



# The Concept of Matrimonial Consent in Can. 1057 CIC 1983

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**Abstract:** The article is devoted to matrimonial consent as described in Can. 1057 CIC/83, which has replaced the former Can. 1081 CIC/17. The regulation found in this canon emphasizes the importance of matrimonial consent and constitutes the basis for all reasons for the nullification of marriage. The analyzed norm, describing matrimonial consent in the positive aspect, was formulated in the personalistic spirit and adapted to Vatican II's teachings. Can. 1057 CIC/83 was placed among the norms introducing the *De matrimonio* of CIC/83 part, which resulted in ordering the vision of marriage in CIC/83. The studies on the normative content of Can. 1057 §1, CIC/83, focus on matrimonial consent, which establishes the matrimonial bond and is the only efficient cause of marriage, being a bilateral consensual contract and a sacrament for those baptized. The article discusses legal requirements assuring that consent will result in contracting a valid marriage. The article explains in detail the norm, according to which a defective matrimonial consent cannot be supplemented or replaced by another legal act. The article analyses the object of matrimonial consent in Can. 1057 §2, CIC/83, which was harmonized with the definition of marriage in Can. 1055 CIC/83. *Ius in corpus* is no longer such an object (as it narrows marriage to a communion finding fulfillment in the sexual and procreative sphere) but rather the parties to the contract, who give themselves to one another in an analogous sense (material object) and the communion for their entire life, in all its dimensions (formal object).

**Keywords:** marriage, matrimonial consent, object of matrimonial consent, *consensual contract*, sacrament of marriage

Considering the need to adapt the legal norms to the contemporary realities of life and to the teachings on the subject of marriage developed by Vaticanum II, as well as the postulates put forward by jurisprudence, the church legislator introduced a revised norm on matrimonial consent to CIC/83<sup>1</sup> – Can. 1057 CIC/83, which replaced the former Can. 1081 CIC/17,<sup>2</sup> containing the definition of matrimonial consent as the efficient cause of marriage and a vague, narrow, even “physiological” definition of consent,<sup>3</sup> which was the result of capturing the formal subject of matrimonial consent based on the primary purpose of marriage.<sup>4</sup>

<sup>1</sup> Cf. Żurowski, *Kanoniczne prawo*, 75; Góralski, *Małżeństwo kanoniczne*, 43; Chiappetta, *Il Codice*, 266–267; Góralski *et al.*, *Komentarz do Kodeksu*, 253–254.

<sup>2</sup> Cf. Lüdicke, “Kryteria rozróżnienia,” 61–62; Hemperek *et al.*, *Komentarz do Kodeksu*, 214; Rybczyk, “Projekt reformy,” 204.

<sup>3</sup> Cf. Żurowski, *Kanoniczne prawo*, 79–80; Chiappetta, *Il Codice*, 267.

<sup>4</sup> Cf. Pastwa, *Istotne elementy*, 111–112.

## 1. The Position and Significance of Can. 1057 in CIC/83

When comparing the old and the new code, there is a noticeable difference in the location of the norm on matrimonial consent.<sup>5</sup> Can. 1081 *CIC/17* was placed at the initial position of the chapter *De consensu matrimoniali*, opening a series of provisions on the defects of matrimonial consent.<sup>6</sup> Thereby, in Can. 1081, §2 *CIC/17*, the legislator defined matrimonial consent from the positive side, and in the following canons, they described this consent from the negative side.<sup>7</sup> Can. 1057 *CIC/83* was placed among the canons introducing the title VII *De matrimonio*, of book IV. *De Ecclesiae munere sanctificandi*, right after Can. 1055 *CIC/83*, defining marriage, and Can. 1056 *CIC/83*, concerning the essential properties of marriage. These three canons constitute the structured vision of marriage in the Code.<sup>8</sup> The change in the placement of the provision on matrimonial consent itself was a well-thought-out move, resulting in a more logical arrangement of the norms and an emphasis on the extraordinary importance of this regulation in the entire marriage law. The legislator also elected to omit the negative description of matrimonial consent, defining it in a positive aspect only.<sup>9</sup>

Can. 1057, §2 *CIC/83* is of exceptional importance in the entire system of canon law, because it constitutes the measure of the validity of the act of matrimonial consent. From the provisions contained in this norm, it is possible to derive all grounds for the invalidity of marriage; however, it cannot be ascertained when a marriage is invalid,<sup>10</sup> with one exception: if the efficient cause of marriage is absent, i.e., matrimonial consent. Without doubt, a valid marriage cannot come to being in such a situation. The basis for the invalidity of marriage is a special form of simulation, which Bruno Primetshofer calls *negative Totalsimulation*, and Hermann Kahler – *absentia consensus*. In such a case, the marriage is invalid, not under Can. 1101, §2 *CIC/83* but pursuant to Can. 1057 *CIC/83*.<sup>11</sup>

<sup>5</sup> Cf. Lüdicke, "Kryteria rozróżnienia," 61–62; Hemperek *et al.*, *Komentarz do Kodeksu*, 214; Rybczyk, "Projekt reformy," 204.

