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Błąd co do nierozerwalności małżeństwa (kan. 1099 KPK) w świetle wyroku Roty Rzymskiej c. Erlebach z dnia 9 lipca 1999 r.

Error regarding the indissolubility of marriage (can. 1099 of the Code of Canon Law) in the light of the judgment of the Roman Rota concerning Erlebach of 09 July 1999

Canon 1099 of the effective Canon Law Code (hereinafter: CIC) defines the concept of „error in law" *(error iuris)* regarding unity, indissolubility or sacramental dignity of marriage, providing that such an error does not contravene marital consensus, unless it determines will. This is how can. 1084 of the CIC of 1917 has been modified.

This cause of invalidity of marriage is difficult to interpret, particularly with respect to the second sentence of the canon: „*nisi determinet voluntatem"*. This clause is a kind of an exception from the general rule adopted in the first part of the sentence. So, if an error determines will, it contravenes the marital consensus and, thereby, results in invalidity of marriage.

An interesting example involving can. 1099 of the CIC had its epilogue on July 9, 1999, in the ruling of the Tribunal of the Roman Rota in the case judged by G. Erlebach (I. M. Serrano Ruiz and I. Sciacca were the remaining judges).[1]

1. Facts of the case

The case concerned the marriage of Martin and Mary, both aged 24, who, after 3 years of acquaintanceship (interrupted after 1 year and then resumed), married on July 24, 1984, after getting a dispensation from the impediment to marriage consisting of a difference of religion (the groom was not baptized). The married life was initially peaceful, the spouses had a child but, in time, they experienced more and more problems (according to the wife), so

[1] *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii 1999*, RRD 91 (1999), p. 533-540.

they parted in August 1992. The wife left her husband after 8 years of marriage and returned to her parents. A civil court gave them divorce on October 15, 1993, on her petition.

Mary, who lived alone, wanted to discharge her maternal obligations, such as the rearing of the child, but Martin wished to re-marry a catholic woman, so he petitioned for declaration of invalidly of his marriage, for a number of causes, twice to the Ecclesiastic Tribunal in diocese „C": on October 29,1994, and on February 14, 1995. The Tribunal determined the „formula of doubt" on March 24,1995, finding only two plausible causes: a total simulation of marital consensus on the part of the defendant and an error regarding indissolubility of marriage on the part of the plaintiff.

The Tribunal heard the parties, 3 witnesses on the part of the plaintiff and 1 witness *ex officio* (clergyman who prepared the parties for the marriage), and gave a judgment of nonsuit for each of the alleged causes for invalidity. After the plaintiff's appeal to the Tribunal in diocese „K" (2nd instance), the adjudicating panel dismissed the simulation as the cause but admitted the plaintiff's error and decreed the marriage invalid on September 3, 1997.

Pursuant to can. 1682 § 1 of the CIC, the case was referred to the Tribunal of the Roman Rota as the 3rd instance. The case files were translated, the adjudicating panel was formed, an *ex officio* „patron" was appointed for the plaintiff and the formula of doubt was redefined. There was no new evidence. After the exchange of letters between the plaintiff's „patron" and the „guardian of marriage", the adjudicating panel dismissed the plaintiff's error as to indissolubility of marriage on July 9, 1999.[2]

2. Legal motives

The Ponens starts from a statement that the error made by someone who thinks that the marriage is dissoluble does not invalidate the marital consensus. The same applies to the error regarding the other important attribute of marriage, the unity, and the error regarding the sacramental dignity of marriage. This rule was set in canon 1084 of the former CIC and has been adopted in can. 1099 of the effective CIC after modification of the wording concerning the lack of relevance of an error in law.

According to the judgment, there is no requirement for providing any special arguments underlying this rule: it cannot be differently if we consider the difference between the nature of marriage and its important attributes. This is further substantiated by the almost daily experience of defectiveness of human cognition, which, however, does not impede the

[2] IBID., p. 533-534.

achievement of legal consequences by acts in which the will takes account of the subject of action only generally and to a slight extent. On the other hand, if the spouses considered an important subject matter of their marital consensus, their will, in default of anything else impeding the marriage, would become effective because the marriage is based on the concord of the spouses.[3]

Referring to the ruling by c. Stankiewicz of 25/04/1991,[4] the Ponens concludes that although any will, proper to a human act, could not act otherwise than it has become aware of by means of the mind, it does not follow automatically intellectual assessment because opposing arguments may prevail, for someone to be obedient to their reason. Indeed, the will affected by erroneous views may remain in a condition of an ordinary readiness for action and, in fact, not choose an act contravening the indissolubility of marriage. The editor of the judgment adds that in the aspect of the rule, i.e., the substantive law, nothing changes the enrooting of an error in the mind of the contract party to better or to worse.[5]

