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Czy osoba z zespołem Downa może ważnie zawrzeć małżeństwo w Kościele katolickim?

Can a person with Down syndrome have a valid marriage in the Catholic Church?

Everyone has probably heard of Down's syndrome, and there are rather few people who would not recognise the phenotypic characteristics of this syndrome. Usually, however, the knowledge of the trisomy of the 21st chromosome ends there. At least as far as true knowledge and facts are concerned, because myths and misconceptions are unfortunately not lacking. Many people talk about children „suffering from Down's syndrome" and identify them with underdevelopment or mental retardation. Moreover, the opinions, revived again in recent months, about the possibility of abortion when genetic defects are found in children who have not yet been born should be considered extreme and unworthy of undertaking anything. For those who, if they have been given the chance to live, are able to enjoy this life and to bestow their unconditional love, which, by virtue of their goodness and innocence, are a special image and likeness of God.

Then, speaking of Down's syndrome, many people's thoughts are directed towards children. But these children also grow up, they also mature, become more or less independent, have their own plans and dreams. Time and time again the media reports about people with Down's syndrome who want to get married and start a family. But are they allowed to do so in the Catholic Church? The church legislator states in the can. 1058 of the CIC that „all can contract marriage who are not prohibited by law". Does it prohibit people with Down's syndrome?

1. Down's syndrome is not a disease

When we talk about Down's syndrome, we should first realise that it is not a disease. From Greek *syndromē*, it means a merger, a convergence and is used in the sense of „co-occurrence", to describe the similarity of morphological and clinical characteristics of individuals with a similarly altered record of genetic information[1]. For the first time it was described in 1866 by an English doctor John Langdon Down, distinguishing 12 characteristics, which he noticed in unrelated residents of a mental institution. However, it was only in the middle of the 20th century, thanks to the development of genetics, that the research of the French physician Jerome Lejeune made it possible to conclude that the cause of the syndrome was the additional chromosome of the pair 21[2].

1.1. What is Down's syndrome?

The smallest particle of the human body is a cell, capable of carrying out life processes on its own. In every human cell, with a normal genotype, there are 46 chromosomes, connected in 23 pairs. In each pair there are 2 chromosomes that fit together, one given to us by our mother and the other by our father. The cells in our organism are formed by division, in the process of mitosis (almost all of them) or meiosis (which leads to the formation of germ cells).

As a result of meiosis, called the reduction process, a cell with a reduced number of chromosomes is formed. In other words, during meiosis, each chromosome pair divides or dissociates so that each offspring cell receives only one chromosome from the original parent pair. Thus, if this division is made correctly, a diploid cell with 46 chromosomes is reproduced in the fertilisation process. Shortly after fertilisation, the fertilised egg begins to grow and develop through mitosis into two identical new cells. The division of the cell by mitosis is that the original cell, called the parent cell, copies itself along with the chromosomes. From such a parental cell, two offspring are formed, each containing 46 exactly the same as the chromosome parent cell. Mitosis lasts until billions of cells are formed. When the cells copy, their genetic material is also

[1] Cf. A.T. MIDRO, *Zespół Downa. Przyczyny powstawania, diagnoza i elementy poradnictwa genetycznego*, in: B.B. KACZMAREK (ed.), *Wspomagania rozwoju dzieci z zespołem Downa – teoria i praktyka*, Kraków 2008, p. 21.

[2] Cf. IBID. Until 1961, the term „mongolianism" was commonly used to describe an already known disease. It was not until that year that a group of international experts proposed to adopt the name of the discoverer (Down's syndrome), which was officially approved by the World Health Organisation in 1965. Cf. E. ZASĘPA, *Problemy zdrowia psychicznego u osób z zespołem Downa*, Kraków 2014, p. 6.

duplicated so that each new cell has exactly the same genetic material as the original fertilised cell.

Because chromosomes function in pairs, each of their systems is exactly balanced. However, if for some reason (which is completely random and hereditary, and not due to anyone's fault) an additional chromosome appears, then this genetic balance is disturbed. This is what happens in the case called medically Down's syndrome, or trisomy 21. The Down's syndrome is usually the result of the non-dissolution or abnormal division of the germ cell of the mother or (less commonly) the father into two equal parts during meiosis. Strictly speaking, 21 pairs of chromosomes are not properly separated: one offspring cell then receives 24 chromosomes and the other 22. The latter cannot survive and cannot be fertilised, unlike the former. However, when it is fertilised, the newly formed cell receives one extra chromosome, and as a result has 47 instead of 46 chromosomes (because 21 pairs of chromosomes actually have three, not two, chromosomes). When a newly formed embryo begins to grow by dividing and copying cells, an additional chromosome is also copied and transmitted to each cell. As a result, all cells of the newly formed organism contain the additional chromosome 21.

