respondent) was in a relationship with another man, but she struck up a relationship with the respondent, nonetheless. Very quickly, this relationship gained intensity, also sexually, and only three months after the relationship started, the woman became pregnant. For that reason, the petitioner and the respondent's relatives decided that marriage would be the optimal solution. However, the woman did not want to marry him, and she made that clear to several people. The parties married when the petitioner was 26 and she was 20. The wedding and the reception took place in a peaceful atmosphere, although some witnesses say the respondent did not behave as brides are expected to. After the marriage, the parties moved into the respondent's mother's home. As they both claim, they never established any community, did not consummate their marriage, and two weeks after their marriage, following a domestic brawl during which the woman was beaten by her relatives, the petitioner moved out of their shared dwelling. Formally, their marital life lasted two years. The parties obtained a divorce with an adjudication of the respondent's guilt. The respondent admitted to having committed a simulation and showed the reason for her express marital consent, which was the fear of the consequences of withdrawing from the promise to marry, all the greater because her family had urged her

[8] Sent. c. Rapacz dated 5 February 2013, file ref. no. L.I.N.105/10, WSMK 2013 (unpublished).

to marry. Furthermore, in the opinion of the judges, the reasons for the respondent's feigned marital consent were the following: the respondent's unplanned pregnancy, the reluctance of her mother and relatives toward her partner, and the pressure they put on the respondent, despite her explicit declarations of unwillingness to marry the man – this pressure correlated with the motive for marriage.[9]

Next is a case relating to parties whose pre-marital acquaintance lasted five years. The parties met in a circle of horse-riding enthusiasts. A shared passion and mutual affection brought them together very quickly. At first, they would correspond with each other, then meet regularly, and over time they started making plans for the future. Such a close relationship between the parties and their shared plans were welcomed by the respondent's parents. A year after the parties met, the man (petitioner) was transferred to the reserve at his own request and thus left the military sports club of which he had been a member. He then moved to another town and moved into the woman's home. Then, after a few months of living together, the parties moved again to a different town, taking up residence in her parents' home. Her parents decided to build a horse-riding centre, which they intended to include a house for the couple. With the prospect of pursuing a shared passion, the parties became very committed to this investment. Two years before the canonical marriage, the couple had their first son, and a year later the parties contracted civil marriage. A few months later, a second son was born. Then, after a year, they entered into canonical marriage, when they were both 28 years old. However, just a few weeks after the wedding, the respondent became involved with another man. Formally, their marital bond lasted two years. They obtained a divorce without adjudication of guilt. The case file contains no information of the respondent's admission of simulation. However, in the judges' opinion, the respondent, being unable to go back on the promise of marriage given to the petitioner, feigned marital consent, as evidenced by her abandonment of the family – her husband and two sons – a few weeks after her promise to continue in a lifelong relationship.[10]

Another case involves parties whose pre-marital acquaintance had lasted since childhood, as they were peers living in the neighbourhood.

[9] Sent. c. Rapacz dated 29 May 2013, file ref. no. L.I.N.200/10, WSMK 2013 (unpublished).
[10] Sent. c. Rapacz dated 19 June 2013, file ref. no. L.I.N.4/06, WSMK 2013 (unpublished).

The parties' close relationship prior to their engagement lasted about four years, for at least half of which the parties lived in the respondent's parents' house. The parties were married when they were both 27 years old. After that the couple continued to live in the respondent's parents' house, where they had their own space to live. The couple' promising marriage turned out to be an unfortunate and unstable relationship. Formally, the parties' marital life lasted a year. They obtained a divorce without adjudication of guilt. The woman denied the man's claim that she had committed acts of disloyalty before marriage and marital infidelity, but she testified on the subject of simulation: "I knew I didn't want to be his wife. The whole thing was forced. I made the biggest mistake of my life."[11]

Next is a case involving a couple whose pre-marital acquaintance lasted three years. The couple met while the man (respondent) worked as a taxi driver. A closer acquaintance developed between the parties. They were seen in their environment as a normal couple of young people in love. They started a sexual relationship, and after a year of acquaintance, they rented a flat and moved in together. After two years they married. The woman (petitioner) was 27 at the time, and the respondent was 29. However, a few months after the marriage, the petitioner moved out of the shared flat and started a relationship with another man. Formally, the parties' marital life lasted four months. They obtained a divorce without adjudication of guilt. The woman admitted to having committed a simulation and declared that the reason for her express consent to marriage was the desire to protect her own reputation, as it would have been damaged had she, in the last days before the wedding, withdrawn from the joint arrangements and cancelled the wedding.[12]

The next case (heard at second instance) concerns parties whose pre-marital acquaintance lasted four years with an interruption caused by the man's (respondent's) stay in the UK. The parties established a close relationship very quickly, they often met and also willingly engaged in sexual intercourse. During the man's stay abroad, the couple met twice. In addition, they were in touch by phone and Internet. The respondent saw the petitioner as a good candidate for a wife. The couple were married when she

[11] Sent. c. Molendys dated 9 April 2014, file ref. no. L.I.N.146/10, WSMK 2014 (unpublished).

[12] Sent. c. Molendys dated 19 October 2016, file ref. no. L.I.N.44/14, WSMK 2016 (unpublished).

was 26 and the respondent was 28. After three months, the respondent stopped seeing the petitioner. Formally, the parties' marital bond lasted a year. They obtained a divorce without adjudication of guilt. When asked about the reasons why the marriage failed, the respondent stated categorically that the reason was that she had become involved with another man. The woman admitted to having committed a simulation, citing her inability to withdraw from her previous engagements for reasons of reputation as the reason for her express marital consent.[13]

The next case involves parties whose pre-marital acquaintance lasted a year. Soon after they met, affection between them quickly developed. After six months' acquaintance, the man (respondent) proposed to the woman in the presence of her parents. The proposal was accepted by the petitioner. The parties set a date for the wedding and started preparing for it. They decided that afterwards they would live in the petitioner's hometown, where her parents had begun building a house, which was going to be made available to the parties. They were married as planned. Both were 29 years old at the time. After the wedding, as planned, the parties moved into the petitioner's parents' home. However, a few months after the wedding, the respondent moved out of the petitioner's place to live back in his mother's home. Later, the parties would still visit each other at their parents' homes – the petitioner urged her husband to start living together, but he was not interested in building marital unity. Formally, their conjugal life life lasted four years. They obtained a divorce without adjudication of guilt. After obtaining a divorce, the respondent became involved with another woman. The case file contains no information of the respondent's admission of a simulation. However, in the opinion of the adjudicating panel, the petitioner points to a series of events connected with the respondent's involvement with another woman (his neighbour) still before the marriage, which in the judges' opinion make up a coherent and logical narrative. The respondent's commitment to marrying the petitioner was so advanced that he was unable to back out of his plans to marry her.[14]

[13] Sent. c. Rapacz dated 7 December 2016, file ref. no. L.II.N.195/14, WSMK 2016 (unpublished).

[14] Sent. c. Rapacz dated 13 December 2017, file ref. no. L.II.N.141/14, WSMK 2017 (unpublished).

Next is a case involving parties whose pre-marital acquaintance lasted two years. They built a closer relationship, which turned out to be turbulent and difficult. They also took their relationship a step further by engaging in sexual intercourse, which led to conception. The woman (petitioner) saw the man as a good candidate for a husband and father, and the strong feelings she had for him made her even idealize him. The couple were married when she was 25 and he was 27. Six months later, a baby was born. Soon afterwards, the parties' marital unity felt apart quickly. A dozen or so months after the wedding, the respondent – under the pretext of renovations carried out on the house – commanded the petitioner to leave with the child, so she moved to her parents' place. After that, the parties never restored their marital community. Admittedly, they tried to establish a marital relationship a few years after their marriage – they went on holiday together and even attempted cohabitation. Unfortunately, they were unable to save their marriage. Formally, the parties' marital bond lasted five years. They obtained a divorce without adjudication of guilt. The respondent admitted to having committed a simulation and justified his express marital consent by the petitioner's blackmailing him and her mother pressurising him to marry her daughter.[15]

2.2. Gaining material goods

The first case of this kind involves parties whose premarital acquaintance lasted a year. They met online. After living in the U.S. for eight years, the respondent (a Korean man) came to Poland at the invitation of the woman (petitioner). She made her flat available to the respondent, and they started living together. He made a very good impression on the woman and her relatives. He also came across as an enterprising man. After a four-month stay in Poland, the respondent went to Korea, where he underwent a catechumenate and was baptised in the Catholic Church. A month before the wedding, the petitioner travelled to Korea to see the respondent, and the parties were married there. The woman was 33 at the time, and he was 36. After the marriage, the couple moved into her flat in Poland and lived off her salary, as the man could not find employment, and he quickly lost the job he had managed to find. When she was four months pregnant, the respondent

[15] Sent. c. Molendys dated 17 October 2017, file ref. no. L.I.N.112/13, WSMK 2017 (unpublished).

went to Korea to, as he stated, find work there and provide for the family. However, his departure proved to be the end of their life together, since he would not return to Poland, and the petitioner would not go with the child to Korea. In addition, even casual correspondence failed between the parties. The respondent was not interested in the fate of the petitioner and their child. Nor did he provide for the child. Formally, the parties' marital union lasted a year. They obtained a divorce with an adjudication of guilt of the respondent. The respondent did not take part in the trial, so the judges based their convictions on the testimony of the petitioner and her witnesses, who testified that the respondent promoted himself as a wealthy man, but in fact his only achievements at the age of almost forty were his studies completed in the USA. Not only that: he treated his baptism in the Catholic Church only as a step to winning the woman. In addition, she stated that the man had shown an unusual interest in the financial sphere of their marriage from the first days of their marriage. Ultimately, the petitioner gave up on the marriage when he became convinced that he would not be able to lay his hands on the petitioner's property. In the case at hand, we are dealing with a situation where a contractant's goal became the main purpose of sacramental marriage, and marriage was only a means to achieve this goal – the *causa celebrandi* and the *causa simulandi* concurred in a single cause.[16]

Another case involves parties whose pre-marital acquaintance lasted five years. Shortly after making acquaintance, they established a close (and sexual) relationship. The man (respondent) proposed to the woman, and she accepted. The couple decided to marry, although their marriage plans were met with disapproval from those in the petitioner's environment. They readily showed their reluctance, advising the woman against entering into a formal relationship with the respondent. The petitioner, however, was in love with the man and idealized him. The respondent's behaviour, which he manifested prior to the marriage, was alarming. He often abused alcohol and was aggressive toward the petitioner. The parties, however, married when the woman was 23 and he was 32. After numerous quarrels, the petitioner ordered the respondent to move out of her family home, where the parties moved in after marriage. Formally, their marital union lasted two years. They obtained a divorce without adjudication

[16] Sent. c. Bogdał dated 5 January 2011, file ref. no. L.I.N.35/08, WSMK 2011 (unpublished).

of guilt. The respondent neither expressly objected to the petitioner's claim of simulated marital consent nor confirmed it. However, he admitted to deceiving, abusing, and harming the petitioner. The witnesses pointed out that the marriage had been concluded at a very specific time – when the respondent had nowhere to live and nothing to live on, as he was in debt from his previous business. Owing to his marriage to the petitioner, he was able to live in her family home, as her mother did not consent that the parties should live in her place unmarried. In the case in question, the judges also pronounced the marriage invalid on the grounds that the man was incapable of undertaking the essential marital duties for psychological reasons.[17]