Then, we read from the sentence, the increasingly widespread mentality contravening the indissolubility of marriage or even directly propagating a union between the husband and the wife, defined as dissoluble at will, given the more frequent support for this from the state legislation, can easily lead someone to a conviction, contrary to the ecclesiastic context, that marriage is dissoluble, at least on certain conditions.[6]

After moving to the thread concerning the so-called „persistent error" *(error pervicax)*, or „enrooted error *(error radicatus)*,[7] the Ponens notes that judgments of the Roman Rota mentioned many times the possibility of existence of such error deeply embedded in a human being much earlier, before the 2nd Council of Vatican. This is why there was a doubt whether also in such cases the rule of the lack of relevance of an error in law should be followed in reference to the marital consensus because of the usual assumption, very well explained by

[3] „Non est cur ut Nobis adducenda sint argumenta specifica quibus innititur hoc principium: aliter esse non potest si attendamus ad distinctionem essentiam matrimonii inter et essentiales eiusdem proprirtates. Hoc confirmatur etiam fere ex quotidiana experientia fragilitatis cognitionis humanae, quae tamen minime praepedit consecutionem effectuum iuridicorum actuum in quibus voluntas nonnisi generice et summatim prae se habet obiectum actionis. Alia ex parte, si nupturientem prae oculis haberent obiectuum essentiale consensus matrimonialis, eorum voluntas aliis haud obstantibus obtineret suum effectum, cum matrimonium facit partium consensus", IBID., p. 534.

[4] *Dec. c. Stankiewicz z 25.04.1991*, RRD 83 (1991), p. 283.

[5] *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii 1999*, op. cit., p. 534.

[6] IBID., p. 534-535.

[7] *Error radicatus* is also termed a „practical" or „operating" error (*error practicus seu operativus*). See *Dec. c. Ferreira Pena z 22.06.2007*, RRD 99 (2007), p. 229; *Dec. c. Ferreira Pena z 14.11.2008*, RRD 100 (2008), p. 329.

I. Parisell,[8] the Rota's auditor, that the more persistent an error is, the easier it is to make a positive act of will.

At the same time, the Ponens notes that also a truly enrooted error as to the indissolubility of marriage, i.e., a conviction that marriage can be dissolved, does not invalidate the marital consensus *ex se* because the error, as they say, stays in the intellect and, by its nature, does not determine will, though, doubtlessly, can lead to inclining it towards such false conviction. However, the latter case should be accompanied by other elements for the marital consensus to be invalid. Referring to the opinion of U. Navarrete,[9] the Ponens concludes that although, in a substantive aspect, one cannot normally adopt the rule of the invalidating effect of the error, *error radicatus* can have a certain evidential value in favor of invalidity in the process aspect.[10]

Matters look differently, we read from the judgment, when a contract party, having a wrong idea about marriage (as dissoluble), not only thinks that marriage is dissoluble but also intends to contract a dissoluble marriage that the party recognizes as a true marriage. In such case, if the spouse-to-be is driven by actually effective will, determined by the error towards the subject matter, which cannot be reconciled with the true marriage, the marital consensus of this person has no legal effect, so the marriage is invalid under can. 1099[11].

While citing again a part of the judgment by c. Stankiewicz of 25/04/1991,[12] the Ponens assumes that the canonic effectiveness of an error invalidating the marital consensus in the proper sense of the term does not consist in that the error as such, as an intellectual act, becomes the subject matter of will but because the error, because of visibility of truth, determines the subject matter of will, so that the will accepts the subject matter. An error like this makes a marriage invalid because the formal subject matter of the act of marital will is limited to the single form of dissoluble marriage and, thus, deprives it of an important attribute.[13]

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[8] I. PARISELLA, *De pervicaci seu radicato errore circa matrimonii indissolubilitatem. Iurisprudentia rotalis recentior*, in: U. NAVARRETE (ed.), *Ius Populi Dei. Miscellanea in h. R. Bidagor*, t. 3, Roma 1972, p. 524.

[9] U. NAVARRETE, *De sensu clausulae ,,dummodo non determinet voluntatem" can. 1099*, „Periodica" 81 (1992), p. 482-484.

[10] *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii 1999*, op. cit., p. 535.

[11] „Aliter tamen res habeantur si contrahens, erronea conceptione matrimonii solubili imbutus, non solum putet matrimonium esse solubile sed etiam intendat inire unionem solubilem, quam putat esse verum matrimonium. Hoc in casu, si nupturiens agat voluntate revera efficaci, per errorem determinata ad obiectum quod cum matrimonio veri nominis componi nequit, consensus haud obtinet iuridicum effectum, ergo et matrimonium nullum dicitur (cf. clausulam can. 1099 «dummodo non determinet voluntatem»)", IBID., p. 535.

