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IS THE BAN ON ENTERING INTO MARRIAGE FOR PEOPLE WITH MENTAL DISORDERS AND IMPAIRED MENTAL CAPACITY NECESSARY TO ENSURE ADEQUATE PROTECTION FOR MARRIAGE AND THE FAMILY?

CZY ZAKAZ ZAWIERANIA MAŁŻEŃSTW PRZEZ OSOBY Z ZABURZENIAMI PSYCHICZNYMI I Z OBNIŻONĄ SPRAWNOŚCIĄ UMYSŁOWĄ JEST NIEZBĘDNY DLA ZAPEWNIENIA ODPOWIEDNIEJ OCHRONY MAŁŻEŃSTWU I RODZINIE?

Summary: The ban on marriages by persons suffering from serious mental disorders or affected by impaired mental capacity has been present in the Polish family legislation for many years. Therefore, there is a question whether the reasons followed by the legislator introducing it several dozen years ago into the legal system remain valid. The author tries to answer this question, at the same time indicating arguments in favour of reviewing the existing legal status. These are arguments raised not only in legal sciences, but also in medical sciences including psychiatry.

Keywords: marriage, family, mental disease, mental underdevelopment, family and guardianship code, constitution

Streszczenie: Zakaz zawierania małżeństw przez osoby cierpiące na poważne zaburzenia psychiczne lub dotknięte obniżeniem sprawności umysłowej jest obecny w polskim ustawodawstwie rodzinnym od wielu lat. Pojawia się związku z tym pytanie, czy powody, jakimi kierował się ustawodawca, wprowadzając go kilkadziesiąt lat temu do systemu prawnego, nadal zacho-

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wują swoją aktualność. Autor stara się udzielić odpowiedzi na to pytanie, wskazując jednocześnie argumenty przemawiające za rewizją istniejącego stanu prawnego. Są to argumenty podnoszone nie tylko na gruncie nauk prawnych, ale także nauk medycznych, w tym psychiatrii.

Słowa kluczowe: małżeństwo, rodzina, choroba psychiczna, niedorozwój umysłowy, kodeks rodzinny i opiekuńczy, konstytucja

THE ORIGIN OF THE BAN

The ban on marriages by persons suffering from serious mental disorders or suffering from a significant decrease in mental capacity has been present in the Polish family legislation for many years. Such an obstacle was already envisaged by the marriage law draft developed by the codification commission in 1929[1]. The draft assumed that mental illness was an obstacle to marriage. It is noteworthy that the draft did not provide for exceptions to this obstacle, because it was assumed that the inadmissibility of marriage resulted from the mental inability of the patient to start a family, and not from the lack of sufficient insight when the declaration of entering into marriage was submitted. The ban on marriages by mentally ill persons was therefore absolute. However, this law never came into force for another reason. It was about the opposition of the Catholic church related to the planned optional civil weddings and the possibility of divorce[2]. Thus, until the beginning of the warfare, there was no unification of marriage law in Poland, and therefore until 1945 various regulations of the partitioning countries had been in force in this respect.

The ban on marriages by mentally ill persons was instead included in the first postwar regulation of the marriage law, i.e. the decree of 25 September 1945, Marriage Law[3]. This decree was one of the elements of the civil law unification[4] after the World War II[5]. According to it, people of whom at least one person was affected by a mental illness, mental underdevelopment or open tuberculosis or a venereal disease in a contagious state, could not enter into marriage[6]. The decree did not provide for the possibility of granting a permit in the event of these conditions, moreover, it assumed the requirement of the submission of medical certificates on the absence of medical obstacles by

[1] Compare: Marriage law draft adopted by the Codification Commission on 28 May 1929, Warszawa 1931. See also K. Lutostański, *Zasady Projektu Prawa Małżeńskiego, uchwalonego przez Komisję Kodyfikacyjną w dniu 28 maja 1929*, Warszawa 1931, p. 65.

[2] See P. Fiedorczyk, *Unifikacja i kodyfikacja prawa rodzinnego w Polsce (1945-1964),* Białystok 2014, p. 29.

[3] Decree dated 25 September 1945, Marriage Law (Journal of Laws of 1945, No. 48, item 270).

