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**Przeszkody małżeńskie w świetle Kodeksu Prawa Kanonicznego oraz Kodeksu
rodzinnego i opiekuńczego**

**Marital impediments in the light of Code of Canon Law
and The Family and Guardianship Code**

Introduction

Undoubtedly, many impediments to marriage identified in the Canon Law Code (hereinafter: CIC) have not been regulated in the Family and Guardianship Code (hereinafter: FGC) because the former are based on the divine law and on the nature of the Catholic Church. However some prohibitions of marriage are identical in the two systems. Most of them come from the natural law applicable to everyone regardless of their nationality or religion. The Concordat¹ signed between the Holy See and the Polish government is considered the major act in law that governs relations between the canonic marriage and the civil marriage. The difference between the two laws and the existence of a room for collision does not mean that they have to fall in a conflict².

¹ Cf. Ustawa z dnia 28 lipca 1993 r. – *Konkordat między Stolicą Apostolską i Rzeczpospolitą Polską* (Dz. U. 1998 Nr 51, poz. 318), art. 10 pkt 1: „As of the contracting, a canonic marriage has identical consequences as the contracting of a civil marriage(...)”.

² Cf. W.GÓRALSKI, *Instytucja małżeństwa w prawie kanonicznym i w prawie polskim*, in: W.GÓRALSKI (ed.), *Studia nad małżeństwem i rodziną*, Warszawa 2007, p. 557

1. Impediments defined in the CIC of 1983 in general³

Canon 1055 § 1 of the CIC defines the marriage. It is a „covenant by the conclusion of which a man and a woman establish a lifetime unity, inherently serving the good of the spouses and the giving birth to, and rearing, offspring. [a marriage – Z.M.] between the baptized has been elevated by Christ to a sacramental dimension”⁴. The ecclesiastic legislator highlighted the following: 1) the covenant – the lifetime unity between a man and a woman; 2) the specificity of the purpose; 3) the sacramental dimension of marriage⁵.

To protect marriage and prevent threats to the good of the public or of the contractors, the ecclesiastic legislator defined impediments preventing the valid contracting of a marriage. Because the impediments restrict human rights, they have to be interpreted strictly and explicitly⁶. The canon law provides for 12 impediments to marriage: age, impotence, prior bond, disparity of cult, sacred orders, public perpetual vow of chastity given to a monastic institute, abduction, crime, consanguinity, affinity, public propriety, adoption⁷. This list given in the CIC/1983 is closed. The supreme legislator does not allow for implementation of other impediments, for instance by conferences of bishops⁸ or by diocesan bishops. The competence for establishing and interpreting impediments has been reserved explicitly to the supreme ecclesiastic authority⁹. In addition, the establishment of an impediment must not be based on a custom¹⁰.

These impediments are closely related to the pursuit of the purpose set by the Church to the sacrament of marriage. Considering different natures and persistence of the impediments,

³ The Canon Law Code of 1917 made a distinction between breaking and prohibitive impediments. The present Code recognizes only the „breaking” impediments. There is no need for using the adjective but using it is not an error.

⁴ *Codex Iuris Canonici auctoritate Ioannis Pauli PP. II promulgatus*, 25 I 1983, AAS 75 (1983); Polish text in: *Kodeks Prawa Kanonicznego*, Poznań 1984, can. 1055 (hereinafter: CIC/1983)

⁵ Cf. W. GÓRALSKI, *Małżeństwo w prawie kanonicznym*, *Prawo Kanoniczne* 1-2 (54) 2011, p. 129

⁶ Cf. H. STAWNIAK, *Przeszkody małżeńskie wynikające z węzła etyczno-prawnego*, *Prawo Kanoniczne* 3 (55) 2012, p. 28

⁷ These impediments have been regulated in can. 1083-1094 of the CIC/1983. The Code of Canons of Eastern Churches (hereinafter: CCEO) contains similar norms. There is a difference of applicability of individual impediment between the Latin and Eastern Churches. In addition, the Eastern Code contains one impediment nonexistent in the Latin Code: the impediment of spiritual relationship. Cf. *Codex Canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus*, AAS 82 (1990); Polish text in: *Kodeks Kanonów Kościołów wschodnich promulgowany przez papieża Jana Pawła II*, Lublin 2002.

⁸ Episcopal conferences may increase the age of consent (set in the CIC/1983). What is important, the focus is on equitableness and not validity of marriage. Episcopal conferences must not lower the age of consent for church marriages.

⁹ Cf. CIC/1983, can. 1075

¹⁰ Cf. W. GÓRALSKI, *Kanoniczne przeszkody małżeńskie in genere*, *Prawo Kanoniczne* 3 (55) 2012, s. 13

the ecclesiastic legislator has introduced a number of distinctions between them. The first criterion is time. „Such an impediment imposed by the canon law – based on the divine, positive or natural law, or for the public and/or private good – makes certain persons unfit to contract marriage either temporarily (temporary impediment) or permanently (persistent impediment)”¹¹. Next, considering the criterion of the subjective scope, we have absolute impediments, applicable to everyone, and relative impediments, concerning specific contractors. The latter criterion of distinction has not been formulated explicitly in the CIC/1983 but it is implied by the canonistic literature. Canonists make a distinction between impediments imposed by the divine law and by the ecclesiastic law¹².