2.3. Gaining accommodation

The only case of this kind concerns parties whose pre-marital acquaintance lasted two years. They met while the man (petitioner) was doing his obligatory military service. With his service complete, the parties continued their acquaintance by correspondence due to the distance separating them. Sometimes he came to visit the woman's family home, where the couple spent time in the presence of her mother and sisters. The man stated that after they had been meeting for a year, the respondent's mother forced him to make a decision to marry her. However, the petitioner did not come to the engagement ceremony that the respondent's mother had planned, and as a result she showed up at his home and persuaded him to get married, promising to bear all the costs associated with the wedding ceremony. As the petitioner came from a poor family and such a deal seemed very convenient to him, he agreed to the respondent's mother's proposal. The petitioner also hoped that by formalising the relationship he would eventually get an assignment for an independent flat. After a year-long acquaintance, the parties entered into a civil contract. Six months later, they also celebrated a canonical marriage, submitting to the persuasion of the woman's mother. The man was 23 and the woman was 20. Six months later, the petitioner moved into the respondent's family home. However, the parties could not run a separate household, as everything was managed by the woman's mother. We learn from the petitioner's testimony that the parties also had to sleep in the same bed with his mother-in-law, who thus prevented them from having children. However, the marriage was consummated

[17] Sent. c. Molendys dated 22 May 2019, file ref. no. L.I.N.175/16, WSMK 2019 (unpublished).

by the parties, which was supposedly done in secret when the mother-in-law was away. Sexual intercourse between the parties was sporadic. The petitioner was disappointed the most by the fact that the respondent's mother would not sign his housing application, which prevented him from moving out with the respondent to an independent accommodation. According to the man, the respondent was controlled by her mother in every way and unable to oppose her. After four months of cohabitation and less than a year of marriage, the petitioner moved out from the woman's flat. The man wanted to persuade the woman to move out of his mother-in-laws' place, but he failed several times. Formally, the parties' marital union lasted three years. They obtained a divorce without adjudication of guilt. The petitioner admitted to having committed simulation: "I only cared about the housing application. I thought the church wedding was a comedy."[18] In this case, too, the *causa celebrandi* and the *causa simulandi* converge in a single reason, which was the desire to gain accommodation.[19]

2.4. Legalization of residence

The only such case relates to parties whose pre-marital acquaintance lasted a year. Even in this period, when the respondent (a Vietnamese man) saw that the petitioner had become emotionally involved in their relationship, he began to neglect her. He would often leave her alone and meet his friends, telling her plainly that business and work were far more important to him than her. The parties initially concluded a civil contract and then a canonical marriage. The woman was 20 at the time, and he was 37. Immediately after the wedding, the respondent became even more indifferent to the petitioner. His indifference to both the petitioner and their children quickly grew and even escalated into acts of aggression – first mental and then also physical – towards her and their children. Formally, the parties' conjugal life lasted nine years. They obtained a divorce without adjudication of guilt. The respondent's admission of simulation is missing from the file. However, witnesses interviewed in the case stated unanimously that the respondent treated the petitioner and the relationship with her instrumentally, taking advantage of her naivety and affection to marry her and thus make it possible for him to stay in Poland and conduct

[18] Sent. c. Molendys dated 9 October 2013, file ref. no. L.I.N.101/10, WSMK 2013 (unpublished).
[19] Ibid.

his business. The parties' marriage was intended to serve the respondent only as a means to an end, which was to legalize his stay in Poland. In this case, the defender of the bond posed a major objection against declaring the marriage invalid on the grounds that it would have been sufficient for the man to enter into a civil contract (as he did) to obtain a visa, without having to contract a canonical marriage. However, as the judges noted, the argument would be valid only if the respondent were familiar with the Polish legal system. In light of the evidence, the judges came to the conclusion that the respondent was completely unfamiliar with the relationship between Polish state law and canon law. He was a follower of Buddhism, in which marriage is performed according to the forms customary in the local community, including the religious form, in accordance with the secular law of the country in which the followers of that religion currently reside [Czapnik 2014, 354-55]. Thus, it can be assumed that for the respondent, the marriage was only "fully" celebrated in canonical form, which is why he agreed to it and even strove to obtain it. Also in this case, the possibility of legalized residency became both a reason for marriage and a reason for simulated marital consent.[20]

2.5. The possibility of emigration

The first case in this category relates to a total simulation committed by both parties. Their pre-marital acquaintance lasted five years. The woman (petitioner) admitted to having committed a simulation. He cites facts to support his admission – the lack of deeper feelings for the man before the marriage and the subsequent failure to pursue a lifestyle appropriate to spouses. As the reason for both the express marital consent and its complete simulation, she recalled her desire to help the respondent realise his emigration plans and to make her travel opportunities easier. The respondent, referring to the petitioner's claim, maintained that she knowingly collaborated with him to carry out the plan to enter into a marriage of convenience. The respondent was actively involved in the opposition movement against communist totalitarianism. Fearing persecution, he entertained the idea to leave for the U.S., where his sister was already living. At a U.S. consulate, he was told that if he did not submit a certificate that he had entered into a "church wedding", he would be refused a visa. Facing

[20] Sent. c. Rapacz dated 13 July 2016, file ref. no. L.I.N.140/07, WSMK 2016 (unpublished).

these difficulties, the respondent decided to enter into a sham marriage with a friend of the same age. The marriage was not preceded by a period of engagement or an appropriate ceremony. The parties were not seen by others as a couple in love. In addition, the respondent's mother testified that she found out about the planned wedding two weeks before it took place. The parties entered into both a canonical marriage and a civil contract on the same day. They were both 25 at the time. After the wedding, the parties and their families and friends met at a party at the petitioner's parents' home, but they never lived together and unanimously declared that they had not consummated the marriage. Formally, the parties' marital bond lasted a year. The parties were granted a divorce without an adjudication of guilt. Shortly afterwards, the respondent left for the U.S. There he met a woman with whom he entered into a civil contract. Also in this case, the desire to emigrate to the U.S. became both the reason for the marriage and the reason for the complete simulation of marital consent by both parties.[21]

The next case involves parties whose pre-marital acquaintance lasted three months. They met in Greece having fled Poland with the intention of emigrating to the United States. The parties were a couple and engaged in sexual intercourse. Having found out that married couples are more likely to get an emigrant visa to the U.S., the couple decided to contract a marriage of convenience. Since civil contract formalities could take several months, the parties decided to celebrate a canonical marriage in Greece, which they were allowed to without any preparation in a short period of time. The man (petitioner) was 22 at the time, and the woman was 19. After the wedding, the two often quarrelled. After arriving in the U.S., the parties, in accordance with emigration regulations, moved in together, but conflicts between them continued. The respondent went to Poland after a year, from where she returned the following year six months pregnant. The petitioner claimed the child as his own so that the respondent and the child would be covered by health insurance. When the respondent needed the status of a single mother required to receive a scholarship, she filed for divorce. The parties were no longer living together at the time. Formally, their conjugal life lasted five years. The petitioner admitted to having committed a simulation. The evidence shows the obvious reason

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[21] Sent. c. Bogdał dated 8 March 2017, file ref. no. L.I.N.147/13, WSMK 2017 (unpublished).

for both the express marital consent and the reason for the complete simulation of marital consent: the desire to increase the chances of emigrating to the United States.[22]

3. The *causa simulandi* in the judgements of the Metropolitan Tribunal of Kraków

3.1. Lack of love

In the first of such cases, the woman (petitioner) stated that the information about her pregnancy with a man she never loved was very difficult for her. She refused to tell anyone about her pregnancy. At a critical time in her life, she wanted to abort the baby, but the respondent told her that if she did, the local community would learn about it.[23]

In the next case, the respondent stated that she took her marriage vows insincerely, because even before the wedding she had understood she did not love the petitioner and did not want to tie herself to him with the marriage knot. Also, the petitioner stated that already before the marriage, the respondent had become cold and distant toward him. She would not take part in marriage preparations. In addition, the petitioner testified that during her parents' blessing the respondent "stood petrified", during the wedding she "was having fun because she had to", after the wedding she refused to consummate the marriage, and her overall attitude made it clear to him that she did not feel bound by any marriage.[24]

Next is a case where the woman (respondent) testified that her early enthusiasm for the petitioner had waned considerably or, if anything, was superseded by an overwhelming reserve. However, when she became pregnant, the respondent consented to marriage, which she did under pressure from both her own and the petitioner's family. The painful experience of a miscarriage a few weeks before the wedding only intensified her reluctance to the planned marriage. The respondent stated: "While taking the marriage vows, I said 'I do', but in my heart I felt otherwise and was against it. I did it against myself, without love."[25]

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[22] Sent. c. Bogdał dated 12 July 2017, file ref. no. L.I.N.172/14, WSMK 2017 (unpublished).

[23] Sent. c. Molendys dated 17 February 2010.

[24] Sent. c. Molendys dated 10 November 2010.

[25] Sent. c. Molendys dated 5 October 2011.

In the next case, the man (respondent) described the parties' pre-marital relationship in this way: "Even before the wedding, I was contemplating dissolution of my marriage to the petitioner because I did not love her."[26] The respondent gave some details of his behaviour after the marriage, which was indicative of total simulation: "For about five months after the wedding, I perfectly concealed the lie uttered in the church. However, after the child was born, I confessed everything to the petitioner. I would run away from my wife to my colleagues and friends."[27] Also, the respondent's mother testified that her son was under pressure from her and from the petitioner who blackmailed him, and that he clearly communicated his aversion to her and the plan to marry her. In the case in question, the judges also declared the marriage invalid owing to his inability to undertake the essential marital duties by reason of psychological obstacles, both in the man and in the woman.[28]

3.2. Leading a "double life"

In the first case of this kind, the woman (respondent) testified that a few months before her marriage to the man (petitioner), she became emotionally and sexually involved with a married man (her co-worker). Shortly after her marriage, she reverted to the intimate relationship with that man, being unfaithful to her husband, and eventually abandoned the petitioner, broke off the marital union, and started living in an informal relationship with her colleague: "At first, I was in love with the petitioner, but when I met my workmate, I already knew that I didn't love the petitioner."[29] In the case at hand, the judges also considered the marriage invalid due to the respondent's exclusion of fidelity. This decision deserves some criticism. Consistently with canonist doctrine and rotal jurisprudence, it is impossible to reason that the respondent had no marital will (total simulation) and at the same time had it, albeit defective (partial simulation), and, consequently, the marriage cannot be declared invalid based on both total simulation and either of the partial kinds of simulation [Sobański 2000, 146].

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[26] Sent. c. Molendys dated 17 October 2017.

[27] Ibid.

[28] Ibid.

[29] Sent. c. Bogdał dated 5 May 2010.

In the next case, the woman (petitioner) testified that after she changed jobs a few months before her marriage, she met a man at work and struck up a relationship with him. At first, they were just friends, but friendship evolved into emotional involvement, and eventually went beyond standard relations between work colleagues, and three months before her planned marriage to the respondent, she engaged in sexual intercourse with her workmate. Under such circumstances, the petitioner started having second thoughts about her planned marriage to the respondent. She also shared these doubts with the respondent, who shortly before the planned wedding resolved to move out of the flat he shared with the petitioner. Nonetheless, on account of his emotional involvement with the petitioner and hoping that she would break off the relationship with her lover, he resolved to carry on with the wedding ceremony. The marriage was not successful. Faced with a marital crisis, the respondent suggested that his wife should see some specialists, but she would not. Instead, she became involved with the other man and broke off marital relations with her husband.[30]

Next is a case where the man (respondent) admitted that he had become emotionally involved with another woman six months before the wedding and had sexual intercourse with her a month before they married. This acquaintance was carefully concealed from those around them. As the respondent's feelings for another woman grew, there was a change in his behaviour toward the petitioner, who was already his fiancée at the time. The respondent's reserve grew, and he became cold toward her, he avoided discussing their future together and preparations for marriage. The woman noticed this process and even wanted to put off the wedding date, but she never did, after all. After the wedding, the respondent's indifferent attitude toward the petitioner intensified, he was not keen on building a real marital union with her. When the man's relationship with another woman came to light a year after the wedding, the parties' marital unity was definitely broken, and the respondent moved out and lived with his lover. The respondent not only confessed to his pre – and post-marital cohabitation with another woman and living a parallel life with her, but also that his taking the marriage vows was not sincere. After the parties divorced, the respondent entered into a civil contract with his lover.[31]

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[30] Sent. c. Molendys dated 3 November 2010.