[4] According to the PWN Encyclopedia, the unification is: unification of the law in force by introducing regulations applicable equally in the territory of one or several countries, https://encyklopedia.pwn.pl/haslo/unifikacja-prawa;3991355.html [access: 28.12.2019].

[5] More on this, see P. Fiedorczyk, P. Fiedorczyk, *Unifikacja*…, pp. 29-88.

[6] CompareArt. 7 point 6 of the Marriage Law.

the nupturients[7] to the registrar. In practice, however, this obligation was not enforced, because the decree enforcement regulations had never entered into force[8].

The next stage of organising family law regulations after World War II was codification[9], which in the case of marital law ended on 27 June 1950[10] with the passage of the Family Code, which adopted a fundamentally different structure. Pursuant to its provisions, a person affected by mental illness or mental underdevelopment could not enter into marriage. Therefore, no obstacle in the form of tuberculosis and venereal disease appeared in the code. Finally, the requirement to submit medical certificates to exclude the ban was abandoned. Instead, the Family Code of 1950 introduced for the first time the possibility of obtaining a court permission to enter into marriage for persons affected by mental illness or mental underdevelopment. The court issued such a permission if the state of health of the nupturient did not conflict with the essence and purposes of the marriage[11]. Thus, from that time on, the obstacle in question became a relative obstacle.

The solution adopted in the Family Code was transferred in practice to the current art. 12 § 1 of the Family and Guardianship Code of 1964. Only the stylistics of the ban was slightly modified. The Family Code provided for the existence of "mental underdevelopment" while the current Family and Guardianship Code[12] used the more modern wording "mental retardation", which in the 1960s was used to describe a certain type of impaired mental capacity[13]. This change was to adapt the terminology of the Law to the medical terminology in force at that time. The conditions for obtaining permission to marry were slightly modified. Pursuant to the current Code, the state of health or mind cannot threaten the marriage or the health of future offspring.

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[7] Compare Art. 10 § 1 point 3 Marriage Law. In accordance with Art. 10 § 2, however, the court could exempt nupturists from the obligation to present these certificates if their submission "encountered obstacles that were difficult to overcome".

[8] In accordance with art. 11 of the Decree of 25 September 1945 Regulations introducing the Marriage Law (Journal of Laws No. 48, item 271, as later amended) the Minister of Justice, by way of an ordinance issued in consultation with the Minister of Health, was to set dates, within which in particular areas of the state, there would be an obligation to submit a medical certificate to a civil registrar.

[9] It is a process of one-time merging of a large set of legal provisions into a uniform, systematic collection from which the basic norms of a given branch of law can be interpreted. The purpose of codification is to put in order all the standards that make up a given branch of law, combined with a corresponding change in their content and to repeal the binding force of existing regulations to the extent normalized in codification. The result of codification is the creation of a code. This term in today's sense was used for the first time by law theorist Jeremy Bentham. He supported the idea of ordering and gathering in one set, i.e. the code of dispersed legal provisions, as well as their systematization. This was to promote better knowledge and application - see Encyclopaedia of Management - https://mfiles.pl/pl/index.php/Kodyfikacja [access: 28.12.2019].

[10] Law dated 27 June 1950 –Family Code (Journal of Laws of1950, No. 34,item 308).

[11] Compare Art. 9 § 1 of the Family Code.

[12] Law dated 25 February 1964 –Family and Guardianship Code (uniform textJournal of Laws of 2019, item 2086).

[13] See T. Bilikiewicz, *Psychiatria kliniczna*, Warszawa 1966, p. 106.

PURPOSE OF THE BAN

Originally, the legislator was about ensuring that marriage declarations were made with proper insight[14]. According to Jan Gwiazdomorski, "the provision on the impossibility of entering into valid marriage for mentally ill or underdeveloped people is based simultaneously on two grounds: on eugenic considerations or health in general, and on the inability to enter into marriage"[15]. It seems that the legislator was still guided by this goal when adopting the Family Code of 1950. This is confirmed by subsequent statements by Professor Gwiazdomorski, in which he pointed out that "all persons with mental illness or mental underdevelopment should not be able to enter into marriage (no necessary insight is needed , lack of ability to establish full marriage community, lack of views on the permanence of the marriage, the danger of bearing a mentally ill, impaired offspring)"[16].