2. Impediments defined in the Family and Guardianship Code in general

The Polish Family and Guardianship Code defines just 7 impediments to marriage. The main difference between them is removability. The following are absolute (non-removable) impediments: full incapacitation, bigamy, consanguinity and adoption. The remaining impediments (age, mental illness or amentia and affinity) are relative, which means that courts may lift the prohibition of marriage in specific instances.

One important difference between the impediments based on the canon law and on the Polish civil law involves the validity of marriage in the event of occurrence of one of the impediments. According to the ecclesiastic law, a marriage contracted in spite of an impediment is invalid right from the beginning while the civil law has an institution of the invalidation of marriage (a marriage is valid in spite of an impediment but can be invalidated)¹³.

3. Impediments shared by the both legal systems

The both legal systems have 5 identical impediments, some varying in their scope: age, prior bond, consanguinity, affinity and adoption.

¹¹ M. AL. ŻUROWSKI, *Kanoniczne prawo małżeńskie Kościoła katolickiego*, Katowice 1987, p. 118-120

¹² Cf. C. SUCHOCKI, *Przeszkody małżeńskie w prawie kanonicznym i polskim kodeksie rodzinnym i opiekuńczym. Poradnictwo rodzinne w aspekcie wymogów Konkordatu*, Lublin – Sandomierz 1997, p. 19

¹³ Cf. G. JĘDREJEK, *Zawarcie małżeństwa*, w: *Prawo rodzinne*, red. G. JĘDREJEK, Warszawa 2015, p. 54

In spite of this similarity, there is a dramatic difference between the two: the Canon Law Code applies to Catholic while the Family and Guardianship Code has jurisdiction over all residents of Poland.

3.1. The impediment of age (*impedimentum aetatis*)

According to can. 1083 § 1, the age of consent is 16 for the male and 14 for the female. The age should be determined pursuant to can. 203 of the CIC/1983¹⁴. The secular legislator has set the same age of consent for the both contractors, 18¹⁵, with an option for lowering this barrier to 16¹⁶ for the female with consent from a guardianship court¹⁷. Before the court gives the consent, it has to make sure whether the family established by the marriage will be able to function in the long term and foster the offspring, if any¹⁸.

The supreme legislator – aware of cultural, biological and legal differences between countries – has implemented a special right in can. 1083 § 2. This clause enables national episcopal conferences to regulate the impediment of age differently. Considering the excessive difference between the age of consent in the canon and civil laws, the Conference of the Episcopate of Poland has raised the age of consent for the both sexes to 18¹⁹. This came as a consequence of the conclusion of the Concordat between the Holy See and the Polish government and of amendment of the FGC. The Conference made a reservation in section 9 of the „Instruction for priests on the Concordat marriage” that the age of consent would apply to all marriages, not just the Concordat ones. Subject to consent of a competent ordinary, this age may be lowered to 16 for a female²⁰, which is the case in the civil law. It should be noted that, pursuant to can. 1075 and 1077 § 2 the restriction implemented by the episcopal conference affects only the equitableness of the contracting of a marriage²¹.

¹⁴ Cf. G. DZIERŻON, *Przeszkoda wieku*, in: W. GÓRALSKI (ed). *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 77

¹⁵ Cf. Ustawa z 25 lutego 1964 r. – *Kodeks rodzinny i opiekuńczy* (Dz. U. Nr. 9, poz. 59 ze zm.), art. 10 § 1, zd. 1 (hereinafter: FGC)

¹⁶ This involves the Civil Code (Dz. U. Nr 16, poz. 93 ze zm.), art. 10 § 2 (hereinafter: CC). A minor (a person younger than 18) who has validly contracted a marriage is deemed an adult. The invalidtion of the marriage will not reverse this change in the person’s legal status.

¹⁷ Cf. FCG, art. 10 § 1, zd. 2

¹⁸ Cf. W. STOJANOWSKA, *Przeszkoda małżeńska ze względu na wiek w prawie polskim*, Prawo Kanoniczne 3 (55) 2012, p. 101

¹⁹ Cf. KONFERENCJA EPISKOPATU POLSKI, *Instrukcja dla księży dotycząca małżeństwa konkordatowego*, 12 XI 1998, pt 8, in: C. KRAKOWIAK, L. ADAMOWICZ (ed.), *Dokumenty duszpastersko-liturgiczne Episkopatu Polski 1966-1998*, Lublin 1999, p. 172

²⁰ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, Warszawa 2006, p. 119

²¹ Por. J. FORNÉS, *Poszczególne przeszkody zrywające*, w: P. MAJER (red.), *Codex Iuris Canonici. Kodeks Prawa Kanonicznego. Komentarz*, Kraków 2011, s. 800

The impediment of age is absolute and violation of can. 1083 § 1 by just one contractor makes the marriage invalid²². The restriction is temporary and expires on the reaching of the age of consent. Note, however, that a marriage that has been contracted does not become valid by virtue of law: it has to be validated retroactively or simply²³.

3.2. The impediment of prior bond (*impedimentum vinculi matrimonialis*)

According to the CIC/1983, a marriage contracted by a person already bound by a previously contracted marriage, even if not consummated, is invalid²⁴. This impediment derives from the natural (or divine), so it may never be dispensed²⁵. A validly contracted and consummated marriage is indissoluble even if the contractors wish to terminate it. This is because the marriage no longer belongs to the parties once they have given their valid consents²⁶. What is important, from the point of view of the origin of the impediment, it applies not only to the baptized but also to the unbaptized. Such a mixed marriage if at least one party is unbaptized, their marriage is a natural bond but if the both parties are baptized, the bond is sacramental²⁷. This impediment can be lifted by death of the spouse²⁸, papal dispensation from marriage contracted but not consummated, Pauline privilege or by the declaration of invalidity of marriage²⁹.

