

Maciej Domański*

Religious Marriage with Civil Effects in Polish Family Law

In the inter-war period, the Polish marriage law consisted of a mosaic of solutions inherited from the partitioning states¹. Civil marriage was the only possible form of marriage in the German civil code (*Bürgerliches Gesetzbuch*), which was in force in the Western provinces, i.e. in the area of the former Prussian partition. In the Southern provinces (in the former Austrian partition apart from Spiš and Orava), where the Austrian civil code (*Allgemeines bürgerliches Gesetzbuch*) was binding, the fundamental form of marriage was by religious ceremony. In addition, the civil form of marriage was available, yet only for persons who did not belong to any acknowledged religious organisation or group and, by way of exception, for people who did belong to acknowledged religious organisations in the event that church authorities denied them the right to marry. In Spiš and Orava, Hungarian matrimonial law was in effect parallel to the regulations of the Austrian civil code, thus allowing civil ceremonies. In the remaining provinces (in the central part of the country with matrimonial law of 1836 and in the East, where Volume X Part I of the Digest of Laws of the Russian Empire of 1832 was in effect), only religious marriages were permitted².

The legal form of marriage became the subject of works of the Codification Commission³. Pursuant to Article 24 of the draft matrimonial law of 1929⁴, marriage was to be contracted either in the civil form before a registrar or before a priest, yet only after preliminary actions had been completed before the competent registrar. This interesting solution, which gave the engaged couple the liberty to choose the type of marriage, and did not impose the civil type, was justified with the constitutional principles of freedom of conscience and religion (Articles 111 and 112 of the Polish Constitution of 1921)⁵.

* PhD, assistant professor at the Department of Civil Law, Faculty of Law and Administration, Warsaw University and at the Institute of Justice.

¹ Poland lost its independence in 1795 and its lands were annexed by three surrounding empires: Russia, Austria and Prussia. It returned as an independent state 123 years later, in 1918.

² Cf. the synthetic analysis of solutions effective in the Polish lands by K. Lutostański, *Zasady projektu prawa małżeńskiego uchwalonego przez Komisję Kodyfikacyjną w dniu 28 maja 1929 r.*, Warszawa 1931. Cf. A. Stawecka-Firlej, *Małżeńskie prawo osobowe ustawodawstwu porozbiorowych obowiązujących w Rzeczypospolitej Polskiej w dwudziestolecie międzywojennym*, „Acta Universitatis Wratislaviensis”, Prawo CCCXV/2, 2013, p. 75.

³ Appointed under the Act of 3 June 1919 (Journal of Laws of 1919, No. 44, Item 315).

⁴ Draft of matrimonial law adopted by the Codification Commission on 28 May 1929 (Codification Commission. Subsection I of Civil Law, Vol. I, No. 1, Warszawa 1931), which never became binding law.

⁵ K. Lutostański, *Zasady...*, p. 39 et seq.

The model proposed by the Codification Commission in 1929 was not adopted in the course of the unification of family law after World War II. Pursuant to Article 11 of the Family Law Decree of 1945, a marriage could be conducted only by a registrar. This solution was determined by the communist political ideology of the time, in particular including the radical secularisation of marital law⁶. It is worth noting that this solution, too, was substantiated by references to Articles 111 and 112 of the Polish Constitution of 1921. The exclusivity of civil marriage was sustained by Article 1 of the Family Code of 1950, and by Article 1 of the Family and Guardianship Code of 1964.

During the communist rule, the legislative body did not only repeal the possibility for a marriage conducted before a priest to obtain civil effects. In addition, the Act of 2 December 1958⁷ introduced Article 50(1) to the Register Office Records Act⁸, pursuant to which a religious marriage could be signed and finalized only after it was solemnised by a registrar, and the priest had obtained an excerpt of the marriage certificate. Pursuant to the newly introduced Article 78(1) of the Family Law Decree, the priest who conducted the religious marriage ceremony prior to receiving the excerpt of the marriage certificate was punishable by detention of up to four months, or by a fine of up to 5 000 PLN. The new solution was explained as “practical”, especially due to the attachment of the majority of society to the religious ceremony and to said ceremony being essentially limited to making a declaration before a clergyman⁹. The discussed solutions were subsequently moved to the Register Office Records Act of 1986 (Articles 63 and 84) and remained in force until 23 May 1989¹⁰.

The possibility to marry by religious ceremony with civil effects was provided for by the Act of 24 July 1998¹¹, which was enforced as of 15 November 1998. It was related to the ratification of the Concordat between the Holy See and the Republic of Poland¹². Pursuant to Article 1(1) of the Family and Guardianship Code (FGC), marriage still can be contracted by making relevant declarations to the head of the register office (or, alternatively, if abroad, to the Polish consul – Article 1(4)). According to Article 1(2) FGC, a man and a woman who are subject to the internal law of a church or any other religious organisation can also marry if they confirm in the presence of a priest their wish to be married that will be simultaneously subject to Polish law, and if subsequently the head of the register office will issue the marriage certificate. When the above conditions are met, the marriage is deemed concluded and binding, as at the time of making the declaration of will before the priest.

⁶ Cf. *Tezy polityczne do prawa małżeńskiego z 1945 r.* [in:] *Prawo małżeńskie. Komentarz*, I. Różański, S.M. Grzybowski (eds.), Kraków 1946, p. 21 et seq.

⁷ Act amending the Register Office Records Act (Journal of Laws of 1958, No. 72, Item 358), which entered into force on 10 December 1958.

⁸ Decree of 8 June 1955 Register Office Records Act (Journal of Laws of 1955, No. 25, Item 151).

⁹ J. Winiarz [in:] *System prawa rodzinnego i opiekuńczego*, J.S. Piątowski (ed.), Wrocław 1985, p. 152.