[31] Sent. c. Rapacz dated 16 January 2013.

In another case, the woman (petitioner) admitted that a few weeks before her marriage, she met another man with whom she had sexual intercourse. Both before and after her marriage, she maintained a close emotional and intimate relationship with this man, with whom she subsequently entered into a civil contract. She told him she loved him and felt more comfort in his company than with the respondent. Those who knew the truth about their relationship advised the petitioner against getting married, but she disobeyed them and on the very second day after her wedding met her lover and had sex with him. Afterwards, she regularly committed marital infidelity. After three months of cohabiting with the respondent, when her infidelities transpired, she left him and moved in with her lover.[32]

In the next case, the woman (respondent), as a teenager, started a close relationship with a man. This was not liked by her close ones, especially her mother, as this man's conduct, his liking for alcohol and the people that surrounded him would not make him come across as a man of good reputation. The respondent, wanting to spite her partner, struck up a relationship with the petitioner, with whom she became pregnant three months into their acquaintance. A few days before the wedding, the respondent's former partner arrived at her parish chancellery and stated that the parties' marriage could not take place because the respondent was emotionally involved with him. The parish priest then called the parties and the respondent's mother to clarify the matter, and proposed that the parties postpone the wedding. In the presence of the petitioner and her mother, the petitioner swore by the holy cross and declared that her partner's statement was not true. For this reason, the parties decided not to reschedule the wedding. After the petitioner moved out of their home following a domestic row just two weeks after their marriage, moved out of their shared home; after a few weeks, the respondent fled her mother's home, too, and moved in with her partner. She came to her family home to collect her belongings assisted by police officers. The respondent entered into a civil contract with her partner.[33]

In another case, the parties made efforts to promote their horse-riding centre before the wedding. A photojournalist – whom the woman (respondent) had been meeting a few months before the wedding, cheating

[32] Sent. c. Rapacz dated 05 February 2013.
[33] Sent. c. Rapacz dated 29 May 2013.

on the petitioner – participated in the production of this advertisement. Witness statements show that she was very much in love with him. A few weeks after the wedding, she ran away from the petitioner. She did not accept his proposal to resume marital relations, nor did she respond to her parents' attempts to save the parties' marital bond. The case file has no information of her admission to a simulation; rather, she seems to accuse the petitioner of simulating marital consent. She claims that when she was pregnant and later took care of their children, the petitioner started an affair with one of the female employees of the horse-riding centre, who is now his wife by civil law, as a result of which he was no longer interested in marrying the respondent, and entered into it solely out of fear of the reaction of his friends and family, especially the respondent's parents. Such a claim by the respondent, in the opinion of the adjudicating panel, should be considered uncritical and naive, for the respondent claims: "The situation [the petitioner's alleged affair with a female employee] was known to almost everyone except me and my parents."[34] It is hard to envisage a situation where in the small and closed environment of the stud farm the life partner of the owners' daughter is having an affair with one of the employees, and this escapes the attention of only the owners and their daughter, and that employee tries to take advantage of this kind of knowledge. The judges assumed that the respondent – having found herself torn between her emotional and intimate relationship with a newly acquainted man and her life achievements to date and the arrangements she had made – resolved to falsify her marital agreement, which she only confirmed with the decisions she made shortly after the marriage.[35]

In the next case, the woman (petitioner) became emotionally closer to her colleague at work a few months before her planned wedding: "I became infatuated with him, we met before the wedding every day at work and after work."[36] This relationship resulted from her disappointment with the respondent. The state of disappointment, she said, evoked her aversion to and even disgust with the respondent.[37]

[34] Sent. c. Rapacz dated 19 June 2013.

[35] Ibid.

[36] Sent. c. Molendys dated 19 October 2016.

[37] Ibid.

In the next case, the woman (petitioner) started a close relationship with another man a few months before her planned marriage to the respondent. She voiced her objections to the respondent about getting married but did not tell him directly that she was emotionally involved with someone else. The respondent expressly rejected the proposal to give up the wedding ceremony. The petitioner lacked the courage and determination to break up and took what she thought was the safe course of action: she went through with the wedding while opposed to its legal consequences. The judges also said that the petitioner's willingness to simulate was confirmed by the fact that their marital union was very short – less than three months.[38]

In the last case of this type, the woman (petitioner) presented a coherent picture of the entire "double life" allegedly led by the respondent. Two years before they married, the respondent's neighbour's husband committed suicide. There were rumours in the respondent's neighbourhood that he and his neighbour were joined by more than just a neighbourly acquaintance. In addition, some neighbours linked the neighbour's suicide to the respondent himself. According to witnesses, the respondent's relationship with the widow continued, which the respondent's mother did not approve of, as she did not think the neighbour would make a suitable daughter-in-law, hence her enthusiasm for the petitioner and the parties' matrimonial plans. After their marriage, the respondent showed an ostentatious lack of interest in the petitioner and in marrying her, and he took every opportunity to exempt himself from living together with her. After parting with the petitioner, the respondent was quick enough to have another woman at his side, who turned out to be his neighbour. Thus the judges concluded it would be extremely naive to claim that his appearance with the above-mentioned woman was a pure coincidence.[39]

3.3. Aversion to the person

In the only case of this kind, the woman's aversion to the man (petitioner) was combined with fear. Rotal jurisprudence often cites situations where simulation-triggering aversion occurs in conjunction with fear as a cause of simulation. Considering the fact that a prospective spouse is afraid of something or someone (fear), he or she expresses marital consent

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[38] Sent. c. Rapacz dated 7 December 2016.

[39] Sent. c. Rapacz dated 13 December 2017.

only externally, while feeling repulsion (aversion) towards the person to be married. In this case, the woman testified: "On the night before the marriage, I was afraid to tell my dad that I didn't want to marry the petitioner. I knew I didn't want to be his wife when those odd scenes of jealousy started."[40] Her testimony shows that in view of the petitioner's mounting suspicions about her alleged infidelities, she found it impossible to live with him. However, she was afraid to tell her close ones about this because of her long acquaintance with the man and the pressure her family was putting on her to sort out the situation caused by the parties' cohabitation. To sum up, the judges came to the conclusion that the respondent "withdrew" her marital consent, as it became apparent to her that she was tying the knot with a jealous paranoid.[41]

Summary

The wealth of reasons for total simulation of marital consent in the *pro nullitate* sentences of the Metropolitan Tribunal of Kraków from 2010 to 2020, presented in this study, demonstrates the importance of proving the reason for simulation in arguing for nullity of marriage. This is because one can hardly speak of total simulation of marital consent being proved if the *causa* of the simulation was not clearly demonstrated. Therefore, in each of the judgements presented, proving the specific reasons for simulation contributed to judges' moral certitude allowing them to declare a marriage invalid by reason of total simulation of marital consent.

It is worth noting that most of the characteristics of total simulation are variable, as they depend on the specific case. It is possible to give examples of circumstances or reasons prompting a prospective spouse to employ total simulation, but no exhaustive list can be provided. Human life goes before the law, which causes jurisprudence to evolve constantly regarding the issue of total simulation. Each case is different, just as each person is unique, hence the church judiciary is required to handle each case individually.

Proving the invalidity of a marriage on the grounds of total simulation of marital consent turns out to be challenging. This is evidenced by the fact that between 2010 and 2020, 161 judgements were issued

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[40] Sent. c. Molendys dated 9 April 2014.

[41] Ibid.

in the Metropolitan Tribunal of Kraków, of which only 20 processes led to a declaration of nullity.

Therefore, it becomes even more interesting to find out what circumstances, including the reasons for simulation, must be revealed during proceedings to convince the judges that a given marriage is invalid. The answer to this question can be found in this study, as it identifies specific reasons for simulation exemplified with cases handled by the Metropolitan Tribunal in Kraków.

The insights offered here throw a new light on the role of premarital instruction and high school catechesis on the sacrament of marriage. As it happens, we are puzzled by situations where the reason for simulation was typically that the culprit was leading a "double life" having, at the same time, given express consent, which was caused by the person's inability to withdraw from plans to marry. Therefore, more attention should be given to preparation leading directly to marriage, since it is often when the lack of sincerity can be manifested by either of the prospective spouses.

In addition, in the cases analysed above, pursuit of self-interest, the absence of love between the prospective spouses, or only one party either loving or detesting the other – all can have the prompt at least one party to completely simulate marital consent. Our examination of the judgements at hand may evoke the impression that the parties, when talking about the love that was allegedly between them, often reduced the feeling to infatuation or just being in love. On the other hand, sometimes one can hardly discern the love that the Church preaches – love understood as responsibility for another person or being there for another person [Pastwa 1999, 97-102]. This may be because prospective spouses, for diverse reasons, earlier in their lives did not learn what true love is and had a vague understanding of it.

In some cases, invalid marriages can possibly be avoided by having a properly directed pastoral conversation with the prospective spouses, a properly filled in prenuptial form, or simply honesty between the couple themselves and between them and the priest.

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RENUNCIATION OF APPEAL BY THE DEFENDER OF THE BOND OF THE APPELLATE TRIBUNAL (CANON 1636 § 2)

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Abstract

The article addresses the renunciation of appeal of the defender of the bond of the appellate tribunal that was brought by the defender of the bond at the court of first instance. This issue is being discussed owing to the marriage process reform implemented in 2015. That problematic aspect must always be considered with the unique nature of canonical marriage process in mind and responsibility for the decisions made. Also, consideration must be given to the social dimension of the ruling handed down by the Church, which is expected to reflect the truth of the appealed marriage. There is no doubt that the renunciation of the appeal by the defender of the bond of the appellate tribunal, brought by the respective defender of the court of first instance seems exceptional in the light of historical, legal and doctrine's arguments presented in this article and can by no means lead to injustice in the Church judiciary, particularly with regard to matrimonial cases. It goes without saying that it is the defender of the bond at the court of first instance who knows the case from its very beginning, follows its course and presents his remarks, including his option to bring an appeal to the ecclesiastical court of second instance. For that reason, such an appeal should be treated with utmost responsibility. Arguments adduced here are derived from the current legislation, the teaching of the Roman pontiffs, and the position of the canonical doctrine all indicate that the rejection of appeal by the appellate tribunal's defender of the bond, brought by the corresponding defender of first instance, should be an extraordinary measure that is very well justified. Despite the said legal option, the article makes a case for not using the canonical norm in ecclesiastical judicial practice, mainly because it was promulgated at the time when there was an obligation to hand down two affirmative sentences for a new marriage to be contracted in the Church. That situation changed after 2015, hence the postulate to amend Canon 1636 § 2.

Keywords: appeal, instance, defender of the bond, truth, procedural reform

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Introduction and outline of the contemporary context

Gian Paolo Montini, who last year published an article on the renunciation of appeal by the defender of the bond in a new nullity process, as stipulated in Canon 1636 § 2 of the 1983 Code of Canon Law,[1] made it very clear that this issue was discussed rather soon after Pope Francis published his apostolic letter motu proprio *Mitis Iudex Dominus Iesus*[2] in 2015 [Montini 2023, 1]. The cited norm of the Code first states that "the appellant can renounce the appeal with the effects mentioned in can. 1525" (Canon 1636 § 1), namely that "a renunciation accepted by the judge has the same effects for the same effects for the acts renounced as the abatement of the trial; it also obliges the renouncing party to pay the expenses for the acts renounced" (Canon 1525); and also what constitutes the subject of the statement: "If the defender of the bond or the promoter of justice has brought an appeal, the defender of the bond or the promoter of justice of the appellate tribunal can renounce it, unless the law provides otherwise" (Canon 1636 § 2).