The secular legislator placed the prohibition of bigamy in art. 13 § 1 of the FGC: „a married person may not contract another marriage”³⁰. This impediment was implemented in the Polish law based on the principle of monogamy. Although the principle is not stated explicitly in the FGC, it derives from the Polish civilizational and cultural contexts and tradition³¹. What is more, the violator of the prohibition (the bigamist, but not the other party) is liable to penalty³².

²² Cf. G. DZIERŻON, *Przeszkoda wieku*, op. cit., p. 77

²³ Cf. TAMŻE, p. 87

²⁴ CIC/1983, can. 1085 § 1

²⁵ Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 802

²⁶ Cf. U. NOWICKA, *Przeszkoda węzła małżeńskiego*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 164

²⁷ Cf. IBID.

²⁸ The death of the spouse can be acknowledged by the following documents: (1) civil death certificate, (2) authentic certificate from an ecclesiastic authority, (3) a diocesan bishop's attestation of presumed death.

²⁹ W. GÓRALSKI, *Przeszkody małżeńskie wspólne w prawie kanonicznym i w prawie polskim*, in: W. GÓRALSKI (ed.), *Studia nad małżeństwem i rodziną*, Warszawa 2007, p. 628

³⁰ FGC, art. 13 § 1

³¹ Cf. E. SUGIER, *Przeszkody małżeńskie w polskim kodeksie rodzinnym i opiekuńczym. Małżeństwo konkordatowe*, Koszalin 1999, p. 36-37

³² See the Penal Code of 06.06.1997 (*Dz. U. Nr 88, poz. 553 ze zm.*), art. 206: „Who contracts a marriage in spite of being in a marital relationship is punishable with a fine, restriction of liberty or a prison sentence of up to 2 years”.

The impediment of bigamy is absolute and non-removable in the Polish law, so no court may give its consent to the contracting of a marriage in this context³³. However, in contrast to the canon law, the Polish law recognizes different causes for the termination of the previous marriage: actual or legally declared death of the spouse and valid divorce³⁴. Article 13 § 2 of the FGC is interesting: „any person with legal interest may demand invalidation of a marriage in which one of the spouses is bound by a previous marriage”. This is a very broad circle of persons, which demonstrates how important the impediment of bigamy is in the Polish law³⁵.

The opinion that art. 13 of the FGC refers to the civil marriage prevails in the literature. A marriage contracted in church by giving the representation of will provided for by art. 1 § 2 of the Code is not considered a civil marriage, unless the head of the Bureau of Vital Statistic produces a relevant document (legal instrument)³⁶. A marriage contracted without meeting the applicable requirements of the code has no legal consequences³⁷.

3.3. The impediment of consanguinity (*impedimentum consanguinitatis*)

The impediment of consanguinity is based on close blood relationship in the lines of descent³⁸. The closeness (degree) of consanguinity or affinity of two persons is defined by the direct and collateral lines of descent and by the distance between the persons on these lines. Computations for the collateral line are based on the Roman system: the number of births excluding the common ancestor³⁹. The impediment of consanguinity has been regulated in can. 1091 of the CIC/1983. According to can. 1091 § 1: „In the direct line of consanguinity marriage is invalid between all ancestors and descendants, both legitimate and natural”⁴⁰. Can. 1091 § 2: „In the collateral line marriage is invalid up to and including the fourth degree”⁴¹. The impediment of consanguinity in the direct line and in the second degree of the collateral line comes from the natural law, so it cannot be dispensed. Can. 1091 § 4: „A marriage is never permitted if doubt exists whether the partners are related by consanguinity in any degree of the direct line or in the second degree of the collateral line”⁴². Starting from the third and fourth

³³ Cf. G. JĘDREJEK, *Zawarcie małżeństwa*, op. cit., p. 54

³⁴ Cf. J. GAJDA, *Unieważnienie małżeństwa*, in: T. SMYCZYŃSKI (ed.), *Prawo rodzinne i opiekuńcze*, t. 11, Warszawa 2014, p. 168-169

³⁵ Cf. G. JĘDREJEK, *Zawarcie małżeństwa*, op. cit., p. 62

³⁶ Cf. J. GAJDA, *Unieważnienie małżeństwa*, op. cit., p. 168

³⁷ Cf. IBID., p. 139

³⁸ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 140

³⁹ Cf. H. STAWNIAK, *Przeszkody małżeńskie...*, op. cit., p. 26

⁴⁰ CIC/1983, can. 1091 § 1

⁴¹ Cf. IBID., can. 1091 § 2

⁴² Cf. IBID., can. 1091 § 4

degrees in the collateral line, the dispensation may be given by the local ordinary⁴³. Can. 1091 § 3: „The impediment of consanguinity is not multiplied”.

As regards the Polish law, the impediments of consanguinity and affinity are placed in art. 14 of the FGC. They prohibit marriage between relatives in the direct line and between siblings. These restrictions do not apply to the third and fourth degrees in the collateral line. The Impediment of consanguinity is absolute and may not be lifted by any court, as in the case of bigamy. „A bigamous marriage may be validated in certain cases but incestuous – never”⁴⁴. Any person with legal interest may demand invalidation of a marriage because of consanguinity of the spouses⁴⁵. As the literature highlights, the prohibition of marriage between close relatives is the oldest of the impediments⁴⁶.

