

**Fr. Ginter Dzierżon**  
**Wydział Prawa Kanonicznego UKSW**

## **Forma wyrażenia zgody małżeńskiej określona w kan. 1104 § 1-2 KPK**

### **The Form of Expressing Matrimonial Consent Specified in can. 1104 § 1-2 of the CIC**

#### **Introduction**

In the canonical legal order, the causative cause of marriage is the consent of marriage (can. 1057 § 2 of the CIC). It should be noted, however, that the provision of the aforementioned canon is of a general nature. The subject of the legislator's attention in this regulation, which from a legislative point of view is completely understandable, has not become a matter of detail, including the problem of the form of expression of marriage consent. This last point is referred to in the can. 1104 § 1-2 of the CIC, deciding: „For a marriage to be valid, it is essential that betrothed are simultaneously present, either in person or by proxy (§ 1). Betrothed should express their marriage consent in words and, if they cannot speak in equivalent characters (§ 2)”. This regulation will be of interest in this paper. A preliminary analysis of the content of this canon shows that two main thematic areas should be distinguished: the issue of the need for the simultaneous presence of prospective spouses and the issue of ways of expressing their consent.

#### **1. The need for the simultaneous presence of prospective spouses (can. 1104 § 1 of the CIC)**

Commentators interpreting can. 1104 § 1 of the CIC consistently maintain that for validity of a marriage the prospective spouses should be present at the same time: in person

by a proxy (can. 1105 § 4 of the CIC)<sup>1</sup>. A similar provision can be found in can. 837 of the CCEO. It should be noted that in Eastern law the necessity of the parties' presence is reinforced by the requirement that the parties must receive a priestly blessing.<sup>2</sup>

Incidentally, it should be added that late Roman law, as well as Germanic law, did not permit marriage by proxy. Such a possibility was only introduced in Justinian law; in Church law, however, such a solution was adopted in the era of classical canonism<sup>3</sup>. During work on the revision of the Code of 1917, the consultants suggested abolishing this institution. This suggestion was not put into practice in the new codification, justifying this decision by the phenomenon of large population migration in the modern world<sup>4</sup>.

The canonists provide various arguments in their studies to justify such a normative arrangement. Referring to the can. 1104 § 1 of the CIC, Sabbarese stressed that the presence of contractors is a guarantee of the validity of the consent of the marriage. The guarantee in question directly concerns the validity of *matrimonium in fieri*; indirectly, it relates to *matrimonium in fact esse*<sup>5</sup>. This interpretative trend is organically in line with the views of Pedro Juan Viladrich and Francesco Bersini. The first considers that the requirement codified in can. 1104 § 1 of the CIC is the guarantee of the unity of the constitutive act, which is the conjugal consensus<sup>6</sup>. Bersini, on the other hand, stated that a marriage consensual becomes effective not as a result of it being expressed by one of the contracting parties, but simultaneously by both<sup>7</sup>. Marriages, added Klaus Lüdicke and Luigi Chiappetta, are not, after all, constituted by two consents, but one agreement of the parties<sup>8</sup>. Lüdicke also made this point very clear. He pointed out that the relationship would be null and void if one of the prospective spouses concluded it before a civil servant; the other before a clergyman<sup>9</sup>.

---

<sup>1</sup> Cf. F. AZNAR GÍL, *Derecho matrimonial canónico*, v. 2, Salamanca 2002, p. 264-265; F. BERSINI, *Il diritto canonico matrimoniale*, Torino 1994, p. 138; P. J. VILADRICH, *Konsens małżeński*, translation S. ŚWIACZNY, Warszawa 2002, p. 456.

<sup>2</sup> Cf. D. SALACHAS, *Commento al. can 837 CCEO*, in: *Commento al Codice dei Canonici delle Chiese Orientali*, ed. „Città del Vaticano 2001, p. 717.

<sup>3</sup> Cf. R. SEBOTT, *Das neue kirchliche Eherecht*, Frankfurt am Main 2005, p.106; J. FORNÉS, *Derecho matrimonial canónico*, Madrid 2008, p. 140.

<sup>4</sup> Cf. *Communicationes* 9 (1977), p. 377; R. SEBOTT, *Das neue...*, op. cit., p.106; J. FORNÉS, *Derecho matrimonial...*, op. cit., p. 141.

<sup>5</sup> Cf. L. SABBARESE, *Il matrimonio canonico nell'ordine della natura e della grazia*, Roma 2016, p. 288.

<sup>6</sup> Cf. P. J. VILADRICH, *Konsens małżeński*, op. cit., p. 456.