<sup>6</sup> Cf. Urbanowska-Wójcińska, "Zgoda małżeńska," 60.

<sup>7</sup> Cf. Lüdicke, "Kryteria rozróżnienia," 61–62.

<sup>8</sup> Cf. Erlebach, "Problem wymiaru," 14.

<sup>9</sup> Cf. *Comm.* 9/1 (1977) 119–120; Lüdicke, "Kryteria rozróżnienia," 61–62; Urbanowska-Wójcińska, "Zgoda małżeńska," 60.

<sup>10</sup> Cf. Lüdicke, "Kryteria rozróżnienia," 62; Reinhardt, "Nowe tendencje," 97.

<sup>11</sup> Cf. Kahler, *Absentia consensus*, 29–362; Reinhardt, "Nowe tendencje," 98–101; Primetshofer, "Der Ehekonsens," 773; Wąsik, "Symulacja zgody," 250–251.

## 2. The Sources of Can. 1057 CIC/83

The sources of Can. 1057, §1 *CIC/83* can be divided into three groups: The first group includes Can. 1081, §1 *CIC/17* and the encyclical *Castii connubii*, containing and re-announcing a comprehensive interpretation of the Catholic teaching on marriage.<sup>12</sup> The second group consists of the Constitution *Gaudium et spes* of the Second Vatican Council.<sup>13</sup> The third group includes *the Allocution of Paul VI* of February 9, 1976,<sup>14</sup> in which the Pope reminded that the efficient cause of marriage is matrimonial consent, not love.<sup>15</sup>

Reading Can. 1057, §1 *CIC/83* literally, it seems that the legislator omitted the teachings of Vaticanum II on matrimonial consent and made concessions to the conservative doctrine, repeating verbatim the contents of Can. 1081, §1 *CIC/17*.<sup>16</sup> It is only in the context of the sources that it becomes apparent that the normative content contained in the analyzed canon should be read in a new, personalistic approach. The consequence of this is the necessity to use such an interpretation of the norm in question that would take into account both the teachings of Vaticanum II and the post-conciliar doctrine.<sup>17</sup>

Among the sources of Can. 1057, §2 *CIC/83* are the former Can. 1081, §2 *CIC/17* and Paul VI's Encyclical *Humanae Vitae* of July 25, 1968,<sup>18</sup> in which the concept of the object matrimonial consent was extended.<sup>19</sup>

## 3. The Efficient Cause of Marriage

At the beginning of Can. 1057, §1 *CIC/83*, the legislator inscribed the legal principle of *matrimonium facit partium consensus*,<sup>20</sup> which is rooted in natural law and confirmed by the Church's Magisterium. According to this principle, matrimonial consent is the element that causes the establishment of, or creates (*facit*), marriage, forming the marital bond.<sup>21</sup> The principle itself is based on Ulpian's legal maxim,

<sup>12</sup> Cf. *CICFontes/83*, 292; Skrzydlewski, "Castii Connubii," 1359–1360.

<sup>13</sup> Cf. *CICFontes/83*, 292; Florczyk – Misztal, "Wprowadzenie do Konstytucji," 511.

<sup>14</sup> Cf. *CICFontes/83*, 292.

<sup>15</sup> Cf. Paulus VI, "Allocutio," 204–208; Navarrete, "Amor coniugalit," 619–632.

<sup>16</sup> Cf. Pastwa, *Istotne elementy*, 125.

<sup>17</sup> Cf. Stasiak, "Teologiczne podstawy," 83–84.

<sup>18</sup> Cf. *CICFontes/83*, 292.

<sup>19</sup> Cf. Navarrete, "Mutationes et praevisae," 4.