3.4. The impediment of affinity (*impedimentum affinitatis*)

Affinity is defined as a closeness arising out of a validly contracted marriage (even if not consummated) and not of the blood relationship. This relationship binds each spouse with the relatives of the other spouse⁴⁷. According to the both Codes, the impediment of affinity exists only in the direct line⁴⁸, i.e. between one spouse and the ancestors and descendants of the other spouse⁴⁹. According to can. 1091 § 2, „affinity is determined in such a way that the blood relations of the man are related by affinity to the woman in the same line and the same degree, and vice versa”. The Polish law defines the method of determination in art. 61⁸ § 2 of the FGC: „The line and degree of affinity is determined based on the line and degree of consanguinity”. What is important, affinity lasts after the cessation of marriage⁵⁰ by a valid court judgment or by death of the spouse but not after invalidation of the marriage⁵¹.

It is not an absolute impediment in any of the legal systems. Based on the canon law, a local ordinary can give a dispensation, which happens very frequently for the sake of children born from the first marriage⁵². In the Polish law, a court may consent to a marriage between relatives-in-law for an important reason⁵³.

⁴³ Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 810

⁴⁴ W. GÓRALSKI, *Przeszkody małżeńskie wspólne w prawie kanonicznym i w prawie polskim*, op. cit., p. 633

⁴⁵ Cf. FGC, art. 14 § 2

⁴⁶ Cf. J. GAJDA, *Unieważnienie małżeństwa*, op. cit., p. 172

⁴⁷ Cf. C. SUCHOCKI, *Przeszkody małżeńskie...*, op. cit., p. 64

⁴⁸ In the Code of Canons of Eastern Churches the impediment of affinity exists not only in the direct line but also in the second degree of the collateral line. Cf. CCEO, can. 809 § 1.

⁴⁹ Cf. CIC/1983, can. 1092; FGC, art. 14 § 1, pos. 1

⁵⁰ Cf. FGC, art. 61⁸ § 1

⁵¹ Cf. M. DOMAŃSKI, *Względne zakazy małżeńskie*, Warszawa 2013, p. 330

⁵² Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 811

⁵³ Cf. FGC, art. 14 § 1, pos. 2

3.5. The impediment of adoption (*impedimentum cognationis legalis*)

The last impediment recognized by the both legal systems is the one resulting from the relationship of adoption established under the civil law. The relationship between the adoptive parents and the adoptive child is identical as in the case of a the natural parents and their biological child. This is why it would be difficult to accept marriages between such persons, though not for eugenic reasons.

According to can. 1094: „Those who are related in the direct line or in the second degree of the collateral line by a legal relationship arising from adoption cannot contract marriage together validly”⁵⁴. Accordingly, the impediment applies to the adoptive parents, their children and the adoptive child⁵⁵. The impediment may go further because the degree of consanguinity in the direct line has not been delineated. It originates from the ecclesiastic law, so it can be dispensed in specific cases. This competence is reserved for the local ordinary⁵⁶. This canonic impediment is not dependent on the recognition of the impediment by the national secular law⁵⁷.

The definition of the impediment in the Polish law is narrower: limited to the adoptive parents and the adoptive child⁵⁸. „The act of adoption establishes the same relationship between the adoptive parents and child as exists between the natural parents and child”⁵⁹. This is an absolute prohibition that may not be lifted by any court. However, according to art. 125 of the FGC, the relationship of adoption may be terminated, which removes the statutory impediment of consanguinity. As the literature explains, the Polish legislator emphasized the fact that the relationship of adoption is not identical with consanguinity (as defined in art. 14 of the Code)⁶⁰.

4. Impediments existing only in the Canon Law Code

The ecclesiastic legislator has introduced 7 impediments that have not been reflected in the Polish law. The first, set only in the CIC/1983, is impotence introduced because this condition prevents the fulfillment of the essential purpose of marriage, which is based on the natural law.

The impediments of disparity of cult, sacred orders and public perpetual vow of chastity given to a monastic institute are obviously irrelevant from the point of view of the secular law.

⁵⁴ CIC/1983, can. 1094

⁵⁵ Cf. C. SUCHOCKI, *Przeszkody małżeńskie...*, op. cit., p. 66

⁵⁶ Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 812

⁵⁷ Cf. T. PAWLUK, *Prawo kanoniczne według kodeksu Jana Pawła II*, t. 3, Olsztyn 2016, p. 152

⁵⁸ Cf. FGC, art. 15 § 1

⁵⁹ IBID., art. 121 § 1

⁶⁰ Cf. J. GAJDA, *Unieważnienie małżeństwa*, op. cit., p. 179

These impediments have been regulated in the canon law because they had been formulated and sanctioned by the Church⁶¹. This is why they can be dispensed. However, all the three impediments, although ecclesiastic, are based on, and legitimized by, the divine law. Also the two next impediments, abduction and crime, exist only in the canon law. The Polish law regulates abduction and homicide in the Penal Code. The last impediment regulated by the ecclesiastic law only is the one of public propriety. This is because the Church stands guard to human dignity and morality.