This type of Down's syndrome is the most common and occurs in 90-95% of children. However, medicine also knows two other forms of Down's syndrome, namely translocation and mosaicism. The first means that an additional chromosome is attached to another chromosome, usually number 14, or another number 21. This defect occurs either spontaneously during fertilisation or - much more often - is inherited from parents; it is the only kind of Down's syndrome that results from the structure of the parent's genes, having two pairs of chromosomes glued together. Mosaicism is by far the least common form. It is also based on an error in cell division, but only occurs after fertilisation. Consequently, if this error occurs during the second or third. Consequently, if this error occurs during the second or third cell division, only some cells of the growing embryo will contain extra chromosome[3].

Although children with Down's syndrome have an additional chromosome of 21 pairs, all the other chromosomes in their cells are normal, leaving the whole range of human characteristics unchanged. Moreover, the genetic material in chromosome 21 is also normal, but only too much.

[3] Elaborated based on L. SADOWSKA, M. MYSŁEK-PRUCNAL, A. GRUNA-OŻAROWSKA, *Medyczne podstawy zaburzeń struktury i funkcji dzieci z zespołem Downa*, in: B. B. KACZMAREK (ed.), *Wspomagania rozwoju dzieci z zespołem Downa*, dz. cyt., p. 38-39; *Co powoduje zespół Downa*, http://www.szansa.katowice.pl/index.php?option=com_content&view=article&id=46&Itemid=2&limitstart=2 (access date: 19 November 2016)

The point is that it is this chromosome 21, although the smallest in its group, it is included in the group G, which is responsible for mental development and intelligence, muscle tension, cartilage and tendon elasticity, joint flexibility, body height and the ratio between trunk and limbs, proportion of the skull and somatic development of the heart, genital organs, pelvis, diagonal fold of the eye, iris, lens, hand and metacarpus phalanges, dermatoglyphic patterns of hands and feet, lateral sinuses of the nose, shape of the auricle, quality and quantity of hair, size of teeth, thickness of cerebral bone[4]. Down's syndrome is therefore not a disease, but a genetic defect, causing specific effects.

1.2. What is characteristic of the Down's syndrome?

The most visible effect of trisomy 21 is the characteristic appearance and it is with this that the thought of Down's syndrome is most often associated. However, this defect is often accompanied by other diseases that have a greater or lesser impact on the lives of people with Down's syndrome and their families.

1.2.1. Outward appearance

People with Down's syndrome are distinctive and recognisable. Today's genetics speak of about 300 traits, some of which are mild dimorphic defects. They do not affect the functioning of the body in any way and do not cause any health effects. It is clear that they do not all occur in a single person, as each of them has its own individual set of phenotypic characteristics[5]. Nevertheless, children with Down's syndrome are usually similar to each other, or at least they have some cardinal traits common to all. So first of all, we will recognise Down's syndrome by the oblique eyes (the outside faces upwards) and the skin fold that covers the inner corner of the eye. The eyelid crevices are often narrow and short, and in some children small white spots are visible at the edge of the iris (Brushfield's spots - more often seen in people with blue eyes). The face appears flat, the nose is similarly flat, small and short, and the ears are small and low. You can also notice characteristic lips: narrow but thick, with the lower lip curled up. The mouth is usually smaller than in other people and the palate is shallow, which means that the tongue has

[4] L. SADOWSKA, M. MYSŁEK-PRUCNAL, A. GRUNA-OŻAROWSKA, *Medyczne podstawy zaburzeń struktury i funkcji dzieci z zespołem Downa*, art. cited., p. 38.
[5] Cf. IBID., p. 40.

less space and tends to stick out. In addition, the muscles of the mandible and tongue are sometimes flaccid and therefore the mouth is usually open.

The legs and arms are short in relation to the entire torso. The hands are wide and flat, with a transverse groove and short fingers. There is a larger gap between the thumb and the rest of the fingers. The smallest finger is particularly characteristic: sometimes it is so short that it has only one bending groove and is usually bent towards the other fingers. The feet are also wide and the toes are short. Just like on the hands, there is a gap between the toe and the other toe, and a vertical groove runs on the sole of the foot, from the inside of this gap.

Children with Down's syndrome are usually of average height and weight at birth, but when they grow up they are usually lower and tend to be obese. They develop more slowly and often have difficulties with speech, which is usually unclear[6].

1.2.2. Accompanying defects

Unfortunately, Down's syndrome is often accompanied by defects with serious consequences for life and health. The first point to note is congenital heart defects, which occur in 45-60% of children. Most often it is a common atrioventricular canal and atrial septal defect of a secondary type. The characteristic feature of these defects is a higher risk of pulmonary hypertension and a tendency to more frequent airway infections. For this reason, children with DS undergo cardiac surgeries, performed even in the first half of their lives[7]. Cardiovascular abnormalities that occur immediately after birth, even if they are corrected at childhood, require constant monitoring throughout their lives[8].