<sup>20</sup> Cf. Chiappetta, *Il Codice*, 266–267; Bonnet, *Introduzione al consenso*, 3; Supremum Tribunal Signaturae Apostolicae, "Dioecesis Ultraiecten," 301; DS 643; DS 775; DS 756; DS 1327; DS 1497; DS 1813; DS 3713; DS 3701.

<sup>21</sup> Cf. Hendriks, *Diritto matrimoniale*, 34; Majer, *Kodeks Prawa*, 782; Giacchi, *Il consenso*, 23.

derived from Roman law, contained in the *Digest*: *nuptias ... consensus facit*,<sup>22</sup> or on its later, Christian interpolation.<sup>23</sup>

In the analyzed norm, the concept of *consensual contract* was adopted as binding in the matter of the relevance and sufficiency of a matrimonial consent for marriage, instead of the concept of *real contract*, according to which marriage arises through the mutual transfer of rights to each other, i.e., through the act of marital intercourse.<sup>24</sup> This is an important remark, because in the Code of John Paul II the concept of real contract was not completely rejected, as evidenced by Can. 1141 *CIC/83* and Can. 1142 *CIC/83*.<sup>25</sup>

Matrimonial consent, as the efficient cause of marriage, according to Can. 1057, §1 *CIC/83*, should not be equated with *casualitas matrimonii in abstracto*, or *casualitas matrimonii divina*, i.e., with the efficient cause of the essence of marriage, but with the efficient cause of the existence of a specific marriage, between a specific man and woman, i.e., with *causalitas matrimonii humana*.<sup>26</sup> It should be added that marriage should be understood here in accordance with its definition contained in Can. 1055, §1 *CIC/83*,<sup>27</sup> primarily as *foedus* – covenant. This technical term borrowed from biblical terminology, found in the text of the constitution *Gaudium et Spes*, No. 48, faithfully reflects the complexity of the concept of marriage and, moreover, refers to the idea of contract.<sup>28</sup> Formulated by Baldus de Ubaldis and based on the commentary to the *Digest* (D. 2.14), the rule states that *contractus essentialiter regulantur a consensu duorum* – each contract is regulated by the consent of the two parties, including its essence (“core of the contract”).<sup>29</sup> Since marriage is a *bilateral consensual contract*, therefore, as with any contract, in order to come into being it requires agreement between the two parties – in this case, one man and one woman. A marriage contract becomes legally effective as a *solo consensu*, which means that apart from the declarations of will of the prospective spouses, no additional element is needed. Matrimonial consent plays the role of the efficient cause (*causa efficiens*) of marriage and the formal cause (*causa formalis*) of the marriage contract, constituting its internal structure.<sup>30</sup>

22 Cf. D 35. 1. 15: *Ulpianus libro 35 ad Sabinum... Nuptias enim non concubitus, sed consensus facit*; D 50. 17. 30: *Ulpianus libro 36 ad Sabinum: Nuptias non concubitus, sed consensus facit*; Mosiek, *Kirchliches Eherecht*, 194.

23 Cf. Zubert, “Consensus sacramentalis,” 9.

24 Cf. Gasparri, *Tractatus canonicus*, 6; Żurowski, *Kanoniczne prawo*, 77; Cavana, “La condizione,” 239; Giacchi, *Il consenso*, 37ff; Fumagalli Carulli, *Intelletto e volontà*, 27; Bánk, *Connubia canonica*, 328.

25 Cf. Fernández Castaño, *Legislación matrimonial*, 42.

26 Cf. Robleda, “Causa efficiens,” 656ff.

27 Cf. Góralski, “Rola zgody,” 6.

28 Cf. Gerosa, *Prawo Kościoła*, 266–267; Wąsik, “Pojęcie małżeństwa,” 197–198; Czapla, “Pojęcie «matrimoniale foedus»,” 28, 31.

29 Cf. Fumagalli Carulli, *Intelletto e volontà*, 47; Полдников, *Формирование учения*, 265.

30 Cf. Fernández Castaño, *Legislación matrimonial*, 99; Duda, *Katolícké manželské*, 46; Bonnet, “La capacità,” 35; Hurtado, *Resoluciones morales*, 53; Gasparri, *Tractatus canonicus*, 5ff; Moneta, “Il Matrimonio,” 185; Chiappetta, *Il Codice*, 266–267; Góralski, *Małżeństwo kanoniczne*, 45.