<sup>7</sup> Cf. F. BERSINI, *Il diritto canonico...*, op. cit. p. 138; G. Boni, *La manifestazione del consenso matrimoniale e il matrimonio per procura e per interprete*, in: P. A. BONNET, C. GULLO (red.), *Diritto matrimoniale*, Città del Vaticano 2007, p. 608.

<sup>8</sup> Cf. K. LÜDICKE, *Heiligungsamt: Ehe*, in: K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici*, t. 1, Essen 1985, ad. 1104, 3; L. CHIAPPETTA, *Il matrimonio nella nuova legislazione canonica e concordatoria*, Roma 1990, p. 256.

<sup>9</sup> Cf. K. LÜDICKE, *Heiligungsamt*, op. cit., ad. 1104, 2.

According to the canonists, not only Catholics, but also acatholics contracting a marriage are obliged to fulfill that obligation (can. 1059 of the CIC)<sup>10</sup>. This statement is supported by the positive answer of the Congregation of the Holy Office of 18 May 1949, published on 15 July 1949, to the question: Should the can. 1088 § 1 CIC/17 also be applied to baptised acatholic marriages? which was approved by Pope Pius XII on 26 June 1949<sup>11</sup>. Explaining this provision, this Congregation - in a further answer of 15 July 1949 - stated more precisely that in the marriages in which at least one party would have been baptised, they would have been annulled if one of them had been absent<sup>12</sup>. On commenting on this answer of the Holy See Lüdicke rightly pointed out to that the value of this requirement is different for a baptised marriage that is sacramental in nature, and different for a marriage of baptised with an unbaptised one that is not of such a nature. In the first case, it is based on God's law, in the second case, it is based on positive law<sup>13</sup>.

German studies indicate that the main reason for this decision by the Dicastery of the Roman Curia was a certain practice applied during World War II. Namely, in the civil forum, unions in which a soldier gave his consent in front of a military representative were considered important, and then a relevant document was sent to the woman's place of residence for signature. After that, she gave her consent in presence of a government official and two witnesses<sup>14</sup>. From a canonical point of view, as Reinhold Sebott pointed out, the problem was that such marriages were not valid for those who were obliged to marry in a canonical form<sup>15</sup>.

## 2. The form of expressing matrimonial consent (can. 1104 § 2 of the CIC)

The can. 1104 of § 2 of the CIC, the legislator, referring to the issue of ways of expressing consent to a marriage, concluded a general principle related to expressing consensus by means of words and an exception to this principle, in which the possibility of marrying by means of equivalent signs was not excluded in certain situations.

---

<sup>10</sup>Cf. J. HENDRIKS, *Diritto matrimoniale. Commento ai canoni 1055-1165*, Milano 1998, p. 220.

<sup>11</sup>Cf. SUPREMA SACRA CONGREGATIO S. OFFICII, *Responsa-18 V 1949*, AAS 41 (1949), p. 427: „Utrum praescriptum can. 1088 § 1 applicetur etiam matrimonii acatholicorum baptizatorum. *Affirmative*”.

<sup>12</sup>Cf. SUPREMA SACRA CONGREGATIO S. OFFICII, *Responsa-15 VII 1949*, in: *Leges Ecclesiae*, t. 2, col. 2615. For more on this subject see L. Sabbarese, *Il matrimonio...*, op. cit., p. 288.

<sup>13</sup>Cf. K. LÜDICKE, *Heiligungsamt...*, op. cit., ad. 1104, 3.

<sup>14</sup>Cf. R. SEBOTT, *Das neue...*, op. cit., p.106; J. FORNÉS, *Derecho matrimonial...*, op. cit., p. 140; R. ALTHAUS, J. PRADER, J.F. REINHARD, *Das kirchliches Eherecht in der seelsorgeriscger Praxis*, Essen 2014, p. 132.

<sup>15</sup>Cf. R. SEBOTT, *Das neue...*, op. cit., p.106; J. FORNÉS, *Derecho matrimonial...*, op. cit., p. 140.

## 2.1. General principle

According to can. 1104 § 2 of the CIC, prospective spouses should give their consent in words. In the PWN Dictionary of Polish Language, the term „word” is understood, among others, as „a set of sounds [...] corresponding to a given term” as well as an oral expression<sup>16</sup>.