Also characteristic for people with DS is reduced muscle tension and limpness of the ligamentous-articular system, which is often associated with structural defects of the skeletal system. They are the cause of serious posture defects, spine curvature and chest deformities, which in turn lead to the fact that the figure of a child with DS is usually careless and the gait is sluggish and ducky[9].

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[6] Cf. IBID.; A. SOBOLEWSKA, *Cela. Odpowiedź na zespół Downa*, Warszawa 2002, p. 24-25.
[7] Cf. L. SADOWSKA, M. MYSŁEK-PRUCNAL, A. GRUNA-OŻAROWSKA, *Medyczne podstawy zaburzeń struktury i funkcji dzieci z zespołem Downa*, art. cited., p. 44.
[8] Cf. K. OCHMAN, *Zmiany w układzie krążenia*, in: *Zespół Downa. Dorosłość i medycyna. Publikacja dla rodziców i opiekunów*, Warszawa 2009, p. 9-10.
[9] Cf, IBID., p. 45.

Children with Down's syndrome are also often diagnosed with visual and functional disorders as well as hearing loss. The development of speech, which often remains unclear and the voice is hoarse and distorted, is significantly delayed in relation to healthy children.

Children with Down's syndrome are often born with primary immune deficiency, which makes them more likely to develop various types of prolonged infections (especially of the upper respiratory tract, chronic rhinitis, tonsillary hypertrophy, middle ear infections) and infections. They also suffer more often from autoimmune diseases and certain types of leukaemia[10]. Intracellular deficiency of vitamins B and C and A is characteristic, which has many negative effects on the functioning of the organism (inflammation of the skin and mucous membrane, conjunctivitis, cracked lips, bleeding from gums, lacrimation). Nearly half of people also suffer from congenital hypothyroidism, which, if untreated, may disturb the intellectual development.

Down's syndrome is often accompanied by abnormalities of the nervous system, especially stereotypical hand movements (rocking the trunk, rubbing the hands on the chest and waving in front of the eyes) and epileptic seizures. The latter are episodes of varying degrees of severity, from brief and almost unnoticeable to long, severe shocks. Closely related to trisomy 21 are also defects of the upper digestive tract.

Perhaps the most delicate subjects are sexual maturity, sexuality and fertility of people with Down's syndrome. Perhaps this is due to the penitent, at least until recently, misconception that people with Down's syndrome are eternal children, and that mental disabilities make them incapable of properly implementing human sexuality. Meanwhile, their adolescence starts at the same age as healthy children, and their sexuality in the physical sense is completely normal. Studies carried out in this area show no abnormalities. It is also believed that the vast majority of women are capable of giving birth to a child (various studies indicate a scale of 50-70%), and possible difficulties in this regard are the result of their general state of health and would therefore affect fertility even if the person concerned was not affected by Down's syndrome. Pregnancies of women with Down's syndrome are always at higher risk, and the probability of having a child with trisomy 21 is 2/3. Men, on the other hand, are characterised by a significant

[10] Cf. IBID., p. 48; M. KRAJEWSKA-WALASEK, *Zespół Downa w praktyce klinicznej*, Medipress Pediatria 1998, n. 4(6), p. 25; A. JAKUBIUK-TOMASZUK, J. ŚMIGIELSKA–KUZIA, J. WYSOCKA, J. ŻAK, M. CHOLEWA, B. OLCHOWIK, K. SENDROWSKI, *Ocena stanu odporności komórkowej u dzieci z zespołem Downa poprzez określenie odsetka subpopulacji limfocytów T CD3+, CD4+ i CD8+ we krwi obwodowej metodą cytometrii przepływowej*, Neurologia Dziecięca 20/2011, n. 41, p. 50.

reduction in fertility, and some sources even say that they are always infertile (although there have been isolated cases of paternity, including children with disabilities, worldwide)[11].

1.2.3. Mental development and mental health

Most often Down's syndrome is identified with some mental disorder or, even more often, mental retardation. However, this is a huge simplification in the first place - too much and too unfair. You cannot „pigeonhole" people with Down's syndrome into some category of mentally disabled people and, on that basis, deny them all the rights and duties that healthy people undertake every day. Although, yes, research also leaves no doubt about the need to recognise the impairment of the development and functioning of people with Down's syndrome.

With regard to mental development, research is carried out on the basis of intelligence tests and the results are recorded in the form of an intelligence quotient (IQ). Its reduced level is determined according to the following scale: light intellectual disability when the IQ is between 50/55 and 70, moderate between 35/40 and 50/55, significant between 20/25 and 35/40, deep when the IQ is below 20/25. Most children with DS have light or moderate intellectual disability, some of them are more severely disabled, while others have IQ almost normal. However, there is a constant decrease in IQ as children grow older[12].