4.1. The impediment of impotence (*impedimentum impotentiae*)

The absence of the impediment of impotence in the Polish law stems from the Constitution⁶²: the state must not interfere with intimate lives of its residents. In addition, the secular legislator has not set a purpose to the marriage, in contrast to the ecclesiastic legislator. The giving birth to, and the rearing of, offspring is one of the central purposes of marriage but, obviously, not the only one and not the most important⁶³. This purpose, organically related to the overall concept of marriage, is treated as both a right and an obligation of the spouses⁶⁴. According to can. 1096 § 1, the procreation requires „some sexual cooperation”⁶⁵. This provision corresponds closely to the stance of the church on natural conception methods. „From the legal point of view, impotence is an inability to fulfill the conjugal duty, or have a sexual intercourse, with all its important aspects dictated by the nature”⁶⁶. The impediment of impotence comes from the natural law, so it cannot be dispensed⁶⁷.

To invalidate a marriage, the impediment has to be antecedent to the marriage and perpetual (i.e., incurable by generally available medicinal means and methods)⁶⁸. In addition, this condition has to be certain. „If the impediment of impotence is doubtful, whether by a doubt about the law or a doubt about a fact, a marriage must not be impeded nor, while the doubt

⁶¹ Cf. J. GREŹLIKOWSKI, *Przeszkody małżeńskie wynikające z węzła religijnego*, Prawo Kanoniczne 3 (55) 2012, p. 77

⁶² Cf. Ustawa z 2 kwietnia 1997 r. – *Konstytucja Rzeczypospolitej Polskiej* (Dz. U. Nr 78, poz. 483 z późn. zm.), art. 33, 41, 47

⁶³ Cf. H. STAWNIAK, *Niemoc płciowa jako przeszkoda do małżeństwa. Ewolucja czy zmiana koncepcji?*, Warszawa 2000, 162-173

⁶⁴ Cf. H. STAWNIAK, *Uprawnienie-obowiązek zrodzenia i wychowania potomstwa w świetle kanonicznego prawa małżeńskiego*, Prawo Kanoniczne 3-4 (32) 1989, p. 126

⁶⁵ Cf. CIC/1983, can. 1096 § 1

⁶⁶ J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 801

⁶⁷ According to can. 85 of the CIC/1983, a dispensation is a relaxation of purely ecclesiastic law. Cf. T. PAWLUK, *Prawo kanoniczne ...*, op. cit., p. 129.

⁶⁸ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 121.

remains, declared null”⁶⁹. The cause of the impotence is not important. The condition can be organic (caused by a physical defect), functional or mental⁷⁰. What is interesting, the supreme legislator did not make the existence of the impediment conditional on knowledge possessed by the spouses-to-be. Any of them can be affected without knowing that⁷¹.

It should be noted that impotence is not identical with sterility. Sterility is a condition that makes it impossible to conceive a child without affecting the sexual aspect of marriage. The spouses are able to have sex life but, regardless of their will, they cannot have a child⁷². „Sterility neither prohibits nor nullifies marriage, without prejudice to the prescript of can. 1098”⁷³.

4.2. The impediment of disparity of cult (*impedimentum disparitatis cultus*)

Under the current canon law, the impediment of disparity of cult occurs „between two persons, one of whom has been baptized in the Catholic Church or received into it and the other of whom is not baptized”⁷⁴. It seems that the identity of those baptized is obvious (those who were validly baptized to become a part of the Church. It is more difficult to define those who have been „received into it”. The term should be interpreted as persons who joined the Church after getting validly baptized in another Church or ecclesiastic community⁷⁵.

Can. 1086 § 1, in which the supreme legislator refers to the party baptized or received into the Church, deserves more attention because it contained the following clause: „and has not defected from it by a formal act”. Pope Benedict XVI deleted it by publishing his apostolic brief *Omnium in mentem* because the clause caused many interpretative problems to the doctrine, jurisprudence and ministrative practice⁷⁶.

The baptism makes a permanent mark on a person, so its consequences cannot be ever erased by any means. The sacrament changes the person ontologically⁷⁷. The ecclesiastic

⁶⁹ Cf. CIC/1983, can. 1084 § 2. On this subject writes: J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 801.

⁷⁰ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 122

⁷¹ Cf. H. STAWIAK, *Przeszkoda niemocy płciowej*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 123

⁷² Cf. J. KRZYWKOWSKA, *Przeszkoda niemocy płciowej w świetle wykładni kan. 1084 Kodeksu Prawa Kanonicznego z 1983 roku*, *Studia Prawnoustrojowe* 21 (2013), p. 37

⁷³ CIC/1983, can. 1084 § 3. Can. 1098: „A person contracts invalidly who enters into a marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner which by its very nature can gravely disturb the partnership of conjugal life”.

⁷⁴ Cf. IBID., can. 1086 § 1

⁷⁵ Cf. U. NOWICKA, *Przeszkoda różności religii*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 223

⁷⁶ Cf. J. GRĘŻLIKOWSKI, *Przeszkody małżeńskie...*, op. cit., p. 77

⁷⁷ Cf. J. KOWAL, *Comunione ecclesiastica e diritto matrimoniale*, in: P.A. BONNET, C. GULLO (ed.), *Diritto matrimoniale canonico*, t. 3, Città del Vaticano 2005, p. 187

legislator has approved this impediment for protection of the Catholic faith and of children born from such marriages⁷⁸.