Incidentally, we should be reminded that the subject of appeals has been studied extensively, also in commentaries on the procedural law amended in 2015, some of which are general statements that unfortunately do not address the concrete, sometimes difficult and questionable procedural issues of interest to ecclesiastical judiciary employees and which arose following the 2015 reform. Interestingly, appeals used in the currently regulated matrimonial process is a constantly recurring topic, as illustrated not only by the referenced article of the Italian jurist, but also by a lecture delivered on 12 March 2024 delivered by Prelate Auditor Grzegorz Erlebach, a judge of the Apostolic Tribunal of the Roman Rota, as part of the monthly

[1] *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 (legal state as of 18 May 2022) [henceforth: CIC/83].

[2] Francis, Litterae apostolicae motu proprio *Mitis Iudex Dominus Iesus* quibus canones Codicis Iuris Canonici de Causis ad Matrimonii nullitatem declarandam reformatur (15.08.2015), AAS 107 (2015), p. 958-70; English text available at: https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html [henceforth: MIDI].

meetings of the Archsodality of the Roman Curia, titled "Le questioni *de jure appellandi* nella recente giurisprudenza rotale".[3]

Before the procedural reform ordered by Pope Francis in 2015, Canon 1636 stipulated identically, and – importantly – this norm was not subject to amendment. Nevertheless, at that time, two affirmative sentences were necessary for one to obtain canonical capacity for a new ecclesiastical marriage. Also, the provision of the 2005 instruction *Dignitas connubii* is still in force,[4] clearly stipulating in Article 279 § 2 that "without prejudice to the requirement of art. 264, the defender of the bond is bound by office to appeal, if he considers the sentence which first declared the nullity of the marriage to be insufficiently founded." Thus, as DC prescribes, the subject of appeal today should be not only the matrimonial process itself, or some of its selected elements, but also an inadequate justification for an affirmative sentence.

Commenting on the canon in question, but before Pope Francis' procedural reform, Richard Sztychmiler pointed out this: "Prof. Pawluk (*Prawo kanoniczne według Kodeksu Jana Pawła II*, vol. 4, p. 301), that even if the defender of the bond withdraws his appeal in the appellate tribunal, this does not suspend the consideration of the case after a sentence in first instance is issued declaring the marriage invalid." He also noted: "It is not clear whether pursuant to Canon 1636 § 2 only the defender of the bond and the promoter of justice of higher instance, or also those of lower instance, can renounce the appeal. Canon law scholars are divided in this respect (F. Della Rocca, *Uno sguardo al nuovo Codice di Diritto Canonico*, in: *Giustizia e servizio* [FS de Rosa], Napoli 1984, 154; Lüdicke, Prozessrecht, ad 1636/2)" [Sztychmiler 2007, 295].

There is no question that the issues related to the renunciation of appeal by the defender of the bond of the appellate court should always be considered in the specific context of canonical matrimonial process, and in the context of responsibility for the decisions made, with due regard for the social impact of the sentence. The process is supposed to bring out

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3 See also Erlebach 2018, 17-44.

4 Pontifical Council for Legislative Texts, Instruction to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage *Dignitatis connubi*, https://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html [henceforth: DC].

the truth about the contested marriage. Also, there is a long church tradition behind it and many changes in its legal make-up. Therefore, it needs to be carried out very thoroughly, in line not only with the applicable formal canonical procedural law but should also include a correct interpretation of the substantive canon law governing marriage.

The two above-mentioned areas pertaining to canonical adjudication on the invalidity of a contested marriage are evidently important and formally distinct, may be the subject of a possible appeal from the defender of the bond, but if a serious violation of the very structure of the modern canonical matrimonial process occurs, in particular its fundamental elements, he will also have the option of filing a complaint of nullity.

The defender of the bond performs his tasks in three forms of matrimonial process: in the ordinary trial (practically the most common type of trial pending before ecclesiastical courts of first instance), trial before a bishop, and documentary trial.[5] Hence, following the Italian canonist, who also notes in the referenced article that the subject in question has elicited emotional reactions from employees of ecclesiastical courts, it seems expedient to look at these issues from a practical vantage point, if only in synthetic form, in order to see why it has a special significance.

Now, we find ourselves ready to analyse the following judicial scenario. The defender of the bond at the ecclesiastical court of first instance, arguably having carefully examined the case and considered of the legitimacy of the appeal, has decided to appeal against the affirmative sentence declaring the invalidity of the marriage (no doubt expected by the parties concerned), issued by the court of first instance. As is generally known, in such a case we are dealing with a serious and no doubt difficult decision of the defender of the bond, with a great deal of responsibility, which is probably at odds with the expectations of the party (or parties) to the trial and, as it were, awkward to the judges who issued the affirmative sentence, and possibly to the diocesan bishop, too, who is the moderator of the ecclesiastical court. Besides, we may be dealing with the last bastion defending the indissolubility of marriage, because in line with the 2015 procedural reform, where a second affirmative sentence is not required and an appeal has not been brought, there is a possibility of contracting a new canonical marriage. And what happens now? After the case is referred to the appellate

[5] See Montini 2017, 301-39.

tribunal, the defender of the bond of that tribunal renounces the appeal, prepared no doubt with considerable effort by the former, and the case is closed definitively, giving rise to various comments, or even bitter feelings [Montini 2023, 2].

To gain a solid understanding of the issue in question, we need to look synthetically at the tasks of the defender of the bond of the court of first instance, which the respective defender of the appellate tribunal is most likely familiar with, too.

1. Tasks of the defender of the bond (synthetically)

The fact that Pope Benedict XIV introduced the office of defender of the bond by his constitution *Dei miseratione*[6] (1741) was due to his practical concern for the due protection of indissolubility of marriage in canonical marriage process, directly motivated by the abuses that occurred in cases of nullity of marriage, including in the practice of ecclesiastical courts in Poland at the time. The papal law posited that the defender of the bond was always obliged to appeal against the first affirmative sentence and had the prerogative – but not the obligation – to appeal to a court of third instance if, in conscience, he considered two unanimous affirmative sentences to be unjust [Wojcik 2005, 89ff.].

Successively, in the 1917 Pio-Benedictine codification, the universal legislator reiterated the existing obligation of the defender's appeal after the first sentence that declares the nullity of marriage;[7] moreover, such an appeal would still be possible "after the second sentence that confirms the nullity of the sentence."[8] Moreover, if the defender of the bond failed to

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[6] Benedict XIV, Constitutio *Dei miseratione* (03.11.1741), in: *Codicis Iuris Canonici Fontes*, vol. I, ed. P. Gasparri, Romae 1923, p. 695-701.

[7] "A prima sententia, quae matrimonii nullitatem declaraverit, vinculi defensor, intra legitimum tempus, ad superius tribunal provocare debet; et si negligat officium suum implere, compellatur auctoritate iudicis." *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: CIC/17], Canon 1986.

[8] "Post secundam sententiam, quae matrimonii nullitatem confirmaverit, si defensor vinculi in gradu appellationis pro sua conscientia non crediderit esse appellandum, ius coniugibus est, decem diebus a sententiae denuntiatione elapsis, novas nuptias contrahendi" (Canon 1987 CIC/17).

file an appeal within the statutory period after the first affirmative sentence, then the presiding judge of the tribunal is to urge him to do so as prescribed by the instruction *Provida Mater*[9] (1936).

The current post-conciliar codification, on the other hand, provides: "A defender of the bond is to be appointed in a diocese for cases concerning the nullity of sacred ordination or the nullity or dissolution of a marriage," whose duty is to "to propose and explain everything which reasonably can be brought forth against nullity or dissolution" (Canon 1432 CIC/83). Thus, he is specifically obliged to defend the indissolubility of marriage. This duty naturally entails the possibility, or even the necessity, of filing an appeal, his presence in the trial is mandatory, while the practical and specific tasks of the defender of the bond are spelled out in Article 56 § 3 of DC: "In every grade of trial, the defender is bound by the obligation to propose any kind of proofs, responses and exceptions that, without prejudice to the truth of the matter, contribute to the protection of the bond." Thus, in the context of issues we are dealing with, we see that the defender of the bond bears serious responsibilities in matrimonial process, pertaining to its various stages.

Another important source that covers the procedural tasks of the modern defender of the bond is no doubt the rotal magisterium of the Roman pontiffs, particularly that of Pope John Paul II, who pointed out in his address to the Apostolic Tribunal of the Roman Rota in 1988 that in recent times there have been tendencies to reorganise the role of the defender of the bond, as a result of which could lead to serious damage to the proper administration of justice in the Church. Therefore, the pope pointed out that he felt obliged to remind that the defender of the bond, according to the norm of Canon 1432 is bound (*tenetur*) to carry out its procedural task "in a serious manner".[10]

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[9] "Defensor autem vinculi a prima sententia, matrimonii nullitatem declarante, ad superius tribunal provocare tenetur intra legitimum tempus; quod si facere negligat, auctoritate praesidis compellendus est (cfr. can. 1986)." Sacred Congregation for the Discipline of the Sacraments, Instructio servanda a tribunalibus dioecesanis in pertractandis causis de nullitate matrimoniorum *Provida Mater Ecclesia* (15.08.1936), AAS 28 (1936), p. 313-61, Article 212 § 2.

[10] John Paul II, *Ad Romanae Rotae Auditors simul cum officialibus et advocatis coram admissos, anno forensi ineunte* (25.01.1988), AAS 80 (1988), p. 1178-185; English text available (without paragraph numbering) at https://www.vatican.va/content/john-paul-ii/

In what followed, John Paul II made it clear that "the necessity of carrying such an obligation assumes a particular importance in those marriage cases […] which have to do with the psychic incapacity of the contracting parties." Nowadays, this incapacity is the main motive for challenging marriages in ecclesiastical courts. The pope noted that he wished to confine his remarks to two points of which the defender of the bond should be particularly mindful – namely, the appropriate anthropological view of the person contracting marriage and the canonical conclusions resulting from the presence of manifested psychopathology (*Ad Romanae Rotae*, no. 3).

Speaking in this context of the role of the defender of the bond, that is, his role in mental incapacity trials, the pope recalled that "the defender of the bond, in cases involving psychic incapacity, is called therefore to refer constantly to an adequate anthropological vision of normality in order to compare with it the results of the reports of the experts." Specifically, his task is to "pick out and indicated to the judge possible errors arising in this matter", primarily when moving from psychological and psychiatric categories to canonical ones. "In this way, the defenders of the bond will help in preventing the tensions and difficulties, inevitably involved in the choice and achievement of the ideals of marriage, from being confused with the signs of a serious pathology. They will prevent the subconscious dimension of ordinary psychic life from being interpreted as a condition which removes the substantial freedom of the person. They will also prevent every form of dissatisfaction and maladjustment in the period of a person's human formation from being understood as a factor which necessarily destroys even the ability to choose and realize the object of matrimonial consent" (no. 10).

What is more, the defender of the bond must "take care that expert evidence, which is scientifically uncertain, or else limited only to an examination of the signs of abnormality without the required existential analysis of the contracting party in the totality of the person's being, should not be accepted as sufficient basis for a diagnosis" (no. 11). Pope John Paul II underscored that the above-cited indications retain validity when "the subconscious or the past may be presented as factors which not only influence

en/speeches/1988/january/documents/hf_jp-ii_spe_19880125_roman-rota.html [henceforth: *Ad Romanae Rotae*], no. 2.

the conscious life of the person, but determine it, impeding the faculty of free decision" (no. 11).