At the stage of the entry into force of the current Family and Guardianship Code of 1964, this view was no longer expressed. The draft originator already pointed out at the time that the occurrence of mental illness or mental underdevelopment is in itself a sufficient condition precluding the possibility of getting married because it threatens the proper functioning of the marriage and the health of future generations. Therefore, the legislator's goal was above all to protect the family which is to be formed on the basis of such a relationship. This was pointed out by Seweryn Sher, recognizing that "mental illness or mental underdevelopment are by themselves circumstances excluding the possibility of a valid marriage because they threaten the proper functioning of the marriage and the health of future generations"[17]. This view seems representative for both doctrine and judicature, which were formed on the basis of the current family and guardianship code. Only by way of example, Andrzej Zielonacki pointed out that "enabling the mentally ill or mentally underdeveloped persons to marry would be detrimental to the essence and purpose of marriage, as well as would be contrary to eugenic arguments"[18]. In turn, the Supreme Court in its judgment of 18 July 1967 emphasized that "The Family Code treats mental illness not as a defect of a declaration of will or - what would lead to the same – a lack of natural ability to make a declaration of getting married, but as the so-called marriage ban"[19]. Taking the above into account, there is no doubt in my opin-

[14] M. Domański, *Względne zakazy małżeńskie,* Warszawa 2013, p. 213.
[15] J. Gwiazdomorski, *Zawarcie małżeństwa*, „Państwo i Prawo" 1949, Vol. 4, p. 49.
[16] J. Gwiazdomorski, M. Grudziński, S. Kaleta, A. Wolter, *Założenia prawa rodzinnego w świetle Konstytucji Polskiej Rzeczypospolitej Ludowej,* [in:] *Zagadnienia prawne Konstytucji Polskiej Rzeczypospolitej Ludowej. Materiały Sesji Naukowej PAN 4-9 lipca 1953 r.*, t. III, Warszawa 1954, p. 62. A similar view was expressed by J. Gwiazdomorski in: *Glosa do orzeczenia SN z dnia 14 lutego 1961 r.,* OSPiKA 1962, Vol. 10, item 265, p. 590.
[17] S. Szer, *Prawo rodzinne w zarysie*, Warszawa 1969, p. 56.
[18] A. Zielonacki, *Zawarcie małżeństwa*, Warszawa 1982, p. 79.
[19] Judgment of the Supreme Court dated 18 July 1967, file No.ICR 43/67, OSNC 1968, No. 2, item 28.

ion that if there were no fundamental relationship between the marriage and the family, the very conclusion of marriage, its substantive content and the issue of its dissolution would be subject to typical contractual regulations.

SUBJECTIVE SCOPE OF THE MARRIAGE BAN DEFINED IN ART. 12 § 1 OF THE FAMILY AND GUARDIANSHIP CODE

Verification of the above thesis on the relationship between marriage and family requires the determination of the motives followed by the legislator when adopting the regulation of art. 12 § 1 of the Family and Guardianship Code, which has been in force to date. Theoretically, the purpose of introducing specific legal solutions should be presented in detail in documents created by public authorities in the course of legislative proceedings. It should be remembered, however, that reading official texts is not sufficient in this respect. Defining the goal requires conducting research on individual actors of the law-making process. One of them is the source, i.e. the actual initiator of introducing specific solutions into the social circulation. Very often, though not always, the source is the same entity as the beneficiary (entity benefiting from the application of the standard, e.g. a political, social, professional group). It is worth emphasizing at this point that the entity responsible for creating the law and the real initiator of solutions to decision dilemmas is not always the same entity.

Answering the question who is the actual source of the regulation contained in art. 12 § 1 of the Family and Guardianship Code is not easy. We are talking here about regulations created in the 1950s and 1960s, in a social and political reality completely different from today. It is worth noting here that the ideal of the state of people's democracy was direct democracy in which the people would directly decide on important matters. However, this solution was difficult to implement in practice, which is why the idea of representative government was accepted. Given the fact that Marxism-Leninism rejected the principle of the separation of powers in favour of the so-called democratic centralism, it became necessary to introduce a centre of supreme power, appearing as a political representation of the nation. Consequently, the Sejm occupied the highest place in the structures of state authorities. Its will was to be fulfilled by the State Council. In turn, the tool used to control the socio-political system was the Council of Ministers and the state apparatus[20]. In practice, however, as Rafał Kania rightly points out, the highest role of the Sejm remained fiction, as key decisions were taken at the level of the highest party authorities, then they were only formally legitimized by the passage of normative acts by this law-making body[21]. Thus it seems that in the period we are interested in the law was created mainly in the privacy of the