It should be noted, however, that although the intelligence test reflects some basic skills, the outcome is primarily a contractual issue and does not preclude the possibility of learning, acquiring skills, doing a job, taking care of one's needs, etc. Yes, a child may learn more slowly, have difficulty concentrating, memory may function worse than others and advanced skills may not be available. This does not mean, however, that the mental development of people with DS does not deprive them of the opportunity to function in society. It seems that such a conviction, which is wrong and has disastrous consequences, is now slowly being overcome. In the past, a lower intelligence quotient has condemned these children to institutions where, being separated from society and often ignored, they were unable to overcome expectations that were too low for

[11] Cf. I. FORNALIK, *Seksualność – czyli nic co ludzkie nie jest nam obce. Refleksje o zmianach*, in: *Zespół Downa w XXI w.*, Warszawa 2013, p. 136-160; D. MEJNARTOWICZ, *Seksualność osób z zespołem Downa*, in: *Wieczne dzieci czyli dorośli. Problem seksualności osób z niepełnosprawnością intelektualną*, Warszawa 2002, p. 5-28.
[12] L. SADOWSKA, M. MYSŁEK-PRUCNAL, A. GRUNA-OŻAROWSKA, *Medyczne podstawy zaburzeń struktury i funkcji dzieci z zespołem Downa*, art. cit., p. 51.

them. Too often, low expectations led to poor results[13]. Nowadays, thanks to greater public awareness and acceptance, better education, early treatment and rehabilitation, early stimulation and special pedagogical assistance, the intellectual capacity of people with DS is constantly increasing. Although the disability cannot be reversed, the intelligence of a child can be increased in good conditions, however, in bad conditions, it can be decreased by negligence[14].

Research does not give a clear answer to how the additional chromosome affects mental capacity, but it does indicate that excess genetic material inhibits or interferes with normal brain development[15]. In principle, all those persons have a delay in brain growth, which reaches a much smaller volume and mass compared to the brain of healthy people. Neuropathological studies have shown that the developing brain differs from the normal brain in the number and organisation of cells. Structural changes in the brain make trisomy 21 the most common cause of genetically determined intellectual disability, and people with DS are at a particularly high risk of developing Alzheimer's disease, at a much younger age than the rest of the population[16].

Intellectual disability, however, affects all spheres of a person's functioning, and encompasses his or her entire personality, and not just his or her typical school skills, measured by the intelligence quotient. The intellect is also everything that allows one to function in life in an autonomous, independent and responsible way, which allows one to decide for oneself, make decisions, take care of oneself and others, cooperate, and so on, and also to implement social adaptations[17]. But it is observed that social development, contacts with people, independence and the ability to maintain relationships are much more developed in people with Down's syndrome than their level of mental development would indicate.

People with Down's syndrome do not have one type of personality but, like all people, they are different in terms of both temperament and behaviour. This is influenced by their innate characteristics, as well as by the educational and social conditions that accompany them during their childhood and adulthood. In most cases, children with DS are seen as joyful, eternally

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[13] *Zespół Downa - co z inteligencją mojego dziecka?* http://www.szansa.katowice.pl/index.php?option=com_content&view=article&id=46&Itemid=2&limitstart=5

[14] Cf. A. SOBOLEWSKA, *Cela. Odpowiedź na zespół Downa*, op. cit., p. 188; A.T. MIDRO, *Genetyczna ruletka*, in: *Z myślą o Tobie. Informator dla rodziców dzieci z zespołem Downa*, Bardziej Kochani. Special edition 2006, p. 9.

[15] L. SADOWSKA, M. MYSŁEK-PRUCNAL, A. GRUNA-OŻAROWSKA, *Medyczne podstawy zaburzeń struktury i funkcji dzieci z zespołem Downa*, art. cited., p. 51.

[16] Cf. IBID., p. 41-43.

[17] Cf. R. J. PIOTROWICZ, *Jak rozwija się dziecko z zespołem Downa?*, in: *Z myślą o Tobie. Informator dla rodziców dzieci z zespołem Downa*, op. cit., p. 46-47; R. ŚMIGIEL, A. STEMBALSKA, *Niepełnosprawność intelektualna uwarunkowana genetycznie – wybrane aspekty*, Nowa Pediatria 4/2007, p. 90.

happy, kind, very emotional, absorbing love and loving. They have a high level of empathy and are sensitive to the harm of others. They are extrovert, they do not hide their emotions, but they also tend to change their moods. They have not been noted to cause greater or different educational problems than healthy children. They may also suffer from various types of behavioural disorders such as aggression, irritability, hyperactivity and impulsiveness, but in Down's syndrome these phenomena are less frequent than in other mental disabilities[18]. Many adults with Down's syndrome (up to 30%) have mental disorders such as depression, hyperactivity and obsessive neurosis. However, schizophrenia and bipolar psychosis are less common than in the population[19].