¹⁰ They were repealed under the Act of 17 May 1989 on the relation of the State to the Catholic Church in the Republic of Poland (Journal of Laws of 1989, No. 29, Item 154).

¹¹ The Act amending the Family and Guardianship Code, the Code of Civil Procedure, the Register Office Records Act, the Act on the relation of the State to the Catholic Church in the Republic of Poland and various other acts (Journal of Laws No. 117, Item 757).

¹² Signed in Warsaw on 28 July 1993 (Journal of Laws of 1998, No. 51, Item 318), ratified on 23 February 1998, effective as of 25 April 1998.

This solution is applied when a ratified international agreement or a legislative act governing the relations between the state and a church or another religious organisation provides for the possibility that a marriage subject to the internal law of that church or other religious organisation has the same effects as a marriage conducted by the head of the register office (Article 1(3) FGC). *De lege lata*, such possibility applies to eleven churches and religious organisations in Poland¹³.

The regulations of Article 1(1) and Article 1(2) FGC provide for two separate (albeit based on legally identical declarations of the bride and groom¹⁴) legal events that have the same effect – the establishment of the legal relationship of marriage subject to the provisions of the Family and Guardianship Code. An analysis of Article 1(2) FGC leads to the conclusion that entering into marriage in the form it provides for establishes (in typical circumstances) two legal relationships. One relationship is religious and subject to religious norms, and the other is secular and governed in particular by the provisions of the Family and Guardianship Code¹⁵. The regulation clearly differentiates between marriage under the internal law of a church or another religious organisation and marriage under Polish law. As accurately pointed out in subject literature, stipulating that only one legal relationship is established pursuant to Article 1(2) FGC, namely a religious marriage, which would additionally have effects under Polish law and cause a significant conflict with regard to the common courts' competence to adjudicate on the deficiency of marriage governed by the internal provisions of a church or religious organisation¹⁶. At the same time, it would cause a problem of effectiveness of ecclesiastical court

¹³ The Catholic Church (Article 15a of the Act of 17 May 1989 on the relation of the State to the Catholic Church in the Republic of Poland, consolidated text, Journal of Laws of 2013, Item 1169 with amendments, and Article 10 of the Concordat), the Polish Autocephalous Orthodox Church (Article 12a of the Act of 4 July 1991 on the relation of the State to the Polish Autocephalous Orthodox Church in the Republic of Poland, Journal of Laws of 2014, Item 1726), the Evangelical Church of the Augsburg Confession (Article 12a of the Act of 13 May 1994 on the relation of the State to the Evangelical Church of the Augsburg Confession in the Republic of Poland, Journal of Laws of 2015, Item 43), the Evangelical Reformed Church (Article 8a of the Act of 13 May 1994 on the relation of the State to the Evangelical Reformed Church in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 483), the Evangelical Methodist Church (Article 11a of the Act of 30 June 1995 on the relation of the State to the Evangelical Methodist Church in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1712), the Baptist Union (Article 10a of the Act of 30 June 1995 on the relation of the State to the Baptist Union in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 169 with amendments), the Seventh-day Adventist Church (Article 10a of the Act of 30 June 1995 on the relation of the State to the Seventh-day Adventist Church in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1889), the Polish Catholic Church (Article 9a of the Act of 30 June 1995 on the relation of the State to the Polish Catholic Church in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1599), the Union of Jewish Religious Communities (Article 9a of the Act of 20 February 1997 on the relation of the State to the Union of Jewish Religious Communities in the Republic of Poland, consolidated text, Journal of Laws of 2014, Item 1798), the Old Catholic Church of the Mariavites (cf. Article 8a of the Act of 20 February 1997 on the relation of the State to the Old Catholic Church of the Mariavites in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 14), and the Pentecostal Church in Poland (Article 11a of the Act of 20 February 1997 on the relation of the State to the Pentecostal Church in the Republic of Poland, consolidated text, Journal of Laws of 2015, Item 13).

¹⁴ On the scope of the legal character of the declarations, see: M. Domański [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, K. Osajda (ed.), Warszawa 2017, p. 9 et seq.

¹⁵ This view is represented by i.a. A. Mączyński, *Konkordatowa forma zawarcia małżeństwa*, „Rejent” 2003, No. 10, p. 139; J. Gajda [in:] *System Prawa Prywatnego. Vol. 11. Prawo rodzinne i opiekuńcze*, T. Smoczyński (ed.), Warszawa 2014, p. 118; T. Smoczyński, *Prawo rodzinne*, Warszawa 2016, p. 33; M. Nazar [in:] *Prawo rodzinne*, J. Ignatowicz, M. Nazar (eds.), Warszawa 2016, p. 193; a different view is represented by K. Pietrzykowski [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, K. Pietrzykowski (ed.), Warszawa 2018, p. 118.

¹⁶ W. Góralski, *Konstrukcja prawna małżeństwa zawieranego w trybie art. 1 § 2 k.r.o.* [in:] *Prawo rodzinne w dobie przemian*, P. Kasprzyk, P. Wiśniewski (eds.), Lublin 2009, p. 114.

decisions on the deficiency of religious marriages from the perspective of state law¹⁷. In light of the Polish civil law provisions as well as those of Article 10(3) and (4) of the Concordat, it would be hard to accept the conclusion that decisions of the courts or authorities of churches and religious organisations should have a direct effect on marriage under state law, or that state courts could have analogous power when deciding on the legal existence of religious marriages. Furthermore, it ought to be noted that Article 1(2) pertains not only to the canonical form of marriage, but also to ten other relationships under the respective provisions of various churches and religious organisations. These solutions form a mosaic of divergent notions of marriage, with various degrees of regulation and differing approaches to e.g. the possibility of divorce. If we accepted that only one marriage (religious marriage) is contracted pursuant to Article 1(2) FGC, it would mean that there is not one, but twelve different legal relationships of marriage under Polish law (one governed by the provisions of the Family and Guardianship Code and eleven governed by various regulations adopted by churches and religious organisations). Such a conclusion must be rejected.