[12] *Dec. c. Stankiewicz z 25.04.1991*, RRD 83 (1991), p. 283-284.

[13] „Efficacia canonica huius erroris, consensum matrimonialem invalidantis, sensu poroprio non consistit in eo quod ipse error tamquam actus intellectus evadit obiectum voluntatis, sed quia error sub ratione apparentis veri determinat obiectum voluntatis [...] ut haec sub ratione boni apparentis illud acceptet. Ex quo fit quod error

The phenomenon of determination of will, truly effective for the conclusion of a dissoluble marriage, Erlebach continues, carries certain difficulties of both psychological and legal-systemic nature.[14] Regarding the difficulties of psychological nature, it is hard for a wrong idea to „enter" the formal subject matter of the of marital consensus and „purport itself" to will as good. In such case, will usually remain „at rest" because it is not about the very subject matter of the marital consensus but just about an attribute of such subject matter. However, it is a matter of more fact than law. Now, regarding the legal-systemic difficulty, there is a trend for classifying defects of will as legal figures of exclusion or condition, even an implicit one. So, there is a certain misunderstanding as regards the recognition of a legal error as an autonomous cause of invalidity.[15]

Regarding the matter of fact and evidential difficulty faced by an ecclesiastic judge, the Ponens refers to the explanation proposed by John Paul II in his address to the Roman Rota of 21/01/2000. The pope said that an error as to the indissolubility of marriage, by way of exception, may have effectiveness invalidating the marital consensus, where the error positively determines the will of a party to the contract towards a choice contravening the indissolubility, pursuant to can. 1099 of the CIC. This can be verified only when the erroneous judgment about the indissolubility of marriage has a determining effect on a decision of will, as guided by an internal conviction deeply enrooted in the mind of the party to the contract and recognized by this person with determination and persistence.[16]

Moving on to the subject of proving *error iuris*, the Ponens notes that one should prove not only the error of the party to the contract regarding an important attribute of marriage existing at the time of contracting the marriage but also, more importantly, find an act of will effectively determined pursuant to the erroneous conviction of the intellect. In other words, one needs to prove also the existence of a positive act of will, though this is typically about will oriented implicitly on a dissoluble „marriage"[17].

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huiusmodi, cum obiectum formale actus voluntatis matrimonialis solummodo ad unicam speciem matrimonii solubilis restringat, ita expoliando illud proprietate essentiali seu indissolubilitate, invalidum reddit matrimonium", *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii 1999*, op. cit., p. 535.

[14] Here the Ponens refers to *Dec. c. Civili z 09.07.1997*, Montesvidei, A. 83/97, n. 6.

[15] Here the Ponens refers to *Dec. c. Pompedda z 18.11.1993*, RRD 85 (1993), p. 668-669 and paper A. Stankiewicza, *L'errore di diritto nel consenso matrimoniale e la sua autonomia giuridica*, in: P.A. Bonnet, C. Gulo (ed.), *Error determinans voluntatem (can. 1099)*, Città del Vaticano 1995, p. 65-85.

[16] Ioannes Paulus II, *Allocutio ad Rotam Romanam diei 21 ianuarii 2000*, AAS 92 (2000), p. 353; *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii 1999,* op. cit., p. 536.

[17] „Attenta peculiaritate figurae erroris circa matrimonii indissolubilitatem determinantis voluntatem, probandus est non solum error contrahentis circa hanc matrimonii proprietatem essentialem momento nuptiarum, sed ante

Resorting to an analogy in relation to an explicit exclusion of indissolubility, typically viewed in the framework of the title of a partial simulation against the good of the sacrament, the Ponens emphasizes that one should establish not only the cause for such villainous determination of will because of the error but also a closer cause that has „induced" will to such contracting because of a subjectively defined good, so „encroaching on" the practical-practical judgment on the marriage being contracted.[18]

However, on the other hand, they added in the judgment, those reasons, i.e. causes leading to the obliteration of the marital consensus, should be necessarily compared also to the cause for contracting the marriage *(causa contrahendi*), i.e., one should evaluate to what extent the spouse-to-be, to whom the cause of invalidity refers, recognized their marriage with the other party to the contract. Because it is very difficult to adopt the determination of will or a not more than dissoluble marriage in the context of existing of marital love in the proper sense.[19]

In addition, the Ponens concludes, regarding means of evidence, one should add nothing else because this kind of matters is governed by rules that are typically applicable to cases concerning defects of the marital consensus, particularly in simulation cases.