This restriction ceases in, basically, two cases: after getting baptized or dispensed⁷⁹. The second case is strictly defined in can. 1086 § 2 of the CIC/1983: „The local ordinary can grant a permission of this kind if there is a just and reasonable cause”⁸⁰. For this to happen, the following three conditions contained in can. 1125 and 1126 have to be fulfilled: „1) The Catholic party is to declare that he or she is prepared to remove dangers of defecting from the faith and is to make a sincere promise to do all in his or her power so that all offspring are baptized and brought up in the Catholic Church; 2) The other party is to be informed at an appropriate time about the promises which the Catholic party is to make, in such a way that it is certain that he or she is truly aware of the promise and obligation of the Catholic party; 3) Both parties are to be instructed about the purposes and essential properties of marriage which neither of the contracting parties is to exclude”⁸¹. As Ryszard Sztychmiller concludes: „a legitimate and reasonable cause, an appropriate edification, a promise, and a dispensation from an ordinary are prerequisites for the valid contracting of a marriage between the baptized and unbaptized parties”⁸².

Can. 1125 of the CIC/1983 makes it clear that only the Catholic party pledges to make the declaration and the promise. The non-Catholic party is just to be informed about the undertakings of the other party. What is more, the latter’s consent or acceptance is not required; an awareness is sufficient⁸³. This regulation is not a surprise: the ecclesiastic legislator cannot oblige a person who is not a subject to the legislator’s jurisdiction.

The Code does not say straightforward how these obligations should be taken. This is why we have can. 1126: „It is for the conference of bishops to establish the method in which these declarations and promises, which are always required, must be made and to define the manner in which they are to be established in the external forum and the non-Catholic party informed about them”⁸⁴. The Conference of the Episcopate of Poland decided in their

⁷⁸ Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 803-804

⁷⁹ Cf. G. DZIERŻON, *Ewolucja doktryny oraz dyscypliny dotyczących przeszkody różności religii w kanonicznym porządku prawnym*, Warszawa 2008, p. 309-310

⁸⁰ Cf. CIC/1983, can. 1125

⁸¹ Cf. IBID.

⁸² R. SZTYCHMILLER, *Sakramentalność małżeństwa w perspektywie prawnokanonicznej*, in: A. PRONIEWSKI (ed.), *Studia teologii dogmatycznej*, t. 2, Białystok 2016, p. 92

⁸³ Cf. U. NOWICKA, *Przeszkoda różności religii*, op. cit., p. 229

⁸⁴ Cf. CIC/1983, can. 1126

„Instruction for the preparations for the contracting of marriage in the Catholic Church” that the both parties should sign the declarations and promises⁸⁵.

The CIC/1983 makes a clear distinction between the impediment of disparity of cult and restrictions concerning mixed marriages (can. 1124-1129 of the CIC/1983). What is important, the current legislation has abandoned the prohibitive impediments of the Canon Law Code of 1917. As rightly commented by Ginter Dzierżon, the supreme legislator has established just a prohibition on the contracting of mixed marriages while the impediment of disparity of cult continues to be a breaking impediment⁸⁶.

4.3. The impediment of sacred orders (*impedimentum ordinis*)

The ecclesiastic legislator defined the next impediment very briefly: „Those in sacred orders invalidly attempt marriage”⁸⁷. This applies to three degrees of sacred orders: the episcopate, the presbyterate, and the diaconate⁸⁸. The impediment is based on the ecclesiastic celibacy⁸⁹ which, though not essential to the nature of priesthood, has its advocacy in the Bible, dates back to the 4th century at least, and was reaffirmed by the Magisterium of the Church a number of times⁹⁰. A man who receives a sacrament of sacred orders commits himself entirely to the love of Christ to serve the whole humanity.⁹¹ The sacred orders need to be valid for the impediment to apply and it may be lifted *pro foro externo* by a court judgment or by an administrative decree stating that the sacred orders⁹². „An ordained person’s attempt to contract a marriage is punishable by the removal of the person from the ecclesiastic office, suspension *late sententiae* and, if the person has not straightened up after admonishment, other penalties up to removal from priesthood”⁹³.

The impediment originates in the ecclesiastic law but its dispensation has been reserved to the Holy See⁹⁴. Impediments whose dispensation is reserved to the Apostolic See are: 1) the impediment arising from sacred orders or from a public perpetual vow of chastity in a religious institute of pontifical right; 2) the impediment of crime mentioned in can. 1090.

⁸⁵ Cf. KONFERENCJA EPISKOPATU POLSKI, *Instrukcja Episkopatu Polski o przygotowaniu do zawarcia małżeństwa w Kościele katolickim*, 13 XII 1989, pt 84, in: C. KRAKOWIAK, L. ADAMOWICZ (ed.), *Dokumenty duszpastersko-liturgiczne Episkopatu Polski 1966-1993*, p. 198

⁸⁶ Cf. G. DZIERŻON, *Ewolucja doktryny ...*, op. cit., p. 311

⁸⁷ CIC/1983, can. 1087

⁸⁸ Cf. IBID., can. 1009 § 1

⁸⁹ Cf. IBID., can. 277

⁹⁰ Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 805

⁹¹ Cf. J. RAPACZ, *Święcenia jako przeszkoda do zawarcia małżeństwa*, *Analecta Cracoviensia* 35 (2003), p. 504

⁹² Cf. T. BIAŁOBRZESKI, *Przeszkoda święceń*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 255

⁹³ J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 806

⁹⁴ Cf. CIC/1983, can. 1078 § 2, n. 1; W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 132

The impediment of sacred orders may cease in three cases: a dispensation from celibacy given by the Bishop of Rome, invalidity of the sacred orders or expulsion from priesthood. In the second case, the impediment has never existed but the law requires that this fact is attested by a judgment or decree. Basically, the expulsion from priesthood does not automatically involve a dispensation from celibacy⁹⁵.