The canonical marriage of the baptized described in Can. 1055 CIC/83 assumes a juridical-religious structure in such a way that it is impossible to separate marriage as a non-religious contract from marriage as a sacrament.<sup>31</sup> In canon law studies, a question is asked as to whether the adoption of the *solus consensus* principle – whereby the efficient cause of marriage is only matrimonial consent – trivializes or even veils the sacramentality of marriage, because this principle was adopted from Roman law into the system of church law in different times, in a climate of a different legal culture, different ecclesial vision of marriage and not yet specified concept of its sacramentality. Moreover, the concept of marriage as “*sacramentum naturae*” and “*sacramentum gratiae*” should not be mixed.<sup>32</sup> Attempts are being made to resolve this problem. Ulrich Rhode notes that the relationship between matrimonial consent and marriage is based on natural law. As a result, matrimonial consent as *causa efficiens* applies to all marriages, both those concluded according to natural law and sacramental ones.<sup>33</sup> According to Otto Pesch, the teachings of the Church on the sacramentality of marriage require matrimonial consent according to Can. 1057, §2 CIC/83, which is a necessary condition for concluding marriage. Marriage, on the other hand, becomes a sacrament through the expression of consent among the baptized, which takes place in the Church.<sup>34</sup> Augusto Sarmiento states that the sacramental sign is constituted by mutual matrimonial consent, which is elevated to the dignity of an effective sign of grace among the baptized. Inseparability exists between consent and the sacramental sign. However, this is only the case in marriages contracted between baptized persons. On the other hand, in the case of the unbaptized, a distinction must be made between sacrament and consent, which is the efficient cause of true marriage, but which is concluded only at the level of natural law.<sup>35</sup> Orio Giacchi takes the position that, in the case of baptized persons, the contractual nature of marriage and its sacramentality are intertwined with each other, in the sense that the consent of the spouses, as an essential element of the contract, is also an essential element of the sacrament since the spouses themselves are ministers of this sacrament and jurisdiction of the Church over marriage is not limited to its sacramental aspect, but also influences its contractual aspect, which determines the conditions for the validity of this act.<sup>36</sup> The legislator themselves in Can. 1055, §2 CIC/83 declares that: *a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament*. The sacramental profile of the Christian marriage is not something incidental, some external addition and supplement

<sup>31</sup> Cf. Serrano Ruiz *et al.*, *Matrimonio canonico*, 41ff; Wąsik, “Pojęcie małżeństwa,” 200.

<sup>32</sup> Cf. Zubert, “Consensus sacramentalis,” 12–13.

<sup>33</sup> Cf. Rhode, *Vorlesung*, 49.

<sup>34</sup> Cf. Pesch, *Ehe im Blick*, 2, 13.

<sup>35</sup> Cf. Sarmiento, *Małżeństwo chrześcijańskie*, 165.

<sup>36</sup> Cf. Giacchi, *Il consenso*, 24.

to the marriage contract, but is part of the essence of the marital bond itself.<sup>37</sup> Therefore, the doctrine of marriage in terms of contract and sacrament is inseparable, and its rejection would entail a rejection of the teachings of the Church's Magisterium.<sup>38</sup> This means that qualified consent in the case of baptized spouses is simultaneously the efficient cause of the contract and the sacrament of marriage.<sup>39</sup>

The transfer of matrimonial consent may only be executed by those legally capable of contracting marriage, as expressed in Can. 1057, § 1 *CIC/83* with the formula *inter personas iure habiles*. Consent cannot cause marriage to come to being in the event of the legal incapacity of one or both parties. This inability may be derived from God's natural or positive law, or from ecclesiastical law.<sup>40</sup> From the declaration of natural law in Can. 1055, §1 *CIC/83* it follows that marriage may be contracted only by one man and one woman.<sup>41</sup> There must be gender differentiation between the prospective spouses. Marriage cannot be a relationship between persons of the same sex,<sup>42</sup> or with a person who has performed a "sex change", because such an operation only concerns the phenotype and does not change the genotype, i.e., the essence of a person's sex.<sup>43</sup>

The proper expression of matrimonial consent presupposes the proper functioning of the mind (cf. Can. 1095 *CIC/83*) and the will of the prospective spouses. The defects of consent relating to the will may concern a substantive difference between the act of the will and the meaning of its declaration (cf. Can. 1096–1097 *CIC/83* and Can. 1099–1102 *CIC/83*) or a qualitative difference (cf. Can. 1098 *CIC/83* and Can. 1103 *CIC/83*).<sup>44</sup> Furthermore, impediments to marriage result in rendering the marriage null and void, unless a competent ecclesiastical authority has granted the required dispensation.<sup>45</sup> In addition, spouses must be physically capable of entering into a valid marriage<sup>46</sup>; an example is the impediment of *instrumental impotence*, i.e., the inability to perform sexual intercourse, which results from the anatomical deficiencies of the genital organs.<sup>47</sup>

Can. 1057, §1 *CIC/83* requires that the consent be externalized in accordance with the provisions of law – *legitimae manifestatus*. The manner of communicating

<sup>37</sup> Cf. Vitali – Berlingò, *Il matrimonio canonico*, 9.