3. Actual motives

At the beginning it is said in the judgment that the plaintiff's thesis on the error regarding indissolubility of marriage on his part was submitted only in the second plaintiff's petition. By making this request, the man presented it in quite vague words. He stated that he had married in a church because the bride wanted that and he did not care. He did not knew that by contracting a church marriage he would not be able to contract another such marriage. Nobody told him and he was unaware of the lifelong nature of the bond. He said he would

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omnia constare debet de actu voluntatis efficaciter determinanto iuxta erronea intellectus placida (cf. coram Giannecchini, sent. diei 18 decembris 1986, Interamnen.-Narien.-America, A. 127/96, no. 4). Aliis verbis, praeter errorem probari debet etiam actus positivus voluntatis etsi agatur plerumque de voluntate implicite ordinata ad <matrimonium> dolubile", *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii* 1999, op. cit., p. 536.

[18] „Per analogiam ad explicitam exclusionem indissolubilitatis, ordinarie iudicatam sub capite simulationis partialis adversantis bono sacramenti, constare debet non solum de causa remota talis pravis determinationis voluntatis ratione erroris, sed etiam de causa proxima quae inducit voluntatem ad ita contrahendum ratione alicuius subiective intenti boni, ingredientis ergo in iudicium practico-practicum de matrimonio contrahendo (cf. coram Monier, sent. diei 17 decembris 1998, Montesvidei, A. 140/98, no. 7)", IBID.

[19] „Alia tamen ex parte haec rationes seu causae ad irritum consensum ducentes necessarie comparari debent etiam cum causa contrahendi, scilicet aestimandum est quantum nupturiens, ad quem sese refert hoc nullitatis caput, habebat matrimonium cum altero contrahente. Dificillime enim admitti potest determinatio voluntatis ad solubilem tantum unionem praesenti genino sensu amoris coniugallis", IBID.

have not agreed to the church marriage if he had known. Next, after the publication of the files, the plaintiff stressed that, as an unbaptized person unfamiliar with the teachings of Catholic Church and brought up in a non-religious family, he believed that a church marriage can be dissolved on the same basis as a civil marriage.[20]

As written further in the judgment, a review of the files cannot start from a premise adopted by the court in advance: who can say right away that such an error on the part of the plaintiff is not plausible since it involves a domain that is very strongly based on the rules of the catholic doctrine? One cannot dismiss such case easily also because of the man's lack of experience with the canon law: he did not ask for any „technical" defense before appearing at the court; he just copied a divorce petition written by certain priest.[21]

Then the Ponens assumes that, without any doubt, there was no further cause of a possible error in law on the part of the plaintiff. The man grew up in a non-religious family and his mother held a prominent position in the communist party. His parents did not struggle against the Church but gave their children a non-religious upbringing, which was completed by similar school education and by general public awareness that was far from recognizing the Christian concept of indissolubility of marriage. Erlebach adds that in this context the following declaration of the plaintiff may be accepted: „Seeing my catholic friends who married at church, divorced and then married again, I thought that also the latter may be dissolved"[22].

The grounds for such possibility, as we read in the judgment, were explained by the plaintiff himself: he thought that if two persons are well-matched, their marriage should last for life but, otherwise, they should part for their own good and arrange for their lives otherwise. The Ponens expresses his surprise that many Catholics that should know the teachings of the Church about marriage share this idea.[23]

Regarding the further cause of the alleged error, the judgment points at the thread involving the special preparations for the marriage. The plaintiff was unbaptized, so, first, he prepared to be baptized (though, ultimately, he was not) and, second, he had to seek a competent ordinary's dispensation from the impediment involving the difference of religion eight days before contracting the marriage. As far as other elements are concerned, there is

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[20] IBID., p. 537.

[21] IBID.

[22] „Osservando i miei amici cattolici che contraevano il matrimonio cattolico, dopo divorziavano e di nuovo contraevano matrimonio, pensavo che anche quello si può sciogliere", IBID.

[23] IBID.

a discrepancy between testimonies of the plaintiff, defendant and priest „J" who made arrangements for the marriage. The plaintiff is silent about letters concerning his will of being baptized. According to the defendant, the man, as unbaptized, did not know initially that he could contract a canonic marriage; he was certain he would need to be baptized, therefore the preparations.[24]

The judges attached much weight to the defendant's declaration that priest „J" informed them that (in the event of a civil divorce) the woman would be bound by the wedlock while the man would not. Reportedly, he also concluded that if the marriage was dissolved and Martin was baptized, he would be allowed to re-marry in church.[25]

Commenting on this strange testimony of the defendant, the Ponens notes that even if it is true, the wrong explanation was given by priest „J" on 21/02/1984 (according to the pre-marital interview report). However, such explanation would be inconsistent with the groom's initial intent to get baptized. Since, according to the defendant, the man actually took certain steps to prepare, this would not be about some vague idea of getting baptized.