In this provision, the legislator speaks of words. The contracting of a marriage should therefore be concluded in accordance with the sequence of words used in marriage rites, i.e. according to the liturgical rules. In the „Rites of the Sacrament of Marriage adapted to the customs of the Polish dioceses”, prospective spouses should enter into a marriage according to the following formula: „I N. take you, N. as my wife (husband) and vow you, love, fidelity, and honesty in marriage and that I will not leave you until death. So help me, Lord Almighty God, in the One Trinity, and all saints”<sup>17</sup>. In referring to this thread, the canonists point out that they cannot be replaced where prospective spouses can talk, by other signs such as a handshake or putting on rings<sup>18</sup>. According to Bersini, it would be sufficient under natural law for a consensus to be expressed in any way. The legislator, however, demands under positive law that it be expressed in a manner strictly defined by law. It is therefore not a question of any words, but of words appropriate to the marriage contraction event<sup>19</sup>. In explaining this, Stefan Biskupski stressed that these words „must clearly specify the subject of the marriage consent”<sup>20</sup>. Therefore, as Petrus Gasparri wrote, it is not possible to use ambiguous words, but unambiguous words that allow witnesses to confirm the fact that the marriage has been contracted<sup>21</sup>. Moreover, they should not refer to the future, but to the very moment of the marriage<sup>22</sup>. It should also be noted that the can. 88 § 2 of the CIC/17 deals with this issue more precisely: „The bride and groom give their consent in words, if they can speak, they are not allowed to use equivalent signs”.

In the current legal order, marriage cannot be concluded by letter, telephone or social media<sup>23</sup>. In raising this problem, Viladrich wrote that it is unacceptable „[...] when simultaneous and personal presence is replaced and made through any medium which is not

---

<sup>16</sup> Cf. *Słowo*: in: L. DRABIK, A. KUBIAK-SOKÓŁ, E. SOBOL, L. WIŚNIAKOWSKA (ed.) *Słownik języka polskiego PWN*, ed., Warszawa 2014, p. 927.

<sup>17</sup> See *Obrzędy sakramentu małżeństwa dostosowane do zwyczajów diecezji polskich*, Katowice 1973, p. 31.

<sup>18</sup> Cf. F. BERSINI, *Il diritto canonico...*, op. cit., p. 138.

<sup>19</sup> Cf. IBID.; G. BONI, *La manifestazione...*, op. cit., p. 606.

<sup>20</sup> See S. BISKUPSKI, *Prawo małżeńskie Kościoła Rzymskokatolickiego*, Warszawa 1956, p. 296.

<sup>21</sup> Cf. P. GASPARRI, *Tractatus canonicus de matrimonio*, t. 1., Typis Polyglotis Vaticanis 1932, p. 68.

<sup>22</sup> Cf. IBID, p. 67.

directly a word”<sup>24</sup>. Historically, church law has long allowed for contracting a marriage between absent people; moral presence was sufficient. The possibility of a marriage by letter was not excluded.<sup>25</sup>

In this context, the question arises about the *ratio legis* in can. 1104 § 2 of the CIC. In discussing this problem, Geralinda Boni pointed out that there is no consensus of opinion on this issue in contemporary doctrine. One group of canonists claims that this way of expressing consensus is to facilitate the perception of the event by a qualified witness (A. Bertola), while others believe that this way of expressing consensus is to protect contractors from entering into a relationship under the influence of coercion and fear (A. Vermeersch, P. A. Bosch)<sup>26</sup>.

On canonistic grounds in the interpretation of can. 1104 § 2 of the CIC is also extremely important to answer the next question: Is the requirement in question demanded for validity or fairness? In other words, it is about answering the question: Does the provision of this regulation have the value of an annulling law (can. 10 of the CIC)?

Commenting on can. 88 § 2 CIC/17 Gasparri and Biskupski pointed out that historically, doctrinal thought on this issue has evolved. In old law there was no consensus among the views of the canonists as to whether a marriage should have been entered into using strictly defined words, or whether it could have been done with the help of clear signs? Most authors were inclined to argue that the use of words was required for fairness, not validity. This is what Pope Innocent III maintained in „De sponsalibus et matrimonio”. The view of this eminent medieval canonist had a decisive influence on subsequent solutions in this matter<sup>27</sup>.