The defender of the bond, in the performance of his task, the pope pointed out, should adapt his activities to the various phases (stages) of the process. He is supposed mainly to take care – for the sake of objective truth – that questions addressed to the expert are formulated clearly and concern the issue at stake, so that the expert retains his competence and that is not expected to provide answers on canonical matters. In the decisive phase, the defender of the bond must be able to correctly evaluate the opinions, if they disadvantageous to the bond, and indicate to the judge as soon as possible the risk entailed by their incorrect interpretation – exercising the right to reply as provided by the 1983 Code in Canon 1603 § 3 ("The promoter of justice and the defender of the bond have the right to reply a second time to the responses of the parties"), or the option of successive appeal, chiefly when gaps in evidence are detected on which the sentence is based, or in their assessment (*Ad Romanae Rotae*, no. 12).

John Paul II indicated clearly that the unique cooperation of the defenders of the bond in the development of the process "makes them an indispensable element in the avoidance of misunderstanding in the pronouncement of decisions," especially where contemporary culture and divorce-oriented mentality outweighs concern for the integrity of the marriage bond (*Ad Romanae Rotae*, no. 13).

With such grounding in the legal doctrine on the role and tasks of the defender of the bond, we face the possibility of the appeal brought by the defender of the bond of the court of first instance being dismissed by the defender of the bond of the appellate court. The practical question therefore arises: what made him do that?

2. Renunciation of appeal under Canon 1524 § 3

The Code legislator allows the possibility of a complete renunciation of instance by the petitioner and the renunciation of all (or some) procedural acts by both the petitioner and the respondent.[11] DC further specifies that

[11] "The petitioner can renounce the trial at any stage or grade of the trial; likewise both the petitioner and the respondent can renounce either all or only some of the acts of the process" (Canon 1524 § 1).

this refers primarily to those procedural acts that the petitioner or the respondent themselves have requested (Article 150 § 1). When renouncing the appeal, the party concerned declares his or her wish to end the dispute without further seeking its definitive termination and decision on the merits of the dispute. According to Canon 1636 § 1-2, this renunciation may also concern an appeal, including filed by a defender of the bond or a promoter of justice. In addition, in marriage cases, a renunciation (which is most likely a single procedural act) must be communicated to the defender of the bond (Article 150 § 3 DC), who, in accordance with Article 197 DC, may demand that a witness called to testify be heard nonetheless, although the party renounces the examination of that witness (Canon 1551 CIC/83). Thus, the cited article of the DC is unquestionably important, since it underscores the dynamic role of the defender of the bond in the matrimonial process, who should take care, above all, that evidence is gathered in the best possible manner, but this is not his main role, however.

An important and practical issue that should be kept in mind when we analyze the renunciation of appeal by the defender of the bond of the appellate tribunal, brought by the defender of the bond at the court of first instance, is the duty to meet the conditions of this renunciation, as stipulated in Canon 1524 § 3, which reads: "To be valid, a renunciation must be written and signed by the party or by a procurator of the party who has a special mandate to do so; it must be communicated to the other party, accepted or at least not challenged by that party, and accepted by the judge."

Gian Paolo Montini clearly indicated, referring directly to the referenced norm, that the renunciation of the appeal filed must meet the following conditions for its validity: 1) it has written form; 2) it is signed by the defender of the bond of the appellate tribunal; 3) it has been communicated to the other party, typically to the defender of the bond at the court of first instance, as well as to the petitioner and the respondent, who may have an interest in seeing their appeal examined; 4) it has been accepted or at least not contested by the defender of the bond at the court of first instance and/or by the other parties to the trial; 5) it has been admitted by the judge [Montini 2023, 26].

Analysis of the conditions shown above seems to be important in the context of the marriage process; it should be emphasized, in particular, that we are dealing with an act of a public character, which also calls for a judge's intervention. He is obliged to read and analyze not only

the sentence declaring the nullity of the contested marriage, but also the files collected during the trial in the first instance, the appeal filed by the defender of the bond and its motives, that is, concrete arguments for the appeal brought, as well as the motives for the renunciation of the appeal presented by the defender of the bond at the appellate court, and the comments of the parties on the renunciation under review, as well as the current stage of the trial [ibid., 28].

It is certain that a serious problem will arise when the defender of the bond of first instance does not accept the decision of the defender of the bond of the appellate tribunal and is willing to challenge it. Naturally, it should be assumed that the appeal filed by the defender of the bond of first instance is not an appeal that in line with the norm of Canon 1680 § 2 is dilatory, since in this situation the collegial tribunal is to "confirm the sentence of the prior instance by decree"; the motives for the appeal filed must stem from the procedural mission of the defender of the bond.

Montini indicates the following solutions to the problems so arising. In the first case, the judge (the presiding judge or ponens) accepts or rejects the appeal presented by the defender of the bond, in accordance with Article 150 § 2 DC; naturally, there is an option for the person concerned to make a recourse to a collegial body who will decide whether to accept or reject the appeal. The second option is for the presiding judge or ponens to refer the case immediately to a collegial body, observing Article 45 °14 DC; in the latter case, the designated body, in keeping with the norm of Canon 1680 § 2, will issue a decision that can either reject the appeal and confirm the sentence of first instance, or reject the renunciation of the instance and refer the case to the appellate tribunal. Naturally, it should be remembered that the decision taken in the form of a decree is to be motivated as prescribed by Canon 1617; it also must have the force of a sentence terminating the proceedings, according to the norm of Canon 1618; therefore, this decision involves possible consequences regulated by the procedural canons – that is, there may be an appeal, a complaint of nullity, or *restitutio in integrum* [ibid., 36ff.].

Conclusion

A party who feels aggrieved by the sentence has the right to appeal – that is, to appeal the sentence to a court of higher instance [Bączkowicz,

Baron, and Stawinoga 1958, 268]. This is because the canonical judicial system recognizes the right to appeal the decision of a higher court within the time limit set by the universal legislator – thus ensuring that a new decision on the same subject will be rendered, in keeping with the Church's long legal tradition, as the appeal is associated with the natural right of defence [Llobell 2016, 421ff.]. The applicable course of action for filing an appeal is the same for the petitioner, the respondent, the defender of the bond or the promoter of justice – all are bound by the same time limits for filing and supporting an appeal.

Erlebach gives practical advice that the "appellate court, after appointing a panel of judges and the defender of the bond, should first check for the presence of all the prerequisites for running the procedure and, in particular, whether certain elements of the procedure that essentially belonged to the court *a quo* should be supplemented, for example the due notification of the sentence or relevant information about the right to appeal and its support to parties who do not take advantage of legal aid. If any deficiencies are found, the appellate court should decide how to proceed. Thus, we can see, the dynamic aspect of appeal is not characterized by any inherent innovation resulting directly from the MIDI, such that would pertain to the appeal procedure itself. Instead, there are various functional innovations, subordinated to the static aspects of appeal, partially altered by the recent reform of the marriage nullity process" [Erlebach 2018, 36ff.]. At the same time, it should be remembered that "the sentence that first declared the nullity of the marriage, once the terms as determined by Canons 1630-1633 have passed, becomes executive" (Canon 1679). By the same token, the first sentence declaring nullity, if not appealed within the prescribed time, becomes enforceable; therefore, a late appeal cannot be accepted now [ibid., 23].

As a result of Pope Francis' procedural reform many authors highlight the responsibility of the defender of the bond for the modern canonical matrimonial process, especially with respect to the appeal brought by him [Montini 2016, 693]. To put it yet another way, John Paul II's 1988 rotal magisterium retains its relevance, namely, in that the defender of the bond should adapt his activities to the different stages of the marriage process (*Ad Romanae Rotae*, no. 12).

Finally, it should be noted that there are statements in doctrine proposing that the ecclesiastical legislator, in the form of an authentic

interpretation, should indicate that the norm in question – Canon 1636 § 2 – is not applicable to the matrimonial process; otherwise, it would no doubt further emphasise the role of the defender of the bond in such trial, showing the Church's enduring concern for discovering the truth about the contested matrimonial bond [idem 2023, 37]. Such an interpretation, or view of doctrine, most likely results from the first point of the interpretation presented, and it needs to be carefully considered, especially in the context of the modern matrimonial process and widespread divorce-oriented mentality. Perhaps it would make sense not to apply this code norm in judicial practice, especially that it was formed in a situation where a single affirmative sentence did not permit a new canonical marriage. Another proposal is to appoint, on an *ad hoc* basis, another defender of the bond, who would decide only on the subject of a possible appeal, that is, whether or not to bring it against the affirmative sentence handed down; a third proposal, on the other hand, would be to compile a catalogue of criteria that would indicate situations for an appeal to be brought [ibid., 39]. Thus, as we can see from these proposals, ecclesiastical procedural law is dynamic and is constantly evolving.

There is no doubt that the renunciation of the appeal by a defender of the bond at an appellate tribunal brought by the defender of the bond of lower instance, with regard to the legal and doctrinal arguments shown here, seems rather exceptional and must never lead to injustice in the ecclesiastical judiciary, especially in matrimonial cases. It is, after all, defender of the bond at the court of first instance who knows the case from its beginning, has followed its course and submitted his comments, including the appeal to the ecclesiastical court of second instance.

The presented arguments, arising from the current law, the magisterium of the Roman pontiffs, opinions found in canonical doctrine, all indicate that the rejection of an appeal by the defender of the bond of the appellate court brought by the respective defender of lower instance should be something truly unique and extremely well-justified, as illustrated by the partial statistics provided by Montini. The analysis cites not only extremely rare cases of the said renunciation of appeal of second instance, but also reveals in general the rare practice of appeals in individual particular Churches in the contemporary marriage process, which are submitted by the defenders of the bon [ibid., 7-10].

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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.

[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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MIXED CATHOLIC-ORTHODOX MARRIAGE ACCORDING TO CANON LAW IN POLAND

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Abstract

The sacrament of marriage between a Catholic and an Orthodox member of the faithful is treated in canon law as a mixed marriage. However, owing to the doctrinal affinity between the two Churches, marriage is also treated differently than other possible mixed marriages. This, however, does not eliminate the need for compliance with the legal regulations when obtaining the required permission and possibly a dispensation from canonical form. The article focuses on the reasons and possible canonical and pastoral issues that may pose problems in such marriages. Therefore, with the concept of mixed marriage and legal requirements presented, the dangers related to mixed marriage are also indicated – all kinds of spiritual threats to the Catholic party that may be experienced in such a marriage. The potential difficulties include divergent notions of marriage, excessive attachment to one's own Church, and the danger of religious indifferentism, impediments to worship, difficulties in the religious education of children.

The permission of the local ordinary, as prescribed by law, should meet conditions that will help the competent authority to decide a specific case. The article also lists the most common situations that priests may encounter in the case of Catholic-Orthodox marriages, for example: difficulty ascertaining that a person is baptised or single, aversion to the institution of promises on the Catholic or non-Catholic side, expression of the desire to join the Church of the other party.

Keywords: mixed marriage, canonical form, validity of the sacrament, Orthodox person, permission, dispensation

Introduction

The new pastoral challenges faced by the Church in Poland, which prompted the Polish Bishops' Conference to issue the *General Decree on the Conduct of Canonical and Pastoral Interviews with Engaged Couples*

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Due to Celebrate Canonical Marriage,[1] include phenomena such as a considerable increase in the number of mixed marriages celebrated by Catholics with the faithful of other denominations and religions, as well as with persons who do not identify with any religious community. In light of the current provisions of canon law in Poland, it will be instructive to look at the special issue of marriage concluded between a Catholic and a person of the Orthodox confession, taking into account the special case where marriage is not celebrated before a Catholic priest – where the canonical form is not observed – but in another form permitted by canon law.