[20] Compare A. Burda, *Rozwój ustroju politycznego Polski Ludowej,* Warszawa 1969, pp. 19, 62.
[21] R. Kania, *Marksizm-leninizm a cybernetyka prawa w PRL. Zarys problematyki,* „Miscellanea Historico-Iuridica" 2017, Vol. 16, book 1, p. 161.

offices of the PZPR Central Committee, which makes the search for real initiators of these solutions very difficult today, if not impossible. Perhaps a conversation with the lawyers who in practice created these regulations: Aleksander Wolter, Seweryn Szer, Jan Wasilkowski or Maurycy Herling-Grudziński would allow to get to know the real initiators of specific solutions. Unfortunately, considering the fact that they are all already dead, this does not seem possible.

The entities formalizing the rules, i.e. the administrators, are primarily the district courts issuing permits to enter into marriage. It is worth emphasizing here that it is less about the protection of the applicants themselves. Their role is primarily to protect the social interest, which manifests itself in caring for the family, which should properly carry out its procreative and social-welfare functions. This category also includes heads of Civil Registry Offices, who at the stage of receiving statements from nupturients should attempt to determine whether they do not suffer from mental disorders or have not been psychiatrically treated. Considering these tasks imposed on the heads of Civil Registry Offices, they can also be seen as maleficiaries, i.e. entities bearing the costs of the introduced solutions, because it is on the heads of Civil Registry Offices that an informal obligation has been imposed to determine whether nupturients suffer from mental disorders and are treated in mental health facilities or have been hospitalized because of this, as part of explanations given to nupturients in addition to the obligation to inform them about the impossibility of entering into marriage by the mentally ill or mentally underdeveloped. Of course, the heads of Civil Registry Offices do not have medical competence as to the assessment of the mental state of nupturients, therefore this duty in practice comes down to observing the nupturients facing them and analysing the documents provided, and in the case of doubts as to their mental state to go to court in the procedure for the settlement of the doubts of the head of the Civil Registry Office. The category of administrators as resolutive administrators[22], seems to be supplemented by the Constitutional Tribunal, which in 2016 ruled (this judgment will be discussed in detail in the further part of the study) that the existing provision of Art. 12 § 1 of the Family and Guardianship Code is not inconsistent with the constitution, but at the same time pointed out that the legislator should consider replacing already archaic terms: mental illness and mental underdevelopment with contemporary, adequate medical terms.

The category of beneficiaries of the applicable regulation might seem to include parents/legal guardians of nupturients. It is worth noting that in the event of marriage of persons incapable of the proper performance of their marriage obligations and later parental responsibility, it would be them who would take over that additional tasks resulting from the potential inability of nupturients to function in the above-mentioned social role. On the other hand, the nupturients themselves can be seen as both maleficiaries

[22] It is an entity indicating the need to establish new legal solutions, i.e. to create a new or to change the existing scheme of action.

and beneficiaries. In practice, everything will depend on the factual circumstances, including, first and foremost, the type and severity of the health dysfunction they are affected by. In this context, it seems very important whether the dysfunctions discussed here affect both nupturientes or only one of them. In the latter case, it is worth paying attention to the therapeutic aspect of marriage. In modern psychiatry, the ban on entering into marriage by the mentally ill persons is rejected and its positive impact on the therapy and functioning of the sick is emphasized. For example, it is emphasized that remaining in the marriage has a beneficial effect on: the length of illness, course of the first episode, employment, nature and frequency of relapses[23]. In my opinion, the category of beneficiaries of the introduced regulation may also include expert psychiatrists who prepare medical opinions for a fee on behalf of the courts. There is no doubt that such an opinion is the most important element of the evidentiary proceedings both in proceedings for resolving doubts of the head of the Civil Registry Office and for permission to marry. The amount of the remuneration awarded is of course different depending on the specific case, but on average, for out-of-patient mental health tests ending with a written opinion, a salary of around PLN 900 is awarded plus about PLN 300 of reimbursement[24]. In turn, the category of maleficiaries could include probation officers who would carry out interviews in the community at the request of the court in the cases of granting permission to marry. Thanks to this, by determining the conditions in which clients live, the level and method of satisfying basic needs, or the ability to run a household and the way the local community functions, it will be easier for the court to assess the premise of a threat to marriage.