Pursuant to the already quoted Article 1(2) FGC, marriage is concluded when the man and the woman who are marrying under the internal law of a church or another religious organisation in the presence of a priest, declare the will to simultaneously marry under Polish law¹⁸. The regulation of the legal event of contracting marriage pursuant to Article 1(2) FGC includes elements of entering into a religious marriage. Entering into marriage under Polish law cannot be separated from entering into religious marriage, for instance in the course of performing other activities or religious ceremonies. Certainly, the manner of marrying under the internal law of a church or another religious organisation, the substantive conditions of its validity or the ceremony are governed by the internal law of the relevant church or other religious organisation¹⁹.

Another crucial issue is the impact of the potential deficiency of marriage under the internal law of a church on the legal event of contracting a civil marriage in a manner set forth in Article 1(2) FGC. The subject literature is clearly dominated by a view following the grammatical interpretation of the analysed provision, which stipulates “entering” into religious marriage and not its “conclusion”. It has to be acknowledged that what matters from the perspective of concluding a civil marriage is declaring the submission to the solemnisation of the religious marriage, regardless of the event’s effects in the area of the internal law of the church or religious organisation. The nullity or other deficiency of a religious marriage does not affect the existence of the marriage under Polish law (of course provided that the conditions set forth in Article 1(2) FGC are met). Therefore it is possible

¹⁷ A. Mączyński, *Oświadczenia małżonków jako element zawarcia małżeństwa w formie konkordatowej* [in:] *Prawo rodzinne w Polsce i w Europie*, P. Kasprzyk (ed.), Lublin 2005, p. 81.

¹⁸ The below analysis omits issues common for both civil and religious marriage, i.e. the issue of the difference of sex of the persons to be married (cf. M. Domański, *Rozdzielność płci nupturientów jako przesłanka istnienia małżeństwa (art. 1 k.r.o.)*, „Kwartalnik Prawa Prywatnego” 2013, No. 4, p. 829 et seq.; M. Domański [in:] *Kodeks...*, p. 19 et seq., and the publications cited therein) as well as the problem of the legal character of the declarations made by the persons entering into marriage.

¹⁹ J. Strzebińczyk, *Zawarcie małżeństwa wyznaniowego podlegającego prawu polskiemu*, „Rejent” 1999, No. 4, p. 18.

that the discussed procedure results in the creation of only one legal relationship: marriage under state law. Moreover, the annulment or termination of a religious marriage has no impact on the existence of a marriage governed by the provisions of the Family and Guardianship Code²⁰.

The position presented above is strongly supported not only by the grammatical, but also by the systematic interpretation. Article 10(3) of the Concordat specifically provides for the exclusive jurisdiction of ecclesiastical courts in matters concerning the validity of the canonical form of marriage²¹. Admitting the assessment of the validity of a religious marriage in a procedure to declare the non-existence of marriage (even if only in a so-called preliminary matter) raises fundamental doubts in light of the provision of the Concordat mentioned above and of the principle of the autonomy of churches and religious organisations (Article 25(3) of the Polish Constitution). The conclusion that the validity of a marriage under Polish law would be dependent on meeting the highly differing requirements specified in the internal regulations *de lege lata* of eleven churches and other religious organisations would be most problematic.

The key element of the legal event provided for in Article 1(2) FGC are the declarations of will to simultaneously marry under Polish law. They cannot be reduced to e.g. only a request to the head of the register office to make out the marriage certificate, or to the clergyman to present the documents required for issuing the marriage certificate to the register office²². The person to be married must declare his or her will to produce the effect of entering into marriage under state law with the person with whom he or she “has pursued” (or rather is pursuing) the procedure of contracting marriage governed by the internal law of the relevant church or religious organisation. Therefore, the content of the declaration is similar to the content of the declaration made pursuant to Article 1(1) FGC²³.

Pursuant to Article 1(2), declarations of will to enter into marriage under Polish law should be made “when entering into” religious marriage. The moment of making the declarations has raised doubts ever since the regulation became effective²⁴. The expression referred to above involves a precise temporal coincidence of making declarations of will to enter into marriage under Polish law and into religious marriage. Yet the provision does not give details on the schedule of the

²⁰ This view is represented by: M. Nazar, *Zawarcie małżeństwa według prawa polskiego z uwzględnieniem postanowień podpisanego 28 lipca 1993 r. konkordatu między Stolicą Apostolską i Rzeczpospolitą Polską*, „Kwartalnik Prawa Prywatnego” 1996, No. 3, p. 478 et seq.; A. Mączyński, *Konkordatowa...*, p. 138; K. Piasecki [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, K. Piasecki (ed.), Warszawa 2011, p. 68; W. Góralski, *Konstrukcja...*, p. 113 et seq.; T. Sokołowski, *Zastosowanie przepisów regulujących zawieranie małżeństw ‘konkordatowych’* [in:] *Prawo rodzinne w Polsce i w Europie: zagadnienia wybrane*, P. Kasprzyk (ed.), Lublin 2005, p. 89; J. Gajda [in:] *System...*, p. 128.

²¹ See: G. Jędrejek, *Regulacja instytucji małżeństwa w prawie kanonicznym i świeckim*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2008, No. 2, p. 55 et seq.

²² A. Mączyński, *Oświadczenia...*, p. 78.