2. Ability to contract a canonical marriage

The church legislator, as mentioned in the introduction, decided in can. 1058 of the CIC that „all can contract marriage who are not prohibited by law". At the same time, in subsequent canons, the Code established a number of circumstances preventing a valid marriage, cataloguing them as marriage obstacles and defects (or lack of) conjugal consent.

2.1. Marital obstacles

A marriage impediment - in the strict sense of the word - is a circumstance arising from God's law or human law or a personal situation directly affecting the contracting party entering into a marriage which does not allow for its valid conclusion. It is an objective circumstance that renders the person concerned incapable of marrying[20]. Canon law knows 12 such circumstances, among them: obstacle of age, sexual impotence, marriage knot, differences of religion, ordination, public wedding of chastity, abduction, misconduct, kinship, affinity, public decency and legal affinity[21].

[18] Developed on the basis of N. Dudkowiak's feuilletons, published on the website www.zespoldowna.com.pl (*Temperament dzieci z zespołem Downa; Charakterystyka osoby z zespołem Downa; Rozwój umysłowy i emocjonalny dzieci z zespołem Downa*).
[19] Cf. J. WIERZBA, *Zaburzenia psychiczne i nietypowe zachowania*, in: *Zespół Downa. Dorosłość i medycyna*, op. cit., p. 36.
[20] Cf. W. GÓRALSKI, *Przeszkody małżeńskie w ogólności*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, Warszawa 2016, p. 38.
[21] Cf. CIC, can. 1083-1094.

Each of these obstacles can affect specific individuals, regardless of Down's syndrome, without any correlation or dependence on it. The only exception that needs to be taken into account and considered is the question of possible gender impotence.

The Church legislature in can. 1084 § 1 of the CIC states that „impotence to have sexual intercourse (...) by its very nature invalidates marriage" and explains that this impotence should be „antecedent and perpetual, prior and permanent, whether on the part of the man or on that of the woman, whether absolute or relative". The doctrine also differentiates between organic impotence, i.e. instrumental and functional. The former is caused by congenital or acquired anatomical deficiencies of the genital organs. The second consists of disorders of the functions of the genital organs, with no clear anatomical changes within them[22].

In the medical literature it is difficult to find a clear answer to the question about the sexuality of people with Down's syndrome. While the sexual capacity of women is not generally questionable, according to some authors the male genital organs are smaller and underdeveloped, which causes problems with erection and ejaculation. Other sources, on the other hand, indicate that both the puberty itself and the state of the organs and the level of sex hormones are not abnormal, and most men have normal erections and ejaculations[23]. However, no data allow us to conclude that trisomy 21 is inextricably linked, or at least gives rise to serious doubts about the ability to take up intimate life. Yet, according to canon law, it is only when the impotence obstacle is certain that the marriage can be prohibited or declared void - however, the doubtful obstacle does not give such possibility, either when the doubt is legal or when it is real.[24].

However, men with Down's syndrome are very likely to be infertile. Although research shows that the process of sperm formation is proceeding properly, sperm production is lower and little is still known about the biological value of the sperm[25]. However, this has no legal significance in the context of the ability to marry, because according to the can. 1084 § 3 of the CIC „sterility neither forbids nor invalidates a marriage", unless it would be the subject of deceitful deception, as will be discussed below.

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[22] Cf. H. STAWNIAK, *Przeszkoda niemocy płciowej*, in: W. GÓRALSKI (ed.), *Przeszkody małżeńskie w prawie kanonicznym*, op. cit., p. 140.
[23] Cf. B. KACZMAREK, *Trudna dorosłość osób z zespołem Downa*, Warszawa 2011, p. 27.
[24] Cf. CIC, can. 1084 § 2; H. STAWNIAK, *Przeszkoda niemocy* płciowej, art. cit., p. 139.
[25] Cf. B. KACZMAREK, *Trudna dorosłość osób z zespołem Downa*, op. cit., p. 29.

2.2. Lack of marriage consent

Marriage is created by the consent of the parties, which is an act of will through which a man and a woman give and receive each other (cf. can. 1057 § 2 of the CIC). However, in order for them to do so, they must be legally able to do so and give their consent in accordance with the law (cf. can. 1057 § 1 of the CIC). Since it is an act of human will, it presupposes the prior action of reason, i.e. an awareness that enables the right decision to be made. The ecclesiastical legislator indicates the requirements of that reason and will that are necessary for the existence of „legally sufficient" conjugal consent in can. 1095-1107 of the chapter IV book IV of the CIC [26].