4.4. The impediment of public perpetual vow of chastity (*impedimentum voti*)

The impediment of public perpetual vow of chastity given to a monastic institute has been set in can. 1088 of the CIC/1983. The current legislation does not make a distinction between solemn and simple monastic vows, so the impediment refers just to a „vow”⁹⁶. According to the Canon Law Code of 1917, a simple vow was just an prohibitive impediment. The present scope of the impediment is modified because the prohibition refers to all public perpetual vows of chastity made to monastic institutes⁹⁷.

For a vow, a conscious and voluntary promise given to God, to turn into an impediment, it has to declare lifetime chastity and has to be made in public before a legitimate superior of a monastic institute in the meaning of can. 607 § 2. So, a temporary or private vow is not deemed an impediment to marriage. The monastic vow has to be valid in the light of can. 658 of the CIC/1983 for the impediment to apply⁹⁸.

The person authorized to dispense the impediment depends on the on the law of the institute that has received the vow. If the perpetual public vow of chastity was given to a religious institute of pontifical right, the dispensation is reserved to the Holy See⁹⁹. For a diocesan institute, the local ordinary has the competence¹⁰⁰. A vow given to an association of apostolic life or to a secular institute, or a private vow of chastity, are not deemed impediments under the current law¹⁰¹.

4.5. The impediment of abduction (*impedimentum raptus*)

According to can. 1089: „No marriage can exist between a man and a woman who has been abducted or at least detained with a view of contracting marriage with her unless the woman chooses marriage of her own accord after she has been separated from the captor and

⁹⁵ Cf. T. BIAŁOBRZESKI, *Przeszkoda święceń*, op. cit., p. 259

⁹⁶ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 133

⁹⁷ Cf. J. GREŹLIKOWSKI, *Przeszkody małżeńskie ...*, op. cit., p. 85

⁹⁸ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 134

⁹⁹ Cf. CIC/1983, can. 1078 § 2, n. 1

¹⁰⁰ Cf. IBID., can. 1078 § 1

¹⁰¹ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 134

established in a safe and free place”¹⁰². The Church stands guard to voluntariness of giving the marital consent by the woman, so in the event of abduction or unlawful detention of the woman, the man becomes unable to contract a marriage with the woman validly¹⁰³. The impediment will cease once the woman has been released and found a safe refuge. This impediment has its origin in the ecclesiastic law, so it may be dispensed on the cessation of circumstances restricting the freedom of consensus of the abducted¹⁰⁴. There is a legal loophole in this canon because the canon considers only the abduction of a woman by a man. If the opposite is the case and if the regulation is applied literally, the marriage will be valid. The most plausible explanation is that the ecclesiastic legislator did not believe that a representative of the weaker sex can abduct a man and force him to marriage.

It is interesting to compare this approach to the one taken by Eastern Catholic Churches. According to can. 806 of the CCEO: „No marriage can take place with a person who is abducted or at least detained for the purpose of entering into marriage (...)”. The impediment applies to the both sexes. There are opinions among the canonist community that this norm should be applied also by the Latin Church but they seem to be wrong. Urszula Nowicka studied the subject in depth and concluded that „a marriage contracted by an abducted Roman Catholic man would be deemed valid while an Eastern Catholic man would be considered unable to contract a valid marriage in such circumstances under the positive law of the Church”¹⁰⁵.

4.6. The impediment of crime (*impedimentum criminis seu coniugicidii*)

The impediment of crime¹⁰⁶ can come to existence in two cases. First, when „anyone who with a view to entering marriage with a certain person has brought about the death of that person’s spouse or of one’s own spouse”¹⁰⁷. Second, „those who have brought about the death of a spouse by mutual physical or moral cooperation also invalidly attempt a marriage together”¹⁰⁸. In the first case, the existence of the impediment can be conjectured from intentions of the person responsible for the death of their spouse, who has to act deliberately for the purpose of re-marrying. In the second case intentions are irrelevant: the legislator is of an opinion that the very contrivance at the homicide is a crime so grave that no additional

¹⁰² CIC/1983, can. 1089

¹⁰³ Cf. C. SUCHOCKI, *Przeszkody małżeńskie ...*, op. cit., p. 37

¹⁰⁴ Cf. IBID.

¹⁰⁵ U. NOWICKA, *Przeszkody małżeńskie w perspektywie międzyobrzędkowej według KPK i KKKW*, *Ius Matrimoniale* 15(21) 2010, p. 9

¹⁰⁶ In the specialist literature known as a mariticide / uxoricide.

¹⁰⁷ Cf. CIC/1983, can. 1090 § 1

¹⁰⁸ IBID., can. 1090 § 2

condition is required. The ordering of the commitment of a murder constitutes a crime. The act has to be accomplished: the attempting of, or planning for, the murder is not a breaking impediment. The impediment of mariticide originates in the ecclesiastic law, so it does not apply to the unbaptized. It may apply to such a person indirectly, provided that a baptized person participated in the crime¹⁰⁹. The dispensation is reserved to the Holy See¹¹⁰.