²³ Family law scholars have expressed the view that the possibility to make a declaration pursuant to Article 1 (2) FGC (simultaneously entering into marriage under state law) may be qualified as subjective right; the opinion was voiced by: H. Haak, *Zawarcie małżeństwa. Komentarz*, Toruń 1999, p. 18. It was supported by K. Pietrzykowski [in:] *Kodeks...*, p. 118 and onwards. This stance may be subject to doubts if we consider the classical civil law definitions of rights (entitlements) to alter a legal relationship as subjective rights. It seems that the analysed provision is rather a special competence regulation that confirms the fundamental area of an individual's autonomy under private law. See: M. Domański and the publications cited therein.

²⁴ See: J. Gajda [in:] *System...*, p. 125 et seq.; A. Mezglewski, A. Tunia, *Wyznaniowa forma zawarcia małżeństwa cywilnego*, Warszawa 2007, p. 159 et seq.

actions. Therefore, it ought to be assumed that the declarations may be made directly before, in the course of or directly after the finalization of the religious marriage²⁵. However, the connection between entering into religious marriage and making declarations of will to enter into civil marriage may not be broken. In the event that e.g. the declarations are made on a different day than the solemnisation of religious marriage, it has to be assumed that no marriage under Polish law is then concluded, even if the head of the register office makes out the marriage certificate (*matrimonium non existens*).

The declarations must be made in person by means of any action that sufficiently reveals the will (Article 60 in conjunction with Article 65(1) of the Civil Code). By way of exception, the declaration may be made by a legal representative (Article 6 FGC)²⁶. No “preferred” manner of making declarations pursuant to Article 1(2) FGC has been specified, not even in detailed provisions (Article 8 FGC concerns solely civil marriages). The manner and the specific moment of making the declarations depend on the ceremony of the individual churches and religious organisations (obviously, the regulations may not be contrary to state law provisions)²⁷. Due to the significance of the declarations and the public character of entering into marriage, oral declarations are most suitable. However, it is admissible (under the principle of freedom of form) to make declarations by signing a certificate pursuant to Article 8(2) FGC. Although the provision distinguishes between making the declaration, and signing the certificate (which is supposed to certify that the declarations have been made), it is of purely organisational character. If the certificate is signed by both bride and groom when entering into religious marriage, it has to be assumed that the declarations were made and that it is impossible to effectively request that the marriage be declared non-existent.

The declarations of will to enter into marriage under Polish law must be made to a “clergyman”, who acts as an officiator and plays a similar role to the head of the register office in the case of civil marriages. Neither the Family and Guardianship Code nor other state provisions define the concept of clergyman or priest. It requires a reference to the internal law of the individual churches and religious organisations. A direct reference to the internal regulations with regard to the definition of the priest (uniformly structured) is also present in all legislative acts that govern the relations between the state and churches (religious organisations) and that provide for the possibility of religious marriage to have civil effects²⁸. Due to the complexity and ambiguity of the internal regulations of churches (other religious organisations), in Article 91 of the Register Office Records Act, the legislative body empowered the minister competent for internal affairs to announce in the Official Journal of the Republic of Poland “Monitor Polski” the list of positions invested with the right to accept declarations of will to enter into marriage and to issue certificates based on which the certificate of marriage

²⁵ The view was expressed by: M. Nazar [in:] *Prawo rodzinne*, J. Ignatowicz, M. Nazar (eds.), Warszawa 2016, p. 198.

²⁶ On that subject see M. Domański [in:] *Kodeks...*, p. 71 and following and the publications cited therein.

²⁷ See for instance the Instruction of the Polish Episcopal Conference for Priests with Regard to Religious Marriage of 1998, www.archpoznan.pl/pdf/synod/t207.pdf.

²⁸ Cf. footnote 16.

contracted pursuant to Article 1(2) and (3) FGC can be made out. The register relies on information received from the competent representatives of churches and other religious organisations²⁹. According to the latest announcement³⁰, the positions invested with the right to accept declarations of will to enter into marriage are: in the Catholic Church – a local ordinary (diocesan bishop, apostolic administrator, diocesan administrator, vicar general, episcopal vicar), military ordinary, parish priest, parish administrator, properly delegated priest; in the Polish Autocephalous Orthodox Church: bishop, parish priest, vicar authorised by the parish priest; in the Evangelical Church of the Augsburg Confession: any ordained cleric (bishop, priest, deacon); in the Evangelical Reformed Church: any cleric; in the Evangelical Methodist Church: pastor; in the Baptist Union: pastor; in the Seventh-day Adventist Church: elders; in the Polish Catholic Church: diocesan bishop, diocesan administrator, parish priest, parish administrator; in the Union of Jewish Religious Communities: rabbi, sub-rabbi; in the Old Catholic Church of the Mariavites: bishop, parish priest, administrator; in the Pentecostal Church in Poland: pastor, deacon, presbyter.

The method of specifying the positions invested with the authority to accept declarations pursuant to Article 1(2) FGC does not, however, dispel numerous doubts. For instance in the case of the Catholic Church, stipulating that a “properly delegated priest” is a “priest” hardly explains the concept. Moreover, the expression fails to ensure legal certainty and to properly protect the bride and groom from making declarations to an unauthorised person. The list published by the Minister of Internal Affairs is additionally imprecise from the perspective of the internal regulations of e.g. the Catholic Church³¹. A better solution would be to compile a public (e.g. maintained by the Minister of Internal Affairs) and open register with the names of the clergymen authorised to accept declarations pursuant to Article 1(2) FGC. The data recorded in the register would be obtained from churches and other religious organisations and the bride and groom could directly verify whether the person to whom they intend to make their declarations is recorded in the register.