<sup>38</sup> Cf. Aubé – Caparros, *Code de droit*, 916; Chiappetta, *Il Codice*, 267; Boggiano Pico, *Il matrimonio*, 297; Pawluk, *Prawo Kanoniczne*, 25–27; Giacchi, *Il consenso*, 24; Fumagalli Carulli, *Intelletto e volontà*, 45.

<sup>39</sup> Cf. Gerosa, *Prawo Kościoła*, 281.

<sup>40</sup> Cf. Góralski, *Małżeństwo kanoniczne*, 45; Żurowski, *Kanoniczne prawo*, 78.

<sup>41</sup> Cf. Fernández Castaño, *Leyslación matrimonial*, 106–107; Żurowski, *Kanoniczne prawo*, 78; Gerosa, *Prawo Kościoła*, 281.

<sup>42</sup> Cf. Żurowski, *Kanoniczne prawo*, 78.

<sup>43</sup> Cf. Stawniak, *Niemoc płciowa*, 322.

<sup>44</sup> Cf. Lüdicke, "Kryteria rozróżnienia," 63.

<sup>45</sup> Cf. Sztáfrowski, *Podręcznik prawa*, 29–30; Gajda, *Prawo małżeńskie*, 39–40.

<sup>46</sup> Cf. Duda, *Katolické manželské*, 46; Fumagalli Carulli, *Intelletto e volontà*, 28.

<sup>47</sup> Cf. Majer, *Kodeks Prawa*, 801; Stawniak, *Niemoc płciowa*, 184–194, 326–337.

the matrimonial consent is specified in Can. 1104–1106 *CIC/83*. It should be expressed either by the prospective spouses simultaneously present or by a proxy duly appointed in accordance with law. It is to be conveyed in words or with equivalent signs. Using the assistance of an interpreter is allowed. On the other hand, the *canonical form*, i.e., persons to whom such consent is expressed, is specified in Can. 1108 *CIC/83* and Art. 6 Motu Proprio of Pope Francis *De concordia inter Codices*, of May 31, 2016 (ordinary form) and Can. 1116 *CIC/83* and Art. 10 Motu Proprio *De concordia inter Codices* (extraordinary form).<sup>48</sup>

Can. 1057, §1 *CIC/83* also contains the rule according to which the matrimonial consent expressed by the prospective spouses may not be supplemented by any human authority. This means that if the consent is deficient or defective, it cannot be replaced by any other legal act. This cannot be completed either by a later coexistence, or by long-term cohabitation, or by an act of will expressed through a third party (e.g., parents), nor can it be done by any human legal authority.<sup>49</sup> At the time of the works on the codification, the possibility that divine authority might supplement the consent was contemplated (*num divina potestas supplere posit consensus*) and the case of *sanatio in radice* was considered, where the Church validates marriage without either party knowing of this and when this same party is not willing to sanction the marriage.<sup>50</sup>

#### 4. Definition of Consent

Can. 1057, §2 of *CIC/83* is classified as a determination<sup>51</sup> or definition of matrimonial consent.<sup>52</sup> A methodologically strict analysis allows us to find in this provision a *real* definition of matrimonial consent, which describes what consent is and *unambiguous*, which means that whenever consent is mentioned in the code, it is referred to in the same sense as the one stipulated by the contents of the norm.<sup>53</sup> According to Grzegorz Erlebach, this is a formal definition of matrimonial consent, which does not so much refer to a specific concept belonging to the canon law system, but rather has the reality regulated by this law as its object.<sup>54</sup> José Maria Serrano Ruiz believes that Can. 1057, §2 *CIC/83* is not an exhaustive definition of matrimonial consent,

<sup>48</sup> Cf. Szafronowski, *Podręcznik prawa*, 30; Góralski, *Małżeństwo kanoniczne*, 45; Franciscus, *De concordia inter Codices*, art. 6, art. 10.