According to contemporary commentators, the requirement we are interested in is only required for fairness; for validity, on the other hand, it is necessary to give consent through some equivalent signs<sup>28</sup>. In this case, it is important, as Chiappetta writes, that the participation of prospective spouses is active, because a passive attitude has no legal effect<sup>29</sup>. This is confirmed by judgment of c. Grazioli of 10 July 1939. In *in iure* part of this rotal

---

<sup>23</sup> Cf. P. M. ANDREINI, *De matrimonio*, Bologna 1998, p. 219; P. J. VILADRICH, *Konsens małżeński*, op. cit., p. 456-457; T. PAWLUK, *Prawo kanoniczne według Kodeksu Jana Pawła II*, t. 3, Olsztyn 1984, p. 170; W. GÓRALSKI, *Kościelne prawo małżeńskie*, Warszawa 2006, p. 218.

<sup>24</sup> Cf. P. J. VILADRICH, *Konsens małżeński*, op. cit., p. 457.

<sup>25</sup> Cf. T. PAWLUK, *Prawo kanoniczne...*, op. cit., p. 170.

<sup>26</sup> Cf. G. BONI, *La manifestazione...*, op. cit., p. 607.

<sup>27</sup> Cf. P. GASPARRI, *Tractatus...*, op. cit., p. 67; S. BISKUPSKI, *Prawo małżeńskie...*, op. cit., p. 296.

<sup>28</sup> Cf. P. J. VILADRICH, *Konsens małżeński*, op. cit., p. 457; F. AZNAR GÍL, *Derecho matrimonial...*, op. cit., p. 265; R. SEBOTT, *Das neue...*, op. cit., p. 106; J. FORNÉS, *Derecho matrimonial...*, op. cit., p. 142; F. BERSINI, *Il diritto canonico...*, op. cit., p. 138.

judgment the ponens emphasized with all the emphasis that if the prospective spouse would not answer the parish priest's questions, then the marriage would be invalid<sup>30</sup>.

The coherent, with the disposition of can. 1104 § 2 of the CIC is also the provision of can. 837 § 1 of the CIC, according to which „For a marriage to be valid and fair, it is necessary for the parties to be present and consent to the marriage at the same time”. Analysing the content of this regulation, it is not difficult to notice that the legislator does not explicitly mention the necessity of marrying in words; it only mentions the necessity of giving consent to marriage. Referring to this principle, Kevin Schembri wrote that, in this legal order, the conjugal consensus is not only seen as a constitutive component of the sacramentality of marriage, but also as a necessary condition for its validity<sup>31</sup>.

Interpreting the can. 837 § 1 of the CCEO Joseph Prader pointed out that its wording is slightly different from that of can. 1104 § 2 of the CIC, because in the Eastern Churches, the consensus is not expressed in words during the ritual of celebration of marriage, but the will to marry is either stated by the priest before the ritual begins, or its expression is legally effective through signs or symbolic rites<sup>32</sup>. Dimitros Salachas, on the other hand, pointed out that some Eastern rites do not allow the will to be expressed in words, as prospective spouses should give their consent by means of gestures or special rhythms. The systemic general premise in this matter is that the validity of a consensus must be expressed in the external sphere<sup>33</sup>.

The analysis shows that can. 837 § 1 of the CCEO does not explicitly state the requirement to get married using specific words. It can be concluded from this provision that in Eastern legislation, as in Western legislation, this requirement is only required for fairness.

Returning to the main thread of these considerations related to the interpretation of the can. 1104 § 2 of the CIC we wish to recall the thought of Tadeusz Pawluka, who, explaining the normative provision that interests us, wrote: „The new law does not explicitly state that the expression of consent in words by those who can speak is only required for the fairness of marriage consent. This was provided for by the provisions of the decree law and the previous Code. There is no basis for claiming that this is not the case now.

---

<sup>29</sup> Cf. L. CHIAPPETTA, *Il matrimonio...*, op. cit., p. 256.

<sup>30</sup> Cf. DEC. C. GRAZIOLI of 10 VII 1939, SRRD, t. 31, p. 436.

<sup>31</sup> Cf. K. SCHEMBRI, *Oikonomia, Divorce and Remarriage in the Eastern Orthodox Tradition*, Roma 2017, p. 58.

<sup>32</sup> Cf. J. PRADER, *Il matrimonio in oriente e in occidente*, Roma 2003, p. 250: „[...] Infatti secondo la genuina tradizione delle Chiese orientali, il consenso non viene espresso con parole durante il rito della celebrazione del matrimonio, perché la volontà concorde di unirsi in matrimonio, o è constatata dal sacerdote prima di iniziare il rito, o la sua manifestazione, sempre necessaria, è effettuata con segni o riti simbolici”.

<sup>33</sup> Cf. D. SALACHAS, *Commento al. can. 837 CCEO*, op. cit., p. 717.