THE OBJECTIVE SCOPE OF THE BAN UNDER ART. 12 § 1 OF THE FAMILY AND GUARDIANSHIP CODE AGAINST THE PRO-CONSTITUTIONAL INTERPRETATION MADE BY THE CONSTITUTIONAL TRIBUNAL IN THE JUDGMENT OF 22 NOVEMBER 2016[25]

The aforementioned judgment of the Constitutional Tribunal is a response to the Ombudsman's request for a declaration of incompatibility of art. 12 § 1 of the Family and Guardianship Code with art. 30 and 47 of the Polish Constitution in connection with art. 31 section 3 of the Polish Constitution. The Ombudsman made this request on the basis of a case in which a civil registrar refused to a woman to get married who, because of cerebral palsy, had, among others problems with speaking,

[23] K. Uznańska, J.C. Czabała, *Cechy osobowości a związki małżeńskie osób chorych na schizofrenię,* „Psychiatria Polska" 2004, Vol. 38, No. 3, p. 412.
[24] https://iws.gov.pl/wp-content/uploads/2019/03/IWS_W%C5%82odarczyk-Madejska-J.-Klimczak-J.-Ostaszewski-P._Koszty-opinii-bieg%C5%82ych-z-zakresu-medycyny.pdf [access: 31.12.2019].
[25] Judgment of the Constitutional Tribunal of 22 November 2016, file reference number K 13/15, Journal of Laws 2016, item 2203.

but was intellectually able. This registrar, on the basis of art. 5 of the Code[26], referred the woman to court to obtain permission to enter into marriage in accordance with art. 12 § 1 and 2 of the Family and Guardianship Code. In the justification of the judgment, several basic arguments raised by the Ombudsman were referred to.

First, the Ombudsman noted the use of the terms "mental illness" and "mental underdevelopment" in Art. 12 § 1 of the Family and Guardianship Code, which are not used in modern medicine, which may cause problems for experts examining a person's ability to marry[27]. The Ombudsman noticed that art. 12 § 1 of the Code does not meet the standard of due precision, because the concept of "mental illness" appears neither in the international statistical classification of diseases and health problems, developed by WHO[28], nor in the classification of the American Psychiatric Association[29]. In both these systems, the concept of mental illness has been replaced by the term mental disorder. There is no doubt that these concepts are not the same. In turn, "mental underdevelopment" is not widely used according to the Ombudsman due to the "stigmatizing meaning given in the colloquial language" and has been replaced today by the term "mental retardation". In its reply, the Constitutional Tribunal emphasized that the Ombudsman did not explicitly indicate any model of constitutional control related to the allegation, although the justification of the application shows that it is a violation of the principle of specificity of legal provisions within the constitutional principle of a democratic state ruled by law. Referring to this allegation, the Constitutional Tribunal emphasized that, it had repeatedly pointed out that the principle of specificity of law requires to avoid adopting regulations which, using undefined or indefinite terms, or which have incomprehensible content, at the same time, however, pointed out that the mere use of indefinite terms or not defined by law cannot be considered *a priori* a violation of the constitution. Only qualified, i.e. unremovable by means of interpretation, indistinctness or ambiguity of a provision may constitute the basis for its unconstitutionality[30]. While analysing the application of the Ombudsman, the Tribunal noted that both under the Law on the protection of men-

[26] This provision states that "The head of the registry office who has learned of the existence of circumstances excluding the conclusion of an intended marriage, shall refuse to accept declarations of entering into marriage or to issue a certificate of absence of obstacles to marry, and in the case of doubts he will ask the court to decide, whether the marriage can be concluded".

[27] For more on the definition of the above concepts in the doctrine and judicature, see A. Rogacka Łukasik, *Małżeństwa osób niepełnosprawnych – kontrowersje wokół przeszkody małżeńskiej określonej w art. 12 kodeksu rodzinnego i opiekuńczego*, [in:] M. Borski (ed.), *Urzeczywistnianie idei humanizmu w kontekście zagwarantowania podstawowych prawa osobom z niepełnosprawnościami*, Sosnowiec 2017, p. 251 et seq.