<sup>49</sup> Cf. Vlaming – Bender, *Praelectiones iuris*, 375.

<sup>50</sup> *Comm.* 33/1 (2001) 41.

<sup>51</sup> Cf. Góralski, *Małżeństwo kanoniczne*, 46.

<sup>52</sup> Cf. Funghini, “L’esclusione,” 282.

<sup>53</sup> Cf. Ajdukiewicz, “Definicja,” 846–847; “Definicja realna,” 60; Kiczuk, “Jednoznaczność,” 1052.

<sup>54</sup> Cf. Erlebach, “Problem wymiaru,” 13.



and additionally there occurs tautology therein. It concerns the phrase: *Consensus matrimonialis ... ad constituendum matrimonium*. In order to eliminate this error, the author postulates that in the place of the expression *matrimonium*, a sentence from the definition of marriage should be substituted: *quo vir et mulier inter se totius vitae consortium constituunt*.<sup>55</sup>

## 5. The Nature of Matrimonial Consent

The legislator showed that the matrimonial consent in Can. 1057, §2 CIC/83 as an act of will, as emphasized in the statement *consensus matrimonialis est actus voluntatis*.<sup>56</sup> However, it must not be forgotten that the act of human will presupposes prior intellectual knowledge and consent on the part of the reason, because: *nihil est volitum nisi praecognitum* – nothing is the object of volition unless it was previously known. The prospective spouse's reason must be aware of the voluntary act of granting matrimonial consent.<sup>57</sup> In the judgment coram Pena of December 10, 2010, we find a clarification of the definition of consent: *Consensus autem est actus rationis et voluntatis a nubentibus elicited, quo iidem mutuam suiipsius donationem in matrimonio perficiunt*.<sup>58</sup> Moreover, matrimonial consent is a *human act* (*actus humanus*), since mutual donation and acceptance constitute a conscious, voluntary, and deliberate action by the prospective spouses, which derives from prudent will.<sup>59</sup> It is also a *legal act* which produces permanent legal effects.<sup>60</sup>

The internal will of a man and woman, separately, cannot establish marriage understood in accordance with Can. 1055 CIC/83. For this, the conjunction of the two wills of the prospective spouses, which merge into one reality, into a marriage pact is needed.<sup>61</sup> However, for this to happen, these internal wills need to be manifested. If the internal will is not communicated by the prospective spouses on the *externum forum*, using words or equivalent signs, it is ineffective. What is required is the materialization of the inner will of a man and woman in a perceptible sign which expresses these wills.<sup>62</sup> This is confirmed by the maxim: *intentio mente retenta, nec parti expressa, nihil in humanis contractibus operatur* – the internal intention of the will,

55 Cf. Serrano Ruíz, "L'errore sulla," 169.

56 Cf. Fumagalli Carulli, *Intelletto e volontà*, 137.

57 Cf. Bánk, *Connubia canonica*, 329; Michiels, *De delictis*, 84; Pastuszko, "Świadomość symulacji," 99.

58 Cf. "Dec. coram Pena, 10 dec. 2010," 41.

59 Cf. Góralski, *Małżeństwo kanoniczne*, 46; Supremum Tribunal Signaturae Apostolicae, "Dioecesis Ultraiecten," 301; Sikorski, "Actus humanus," 144; Stępień, "Akt ludzki," 263–264.

60 Cf. Moneta, "Il Matrimonio," 185; Chiappetta, *Il Codice*, 266–267; Góralski, *Małżeństwo kanoniczne*, 45; Góralski, "Rola zgody," 5.

61 Cf. Viladrich, *Il consenso matrimoniale*, 299.

62 Cf. Viladrich, *Il consenso matrimoniale*, 300–303.



which is not expressed externally, plays no role in the contracts between people.<sup>63</sup> The legislator also adopted in Can. 1101, §1 *CIC/83* an ordinary presumption whereby *the internal consent of the mind is presumed to conform to the words and signs used in celebrating the marriage*. This means that the consent expressed externally is a reflection of the inner will of the prospective spouses and there is no dissonance between them.<sup>64</sup>

Moreover, in order to ensure the legal effectiveness of matrimonial consent, it is necessary for the acts of will of a man and woman to be characterized by *adhesion*, consisting in the adhesion of the will, in the sense of a psychological act, to the legal concept of marital will. During the conveyance of consent, a psychological and legal consolidation of the will of the entities intending to enter into marriage is made. As a result, a marriage contract is created.<sup>65</sup>