2.2.1. Inability to marry for a mental reason

The ecclesiastical legislator states in the can. 1095 of the CIC that „The following are incapable of contracting marriage:

1) those who lack sufficient use of reason

2) those who suffer from a grave lack of discretionary judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted

3) those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage".

The common denominator of all three figures of consensual incapacity is the mental state of the person concerned at the time of his or her conjugal consent. And since this is the case, the content of this canon will be as up-to-date and necessary as possible for consideration in the context of people with Down's syndrome. This does not in any way mean, however, that it would be legitimate for them to automatically apply this incapacity from can. 1095 of the CIC. That would be an oversimplification and a great injustice.

The capacity necessary to take any legal act is not a sufficient capacity to validly marry, but a specific capacity linked to the substance of the act in question. In other words, a certain degree of rationality and freedom of will is required, proportionate to the value of the marriage

[26] Cf. P. M. GAJDA, *Prawo małżeńskie Kościoła katolickiego*, Tarnów 2000, p. 128-129; L. SABBARESE, *Il matrimonio canonico nell'ordine della natura e della grazia. Commento al Codice di Diritto Canonico. Libro IV, Parte I, Titolo VII*, Roma 2002, p. 236-237.

consent[27]. Therefore, when, in n. 1 of the canon cited, the legislator states that „sufficient use of reason", it must be understood that, firstly, he assumes that, although the existence of some level of use of reason at a given person cannot be ruled out *a priori*, it may not be sufficient in view of the act of marriage consent; secondly, that, for a valid marriage, the legislator does not require the full possession of reason; thirdly, that he demands one that enables valid consent[28].

According to canon law, a 7-year-old child is considered an adult and is presumed, if healthy born, to have the ability to use reason properly. The main reason, however, which affects the cognitive and volitional powers of a human being, and thus his or her ability to obtain marital consent, is mental illness[29]. They cause, to a greater or lesser extent, disorders of the mind and will, and as a result they either completely abolish or weaken the possibility of discernment and free decision making. It is assumed, however, that a mental illness makes a marriage void if it abolishes the possibility of a human act[30].

The classification of mental illness is very difficult. All kinds of psychosis are involved, and the relatively most common diseases of this kind include schizophrenia, which, moreover, has a number of variations[31]. Nevertheless, on the basis of what has been shown above, trisomy 21 does not go hand in hand with a mental illness, and even mental illnesses are observed less frequently in these people than in the rest of the population.

Canonical law puts a temporary lack of use of reason, caused by alcoholic intoxication, drug intoxication, hypnosis, etc., (i.e. also circumstances not directly related to Down's syndrome), as well as mental retardation on a par with mental illness, in the context in question. And it is the latter statement that authorises the inclusion of the content of can. 1095 n. 1 of the CIC in discerning the ability of people with DS to contract a marriage.

Polish family law provides that although a person affected by a mental illness or mental retardation cannot, as a rule, enter into marriage, if the state of his health or mind does not

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[27] Cf. G. DZIERŻON, *Niezdolność do zawarcia małżeństwa jako kategoria kanoniczna*, Warszawa 2002, p. 182-184.
[28] Cf. P. VILADRICH, *Comento al can. 1095*, in: A. MARZOA, J. MIRAS, R. RODRIGUEZ-OCAÑA, *Comentario exègetico al Código de Derecho Canónico*, v. 3, Pamplona 1995, p. 1217-1219.
[29] Cf. W. GÓRALSKI, *Kanoniczna zgoda małżeńska*, Gdańsk 1991, p. 33.
[30] Human acts must be distinguished from acts of a man. The latter are physically performed by every human being, but without intellectual consideration and free decision of will, most often reflexively or spontaneously, according to their nature, but they do not value them, do not reflect on them, do not think about them, do not consider them; whereas human acts are actions undertaken by a human being not only with full discernment, but also with a voluntary decision, aware of the value of the act being performed and anticipating the consequences of their action. Cf. P. M. GAJDA, *Prawo małżeńskie Kościoła katolickiego*, op. cit., p. 132-133.
[31] Cf. W. GÓRALSKI, *Kanoniczna zgoda małżeńska*, op. cit., p. 33.