[28] Compare Międzynarodowa Statystyczna Klasyfikacja Chorób i Problemów Zdrowotnych, ICD 10, Centrum Systemów Informacyjnych Ochrony Zdrowia 2012, https://www.csioz.gov.pl/fileadmin/user_upload/Wytyczne/statystyka/icd10tomi_56a8f5a554a18.pdf [access: 30.12.2019].

[29] P. Gałecki, M. Pilecki, J. Rymaszewska, A. Szulc, S. Sidorowicz, J. Wciórka, *Kryteria diagnostyczne zaburzeń psychicznych DSM-5*, Wrocław 2018.

[30] See the judgment of the Constitutional Tribunal of 6 October 2015, reference number SK 54/13, OTK ZU No. 9 / A / 2015, item 142.

tal health as well as in psychiatry, it is possible to determine the content of the term "psychotic disorder" equivalent to "mental illness". Similarly, the concept of "mental retardation" can be compared with the concept of "mental underdevelopment". This argument is incomprehensible in that the Tribunal, referring only to the principle of specificity of law, being the scope of art. 2 of the Polish Constitution, completely omitted the relation of the family and guardianship code to the hierarchically higher act which is the European Convention on Human Rights and Fundamental Freedoms[31]. It is worth noting here that the European Court of Human Rights in its judicial decision emphasized that restrictions on the right to marry, as defined in art. 12 ECHR[32] cannot reduce it in such a way that the essence of this right is violated[33]. The Tribunal also emphasized that while states may impose restrictions on the right to marry, they must respect the standard of accessibility and clarity[34]. The standard underlying the interference must therefore be formulated so precisely that the addressee, possibly using the assistance of lawyers, was able to determine what legal consequences of his behaviour in a given situation may be[35]. It is worth emphasizing at this point that the ECtHR in its rulings against Poland, referred to in the footnote above, emphasized that the law cannot deprive persons who have full legal capacity to enter into marriage with the person they chose. Therefore, it seems that the limitation of admissibility of marriage to these persons pursuant to art. 12 § 1 of the Family and Guardianship Code is contrary to the Convention as an act of a higher rank.

Secondly, referring to the allegation of incompatibility of art. 12 § 1 with art. 23 of the UN Convention on the Rights of Persons with Disabilities[36], which provides for the right of all persons who are of adequate age to marry, to enter into marriage, and to found a family, based on the free and full consent of future spouses, the Constitutional Tribunal, stressed that Poland made a reservation to the Convention that the relevant

[31] Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284).

[32] This provision states that "Men and women of marriageable age have the right to marry and to found a family, in accordance with the national laws governing the exercise of this right".

[33] See case 11329/85, F.v. Switzerland, judgment of 18 December 1987, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57490%22]} [access: 30.12.2019], similarly the case 9532/81, Rees v.UK, judgment of 17 October 1986, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57564%22]} [access: 30.12.2019], case 36536/02, B and L v. UK, judgment of 13 September 2005, https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-70136%22]} [access: 30.12.2019].

[34] See case 24023/03 Jaremowicz v. Poland, judgment of 5 January 2010, http://trybunal.gov.pl/uploads/media/Sprawa_Jaremowicz_przeciwko_Polsce__skarga_nr_24023_03___wyrok_z_dnia_5_stycznia_2010_r.pdf [access: 30.12.2019] and case No. 22933/02 Frasik v. Poland, judgment of 5 January 2010,-http://trybunal.gov.pl/uploads/media/Streszczenie_wyroku_w_sprawie_Frasik_przeciwko_Polsce__skarga_nr_22933_02___wyrok_z_dnia_5_stycznia_2010_roku.pdf [access: 30.12.2019].

[35] L. Garlicki, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności,* Vol. 1, Commentary on articles 1-18, Warszawa 2010, p. 486.