1. Mixed marriages in canon law

The 1983 Code of Canon Law for the Latin Church[2] defined mixed marriage as one "between two baptised persons, one of whom was baptised into the Catholic Church or received into it after baptism, and the other a member of a Church or ecclesial community not in full communion with the Catholic Church" (Canon 1124), such marriages are forbidden, which is to say they cannot be celebrated without the express permission of the competent ecclesiastical authority (ibid.). This ban is motivated by a supposition that a mixed marriage is "highly likely" to run into difficulties on important issues caused by differences of religion (*Decree*, no. 70). This position of the Church originate in its centuries-long experience.[3] The potential problems include different notions of marriage, threats to one's religious affiliation, and the danger of religious indifferentism, impeded practice of faith, and difficulties in the religious upbringing of children (*Decree*, no. 70) – which is why the Church is averse to mixed marriages, and as a consequence, even the Conference's 1989 *Instruction on Preparation for Marriage in the Catholic Church* strongly recommended that young people be dissuaded from such marriages (*Instruction on Preparation*, no. 73). However,

[1] Polish Bishops' Conference, *Dekret ogólny o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego* (08.10.2019), "Akta Konferencji Episkopatu Polski" 31 (2019), p. 28-49 [henceforth: *Decree*].

[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] Polish Bishops' Conference, *Instrukcja Episkopatu Polski o przygotowaniu do zawarcia małżeństwa w Kościele Katolickim* (13.12.1989), Wydawnictwo św. Stanisława B.M. Archidiecezji Krakowskiej, Kraków 1990 [henceforth: *Instruction on Preparation*], no. 74.

giving consideration to natural law, which concerns not only the possibility of celebrating marriage, but also the free choice of a spouse, the Catholic Church grants such a marriage, but subject to some conditions.[4]

It is highly recommended that preparation for a mixed marriage place special emphasis on the positive aspects of what Christians spouses share in the life of grace, faith, hope and love, and other inner gifts of the Holy Spirit (*Decree*, no. 71). As regards mixed marriage (which is of special interest to us) – a Catholic marrying an Orthodox believer – it is worth noting that some of these concerns and difficulties are far less pronounced, since "these Churches, although separated from us, possess true sacraments, above all by apostolic succession, the priesthood and the Eucharist, whereby they are linked with us in closest intimacy";[5] The 1993 *Directory on Ecumenism* calls these relations "close communion that exists between the Catholic Church and the Eastern Orthodox Churches".[6] For this reason, special provisions have been introduced for mixed marriages celebrated by a Catholic with an Orthodox person, pursuant to which the observance of the canonical form is required only for liceity (legitimacy), whereas for validity a sacred minister must be present (Canons 1127 and 1108 CIC/83) [Nowicka 2007, 193-94].[7] However, all of these arguments make it necessary to carefully examine the legal and, consequently, pastoral aspects of such mixed marriages.

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[4] Polish Bishops' Conference, *Dyrektorium duszpasterstwa rodzin*, Rada Episkopatu Polski do spraw Rodziny, Warszawa 2003, no. 36.

[5] Vatican II, Decretum de oecumenismo *Unitatis redintegratio* (21.11.1964), AAS 57 (1965), p. 90-112, no. 15; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_unitatis-redintegratio_en.html.

[6] Pontifical Council for Promoting Christian Unity, *Directorium oecumenicum noviter compositum* (25.03.1993), AAS 85 (1993), p. 1039-119; my translation based on the Polish version: *Ut unum. Dokumenty Kościoła katolickiego na temat ekumenizmu 1982-1998*, edited by S.C. Napiórkowski, K. Leśniewski, J. Leśniewska, Towarzystwo Naukowe KUL, Lublin 2000, p. 30-101, no. 98b.

[7] The priest's crucial role in the celebration of marriage in the Eastern Churches is also recognized by an amendment to the 1983 Code of Canon Law with respect to the canonical form of marriage to a member of the Eastern Catholic or non-Catholic Churches (see § 3 of Canon 1108 CIC/83), added in 2016 by Pope Francis; Litterae apostolicae motu proprio datae *De concordia inter Codices* quibus nonnullae Codicis Iuris Canonici immutantur (31.05.2016), AAS 108 (2016), p. 602-606.

2. Legal requirements binding prospective spouses

As the universal legislator stipulates, the local ordinary will grant permission for a mixed marriage in the presence of a just and reasonable cause and if the following conditions are met: 1) the Catholic party declares that they are ready to remove from themselves the danger of "defecting from the faith", and pledges sincerely to do all in their power to ensure that "all offspring are baptised and brought up in the Catholic Church"; 2) the other party is informed of the Catholic party's pledges; 3) both parties are instructed about the ends and essential properties of marriage, which neither party may exclude (Canon 1125 CIC/83). The cause, just and reasonable, can be a serious intention to marry, which accommodates such aspects as the spiritual well-being of the parties and their children (*Decree*, no. 82); or it can be a small number of Catholics in a particular region inhabited by the contractants, the need to normalise their relationship and thus quit living in cohabitation, a reasonable hope that the non-Catholic party may be inclined to convert to the Catholic faith, inspired by the example of the spouse's Catholic life [Chiappetta 2012, 400].

Of special note is the above-mentioned statement made by the Catholic party, which is to be acknowledged by the non-Catholic party, too (Canon 1125). This institution, called 'promises', has for years functioned bilaterally: both the Catholic and the non-Catholic party were obliged to make pledges to cater for the spiritual good of the Catholic party [Góralski 2006, 220]. As from the motu proprio *Matrimonia mixta*,[8] a promise is no longer required of the non-Catholic party. In this way the provision that no one should be forced to act against one's conscience,[9] contained in Vatican II's Declaration on Religious Freedom *Dignitatis humanae*, was implemented with respect to mixed marriage. However, the non-Catholic party is to be informed "in due time" of the Catholic party's obligations,

[8] Paul VI, Litterae apostolicae motu proprio datae. Normae de matrimoniis mixtis statuuntur *Matrimonia mixta* (31.03.1970), AAS 62 (1970), p. 257-63, nos. 5226-269; English text available at: https://www.vatican.va/content/paul-vi/en/motu_proprio/documents/hf_p-vi_motu-proprio_19700331_matrimonia-mixta.html.

[9] Vatican II, Declaratio de libertate religiosa *Dignitatis humanae* (7.12.1965), AAS 58 (1966), p. 926-46, no. 3 [henceforth: *DH*]; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

so that the former is aware not only of the very fact, but also of the content of the pledge and the resultant obligation (Canon 1125, 2°).

The Catholic party's obligation and declaration as well as informing the other party of these should be regarded as tools that pastors are given to possibly exclude or at least minimise the potential dangers covered by the ban on marriages where the parties' denominations are different (*Decree*, no. 83). The local ordinary, on the other hand, should focus on the Catholic party's promise and, on that basis, judge whether the marriage poses a threat to his or her faith [Hendriks 2001, 267]. Regarding offspring, it should be made clear that both parties may declare their willingness to do their utmost to have their children baptised and educated in their parents' religion. The inability to carry out the obligation to baptise a child or, for example, to bring up children in two traditions, should not be considered as a canonical offence (Canon 1367) [Mosconi 2022, 1120].

3. Necessity to obtain permission and dispensation from canonical form

Canon law, both the universal laws contained in the 1983 Code of Canon Law and the regulations of particular Churches in Poland, emphasize that the celebration of mixed marriage requires the permission of the competent authority. Without express permission, such a marriage is prohibited (Canon 1124). The universal legislation provides that the competent authority in this case is the local ordinary (Canon 1125). However, exceptional cases – that is, such that do not meet the conditions stipulated in the canons on mixed marriages or ones that cause the local ordinary to have doubts as the faith of the Catholic party may be at risk – can be referred to the Dicastery for Divine Worship and the Discipline of the Sacraments (*Decree*, no. 85), which is the Curia institution competent in this matter,[10] although in very complicated cases the competence of the Dicastery for the Doctrine of the Faith cannot be ignored with complete certainty [Chiappetta 2012, 399], which is not mentioned in the *Decree* of the Polish

[10] Francis, Costituzione apostolica sulla Curia Romana e il suo servizio alla Chiesa nel mondo *Praedicate Evangelium* (19.03.2022), "L'osservatore Romano" (31.03.2022), Article 90 § 2; English text available at: https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html#Dicastery_for_Divine_Worship_and_the_Discipline_of_the_Sacraments.

Bishops' Conference. It must be stated, nonetheless, that by virtue of Article 90 § of the apostolic constitution *Praedicate evangelium* competence can be determined in this manner. Authors stress that it is not possible to obtain permission to marry when there is a serious threat to the faith of the Catholic party [Majer and Adamowicz 2021, 192-93].

Although Canon 1125 speaks of permission for such a marriage, the requirement that the cause be just and reasonable, nevertheless, refers to the concept of dispensation, since these are the classic properties essential for dispensation [Dzierżon 2020, 133-39]. In fact, the term 'dispensation' was not replaced by 'permission' until the last phase of drafting the CIC/83 and replaced by 'permission' (Lat. *licentia*) [Peters 2005, 1005]. The change seems significant because the prohibition contained in Canon 1124 appears not to be equally applicable for all mixed marriages. Although in every case the consent of the local ordinary is required for a marriage to a non-Catholic, the legislator introduces an exception that in marriages with an Orthodox person, the canonical form is necessary only for liceity, and the presence of a sacred minister is required for validity (Canon 1127). It seems that in this case, then, the lack of consent to a mixed marriage by the ordinary of the Catholic party, and thus celebrating the sacrament of matrimony before a sacred minister of an Eastern Church that is not in communion with the Catholic Church, will not invalidate the marriage, since the requirement for its validity has been met. However, such a course of action is not in keeping with the provisions of canon law, and as a result, it must be concluded that the above legal hypothesis is certainly does not consistent with the intent of the legislator.

4. The moral obligation to request permission and dispensation from canonical form

4.1. Licit celebration of the sacrament as a condition for its fruitfulness

Although the legislator recognises that a sacrament celebrated without canonical form but in the presence of a sacred minister is valid (Canons 1127 CIC/83 and 834 § 2 CCEO[11]), it should be remembered, however, that

[11] *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus* (18.10.1990), AAS 82 (1990), p. 1045-363; English text available at: https://www.intratext.com/IXT/ENG1199/_INDEX.HTM [henceforth: CCEO].

the universal legislator, notably, emphasized the necessity of observing canonical form. The idea that the sacrament of marriage between a Catholic and a member of the Orthodox Church should conform to canonical form not for validity, but only for liceity (legitimacy), follows chiefly from consideration given to spiritual closeness mentioned in ecclesiastical documents. What matters is the almost the same sacramental doctrine, hence recognition of the validity of all the sacraments administered in a specific Church, subject to conditions imposed by the Catholic Church for their celebration. The absence of a sacred minister of the Orthodox Church, who should be a priest capable of performing the rite of blessing the spouses, will render the marriage so celebrated null and void. Therefore, it can be concluded that the legislator, in the case under consideration, permits "two alternative canonical forms" in which to celebrate marriage. One is specified in Canon 1108 CIC/83, whereby the sacrament is valid through the presence of an authorized priest (no deacon may assist) (§ 3) and two witnesses. The other form is mentioned by Canon 1127 CIC/83[12] – for validity, a sacred minister must be present. This formula raises several doubts. First of all, a sacred minister is mentioned (Lat. *sacerdos*), so it is not made clear whether the person should be a Catholic or a non-Catholic minister. Another doubt is that his active part in the ceremony is not specified, only his participation is required, which can also be understood as merely presence – this is because the Latin term *interventus* means 'arrival, appearance' [Plezia 1998, 236]; there is also no mention of two witnesses, and although in some commentaries all these requirements are considered valid as concluded in the canon – "and the other requirements of law are to be observed" (Canon 1127) [Navarro-Valls 2004, 1512] – this cannot be accepted. In the first place, because the structure of this canon would not be logical, since the general principle is laid out in the first sentence that speaks of the necessity of the canonical form (reference to Canon 1108), and only then is an exception mentioned, which is the validity of the sacrament celebrated, even if not canonical in form. Therefore, it should be

[12] This norm originates in: Vatican II, Decretum de Ecclesiis Orientalibus Catholicis *Orientalium Ecclesiarum* (21.11.1964), AAS 57 (1965), p. 76-89, no. 18; English text available at: https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_orientalium-ecclesiarum_en.html [henceforth: *OE*]; Sacred Congregation for the Oriental Church, Decretum de matrimoniis mixtis inter catholicos et orientales baptizatos acatholicos *Crescens matrimonium* (22.02.1967), AAS 59 (1967), p. 165-66.

assumed that for the legislator 'sacred minister' means a non-Catholic rather than a Catholic minister, without excluding the latter;[13] also, it should be concluded that since the presence of witnesses is not expressly required, no such requirement should be made when interpreting this norm. One admissible interpretation could indicate the participation of a Catholic minister at such a mixed marriage, without witnesses taking part, because then, indeed, the canonical form is not observed. Thus, it is obvious that introducing an exception to the canonical form, but without prejudice to relevant provisions of Canon 1108, would not make sense. This is confirmed by a provision in the CCEO that makes the validity of a marriage conditional on being blessed by a non-Catholic priest, despite failing to observe the Catholic canonical form, which in the case of a Catholic-Orthodox marriage contracted even illegally in an Orthodox church is required only for liceity (Canon 834 § 2 CCEO). Similarly, with marriages performed in extraordinary form (including between two Eastern Catholics) and under special circumstances (Canon 832 § 2 CCEO), a non-Catholic priest may be engaged.