The legal situation with regard to specifying the notion of the clergyman is fairly complex. First, the Family and Guardianship Code offers no definition. Second, the individual acts on the relation to churches (religious organisations) directly refer to their internal regulations. Finally, the public register of positions does not entirely comply with the regulations of individual churches and other religious organisations. According to the legislative acts governing the state’s relation with various churches and religious organisations, there is no doubt that the priest to whom the persons to be married make their declarations pursuant to Article 1(2) FGC requires authorisation under the internal regulations of the church or another

²⁹ A separate register of positions invested with the authority to accept declarations of will to enter into marriage and a different register of positions invested with the authority to issue certificates that are the basis for issuing marriage certificates has been stipulated *de lege lata*.

³⁰ Announcement of the Minister of Internal Affairs of 5 February 2015 publishing the register of positions invested with the authority to accept declarations of will to enter into marriage and to issue certificates that are the basis for issuing marriage certificates pursuant to Article 1(2) and (3) FGC, Official Journal of the Republic of Poland “Monitor Polski” of 2015, Item 230.

³¹ Cf. A. Mezglewski, *Udział świadka urzędowego w procedurze zawarcia małżeństwa w formie wyznaniowej pod reżimem nowej ustawy o aktach stanu cywilnego*, „Przegląd Prawa Wyznaniowego” 2016, No. 8, p. 107 et seq.

religious organisation. In that context, the data in the cited register remains purely informational. Such a position does not, however, determine the result of an insufficient authorisation of a priest to conduct marriage under Polish law.

A view has been voiced in subject literature that a lack of relevant competence of the cleric under the internal regulations of the church or other religious organisation to accept declarations pursuant to Article 1(2) FGC results in the marriage not being formalized (*matrimonium non existens*)³². This theory is highly disputable. Article 2 FGC unambiguously connects the sanction of the non-existence of marriage solely with a breach of the provisions of Article 1 FGC. The conditions (from the perspective of the sanction) of the non-existence of marriage must be subject to precise interpretation. Extending them to cover circumstances not listed in Article 1 FGC would be unfounded. Article 1(2) FGC does not stipulate a requirement that the priest to whom the relevant declarations are made must be competent to accept such declarations under the internal regulations of the church or other religious organisation. The only condition included in the provision is that the person has to be an ordained priest. Similarly, sentence 2 of Article 1(2) clearly indicates that marriage is deemed binding if the conditions listed in sentence 1 are met. Obviously, determining whether the person is a priest (within the meaning of Article 1 FGC) necessarily involves verification based on the internal regulations of the relevant religious organisation. According to the discussed interpretation, a marriage under Polish law is not binding (*matrimonium non existens*) only if the relevant declarations are made to a person who is not a priest within the meaning of the internal regulations of the church (religious organisation) in whose ceremony the religious marriage is being contracted. If the declarations are made to a priest who is not competent to accept them, however, the marriage is deemed binding (provided that the remaining conditions are met). This thesis is also a consequence of acknowledging that the deficiency of a religious marriage does not affect the formation of a civil marriage. Apart from the argument offered by the grammatical interpretation, the above theory is furthermore supported by systematic arguments – predominantly by the principle of legal certainty. Making the existence of marriage under Polish law conditional upon the internal regulations of churches and other religious organisations, which are often difficult to ascertain, would result in legal uncertainty. The bride and groom would often have very limited possibilities of finding out (even if exercising the highest standard of due diligence) whether the priest at a given time and place is authorised to accept their declarations. The head of the register office would be frequently completely deprived of such a possibility. Let us assume that this would entail serious difficulties even in a procedure to declare a marriage non-existent (which may, after all, take place many years after the marriage certificate was issued).

Fundamental doubts in the family law doctrine have been raised with regard to the character of issuing the marriage certificate when the marriage is contracted pursuant to Article 1(2) FGC. According to the prevailing view, the marriage certificate being issued by the head of the register office is a condition of a civil

³² A. Mezglewski, A. Tunia, *Wyznaniowa...*, p. 133; A. Tunia, *Realizacja przesłanki koniecznej dotyczącej udziału czynnika oficjalnego przy zawieraniu małżeństw w trybie art. 1 § 2 k.r.o.* [in:] *Prawo rodzinne w dobie przemian*, P. Kasprzyk, P. Wiśniewski (eds.), Lublin 2009, p. 133.

marriage being contracted pursuant to Article 1(2) FGC³³. The Supreme Court, too, adopted the stance that making out the marriage certificate is constitutive³⁴.

Evidently, the view of the majority has to be adopted in this context. The content of Article 1(2) FGC is clear: “marriage is binding when (...) subsequently the head of the register office issues the marriage certificate. If the conditions listed above are met, the marriage is deemed finalized and effective at the moment when the declaration of will was made in the presence of the clergyman”. Article 2 FGC directly connects the failure to comply with the provisions of Article 1 with the possibility to request the marriage be declared non-existent. It is difficult to say how the effect of contracting marriage pursuant to Article 1(2) FGC could have been made more evidently conditional on the marriage certificate being issued. The element is necessary for the effect in the form of marriage to occur. Yet the requirement of the marriage certificate being made out itself may be variously classified. According to subject literature on acts in law, the character of requirements on which the effectiveness of a legal act is conditional, such as the constitutive entry in the register or the consent of a public body, is subject to various interpretations. According to one theory, they are deemed conditions of effectiveness external with regard to the legal act itself³⁵. Other authors state that these elements, together with the declaration of will, are parts of the “state of reality” that constitute the legal act³⁶. These differences are significant not only in terms of theory. If we assume that e.g. the entry in the relevant register constitutes a part of the legal act itself, consequently the act cannot be deemed performed prior to the registration, and thus – it does not exist. According to the other view, an act is deemed performed (at the moment when the declaration of will is made), yet ineffective until the condition of its effectiveness, e.g. the entry into the register, is met³⁷. If we perceive the fundamental difference between a legal act and a legal event of contracting marriage pursuant to Article 1(2) FGC³⁸, it seems that the “state of reality”³⁹ of the act of marriage in the analysed case consists of declarations made