[36] Convention on the Rights of Persons with Disabilities of 13 December 2006 (Journal of Laws of 2012, item 1169).

provision of the Convention would not be used until the change in Polish law. In practice, this means that it is necessary to continue to apply art. 12 § 1 of the Family and Guardianship Code, and hence the assumption that a person whose disability results from a mental illness or mental retardation, and who is of the right age to marry, will not be able to enter into marriage, unless the court permits it, establishing in advance, that the state of health and mind of this person does not threaten the marriage or the health of future offspring, of course, assuming that the person has not been completely incapacitated[37]. Considering the fact that the Convention was ratified by Poland in 2012, it seems that it is high time for the Polish legislator to intervene, which will lead to the compliance of Polish solutions with international legal regulations.

Thirdly, the Ombudsman noted that art. 12 § 1 of the Family and Guardianship Code is also inconsistent with art. 47 in connection with art. 31 section 3 of the Constitution. In accordance with art. 47 of the Constitution, everyone has the right to the legal protection of private and family life, honour and good name, and to decide about their personal lives. From the point of view of the discussed issues, it seems that the protection covers, in particular, such aspects of family life as the durability of the family and marriage based on emotional and economic ties that connect spouses and other family members and relatives, freedom of marriage and choice of spouse[38]. In the Ombudsman's opinion, the abovementioned provision of the Family and Guardianship Code deprives nupturients of the right to marry on the basis of unclear, ambiguous and incompatible with the state of modern knowledge medical criteria, i.e. "mental illness" and "mental underdevelopment". The Ombudsman also acknowledged that the above-mentioned regulation does not meet the necessity condition in a democratic state arising from art. 31 section 3 of the Constitution. This is because it excludes persons with health dysfunctions, who have not only limited, but sometimes even full legal capacity, from the group of persons having the right to enter into marriage. Hence the Ombudsman pointed out that the conclusion of marriage by persons with health dysfunctions should be based solely on the criterion of awareness and freedom of expression of will by nupturients. Referring to these allegations, the Constitutional Tribunal noted that the law stipulated in art. 47 of the Polish Constitution, is not an absolute value and according to the settled case-law, any possible restrictions thereof may find their justification primarily in art. 31 section 3 of the Constitution[39]. This argument is all the more disappointing that the exclusion of persons with health dysfunctions often having full legal capacity from the group of persons having the right to enter into marriage does not absolutely meet, in my opinion, the condition

[37] On the relationship of both obstacles to marriage, see among others A. Rogacka-Łukasik, *Małżeństwa* …, pp. 253-254.

[38] M. Wild, [in:] M. Safjan, L. Bosek (ed.), *Konstytucja Rzeczypospolitej Polskiej*, tom 1: *Komentarz. Artykuły 1-86*, Warszawa 2016, p. 1178.

[39] Compare judgment by the CT dated 20 March 2006 r., file No.K 17/05, OTK ZU 2006, No. 3, item 30.

of necessity in a democratic state formulated in art. 31 section 3 of the Constitution. This provision clearly states that any possible restrictions cannot infringe the essence of these rights.

Finally, the Ombudsman raised a plea of incompatibility of art. 12 § 1 of the Family and Guardianship Code with art. 30 of the Constitution. The Ombudsman noted that people affected by health dysfunctions who face a refusal or need to apply for a court permission to get married, even though they can fully consciously and freely express their will, feel hurt and socially degraded. Art. 30 of the Constitution being a legal provision in the strict sense of the word[40] states that the inherent and inalienable human dignity is a source of freedom for human and citizen rights. This dignity is inviolable and its respect and protection is the responsibility of public authorities. Referring to the Ombudsman's allegations, the Constitutional Tribunal noted that human dignity can only be limited exceptionally in the aspect of the so called personal rights. In connection with this, it considered that since there was no violation of art. 47 in connection with art. 31 section 3 of the Constitution, it is even more difficult to see the incompatibility of art. 12 § 1 of the Family and Guardianship Code with art. 30 of the Constitution, which incompatibility can be stated exceptionally, when the challenged regulation clearly leads to an arbitrary violation of the personal rights.