## 6. Personalistic Concept of the Subject of Matrimonial Consent

The legislator themselves in Can. 1057, §2 *CIC/83* redefined the subject of matrimonial consent. During work on the codification at the session of *Coetus Studiorum de Matrimonio*, committed to updating matrimonial law, on October 24, 1966, a suggestion was made to closely link the definition of the object of the consent with the future definition of marriage: *definitio obiecti consensus matrimonialis nequit esse alia ac definitio matrimonii ipsius; ipsum enim matrimonium est obiectum illius consensus, cum actus ab obiecto specificetur* – the definition of the object of matrimonial consent cannot be different from the definition of the marriage itself; for marriage itself is subject to that consent, since the act of consent is determined by its object.<sup>66</sup>

In the former Can. 1081 §2 *CIC/17*, the object of matrimonial consent was reduced to *ius in corpus*, or more precisely, to the exchange of the law of *ius in corpus*. Such a formulation gave the impression that only the body of the spouses was the object of the consent.<sup>67</sup> Marriage, however, is more than just a sexually procreative communion, as it covers all levels of the spouses' lives.<sup>68</sup> The new personalistic treatment of the object of matrimonial consent inscribed in Can. 1057, §2 *CIC/83* is a consequence of the definition of marriage<sup>69</sup> adopted in *CIC/83*, but also of the sen-

<sup>63</sup> Cf. Hurtado, *Resolutiones morales*, 53; Sanchez, *Sancto matrimonii*, 44.

<sup>64</sup> Cf. Pawluk, *Prawo Kanoniczne*, 154.

<sup>65</sup> Cf. Fumagalli Carulli, *Intelletto e volontà*, 138–139.

<sup>66</sup> Cf. *Comm.* 32/2 (2000) 177; Rybczyk, "Projekt reformy," 201.

<sup>67</sup> Cf. Burke, "La «traditio suiipsius»."

<sup>68</sup> Cf. Wąsik, "Pojęcie małżeństwa," 196.

<sup>69</sup> Cf. Hempterek *et al.*, *Komentarz do Kodeksu*, 221; Reinhardt, "Entsprechen Konsensanforderung," 70; Góralski *et al.*, *Komentarz do Kodeksu*, 254; Vela, "De personalismo," 56.

tence of the Apostolic Signatura, coram Staffa, of November 29, 1975, in which we read: *Obiectum consensus... declaratur esse coniuges ipsos*.<sup>70</sup> The object of consent in Can. 1057, §2 *CIC/83* includes a man and a woman who, in an irrevocable covenant, give themselves to each other and accept each other for the purpose of creating a marriage.<sup>71</sup> The man's act of will and the woman's act of will bestow them to each other as a mutual gift and acceptance of each other.<sup>72</sup> This concept is controversial and criticized because a person cannot give all of themselves to another person, and at best they can convey some of their services and activities.<sup>73</sup> Attempts are being made to solve this problem. Some canonists, following Card. Pietro Gasparri, distinguish *the material object of the matrimonial consent* – it is the persons of the parties to the contract who transfer themselves not in a physical, but in a moral sense, analogous to *the formal object*, which is – taking into account Can. 1057, §2 *CIC/83* and Can. 1055, §1 *CIC/83* – the communion of the spouses' entire life.<sup>74</sup> Others create their own concepts. Ryszard Sztychmiller reduces the object of consent to mutual dedication and the transfer of rights to oneself by the prospective spouses, resulting from natural law and the teachings of the Church.<sup>75</sup> According to Wojciech Góralski, the object of matrimonial consent also includes, apart from *ius in personam*, the essential attributes of marriage, which, according to Can. 1056 *CIC/83* are the unity and indissolubility of marriage<sup>76</sup> and the whole complex of matters and duties specific to marriage, consisting in the creation of a community for mutual commitment and fulfillment.<sup>77</sup>

During the work on the revision of the Code, postulates emerged, claiming that the subject of matrimonial consent should also include conjugal love. Pope Paul VI made it clear in his address to the Roman Rota on February 9, 1976, that marriage is not legally based on love and therefore does not pertain to the object of consent.<sup>78</sup> If conjugal love were to be given legal significance and recognized as a component of the object of matrimonial consent, the lack of love would render the marriage nullified. However, there are no objective and sufficient criteria for verifying conjugal love, so in the procedural practice it would not be possible to decide whether a given marriage was validly contracted or not.<sup>79</sup>

<sup>70</sup> Cf. *Supremum Tribunal Signaturae Apostolicae*, "Dioecesis Ultraiecten," 306.