³³ H. Haak, *Zawarcie...*, p. 20 et seq.; A. Mezglewski, A. Tunia, *Wyznaniowa...*; W. Borysiak [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, J. Wierciński (ed.), Warszawa 2014, p. 28; M. Nazar [in:] *Prawo...*, p. 199 et seq.; J. Strzebinczyk, *Prawo rodzinne*, Warszawa 2016, p. 80; T. Smoczyński, *Konstytucyjny charakter sporządzenia aktu małżeństwa konkordatowego*, „Państwo i Prawo” 2006, No. 3, p. 100; T. Smoczyński, *Prawo...*, p. 35 et seq.; G. Jędrejek, *Kodeks rodzinny i opiekuńczy. Małżeństwo. Komentarz do art. 1–61(6)*”, LEX 2013, Komentarz do art. 1 k.r.o., section 3; T. Sokołowski, *Zastosowanie...*, p. 90; K. Gromek, *Kodeks rodzinny i opiekuńczy. Komentarz*, Warszawa 2016. A differing view has been expressed in subject literature, as well, according to which issuing the marriage certificate is of declarative nature only. It is represented by: A. Mączyński, *Znaczenie...*, p. 312; R.A. Domański, *Konstytucyjny czy deklaracyjny charakter. Rozważania na tle wyroku SN z 3.3.2004 r., III CK 346/02*, „Orzecznictwo Sądów Polskich” 2005, No. 2, Item 23, p. 98; K. Pietrzykowski [in:] *Kodeks...*, p. 119 et seq.; A. Zielonacki [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, H. Dolecki, T. Sokołowski (eds.), Warszawa 2013, p. 25; J. Wójcik, *Charakter prawny sporządzenia aktu małżeństwa z art. 1 § 2 k.r.o. w perspektywie prawnoporównawczej*, „Przegląd Sądowy” 2016, No. 7–8, p. 126.

³⁴ In the judgment of 3 March 2004, III CK 346/02, „Orzecznictwo Sądów Polskich” 2005, No. 2, Item 23.

³⁵ J. Preussner-Zamorska, *Nieważność czynności prawnej w prawie cywilnym*, Warszawa 1983, p. 47.

³⁶ A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 2001, p. 254; J. Gwiazdomorski, *Próba korektury pojęcia czynności prawnej*, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z wydziału i ochrony własności intelektualnej” 1974, No. 1, p. 58; Z. Radwański [in:] *System Prawa Prywatnego. Vol 2. Prawo cywilne – część ogólna*, Z. Radwański (ed.), Warszawa 2008, p. 33 et seq.

³⁷ R. Trzaskowski [in:] *Kodeks cywilny. Komentarz. Część ogólna*, Vol. I, J. Gudowski (ed.), Warszawa 2014, p. 332.

³⁸ On this subject see: M. Domański [in:] *Kodeks...*, p. 13 et seq.

³⁹ The expression “material facts” in the context of a legal act is sometimes questioned, cf. J. Preussner-Zamorska, *Nieważność...*, p. 69.

by the woman and the man to a priest in the event of a religious marriage. The specific act of entering into marriage is deemed performed at that moment, only its effectiveness was made conditional on an additional element – the marriage certificate being issued. The content of Article 1(2) FGC likewise indicates such interpretation (according to which the issued marriage certificate is an external condition of the effectiveness of the legal act of marriage). Marriage is formalized when two elements connected with the conjunction “and” occur (“and subsequently the head of the register office issues the marriage certificate”).

If relevant declarations were made but the marriage certificate was not issued, the situation can be compared to a legal act performed under a conditional precedent⁴⁰. According to one of the views presented in subject literature, from the moment of the declaration (of will) being made and prior to the condition being met, a unique and mutually legally binding relationship between the parties is formed⁴¹. Irrespective of the interpretation, the parties are bound by their declarations. If we apply this view to the situation of entering into marriage, it has to be acknowledged that during the period of this special *pendente conditione*, the bride and the groom are bound by their declarations of will to commit to marriage. It is true that the marriage is not effective until one more condition is met. However, the two persons cannot be treated as persons who have made no declarations. Therefore, it is impossible to state that the act of marriage was not performed. It has only failed to bring the legal effect of the legal relationship of marriage. That is why the head of the register office should refuse to accept the declarations of will to formalize marriage with other persons or to issue a certificate stating the lack of circumstance precluding marriage (Article 8(1) FGC).

Some scholars represent the view that contracting a marriage is dependent not only on the issued marriage certificate, but also on the five-day limit for the priest to forward the certificate as the basis for issuing the marriage certificate (Article 8(3) FGC). Even if the marriage certificate was issued, yet on the basis of a certificate delivered after the relevant deadline, the marriage may be declared as legally non-existent⁴². This view appears rather controversial. Article 1(2) FGC does not provide for a condition of entering into marriage within the time limit specified in Article 8 FGC. The provision stipulates solely that the marriage certificate has to be issued. The possibility to declare a marriage non-existent is related only to a failure to meet the requirements specified in Article 1 FGC. The time limit for forwarding the certificates is set forth in Article 8 FGC, which is but an administrative (processing) regulation. Treating administrative requirements as conditions of the existence of marriage not only is contrary to the content of Articles 1 and 2 FGC, but also may upset the entire system of conditions of the legal act of marriage. If forwarding the certificates within the relevant time limit is deemed such a condition, then nothing obstructs e.g. the required presence of witnesses (Article 7(1) FGC) from being acknowledged as another condition confirming marriage.

The theory of the constitutive character of the time limit set forth in Article 8(3) FGC has been justified with the content of Article 10 of the Concordat⁴³. According

⁴⁰ This view with regard to acts in law which require e.g. entry in the register for their effectiveness expressed by R. Trzaskowski [in:] *Kodeks...*, p. 333.