CONCLUSION

Therefore, a question arises what were the reasons for creating the current regulation of art. 12 § 1 of the Family and Guardianship Code? Several main reasons for this can be indicated. Firstly, it was recognized that people affected by mental illness or mental retardation are unable to create a properly functioning family due to their health limitations; secondly, they do not have the appropriate educational competences necessary for the proper exercise of parental responsibility, and thirdly, the eugenic argument is also important related to the fear of breeding offspring affected by parents' dysfunctions. Are these arguments still valid? It should be remembered that the regulation of art. 12 § 1 of the Family and Guardianship Code has been in force unchanged since the 1960s, while the progress in medicine, including psychiatry, which has been made in the last sixty years is enormous. It is worth noting that already in 1989 psychiatrists from the Clinic of Forensic Psychiatry of the Institute of Psychiatry and Neurology in Warsaw pointed out that the ban on marriages in their current form, practically unchanged since the 1950s, is a drastic deprivation of

[40] See among others the CT judgments dated: 8 November 2001 r., file No. K 11/00, OTK 2001, No. 3, item 54; 14 July 2003, file No. SK 42/01, OTK-A 2003, No. 6, item 62; 22 February 2005, file No. K 10/04, OTK 2005, No. 2, item 17; 24 October 2006, file No. SK 421/05, OTK-A 2006, No. 9, item 126; 6 November 2007, file No. U 8/05, OTK-A 2007, no. 10, item 121; 24 February 2010, file No. K6/09, OTK-A 2010, No. 2, item 15; 4 November 2014 , file No. SK 55/13, OTK-A 2014, No. 10, item 110.

citizenship rights of persons with mental disorders. At the same time, they argued that the arguments justifying the general ban on marriage for patients came from a period when the role of hereditary factors in the development of mental disorders was overestimated, there were no modern psychotropic drugs and separation of patients in hospitals was approved of, eliminating them from social life[41]. Thus, it is worth emphasizing that modern psychiatry exposes the positive impact of marriage on the therapy and functioning of sick people, criticizing the ban on marriages of people with mental disorders. It is pointed out that such people are often able to start a family and be valuable members of it. This approach to mentally ill people is expressed not only in the Convention on the Rights of Persons with Disabilities, saying in art. 23 section 1 that the state's duty is to take effective and appropriate measures to eliminate discrimination against persons with disabilities in such a way so as to, among others, ensure recognition of the right of all persons with disabilities who are of adequate age to marry, to enter into marriage and to found a family, on the basis of free and full consent of future spouses, but also the applicable Mental Health Act, which in art. 2 section 1 point 3 says that the protection of mental health includes the implementation of tasks concerning in particular shaping appropriate social attitudes towards people with mental disorders, in particular understanding, tolerance, kindness, as well as preventing their discrimination[42].

Given the above, it seems that while maintaining certain restrictions on entering into marriage by persons with the health dysfunctions presented here is necessary, art. 12 § 1 of the Family and Guardianship Code in the current wording is absolutely unsustainable. The ban on entering into marriage stipulated in this provision does not meet the standards of precision and clarity, which means that not only nupturients, but also expert psychiatrists and, as a consequence, the courts themselves are not sure whether a given person should be allowed or forbidden to enter into marriage. This is because there is no catalogue of mental disorders to be banned from entering into marriage. Thus the ban formulated in this way raises serious doubts in terms of compliance with human rights standards. Regardless of that, this provision simply seems ineffective. It is worth noting that no provision of universally binding law prohibits the maintenance of sexual relations and even the birth and raising of children by persons with mental disorders and reduced mental ability, who remain in informal relationships. *De lege ferenda* should therefore, in my opinion, call for a change of art. 12 § 1 of the Family and Guardianship Code aimed at departing from the principle that marriages by persons with mental disorders are banned, and repealing this ban is treated as an exception. Generally, these persons should be allowed to get married, and when it turns out that

[41] Compare R. Rutkowski, E. Waszkiewicz, U. Ludwikowska, *Psychiatryczne aspekty nowej kodyfikacji prawa cywilnego w Polsce,* „Psychiatria Polska" 1989, Vol. XXIII, No. 3, pp. 226 et seq.

[42] Law of 19 August 1994 on the protection of mental health (consolidated text, Journal of Laws of 2018, item 1878).

the relationship will endanger the marriage or health of future offspring, then the court should be able to annul it. Article 12 § 1 of the Family and Guardianship Code could therefore take the following form: "If the state of health or mind of a person with psychotic or mental disabilities threatens the marriage or the health of future offspring, the court may annul the marriage." This solution seems even more justified because under the influence of constant social changes a peculiar bottom-up process of privatization of family law is taking place, which will force the departure from outdated normative constructions that are out of touch with real needs.

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