These latter forms of mixed marriage can have two aspects: only validity, when the sacrament is celebrated without the permission of the local ordinary of the Catholic party, or both validity and liceity, when a marriage is celebrated with the consent of the competent authority and with a dispensation from the canonical form. Although a marriage concluded without the lawful canonical form is usually associated with the absence of a canonical examination of the prospective spouses, when concluded before a priest, it enjoys a presumption of validity (Canon 1060 CIC/83) [Kędracka 2020, 161]. It should be emphasized that receiving the sacraments illicitly weighs on the conscience of those receiving them and thus limits the operation of grace and thus the possibility of enjoying the fruits of the sacraments received. Therefore, there surely exists a moral obligation to ask for permission and a dispensation from the canonical form in order to receive the sacrament of marriage licitly.

4.2. The offence of receiving a sacrament in a different denomination

Disrespect for the prescripts of canon law – that is, receiving the sacrament of marriage in violation of the provisions of the universal legislator,

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[13] Canon 844 CIC/83 uses the explicit term 'non-Catholic minister'.

even if the latter acknowledges its validity but defines it as illicit, should be considered not only in the moral order, which concerns the conscience, but also in the legal order. Although these issues in canon law are intertwined, because from the beginning of the Church, sin has been treated as an inseparable component of the offence [Burchard 2014, 44]. According to the idea that "an offence is always a sin, but not every sin constitutes an offence" [Myrcha 1986, 46], we might want to ask whether by reason of a sacrament being illicit, the elements of an offence under canon law are also observed. Since the legislator reasoned that a mixed marriage "cannot be celebrated without the express permission of the competent authority" (Canon 1124 CIC/83). And in Book VI, in the title "Offences against the Sacraments", Canon 1381 provides as follows: "One who is guilty of prohibited participation in religious rites is to be punished with a just penalty" (Canon 1381). In light of these provisions, it should be noted that the situation under consideration may satisfy the elements of this crime if all of them are present (Canon 1321 § 2). Therefore, the lack of respect for the provisions of canon law cannot be explained by the new spirit of ecumenism [Chiappetta 2012, 700], since it is evident from many places in 1983 Code of Canon Law that the ecclesiastical legislator takes account of the provisions of the Second Vatican Council, also with respect to ecumenism (Canon 844), but the sacrament of marriage is not subject to the regulations of *communicatio in sacris* [Jakubiak 2013, 130-31]. Therefore, the conduct in question could be considered a canonical offence not as administration of the sacraments to persons forbidden from receiving them (Canon 1379 § 4),[14] but as initiatives going beyond the *communicatio in sacris* mentioned in Canon 844 not only with respect to the sacraments mentioned therein, especially if this conduct presupposes religious indifferentism contrary to divine law.[15]

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[14] Some authors refer to the impossibility of treating this issue as a delict pursuant to Canon 1379 § 4 [Pighin 2021, 383].

[15] However, a study prepared by the Dicastery for Legislative Texts offers an explanation concerning the penal law on the prohibited *communicatio in sacris*, which does not rule out the possibility that a Catholic prospective spouse's act may constitute an offence – all acts that contravene the provisions of Canon 844. In consequence, this also applies to other sacraments in addition to those listed in that canon. Dicastery for Legal Texts, *Le sanzioni penali nella Chiesa. Sussidio applicativo del Libro VI del Codice di Diritto Canonico*, https://www.delegumtextibus.va/content/dam/testilegislativi/TESTI NORMATIVI/Testi Norm CIC/Libro VI/LibroVIsussidio/Sanzioni penali Sussidio.pdf [accessed: 13.11.2023], p. 141-42.

The 1987 *Instruction on the Pastoral Care of Marriages of Different Ecclesiastical Affiliation* did not see this sort of conduct as an offence, but rather as a sin, or more precisely "guilt against one's own Church," since it allows – as far as marriage between a Catholic and an Orthodox person is concerned – this matter to be resolved by the Catholic party internally during the sacrament of penance and reconciliation. Before that, however, it is required that *post factum* promises be made, necessary for issuing a permission for a mixed marriage.[16] As regards canonical interviews, the *Decree* offers more precision, stating that this marriage is contracted validly, but illicitly – in other words, illegally (*Decree*, no. 117). Therefore, there is a "need to verify that the principles of divine law have not been infringed and that the Catholic party has met all the conditions for a valid celebration of marriage before being admitted to Eucharistic Communion" (ibid.). For this reason, the *Decree* contains a procedure intended to verify the circumstances of marriage conclusion (ibid.). Although the *Decree* does not mention the possibility of committing an offence either, it provides a better support for such a perspective, speaking of a violation of divine or ecclesiastical law.

These requirements show that this is not an issue that concerns the internal forum only, so it cannot be ruled out that the local ordinary can make a decision in case of a violation of the law that is external and gravely imputable (Canon 1321 § 2) to impose a just penalty, such as some canonical penance, since entering into the sacrament of marriage without permission was a public form, so the penance could have a public character (Canon 1340 § 2). This could have happened if the Catholic party had acted in this way clearly disregarding the rules of canon law, rather than being ignorant or desiring to avoid conflicts with the non-Catholic side early on in their life path together.

5. Necessary steps before issuing a permission for a mixed marriage

Before the local ordinary gives permission for a mixed marriage and possibly grants a dispensation from the canonical form, he is to verify

[16] Polish Bishops' Conference, *Instrukcja w sprawie duszpasterstwa małżeństw o różnej przynależności kościelnej* (14.03.1987), in: *Codex Iuris Canonici. Kodeks Prawa Kanonicznego. Komentarz. Powszechne i partykularne ustawodawstwo Kościoła katolickiego. Podstawowe akty polskiego prawa wyznaniowego*, p. 1356-362 [henceforth: *Instruction on Pastoral Care*], IV, no. 8.

if the following have been removed or minimised: the potential danger posed by the error of religious indifferentism, threat to the faithfulness to one's own Church or, finally, the absence of discrepancies in the understanding of the sacrament of marriage (ibid., no. 70), which also concerns disciplinary issues that are different in the Catholic Church and the Orthodox Church. The local ordinary, to be able to properly evaluate the specific case elucidated by the pastor at the request of the engaged couple, should analyse all these circumstances. Therefore, canon law offers specific tools for their verification to enable the local ordinary to make the proper decision.

5.1. The need for canonical-pastoral interviews

When a departure from the canonical form in the case of a marriage between a Catholic and an Orthodox person is allowed for, a stipulation in the final clause is emphasised, too: "and the other requirements of law are to be observed" (Canon 1127). As mentioned earlier, some canonists, however, see in this clause a reference to the provisions on witnesses or the active participation of the sacred minister, but this opinion should be seen in a broader perspective. The "other requirements of the law" mentioned here underscore the fact that only a marriage that meets all validity conditions under canon law will be validly contracted, since this law affords protection to the Catholic doctrine of the sacrament of marriage and even the law binding on the Orthodox party (*Decree*, nos. 71, 80).[17] It becomes necessary, then, to have canonical-pastoral interviews with the prospective spouses before celebrating canonical marriage to make certain that all other conditions for the validity of the sacrament of marriage are satisfied. The conduct of such interviews is explicitly required by the Polish Bishops' Conference's *Decree*. It says that a record of canonical-pastoral interviews, with all attachments (paying special attention to the promises given by both parties), is to be sent to the curia (no. 83) – a procedure aimed at enabling a verification of all the legal requirements: the lack of diriment impediments, the validation of a just and reasonable cause for a mixed marriage,

[17] Pontifical Council for Legislative Texts, Instruction to be observed by diocesan and interdiocesan tribunals in handling causes of the nullity of marriage *Dignitas connubi*, https://www.vatican.va/roman_curia/pontifical_councils/intrptxt/documents/rc_pc_intrptxt_doc_20050125_dignitas-connubii_en.html [henceforth: *DC*], Articles 2-3.

and so on. The obligation to hold the interviews in the case of a mixed marriage that is to take place with a dispensation from the canonical form is explicitly mentioned in another article of the *Decree*: "before granting a dispensation from the canonical form, the pastor of the Catholic party is to run a complete canonical examination of the engaged couple in the usual form, and thus make a record of canonical-pastoral interviews, ascertain the single status of the parties and the integrity of the consensus, and obtain the necessary permissions and dispensations, including permission for a mixed marriage" (no. 91). The *Decree* explicitly mentions a situation where a mixed marriage between a Catholic and an Orthodox person would be concluded without permission and without a dispensation from the canonical form – although validly concluded, it is illicit (illegal) nonetheless. Such a situation is described in the *Instruction on Pastoral Care*. It says that *post factum* the declarations and pledges of the parties should be completed at the parish office, but nothing is mentioned about the record (IV, no. 8) that would help determine whether this marriage is indeed celebrated validly – as required by law. We read in the *Decree* that it is necessary to analyse the observance of not only divine law but also prescripts required for the validity of a mixed marriage. Therefore, the *Decree* requires that a number of actions be carried out after the celebration but before the Catholic party is admitted to Eucharistic Communion (*Decree*, no. 117).

5.2. Potential difficulties in fact-finding during canonical interviews

While having canonical-pastoral interviews, the pastor of the Catholic party may face some problems in establishing the facts concerning the engaged couple's capacity for canonical marriage and their intentions. Therefore, it would be instructive now to examine at least issues considered the most common and thus discussed by authors addressing mixed marriage.

5.2.1. The Catholic party's refusal to sign the promises

It may happen that during a canonical-pastoral interview the Catholic party refuses to make a written statement that they are willing to remove the danger of straying from their faith and pledge to do their utmost to have all the children of the marriage baptised and raised in the Catholic Church. Should this happen, the pastor is obliged to make it unequivocal

that this is an imperative of faith arising from divine law; he is also to clarify the meaning of the pledge (ibid., no. 83). Notably, this is underscored in the teaching of Vatican II when it speaks of participation in liturgical acts (*communicatio in sacris*) – such participation "harms the unity of the Church or involves formal acceptance of error or the danger of aberration in the faith, of scandal and indifferentism, is forbidden by divine law" (*OE* 26). The pastor is to emphasise the Catholic party's obligation to act in accordance with their conscience – properly formed and obedient to divine law – with respect to the baptism and Catholic education of children, but in adherence to the religious freedom and conscience of the other parent, out of concern for the unity and permanence of marriage and peace in the family. "The Catholic party should be made aware that physical or moral incapacity for obligations does not entail moral responsibility (sin) and penal-canonical liability. In contrast, conscious resignation or actual non-performance, given the possibility of carrying out obligations, gives rise to moral or even criminal liability" [Majer and Adamowicz 2021, 189]. To the above-mentioned acts that may bear the hallmarks of an offence one should add the handing over of children to be baptised or bringing them up in a non-Catholic religion (Canon 1367). Should the Catholic party, regardless of such an explication, not agree to give the required promises, efforts to obtain permission from the local ordinary for a mixed marriage should be abandoned, since such obligations demanded by the Church of the Catholic party are a sacred requirement of the faith. If this requirement is not met, permission cannot be granted, and the marriage cannot be celebrated (*Decree*, no. 83). Even if it were concluded outside the Catholic Church, it would certainly be illegitimate in the absence of grounds for nullity.