The Ponens recognized the testimony of the *ex officio* witness, priest „J", as more consistent and better grounded in the chronological context. The priest testified at the first instance that the plaintiff had asked to be baptized and the wish seemed to be genuine. However, the clergyman said: „As far as I remember, Martin came to me three days before getting married, said he was not a believer and he would not accept the baptism"[26]. According to the witness, the plaintiff contacted Mary's mother right away, believing that Mary's family did not know about this matter. Then he discouraged Mary from marrying Martin. He was so moved, that he made a mistake while delivering the explanation: he told Mary and her mother that if Mary maries Martin, the marriage will be sacramental to Mary but not to Martin. Besides, he said that if Martin gets baptized after the marriage, he could be permitted by the Church to re-marry while Marry could not.[27]

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[24] IBID, p. 538

[25] „Maioris momenti est tamen affirmatio Conventae iuxta quam Rev. J. occasione processiculi praematrimonialis et quidem utraque parte adstante, affirmavit mulierem adstrictam fore post nuptias vinculo matrimoniali, non autem virum. En sequitur mira conclusio: «se il nostro matrimonio si fosse disfatto [...] e Martino si fosse battezzato, allora avrebbe potuto contrarre un altro matrimonio in Chiesa»", IBID.

[26] „Per quanto mi ricordo, a tre giorni [prima delle nozze] Martino era venuto da me e mi ha dichiarato che è non credente e che non avrebbe ricevuto il battesimo", IBID.

[27] „Ho sconsigliato a Maria il matrimonio con Martino. Ero così agitato che durante le mie spiegazioni ho commesso un errore [...] Ho detto a Maria e a sua madre che se avesse sposato Martino, per Maria questo matrimonio sarà sacramentale, per Martino no. E in più ho detto che dopo le loro nozze se Martino si fosse battezzato, avrebbe potuto ottenere in Chiesa il permesso per un nuovo matimonio, invece Maria no". IBID.

In the light of this account, the Ponens asks whether it is possible that this wrong explanation from priest „J" (a fully qualified person) could lead the plaintiff to a wrong conclusion about his marriage-in-waiting. The conclusion is that, in theory, there is such a possibility but it is implausible in this specific case. The testimony of the plaintiff is silent about this matter. On the one hand, priest „J" anticipated a room for such mistake: he told the judge that „if Mary presented my argumentation to Martin, he could conceive a wrong idea that the marriage will be indissoluble to Mary and dissoluble to him". However, on the other hand, the witness explained to Martin while preparing him for the baptism that a church marriage is characterized by unity and indissolubility. He never told Martin directly that the marriage would be dissoluble to him if he does not get baptized.[28]

Next, it is written in the judgment that a thorough analysis of the files revealed that the wrong explanation from the priest had no real effect on the opinion of the plaintiff. The plaintiff treated the baptism instrumentally (as he admitted) and gave up the intention soon (according to the defendant, Martin knew about the possibility of obtaining a dispensation from the impediment of difference of religions while he was preparing for the baptism so he decided not to get baptized). In this context, we have an important statement of the Ponens: „The plaintiff acted on his own initiative and if, then, possibly, got into the error regarding the indissolubility of marriage as a consequence of the regrettable explanation from the priest, he acted, at most, under the influence of his mistaken belief about the possibility of getting divorced at will"[29].

This is how it can be explained why the plaintiff was silent on this matter both in his divorce petition and in his testimony and why he raised this subject only after obtaining the judgment at the 1st instance. Not until the reading of the files (at the end of the 1st instance process) did the plaintiff declare that the priest who had prepared the plaintiff for the marriage

[28] „Estne possibile quod ex hac errata explicatione, facta a pesona omnino qualificata, enascere posset specifica Actoris erronea persuasio circa matrimonium prope contracturum? In abstracto talis possibilits sine dubio exstat, attamen in casu est minus probabilis. Actor enim sua in depositione iudiciali omnino silet de hoc argumento. Rev. J. ex una parte prospexit possibilitatem talis erroris – «se Maria gli ha riferito la mia argomentazione, Martino poteva avere una convinzione erronea che il matrimonio [...] per Maria sarà indissolubile, e per lui solubile» – ex alia tamen parte Nos certiore fecit quod durante la preparazione al battezimo di Martino gli ho spiegato che il matrimonio contratto in Chiesa è caratterizzato dall'unità e dall'indissolubilità. Non ho mai detto a Martino in modo diretto che il matrimonio contratto da lui in Chiesa cattolica, se non si battezzerà sarà per lui un matrimonio solubile", IBID.