Therefore, a marriage would be important if a party at the time of the wedding, under the influence of a strong impression, not being able to speak out only with a nod, gave his or her consent to the marriage. Therefore, a marriage would be important if a party at the time of the wedding, under the influence of a strong impression, not being able to speak out only with a nod, gave his or her consent to the marriage<sup>34</sup>. A similar opinion was expressed by Vildrich when he wrote: „With regard to can. 1104 § 2 we should distinguish between validity and fairness. In the strict sense, for the validity of consent to marriage, it is sufficient for prospective spouses to give their consent by means of *those signs which manifest in an unambiguous form the common will to marry and not some other relationship*. A specifically important sign is one that is capable of expressing unambiguously according to the relevant cultural forms of prospective spouses - that they both positively want and that what they want is marriage and not something else. To be fair, prospective spouses should give their own word - oral expression - their consent, and it is not considered fair to use other equivalent signs unless the prospective spouse cannot speak<sup>35</sup>.

## 2.2. Exception to the general rule

As mentioned, in the discussed can. 1104 § 2 of the CIC also an exception to the general rule was codified, stating that in a situation where a prospective spouse could not speak, he could then give his consent with equivalent signs. Referring to this paragraph, Bersini stressed that in this case it was not only about physical impossibility, but also about moral impossibility. In his view, any serious cause gives rise to the use of other signs, but only those that clearly indicate a desire to enter into a relationship<sup>36</sup>. These signs should be unambiguous for witnesses<sup>37</sup>. The literature indicates that this could be done, for example, by exchanging rings or by a mutual handshake<sup>38</sup>. This is why silence does not meet this condition<sup>39</sup>. This is because it is not an external sign<sup>40</sup>. After all, in such a situation it is impossible to verify whether the parties want marriage.

---

<sup>34</sup> Cf. T. PAWLUK, *Prawo kanoniczne...*, op. cit., p. 170.

<sup>35</sup> See P. J. VILADRICH, *Konsens małżeński*, op. cit., p. 457.

<sup>36</sup> Cf. F. BERSINI, *Il diritto canonico...*, op. cit., p. 138.

<sup>37</sup> Cf. T. PAWLUK, *Prawo kanoniczne...*, op. cit., p. 170; P. J. VILADRICH, *Konsens małżeński*, op. cit., p. 457.

<sup>38</sup> Cf. J. PRADER, *Il matrimonio...*, op. cit., p. 250; R. ALTHAUS, J. PRADER, J.F. REINHARD, *Das kirchliches Eherecht...*, op. cit., p. 132.

<sup>39</sup> Cf. F. BERSINI, *Il diritto canonico...*, op. cit., p. 139.

<sup>40</sup> Cf. P. J. VILADRICH, *Konsens małżeński*, op. cit. p. 457; L. SABBARESE, *Il matrimonio canonico...*, op. cit., p. 289.

Canonists dealing with this issue also write that this hypothesis also concerns the possibility of an interpreter marrying if the counterparties do not know the language (can. 1106 of the CIC)<sup>41</sup>. In this case, it is not necessary to obtain the permission of the ordinary of the place<sup>42</sup>.

### **Conclusion**

The analysis shows that in the current legal order, both prospective spouses should be present at the same time, or they may enter into a relationship through an proxy(ies).

By its very nature, it is not sufficient for validity to express a marriage consensus in the internal sphere; it is necessary to make it public in view of the need for social verification<sup>43</sup> and in view of the dignity of the other person to whom the prospective spouse wishes to offer himself<sup>44</sup>.

The canonists agree that, under natural law, the consent of the couple in the external sphere can be given in any way. In church law, however, the legislator did not allow such freedom, because he defined the manner of expressing consent, as evidenced by the provisions of can. 1104 § 1- 2 of the CIC. In an ordinary situation, where prospective spouses can speak, they should marry in words. This requirement is not required for validity, but for the fairness of the act. In extraordinary circumstances, however, and thus in a situation where at least one of the parties could not speak, they could express their consensus with equivalent signs. The requirements in question are not met by silence. In this hypothesis, the will behaves inertly. As a result, a legal act such as marriage consent in the system is not effective.

---

<sup>41</sup> Cf. F. BERSINI, *Il diritto canonico...*, op. cit., p. 138.

<sup>42</sup> Cf. T. PAWLUK, *Prawo kanoniczne...*, p. 171.

<sup>43</sup> Cf. W. GÓRALSKI, *Kościelne prawo...*, op. cit., p. 218.

<sup>44</sup> Cf. L. SABBARESE, *Il matrimonio...*, op. cit., p. 288.