threaten the marriage or the health of his future progeny and if the person has not been fully incapacitated, the court may allow him to enter into marriage (art. 11 § 2 KRO - Family and Guardianship Code). Canon law does not provide such criteria and it is certainly not possible, due to the obvious differences between the essence of canonical and civil marriage, to transfer automatically the above mentioned criteria to it. Nevertheless, this norm also draws attention to an issue very important and valid also on the ground of the canon law, namely, that it is necessary to consider each individual case of underdevelopment and therefore the functioning of each individual person. Above all, as mentioned above, intellectual disabilities can be mild, moderate, severe and profound. The first is that it „is the mildest form of mental retardation. It is the most commonly diagnosed type of intellectual disability (it accounts for 85% of all diagnoses). People with mild handicaps have problems with abstract thinking, are less perceptive, have weaker memory and their ideas are less accurate. They are unable to understand certain concepts, especially those relating to complex phenomena and objects. They are dominated by concrete and imaginative thinking. They are poor at drawing conclusions, cause and effect reasoning, comparisons and generalisations. They do not have problems in family life, they generally go through the process of socialisation well, although the role of the environment and its attitude towards the disabled is decisive”[32]. It should be added to this that the social development of people with DS usually overtakes and exceeds their other skills and allows for better functioning. All the more so if they are lucky enough to grow up in proper educational conditions and have been properly cared for since childhood.

Under number 2 the can. 1095 of the CIC states then that an important marriage is also prevented by a serious lack of judgement as to the essential rights and obligations of a married couple. The doctrine assumes that judgement capacity can be spoken of when a person is able to understand the value of a marriage covenant, his or her powers and duties, and at the same time is able to critically assess the motives for making this decision and is internally free to make it. Evaluation discernment therefore represents a certain maturity of the judgement, or, in other words, discernment that is proportionate to the nature of the contract being entered into. It is therefore a situation in which a person, although having sufficient use of reason, is affected by a serious lack of this evaluation discernment. A distinction must be made between cognitive

[32] http://www.poradnikzdrowie.pl/psychologia/choroby-psychiczne/uposledzenie-umyslowe-niepelnosprawnosc-intelektualna-objawy-przyczyny_43198.html

capacity itself and critical appraisal capacity, which is made through judgement and reasoning[33]. Marital consent will therefore only be validly expressed if the person expressing it is capable of properly assessing its subject matter (matrimonial rights and obligations) and their free choice.

Do people with Down's syndrome have this ability? Here too, it seems that the essence of the answer is their mental state, and not a genetic defect itself, which as such do not abolish the ability to know, understand and decide. Nevertheless, intellectual disability, which usually accompanies trisomy 21, presupposes at least difficulties in perception, abstract thinking, cause and effect reasoning, concentration, and control of emotions. For this reason, there is no doubt that this aspect should be taken into account when assessing the ability of people with DS to contract a marriage, but it also cannot be unambiguously associated, identified and generalized.

Under number 3 the can. 1095 of the CIC the ecclesiastical legislator, in turn, referred to a mental state which makes it impossible to undertake significant marital duties. It is not possible to make a list of them, however, the definition of important matrimonial duties results from the very essence of marriage, its essential properties and aims. It is therefore a matter of duties that fall within the spouses' welfare, the welfare of their offspring, unity and inseparability and the sacrament. In other words, the behaviours (actions and omissions) that are necessary to create a community of marital life.

By „causes of a mental nature" we mean various types of disorders, both in the personal sphere and in the sexual sphere. There is no catalogue of disorders that make it impossible to take on important matrimonial duties, and there can be many causes. First of all, it is possible to signal those, which are relatively easy to ascertain, which fall within the psychosexual sphere. These are: nymphomania, satirism, homosexuality, transsexualism, which is characterised by an unbeatable tendency to have physical intercourse with people other than the spouse, as well as other anomalies and pathologies in this area[34]. It is more difficult to identify the causes of the incapacity in question, linked to personality disorders of the counterparty that lie outside the psychosexual sphere. The doctrine lists here, for example, emotionally unstable personality, dependent, fearful, dissocial, pathological immaturity, alcoholism and other addictions. In any

[33] Cf. W. GÓRALSKI, *Kanoniczna zgoda małżeńska*, op.cit., p. 38-43; G. DZIERŻON, *Niezdolność do zawarcia małżeństwa jako kategoria kanoniczna*, op.cit., p. 185-189; P. M. GAJDA, *Prawo małżeńskie Kościoła katolickiego*, op. cit., p. 137-139.

[34] Some of them may also be symptoms of some deeper mental illness and fall under the category of mental illness (such as zoophilia, necrophilia, exhibitionism, etc.).

case, however, it must be borne in mind that the cause of this incapacity is only a serious mental anomaly, independent of human will, which does not hinder, but even prevents, the fulfilment of marital duties. Therefore, the condition of a person, including those with Down's syndrome, must be considered in each individual case. For example, an article entitled *Break the double taboo*, devoted to homosexuality of people with Down's syndrome, appeared on the www.niepelnosprawni.pl website not so long ago. The literature provides also the opinions that there are deficits in higher emotions and reduced moral sensitivity and lower criticism, emotional lability, impulsivity, states of anxiety, self-control disorders and aggressiveness in the group of people with Down's syndrome[35]. Attention should also be paid to the epileptic personality, also known as epileptic characterisation, which shows certain characteristics (tendency to persist and accumulate affections over a long period of time, lengthy thinking, fundamental approach to many issues, hysterical features, tendency to anger and aggression, vindictiveness, tendency to exaltation, etc.[36]). The above shows that various types of disorders are not strange to Down's syndrome. Each of these aspects may affect the ability to take on important matrimonial duties, but it is also not a significant manifestation of trisomy 21 and may occur completely independently of it.