5.2.2. The non-Catholic party's refusal to participate in the interviews

The *Decree* of the Polish Bishops' Conference does not specify the course of action when the non-Catholic party categorically refuses to take part in canonical-pastoral interviews with the pastor of the Catholic party. Therefore, provisions of the *Instruction on Pastoral Care* should be utilised again; the document says that "the pastor is to conduct activities related to recording canonical-pastoral interviews before the marriage is concluded at least with the Catholic party (if the non-Catholic party has not shown willingness to come) [...]" (IV, no. 7, c). Nevertheless, we should underscore

that the unwillingness to come is a major issue when the risks that a mixed marriage faces are assessed. In the application directed to the local ordinary, the pastor should cite the explanation of the Catholic part as to why the other party did not wish to take part in a canonical interview. Most certainly, the local ordinary – when issuing a permission for such a marriage – should take account of the non-Catholic party's stance and exercise particular caution and prudence out of concern for the spiritual welfare of the Catholic party.

However, in the case where the non-Catholic party attends premarital canonical interviews, but having been informed in a timely manner of the Catholic party's obligations, it refuses to confirm such a fact with a signature, it becomes necessary for the pastor to clarify the meaning of the declaration made – that is, if he or she is acting in good faith, the Church does not require them to make a commitment that is at odds with their conscience, but only to acknowledge what obligations the Catholic party has. If the non-Catholic party still refuses to sign the declaration, the pastor can do so if he has moral certainty that the non-Catholic is aware of what the Catholic party is pledging. However, in the request for permission, the non-Catholic should describe this fact (*Decree*, no. 84), as this is highly relevant to the decision of the ordinary in terms of assessing the risks to such a marriage and to the faith of the Catholic party. Such difficulties, emerging at the beginning of the life journey together, should be discussed by both parties, because this can seriously jeopardise the unity of marriage and family and the Christian upbringing of children [ibid., 191].

5.2.3. Confirming the conferral of baptism

The Conference's *Decree* obliges the non-Catholic party to present a certificate of baptism. However, a practical problem may emerge here, as the non-Catholic party may have difficulty furnishing a certificate of baptism for a number of reasons, for example, not being able to go to the place of baptism, the perishing of baptismal records in war, the Orthodox parish refusing to issue such a certificate, etc. [Adamowicz 2014, 70]. In a case like this, the rules for confirming baptism should be applied; first and foremost, "the declaration of one witness beyond all exception is sufficient or the oath of the one baptized if the person received baptism as an adult" (Canon 876 CIC/93). Also, the condition included in this canon can be considered: "if prejudicial to no one." With respect to marriage, however, certainty that

baptism was indeed conferred is desirable not only for the party in question, but the other party too, as well as the public good owing to the social character of this sacrament [Blanco 2004, 484] (Canon 1430).[18] It must be assumed that it is necessary to prove the conferral of baptism by a document stating this fact. This interpretation also seems to be supported by the *Decree*; although the ordinary procedure is allowed for both Catholic parties by Canon 876, consultation with the diocesan curia is necessary to determine the further course of action, and thus the assessment is left to the competent ecclesiastical authority (*Decree*, no. 22). The case is somewhat different with a mixed marriage, as we read in the *Decree*: "in case of doubt as to whether the fact of baptism is sufficiently certain, or if there is doubt as to its validity, the local ordinary is to be consulted. If doubts cannot be cleared up, it is advisable that – additionally to permission for a mixed marriage – a dispensation from the difference of religion impediment be granted *ad cautelam*" (ibid., no. 78). Therefore, if a baptism certificate was not issued, a conditional dispensation is to be granted for the difference in religion. The lack of such dispensation – if the person was not baptised or if the baptism was found invalid – would also render the marriage invalid, too. This shows that also the Catholic party, and it cannot be ruled out that this fact might bring confusion to the community of believers.

5.2.4. Confirming the unmarried status

If a baptismal certificate is not presented, there is also the problem of confirming the unmarried status. It should be emphasised, however, that the confirmation of the unmarried status by clerics of other denominations, including the Eastern Orthodox Churches, does not always

[18] "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. All of these have a very decisive bearing on the continuation of the human race, on the personal development and eternal destiny of the individual members of a family, and on the dignity, stability, peace and prosperity of the family itself and of human society as a whole." Vatican II, Constitutio pastoralis de Ecclesia in mundo huius temporis *Gaudium et spes* (07.12.1965), 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 [henceforth: *GS*], no. 48.

indicate the unmarried status with complete certainty under the canon law of the Catholic Church. "Documents issued by non-Catholic church authorities confirming the prospective spouse's unmarried status (e.g., a decision to recognize a civil divorce or annulment of marriage, or a decision of an Orthodox hierarch to allow a second or third marriage) are not acceptable" (ibid., no. 79). Also, a baptismal certificate issued by the Orthodox Church (even recently) does not confirm the unmarried status. Therefore, in every case, a sworn testimony of at least two credible witnesses who have known the non-Catholic party well since at least the age of majority is to be used (ibid., no. 22). If the Orthodox party celebrated a prior marriage in an Orthodox church or one subject to canonical form, a declaration of nullity of that marriage under the canon law of the Catholic Church issued as a decision by an ecclesiastical court must be presented (*DC* 3).

5.2.5. Conversion of the spouse to the Catholic Church

The Conference's *Decree* also envisages the possibility that a non-Catholic party may declare readiness to enter into full communion with the Catholic Church. Such a state of affairs would eliminate the impediment of difference of religion, as it would remove the dangers associated with unions of this kind – where, nevertheless, differences emerge in the marital community of all life on account of religion. Although such a situation would help avoid many inconveniences and would simplify the preparation of marriage documents, such a condition cannot be set for a non-Catholic party during canonical-pastoral interviews. This is a practical application of the principle of religious freedom emphasized by the conciliar fathers (*DH* 2). However, if such an intention were declared by the non-Catholic party, then it should be verified carefully by: "examining the reasons for and degree of maturity of such a decision" (*Decree*, no. 81).

If a conversion to the Catholic Church occurs, the non-Catholic party's ecclesiastical affiliation with a given Church *sui iuris* is determined on the grounds of its affinity with the tradition of the Eastern Church whence the party has converted (cf. Canon 35 CCEO). Therefore, notably, there is no difference of religion in such a marriage, but there may occur a difference of rite.[19] However, the universal legislator allows married

[19] "[...] a person who is baptized outside the Catholic Church, regardless of who has accepted the Catholic profession of faith from them, the person retains the corresponding

couples to practice a single ritual tradition for the duration of their marriage. However, it should be remembered that the 1983 Code allows both male and female spouses to convert to another Church *sui iuris* (Canon 112 § 1, 2° CIC/83), while the CCEO allows a woman to convert to the Church *sui iuris* of her husband (Canon 33 CCEO). This distinction is intended to protect the smaller churches *sui iuris*. Both Codes allow a person to return to their earlier Church *sui iuris* after the marriage ceases.

5.2.6. Obligation to record and report a marriage

In the case of a mixed marriage, there is also an obligation to make a marriage certificate in the marriage register. The universal legislator does not make a distinction in this regard between single-faith and mixed marriages. Admittedly, such a distinction could be introduced by the conference of bishops or the diocesan bishop, since they are authorised by the universal legislator to determine the manner in which to make such an entry in the register (see Canon 1121 § 1 CIC/83). What is more, there is an obligation to inform the parish of the baptism about the marriage contracted. Even if the Orthodox party does not supply a baptismal certificate, information about the changed canonical status of the Orthodox person must be sent (cf. Canon 1122 CIC/83).

The case is similar when the marriage was performed with a dispensation from canonical form, which is to say that it took place in an Orthodox church or other convenient place, and the pastor who made a record of the canonical-pastoral interview was unable to verify whether the marriage had actually been celebrated. Therefore, the Catholic party is under the obligation to inform the pastor and the ordinary of the marriage, also about the place where it happened and the public form observed (Canon 1121 § 3 CIC/83). The Conference's *Decree* further specifies this provision, stating that the Catholic party is obliged to notify the pastor, and that he is to follow the procedures prescribed by law: to make a note in the marriage register and make sure that a note of the marriage is made in the baptismal

Eastern rite (if the person was an Eastern non-Catholic) or the Latin rite (if the person was previously a Protestant, Anglican, Polish Catholic, etc.)." Legal Council of the Polish Bishops' Conference, *Pro memoria dotyczące relacji duszpasterskich Kościoła łacińskiego z katolikami Kościołów wschodnich*, (4.10.2018), "Wrocławskie Wiadomości Kościelne" 71/2 (2018), p. 59-68.

register of the Catholic party. To draw a marriage certificate, the presence of only the Catholic party is sufficient, but it is even better if both parties are present. If this is the case, both parties should sign the marriage certificate inscribed in the book and the signature of the pastor who made the record is to be affixed. In the absence of the non-Catholic party, only the Catholic party and the pastor put their signatures. The marriage certificate should be made on the basis of an appropriate document confirming the marriage (e.g., a marriage certificate from an Orthodox church or a document issued by a civil registry office, etc.).

5.2.7. The Catholic party attempting to convert to the Eastern Orthodox Church

The *Decree* issued by the Polish Bishops' Conference does not offer the pastor any guidance if the Catholic party – either when reporting the fact of marrying a Christian who is not in communion with the Catholic Church or at any other time – has communicated their decision to convert from the Catholic Church to another denomination. However, the *Instruction on Pastoral Care* is still relevant helping pastoral workers to take the proper course of action. The pastor is under a "strict duty of conscience to make every necessary effort (instruction, request, admonition)" so that the Catholic party will desist from doing so" (IV, no. 9). By realising this intention, the person would be led to schism through "refusal of submission to the Supreme Pontiff or of communion with the members of the Church subject to him" (Canon 751 CIC/83). Such conduct, in turn, is not only a sin, but also an offence under canon law under the pain of excommunication *latae sententiae* (Canon 1364 § 1 CIC/83).

Conclusion

In the circumstances of today, mixed marriages are becoming more common, as people have greater freedom of movement and professional requirements, or other circumstances force them to move elsewhere (owing to war or labour migration); in consequence, mixed marriages have the opportunity to exist in a different culture with, among other things, a different religion or denomination.

In the case of a mixed marriage between a Catholic and an Orthodox person, despite small differences of doctrine, there are considerable

differences in discipline and worship practices. When preparing for the sacrament of marriage, the parties should fulfil all the obligations imposed by the universal legislator or by competent legislators in particular churches.

The pastor himself is required to help the parties prepare well for the sacrament of marriage, make sure the prospective spouses' have an adequate knowledge of the Catholic doctrine of marriage, and verify possible risks involved in such a mixed marriage, so as to be able to lay out the matter to the local ordinary so that the required permission can be issued. Thus, the pastor is the one intended to help prospective spouses overcome both legal and pastoral obstacles that were noted at the preparatory stage. Also, it belongs to him to present the case of a mixed marriage to the local ordinary, who assesses whether it is possible to issue the legally required permission for such a union.

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