[29] „Actor ergo sua sponte egit et si forsan ulterius in errorem irrepsit circa matrimonii indissolubilitatem ob infaustam explicationem Sacrdotis, ageretur ad summum de influxu concomitanti erroneae persuasionis de possibilitate ad lubitum divertendi", IBID., p. 539.

had not told the plaintiff that he would not be able to dissolve his church marriage even if he was a nonbeliever.[30]

The Ponens was insightful enough to state, based on individual claims of the plaintiff, that it could be doubted whether his marital consensus had been valid because of the lack of this consensus, i.e., the total simulation on the part of the plaintiff. The man testified that he spoke the words of marital consensus in accordance with the applicable ceremony but he did not attach any weight to these words. He was there just because he could not do anything else; the ceremony would not have happened without his participation.

This was confirmed by witness „S" who testified that Martin told him that the marriage had been contracted at the church only by Mary. Martin just accompanied her, so he could not be bound by the religious matrimony. Also Mary said that. According to the witness, the fact of Martin's being unbaptized should substantiate the claim. Allegedly, Martin used to make jokes, saying that he was still single and only Marry was married woman.

As the Rota's auditor recalls, the simulation has never been involved in the case concerned as a cause. Only on a side note it should be stressed that the words of the witness should not be removed from their context because, in this case, and this refers directly both the plaintiff's error and the indissolubility of marriage, crucial is the plaintiff's will to contract the marriage with the defendant which was done through the double celebration: civil (mandatory at that time and better suited to the outlook of the man's parents) and religious (proposed by the defendant's parents).

In the continuation of his dilatation, Erlebach adds another significant conclusion: without any doubt, the parties, loving each other, contracted the marriage by their mutual decision. According to the plaintiff, the marriage was successful and came to the unhappy end only after a few years, as a consequence of an unexpected initiative of the wife. She petitioned for divorce while the plaintiff, as testified by his mother, refused to give his consent for a long time, hoping for reconciliation with Mary. He gave up when he had lost the hope.[31]

Concluding from the hitherto findings, the Ponens assumes that the undisputable circumstances are indicative of the plaintiff's determination to contact a lasting marriage with the defendant rather than a marriage dissoluble at will. If the plaintiff was actually mistaken about the indissolubility of marriage, it does not seem that the error determined his will in any

[30] IBID.

[31] IBID., p. 538-539.

way. It is more likely that the plaintiff intended for a *matrimonium perpetuum*, though only in a natural sense, and this is clearly sufficient for assuming validity of the „naturally sufficient" marital consensus. The plaintiff's mistake, ignorance or the lack of knowledge were relevant only to ecclesiastic legal consequences of his canonic marriage. More specifically, the plaintiff did not know while getting married that he would be unable to contract another canonic marriage in the event of divorce but, in fact, he did not consider ever getting divorced with Mary.[32]

The Ponens shares the stance of the plaintiff's „patron" who claims, in opposition to certain theses of the „guardian of marriage" that the affection between the parties before the contracting of the marriage and the reluctance of the plaintiff to terminate it do not lessen the probability of the plaintiff's error regarding the indissolubility of marriage or his error of a „determining nature", however, there is no evidence to the opposite, i.e. a proof substantiating the thesis that such error not only existed but also determined the will of the plaintiff in the contracting of his marriage.[33]

According to the judgment, after establishing all the foregoing facts, elaborating on less important „moments", mainly those „revolving" outside the recognized „title of invalidity" is utterly unnecessary. The Ponens adds that, in a particular way, in opposition to the judges of the 2nd instance, the auditors of the adjudicating panel do not attribute at all significance to the unfortunate question asked the plaintiff before the very contracting of the marriage by the *ex officio* witness who, as stated by the plaintiff, asked him whether he wished to speak the oath formula; this question, as Erlebach states, could be understood in more than one way while what is of interest to the adjudicating panel is the belief of the plaintiff, who knew very well that a marriage cannot be contracted without speaking the formula of the marital consensus.[34]

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[32] „Ergo ex circumstantiis certis emergit potius determinatio Actoris ad unionem duraturam cum Conventa, non ad matrimonium ad lubitum solubile. Si revera agebatur de quodam errore ex parte Actoris circa matrimonii indissolubilitatem, non videtur talem errorem aliquomodo determinavisse voluntatem Actoris. Magis vera videtur thesis Actorem intendisse cum Conventa matrimonium perpetuum, etsi solummodo sensu naturali intentum: id evidenter sufficit ad validitatem consensus naturaliter sufficientis ! Eius error, vel ignorantia, vel aliquomodo defectus efformatae scientiae, respiciebat solummodo effectus iuridicos eius matrimonii canonici, et quidem effectus iuridicos coram Ecclesia. Magis adhuc exacte, tempore nuptiarum Actor nesciebat quod in casu rupturae sui matrimonii ille non potuisset novum contrahere matrimonium canonicum. Sed re vera, ille neque serio admittebat possibilitatem rupturae sui matrimonii cum d.a Maria !", IBID., p. 539-540.