⁴¹ B. Swaczyna, *Warunkowe czynności prawne*, Warszawa 2013, p. 213.

⁴² M. Nazar [in:] *Prawo...*, p. 199 et seq.; K. Piasecki [in:] *Kodeks...*, p. 100.

⁴³ M. Nazar [in:] *Prawo...*, p. 200.

to Article 10(1)(3) of the Concordat, the canonical form of marriage has the same effects as contracting marriage under Polish law, i.a. provided that the marriage was recorded in the register upon request filed with the registrar within five days of the marriage being concluded. It ought to be noted, however, that the content of the entire Article 10 does not adhere with the structure of marriage under Polish law. In particular, it was literally determined that the lack of “impediments” under Polish law (a term unknown to the Family and Guardianship Code) is a condition of entering into marriage. Yet the crucial argument in favour of rejecting the grammatical interpretation of Article 10 of the Concordat is the content of section 6 of the same. The provision evidently stipulates that the article is not a self-executing regulation⁴⁴ and that its application is conditional on the adoption of a legislative act (Article 91(1) *in fine* of the Polish Constitution). In order to perform the obligations under the Concordat, the legislature incorporated its solutions into and adapted them to the national legal system. Article 10 of the Concordat is not directly applicable, and any attempts to the contrary would lead to bizarre and hardly acceptable solutions (lack of martial “impediments” as a condition to contract marriage).

Taking into account the above argumentation, obviously the clergyman is obliged to forward the relevant certificates to the register office within five days of the marriage being contracted (Article 8(3) FGC) and the head of the register office should refuse to issue the marriage certificate if the time limit has not been met (Article 87(5) of the Register Office Records Act). However, despite the breach of the regulations mentioned, the marriage certificate will be issued, the marriage will be binding, and no requests for declaring its non-existence can be made⁴⁵.

Issuing the marriage certificate results in the condition of the effectiveness of the legal event described in Article 1(2)(1) FGC being met. Marriage is deemed contracted *ex tunc* at the moment when the declarations of will to enter into marriage under Polish law are made (as unambiguously stipulated in Article 1(2)(2) *in fine* FGC, according to which marriage is contracted when the declarations of will to enter into marriage under Polish law are made before the priest, and not when the religious marriage is contracted)⁴⁶. According to this structure, the precise moment of entering into religious marriage may not be identical with the moment of entering into marriage under Polish law. Depending on the time when the declarations are made, the civil marriage may begin to exist directly before as well as directly after the religious marriage.

It should be noted that there is a discrepancy between the provisions of Article 1(2)(1) FGC and those of Article 1(2)(2) FGC in terms of specifying the exact moment of the act of marriage. Sentence 1 refers to the declaration of will to “simultaneously” enter into religious and civil marriage. Sentence 2 specifies the moment as described above. It ought to be assumed, however, that while sentence 1 determines the mechanism of entering into marriage as such (by specifying the elements of the legal event), sentence 2 indicates specifically and precisely the

⁴⁴ Cf. A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, p. 566 et seq.

⁴⁵ The view is supported by W. Borysiak [in:] *Kodeks...*, p. 29.

⁴⁶ The view is clearly expressed by M. Nazar [in:] *Prawo...*, p. 201.

moment when the effects of that event occur. Insofar, sentence 2 ought to be seen as *lex specialis*. Yet the problem discussed above is chiefly of theoretical concern. It ought to be noted that both the certificate confirming that the declarations of will to enter into marriage were made before the priest⁴⁷ and the marriage certificate, pursuant to Article 88(1)(2) of the Register Office Records Act, only specify the date and place of the declarations, but not their exact hour (as is done, for example, when specifying the moment of death in the death certificate – Article 95(1)(4) of the Register Office Records Act).

Article 1(2) FGC does not repeat the requirement that the persons to be married must be simultaneously present when the declarations are made, while Article 1(1) FGC stipulates that explicitly. The evidently prevailing view in the doctrine is that the requirement of simultaneous presence is obvious and that Article 1(1) FGC should be applied in this respect⁴⁸. Yet finding the right answer to that problem is not that simple. The legislature did not include the requirement that the persons to be married must be simultaneously present when the declarations are made in the content of Article 1(2) FGC, but it did repeat the requirement of the difference of sex. If the conditions set forth in Article 1(1) FGC were to be automatically applied when entering into marriage pursuant to Article 1(2) FGC, the repeated requirement of the difference of sex would be superfluous and breach the principle of legislative rationality. The grammatical interpretation indicates clearly that sections 1 and 2 provide for two autonomous legal events that lead to the act of marriage, and that they cannot be treated as one. Moreover, the content of Article 2 FGC and the character of the particularly acute sanction of the non-existence of marriage demand that the conditions set forth in both Article 1(1) and (2) FGC be interpreted most precisely. In addition, it is hard to treat the requirement of simultaneous presence as obvious if no such condition was present in the Family Code of 1950 – it was introduced only to Article 1 FGC (and later to Article 1(1) FGC).

It seems acceptable to interpret Article 1(2) FGC in the following manner: the question of the simultaneous presence of the persons to be married depends on the internal regulations of the relevant church or other religious organisation. In the event that such regulations admit that the bride and groom are not simultaneously present during the solemnisation of religious marriage, while the remaining conditions of contracting marriage under Polish law are met, civil marriage ought to be deemed valid and binding. It would only be crucial that the declarations of will to enter into marriage under Polish law be made in the course of contracting religious marriage and not at any other time. If, however, the internal law of the relevant church or other religious organisation does not provide for the possibility that the persons to be married are not present simultaneously (at the same time and place), the conditions of entering into marriage under the internal law of the church (religious organisation) or of making declarations when contracting

⁴⁷ Annex 27 to the Regulation of the Minister of Internal Affairs of 29 January 2015 on model documents concerning civil registration, Journal of Laws of 2015, Item 194.