2.2.2. Defects of marriage consent

Among the defects of marriage consent, the Church legislator enumerates: error about the person, error about a quality of the person, deceitful deception, mistake as to the substance of the marriage, bogus marriage consent, condition and compulsion and fear.

Error about the person (can. 1097 § 1 of the CIC) concerns a person's physical identity and is extremely rare in procedural practice. Nor does it seem to be necessary to analyse it in detail in the context discussed here. The error about the quality of a person (can. 1097 § 2 of the CIC), if it is an ordinary error, even if it is the cause of the marriage, does not make it null and void. A marriage is only invalid if someone intended a certain attribute on the other side directly and essentially, and therefore wanted it above all, putting the same person in the background. If, therefore, one were to assume that one preferred his or her own will to be directed towards

[35] Cf. M. ORZEŁ, *Zaburzenia psychiczne i zaburzenia zachowania u osób upośledzonych umysłowo*, Zeszyty Naukowe WSSP, v. 16 (2013), p. 82.
[36] Cf. S. PAŹDZIOR, *Przyczyny psychiczne niezdolności osoby do zawarcia małżeństwa w świetle kan. 1095 n. 3*, Lublin 2009, p. 239.

a healthy person, it would be difficult for him or her to prove that he or she was wrong in wanting to marry a person with Down's syndrome. Likewise, reference should be made to possible deceitful deception (can. 1098 of the CIC). I come back here to the aforementioned issue of infertility, about which the ecclesiastical legislator wrote in can. 1084 § 3 of the CIC, that it neither forbids nor invalidates a marriage, unless it would become an object of deceitful deception. In this context, there is a reflection that since research indicates that men with trisomy 21 are usually infertile, and knowledge of the subject is open and public, it would be virtually impossible to prove a deceitful act in this respect. This does not, of course, in any way mean that a person with DS would not be able to mislead or be misled as to another person's quality. Similarly, in theory, he or she could be mistaken about the essence of the marriage, simulate the marriage consent (assuming the correct level of his or her intellect - since the simulation is also carried out by an act of will), enter into a marriage under the condition of, and as a result of, compulsion and fear. However, these issues are in no way related to trisomy 21 and there is no reason to take them into account in particular in cases of marriages of persons with DS.

Conclusion

Although there is no doubt that people with Down's syndrome are living easier today than they used to do in the past (both because of medical progress and because of greater public awareness), there still seems to be a long way to go to normal in this regard. Recently, it has been reported to the world that the French Government has rejected an appeal made on behalf of people with Down's syndrome on the ban on social advertising for World Day of Down syndrome. The explanatory statement states that it is inappropriate to allow the publication of the smiling faces of these people because this expression of happiness „probably violates the conscience of women who have legitimately made other personal choices”[37]. When I look at my nine-year-old niece, also a holder of an additional chromosome, I constantly ask myself what this discussion is about and where this world is going. It was my great love for her that prompted me to address a subject that is socially important, topical and also scientifically interesting. Thanks to it, not only will people with DS and their families have a chance to learn something about their legal situation in the Church, but also canonists (and other readers) will perhaps learn what this

[37] http://niezlomni.com/we-francji-zakazano-emisji-tej-reklamy-spolecznej-narusza-spokoj-sumienia-kobiet/

defect is and what its consequences are. The general knowledge of Down's syndrome is very cursory and, unfortunately, stereotypes are too much. Perhaps someone would say that exceptions only confirm the rule, but it is impossible not to mention Pablo Pineda here. He is 42 years old, a teacher and the first university student in Europe to receive a higher education (he is a graduate of Malaga University). His life shows how a person with DS can function and that it is unfair to generalise their situation and identify them with a severe mental handicap.

Therefore, there is one conclusion to be drawn from these considerations. The assessment of the ability of people with DS to marry in the Church should be carried out on a case-by-case basis, and never be generalised because of this additional chromosome. Nor should it deviate from the assessment of other people's ability, in the sense that the criteria for such an assessment must be the same. And if a person with a DS can indeed be considered unable to marry, it is not because of the DS itself, but because of - above all - the state of his or her psyche. At the same time, it should not be forgotten that this condition may also be identical in people with a normal karyotype of 46 chromosomes.