[33] „Concordamus cum navo Patrono partis actricis affirmante – contra quasdam asseverationes vinculi Defensoris – amorem partium ante nuptias et oppoositionem Actoris erga dissolutionem vitae coniugalis non infirmare possibilitatem erroris eiusdem viri actoris circa indissolubilitatem matrimonii et eiusdem erroris «naturam determinantem», attamen in casu deficit probatio contrarii, scilicet quod talem errorem non solum exstitisse sed et voluntatem Actoris ita in contrahendo determinavisse", IBID., p. 540.

[34] IBID.

The judgment concludes with the following disposition: *„Negative, seu non constare de nullitate matrimonii, in casu, ob errorem viri actoris circa indissolubilitatem matrimonii".*

4. Final remarks

The concept of indissolubility of marriage, next to the unity, constitutes an important attribute of this relationship (can. 1056 of the CIC and can.776 § 3 of the CCEO) contracted not only by Christians or Catholics. Both can.1099 of the CIC and can.822 of the CCEO state that an error as to the unity, indissolubility or sacramental dignity of marriage does contravene the marital consensus, unless the error determines will. This rule is strongly established in the teaching of the Church.[35]

The revision of the clause implemented in new codes (the Latin and the Eastern ones), „unless the error determines will", sanctioning the contravention of the marital consensus and, thereby, invalidity of marriage means that, while determining the subject matter of the consensus, removes from it subject matter, explicitly or implicitly, the unity, indissolubility or sacramentality of marriage.

The determination of will by the error, done by a positive act of will and resulting in a contravention of the marital consensus, occurs only when it applies to one's own, specific, marriage and not marriage in general. The case-law of the Rota stresses that even if such a person is clearly opposed to the indissolubility of marriage, or even, one way or another, combats this important attribute of marriage, the person may wish to contract, and that explicitly, an indissoluble marriage (e.g., because of their affection to the partner). This case-law assumes that, in the context of the error, there can be circumstances that, in the specific case, make it impossible, even if not absolutely, application of the error to one's own marriage.

Also, the judicature of the Rota highlights the necessity of identification of the cause that has led to the determination of will by the error, so the limitation of the subject matter of the marital consensus, assuming at the same time that the very existence of the cause does not have to mean that there is the consequence, i.e., the determination of will.[36]

This and other rules concerning interpretation of the *„nisi determinet voluntatem"* clause contained in can.1099 of the CIC were considered by the adjudicating panel of the Rota who recognized the *nullitatis matrimonii* case finalized (in the 3rd instance) after the

[35] See Z. GROCHOLEWSKI, *L'errore circa l'unità, l'indissolubilità e la sacramentalità del matrimonio*, in: P.A. Bonnet, C. Gulo (ed.), *Error determinans voluntatem (can. 1099)*, Città del Vaticano 1995, p. 7-8.

[36] IBID., p. 14-15.

passing of two divergent judgments at the two lower levels of jurisdiction. The case was certainly not an easy one. The key question was whether the plaintiff was actually in error regarding the indissolubility of marriage while contracting it and, if so, whether the error has determined his will.

Among the legal grounds for the judgment, after explaining briefly the first part of can. 1099 of the CIC (no relevance of the *error iuris*, as a principle), where the autonomy of will vs. „proposals" from the intellect was highlighted, the thread worth stressing is the one concerning the so-called „enrooted error" *(error radicatus*) that, by itself, does not invalidate the marital consensus (does not determine will or, strictly speaking, its subject matter). It is also important to explain at this point that the *error determinans voluntatem* makes a marriage invalid because the formal subject matter of the marital consensus gets limited to just one form of marriage (as a dissoluble relationship), which deprives it of an important attribute.[37]

The next statement deserves attention: causes of invalidation of the marital consensus should be compared to causes for the contracting of marriage because it is hard to recognize the fact of determination of will to contract a marriage as only a dissoluble one where there is a deep affection between the parties.