⁴⁸ A. Zielonacki [in:] *Kodeks...*, p. 23; W. Borysiak [in:] *Kodeks...*, p. 28; J. Gajda [in:] *System...*, p. 119; H. Haak, *Zawarcie...*, p. 17; J. Strzebińczyk, *Zawarcie...*, p. 24; different view was expressed by K. Pietrzykowski [in:] *Kodeks...*, p. 118. Doubts as to the requirement of simultaneous presence were raised by T. Sokołowski. Ultimately, however, he expressed the view that it ought to be extended to cover Article 1(2) FGC, as well: T. Sokołowski, *Zastosowanie...*, p. 87.

religious marriage are not met. Such marriage would be void. An analogous principle (which makes the conditions depend on the internal regulations of a church or another religious organisation) cannot obviously apply to the requirement of the difference of sex of the persons to be married (as results directly from Article 1(2)(1) FGC).

Almost twenty years have passed since the possibility to enter into marriage by religious ceremony with civil effects was introduced into the Polish legal system. It has become a most significant element of the legal reality over time. It ought to be noted that as many as 121 884 out of 193 455 marriages concluded in Poland in 2016 were contracted by religious ceremony (63%)⁴⁹. If we considered only the first marriages of both bride and groom, the rate would be even higher⁵⁰. The indicated shortcomings and interpretative doubts have not affected marital stability. According to the data of the Ministry of Justice, only seven cases concerning validity of marriage were filed with Polish courts in 2016. Nine such cases were examined and only three petition requests were granted. The stability of the legal situation as well as the social attachment to the existing regulation should be taken into account in the course of any potential works on amending personal marriage law.

Abstract

Maciej Domański, *Religious Marriage with Civil Effects in Polish Family Law*

The article presents and analyses the issue of religious marriage with civil effects (Article 1(2) FGC), introduced into Polish law by the Act of 24 July 1998. Ever since the Act became effective (on 15 November 1998), people who wish to marry have been able to enter into civil marriage (Article 1(1) FGC), or to marry under state law in the course of contracting marriage under the internal law of a church or another religious organisation (currently such possibility exists for eleven churches and religious organisations). The article analyses the individual conditions of entering into marriage pursuant to Article 1(2) FGC. It discusses the following issues: the moment when the declarations of will to simultaneously contract marriage under Polish law should be made, the concept of the priest and the impact of the deficiency of religious marriage on marriage under state law. Particular doubts have been raised in family law doctrine with regard to the legal nature of the marriage certificate being issued by the head of the register office. The article lists arguments in favour of the prevailing view, according to which issuing the marriage certificate is of constitutive nature and its absence results in the invalidity of marriage under Polish law. In addition, the text presents the view that the simultaneous presence of the bride and groom when making the required declarations for entering into religious marriage is not a condition stipulated in Article 1 FGC, but may possibly result from the internal regulations of the church or other religious organisation.

Keywords: *marriage, religious marriage, head of the register office, marriage certificate*

⁴⁹ Data according to the Demographic Yearbook 2017 of the Central Statistical Office.

⁵⁰ A great majority of those marriages were contracted pursuant to the provisions of the Code of Canon Law (99%). Only 1 163 marriages were formed by ceremony of churches and religious organisations other than the Catholic Church. The majority of those (500) followed the rite of the Polish Autocephalous Orthodox Church and the least (7) – of the Evangelical Methodist Church.

Streszczenie

Maciej Domański, Zawarcie małżeństwa w formie wyznaniowej ze skutkiem cywilnym w polskim prawie rodzinnym

W artykule przedstawiona została problematyka zawarcia małżeństwa w formie wyznaniowej ze skutkiem cywilnym (art. 1 § 2 k.r.o.). Możliwość taka została wprowadzona do polskiego prawa ustawą z 24.07.1998 r. Od chwili jej wejścia w życie (15.11.1998 r.) poza formą cywilną (art. 1 § 1 k.r.o.) nupturienti mogą zawrzeć związek małżeński regulowany przepisami państwowymi przy zawieraniu związku małżeńskiego podlegającego prawu wewnętrznemu kościoła albo innego związku wyznaniowego (obecnie możliwość taka została przewidziana dla jedenastu kościołów i związków wyznaniowych). W artykule zostały przeanalizowane poszczególne przesłanki zawarcia małżeństwa zgodnie z art. 1 § 2 k.r.o. Przedstawiono zagadnienia: chwili w której powinny zostać złożone oświadczenia jednoczesnego zawarcia małżeństwa podlegającego prawu polskiemu, pojęcia duchownego, jak również wpływu wadliwości małżeństwa wyznaniowego na małżeństwo podlegające regulacjom prawa państwowego. Szczególne wątpliwości doktryny prawa rodzinnego dotyczą charakteru prawnego sporządzenia aktu małżeństwa przez kierownika USC przy analizowanej formie zawarcia małżeństwa. W artykule wskazano argumenty przemawiające na rzecz dominującego poglądu zakładającego, że sporządzenie aktu małżeństwa ma charakter konstytutywny a jego brak powoduje, iż małżeństwo podlegające prawu polskiemu nie zostaje zawarte. W tekście zaprezentowano również pogląd zgodnie z którym jednoczesna obecność nupturientów przy składaniu oświadczeń koniecznych do zawarcia małżeństwa w formie wyznaniowej nie jest wymaganiem ustanowionym w art. 1 k.r.o., ale ewentualnie może wynikać z regulacji wewnętrznych kościoła albo innego związku wyznaniowego.

Słowa kluczowe: zawarcie małżeństwa, forma wyznaniowa, kierownik urzędu stanu cywilnego, akt małżeństwa