4.7. The impediment of public propriety (*impedimentum honestatis publicae*)

The impediment of public propriety is the last of the marital impediments defined in the canon law. It is based on an invalid marriage or on a notorious or public concubinage¹¹¹. According to can. 1093: „The impediment of public propriety arises from an invalid marriage after the establishment of common life or from notorious or public concubinage. It nullifies marriage in the first degree of the direct line between the man and the blood relatives of the woman, and vice versa”¹¹². Invalid is such a marriage that has an external appearance of marriage but, because of an impediment, defect of consent or nonobservance of the prescribed form of the contracting of marriage, there is no marital bond¹¹³. It does not matter whether the parties live together permanently. It is not important whether they are single or married¹¹⁴. As the literature highlights, the impediment of public propriety is inherently permanent and does not cease automatically after the declaration of invalidity of marriage or after the termination of concubinage¹¹⁵. The impediment has an ecclesiastic origin, so it can be dispensed by a local ordinary¹¹⁶.

5. Impediments to marriage existing only in the Family and Guardianship Code

Impediments to marriage defined in the Polish Family and Guardianship Code include two ones that are recognized not as impediments but as defects of consent in the Canon Law Code¹¹⁷: the full incapacitation and the psychic illness or amentia.

¹⁰⁹ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 139

¹¹⁰ Cf. CIC/1983, can. 1078 § 2, n. 2

¹¹¹ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 148

¹¹² CIC/1983, can. 1093

¹¹³ Cf. T. PAWLUK, *Prawo kanoniczne ...*, op. cit., p. 150

¹¹⁴ Cf. W. GÓRALSKI, *Kanoniczne prawo małżeńskie*, op. cit., p. 149

¹¹⁵ Cf. U. NOWICKA, *Przeszkoda przyzwoitości publicznej*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 458

¹¹⁶ Cf. J. FORNÉS, *Poszczególne przeszkody zrywające*, op. cit., p. 811

¹¹⁷ The ecclesiastical legislator has included regulations concerning marital consent in can. 1095-1107 CIC/1983.

5.1. Full incapacitation

According to art. 11 § 1 of the FGC, a fully incapacitated person may not get married. It should be noted that the prohibition is absolute because it cannot be lifted by any court¹¹⁸. The full incapacitation is defined in art. 13 § 1 of the Civil Code: it can be imposed on a person older than 13 because of mental illness, amentia or other psychic disorder, such as alcohol or drug addiction, which condition makes the person unable to control their actions¹¹⁹. What is important, only the full incapacitation constitutes the impediment. If the full incapacitation is lifted or changed to a partial incapacitation, the impediment will cease to exist and the person may get married¹²⁰.

An obvious reason for the implementation of the prohibition was the state legislator's care about the institutions of marriage and parenthood. It is hard to image that a person who cannot control their actions could discharge their marital obligations.

This condition has to be antecedent to the contracting of marriage. If a person is fully incapacitated after getting married, the marriage will not be invalidated. Each of the spouses-to-be may demand invalidation of their marriage for this cause¹²¹.

5.2. Mental illness or amentia

The other impediment existing only in the FGC is mental illness or amentia. These conditions are defined in the 1st sentence of art. 12 § 1. However, the prohibition is not absolute because the 2nd sentence allows a person who has not been fully incapacitated, whose condition does not endanger the marriage or the offspring, to marry, subject to a court consent given under a non-litigious procedure¹²². According to art. 561 § 2 of the Civil Proceedings Code, the person affected by the condition may ask for the consent.

As in the case of the former impediment, the prohibition of marriage because of a psychic illness or amentia has been introduced to the FGC for protection of the family. A person afflicted by such condition may not be able to discharge their marital obligations in full. Moreover, there is a risk of an inherited disease.

Mental illness, amentia or other disorder should be diagnosed by a forensic psychiatrist. A marriage can be invalidated for this reason only if the medical condition concerned existed

¹¹⁸ Cf. G. JĘDREJEK, *Zawarcie małżeństwa*, op. cit., p. 58

¹¹⁹ Cf. Penal Code, art. 13 § 1

¹²⁰ Cf. J. GAJDA, *Unieważnienie małżeństwa*, op. cit., p. 159

¹²¹ Cf. FGC, art. 11 § 2, 3, also G. JĘDREJEK, *Zawarcie małżeństwa*, op. cit., p. 58

¹²² Cf. G. JĘDREJEK, *Zawarcie małżeństwa*, op. cit., p. 59

before the marriage was contracted. The developing of such condition by one of the spouses is not considered as legitimate grounds for the invalidation of the marriage¹²³.

Pursuant to art. 12 § 2 of the FGC each spouse may apply for the invalidation of the marriage. What is important, the marriage cannot be invalidated after the cessation of the psychic illness¹²⁴. The validation of marriage is impermissible in the case of amentia because this is a permanent condition but is possible in the case of recovery from alcohol or drug addiction¹²⁵.

Conclusion

The range of impediments to marriage is much broader in the canonic law than in the secular law. Five impediments are identical in the both legal systems: age, prior bond, consanguinity, affinity and adoption. The secular legislator has introduced two marital impediments that have been defined as defects of consent in the ecclesiastic law: full incapacitation and psychic illness or amentia. The impediments recognized only by the canon law (impotency, disparity of cult, sacred orders, public perpetual vow given to a monastic institute, abduction, crime and public propriety) have been introduced because of the special attention given by the Church to the institutions of marriage and family. What is obvious, they could not be implemented in the Polish law because of the different nature and purposes of the state law.

¹²³ Cf. J. GAJDA, *Unieważnienie małżeństwa*, op. cit., p. 162

¹²⁴ Cf. FGC, art. 12 § 3

¹²⁵ Cf. J. GAJDA, *Unieważnienie małżeństwa*, op. cit., p. 167