The judgment touched the important question of autonomy of the legal concept of *error iuris*. In reference to this statement, any determination of will of the party to the contract by an error should be done by a positive act of will, which does not mean that this „title of invalidity" is identical with a partial simulation of the marital consensus. A will-determining error does not contain, by any means, a positive act of will excluding the indissolubility (or unity or sacramentality of marriage). This is because the error assumes a state of certainty of the party to the contract (about the dissolubility of marriage), so a strong and lasting belief excluding anxiety about something to the contrary (that marriage is insoluble). An error-determined will, since it consciously disclaims a difference versus objective reality (the indissolubility of marriage), does not aim deliberately for direct and unjustified exclusion of indissolubility done by a positive act. This is because indissolubility is not located in a false judgment of the intellect as something important for marriage, which should be excluded. Therefore, an error-determined will heads towards achieving another subject matter

[37] „Efficacia canonica huius erroris, consensum matrimonialem invalidantis, sensu poroprio non consistit in eo quod ipse error tamquam actus intellectus evadit obiectum voluntatis, sed quia error sub ratione apparentis veri determinat obiectum voluntatis [...] ut haec sub ratione boni apparentis illud acceptet. Ex quo fit quod error huiusmodi, cum obiectum formale actus voluntatis matrimonialis solummodo ad unicam speciem matrimonii solubilis restringat, ita expoliando illud proprietate essentiali seu indissolubilitate, invalidum reddit matrimonium", *R.P.D. Gregorio Erlebach. C.vien. Nullitatis matrimonii. Sententia definitiva diei 9 iulii* 1999, op. cit., p. 535.

essentially different from the important formal subject matter of the marital consensus, thereby putting, though unconsciously one's own model of this relationship (as only dissoluble), shaped in line with the erroneous view, in place of the scheme based on the important attribute of marriage.[38]

A wrong belief that positively determines will depending on the subject matter defined by the error acts automatically as long as the error remains undefeatable. If, on the other hand, an unwavering belief of the mind as to one type of marriage (as dissoluble) begins to coexist with an anxiety about something opposite felt by a party to the contract (that marriage is indissoluble), then the loss of the state of certainty (an uncertainty arises, and so a doubt) introduces, already consciously, a difference between the inner will and the objective reality of the canonic marital regime, which will should be expressed in an outspoken declaration during the contracting of a marriage. Now, because of this declaration, views on the dissoluble of marriage, enrooted deeper in the mind of the party to the contract, may become a cause, proportional and serious, closer or more remote, of conscious exclusion of indissolubility by a positive act of will, which means a partial simulation of the marital consensus.[39]

Everything included in the factual grounds for the judgment deserves particular attention. The Ponens has shown here his inherent accuracy and insight, indicating convincingly that, in the case concerned, the man did not yield to a will-determining error while contracting his marriage.

As mentioned above, the case turned out to be quite complex one, requiring a deeper examination in the light of can. 1099 of the CIC and of interpretation trends that have been already developed by the case-law of the Rota.

The plaintiff's admission of his ignorance concerning the canonic indissolubility of marriage, excused due to the secular outlook of his parent and non-religious upbringing (in this context it is obvious he has not been baptized) and, then, his readiness to accept this sacrament and the ultimate withdrawal, had to be evaluated in detail by the judges. An additional difficulty seemed to come from the circumstance of the misleading explanation of the consequences of marriage to the baptized party (Mary) and the unbaptized one (Martin) provided by priest „J", similarly as the plaintiff' silence on the letters concerning the disclosure of his will to get baptized.

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[38] See *Dec. c. Stankiewicz z 25.05.1991*, 83 (1991), p. 284.

[39] IBID., p. 284-285.

The „somewhat" introductory step in the recognition of the „volitional condition" of the man at the time of the contracting of the marriage with the defendant consisted in determining whether there actually was a *error iuris* in reference to the indissolubility of marriage. It was assumed in the judgment that the aforementioned misleading explanation from the presbyter did not affect the view of the plaintiff on the indissolubility of marriage.

As a result of their investigations, the judges assumed that the plaintiff had acted on his own initiative, allowing a possibility that he had acted in error as to the indissolubility of marriage but at most an *error concomitans*. The lack of a cause was an important premise to the dismissal of the possibility of the man's yielding to a will-determining error.

The Ponens pointed in the rationale for the judgment at an important circumstances: the plaintiff's determination to marry the defendant, the harmonious life over several years and the plaintiff's surprise at the divorce initiative from the defendant.

The judgment's assumption of the plaintiff's intention of marrying „for life", in the natural sense, seems very right. And this is sufficient for recognizing validity of the marital consensus as „naturally sufficient". It was also reasonable to presume that the subject matter of the error or ignorance on the part of Martin consisted exclusively of ecclesiastic legal consequences of his marriage (the inability to contract a new, canonically valid, marriage).

The judgment of c. Erlebach of the Rota is an example of a fair, comprehensive and in-depth study into the case evidence.