<sup>71</sup> Cf. Góralski *et al.*, *Komentarz do Kodeksu*, 254; Góralski, *Małżeństwo kanoniczne*, 46–47; Burke, "La «tradio suiipsius»."

<sup>72</sup> Cf. Viladrich, *Il consenso matrimoniale*, 299.

<sup>73</sup> Cf. Góralski, *Małżeństwo kanoniczne*, 48.

<sup>74</sup> Cf. Hendriks, *Diritto matrimoniale*, 51; Stawniak, *Niemoc płciowa*, 327–328.

<sup>75</sup> Cf. Sztychmiller, *Doktryna Soboru*, 363–364.

<sup>76</sup> Cf. Góralski *et al.*, *Komentarz do Kodeksu*, 254.

<sup>77</sup> Cf. Góralski, *Małżeństwo kanoniczne*, 46–47.

<sup>78</sup> Cf. Paulus VI, "Allocutio," 204–208.

<sup>79</sup> Cf. Sztychmiller, *Doktryna Soboru*, 373–376.

## Summary

The ecclesiastical legislator introduced a revised norm on matrimonial consent into *CIC/83*, inspired by the doctrine of Vatican II on marriage and Christian personalism. Can. 1057 *CIC/83* replaced the former Can. 1081 *CIC/17*. In the new Code, the position of the norm on matrimonial consent was corrected. The former Can. 1081 *CIC/17* placed at the beginning of the chapter *De consensu matrimoniali*, defined consent from the positive side while the following canons mentioning the defects of matrimonial consent described it from the negative side. In *CIC/83*, the legislator applied a different, more practical solution. Can. 1057 *CIC/83* was among the norms forming an introduction to the entire title *De matrimonio*, next to the definition of marriage and the provision on the essential attributes of marriage. This treatment allowed for the creation of a more orderly and uniform vision of marriage in the code. Moreover, the definition of matrimonial consent in Can. 1057 *CIC/83* gained the rank of a real and unambiguous definition in the entire system of canon law.

In the first paragraph of Can. 1057 *CIC/83* the legislator repeated verbatim the contents of Can. 1081 §1 *CIC/17*, with a slight change in punctuation. However, he had little room for maneuver here because the principle that matrimonial consent is the efficient cause of marriage – that is, the element that creates a particular marriage – is a declaration of natural law. This rule, read in the context of sources, acquires a fuller, personalistic dimension. It is complemented by another legal principle which states that the matrimonial consent expressed by the prospective spouses cannot be supplemented by any human authority.

The brief formula used in Can. 1057, §1 *CIC/83*, which states that matrimonial consent is the efficient cause of a specific marriage, carries deeper content. First, it testifies to the fact that this norm adopts the concept of a *consensual contract*, i.e., of the sufficiency of matrimonial consent for contracting marriage (*solus consensus*). Secondly, since the canonical marriage of the baptized persons takes on a juridical-religious structure, it indicates that consent simultaneously creates marriage in the contractual and sacramental dimension. This is because the sacramental profile of a Christian marriage is not an addition or supplement to the marriage contract but belongs to the essence of the marital tie. Negating this would lead to the rejection of the institution of marriage according to the teachings of the Church.

The church legislator, taking into account the postulate, developed while working on the codification, that the definition of the subject of matrimonial consent cannot be different than the definition of marriage itself, made far-reaching changes to Can. 1057 §2 *CIC/83*, which was adapted to the definition of marriage. In Can. 1081, §2 *CIC/17*, in line with the tendencies prevailing in canon law studies of the time, the object of matrimonial consent was harmonized with the primary purpose of marriage and was reduced to *ius in corpus*. Such a concept, however, gave the impression

that only the spouses' bodies and their sexual-procreative sphere constitute the object of the consent. However, in the light of the teachings of Vatican II, marriage is something more than just a communion of people implemented in the biological and reproductive sphere, because it covers all levels of the spouses' life. Therefore, in Can. 1057, §2 *CIC/83*, a new, personalistic approach to the subject of matrimonial consent was introduced, centered around the idea of spouses as parties to a contract who transfer themselves in an analogous sense (material object) and the communion of their entire lives, in all its dimensions (formal object). The proposal to include conjugal love as the object of matrimonial consent was rejected, as there are no criteria for its verification. Such a solution would translate into lawsuit practice and impossibility of resolving matrimonial cases.

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