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**SEPARATE REGULATIONS ON DEFECTS IN A DECLARATION  
OF INTENT TO ENTER INTO MARRIAGE, AS DISTINCT FROM  
GENERAL PROVISIONS OF THE POLISH CIVIL CODE**

**Abstract**

The aim of this paper is to present regulations on defects in a declaration of intent to enter into marriage and compare them with regulations set out in Articles 82-88 PCC with respect to the scope of the individual defects in a declaration of intent and the ways in which the resulting inconsistencies can be justified.

The paper uses a method of research based on legal doctrine, involving an analysis of legal provisions, especially those set out in the Polish Family and Guardianship Code, the Polish Civil Code, case law and the literature. Methods based on comparative law and the history of law are used as a secondary measure.

The research has shown that a limitation of the catalogue of defects in a declaration of intent as set out in Article 15<sup>1</sup> PFGC and the definition of the scope of the individual defects is justified by the nature of marriage as a lasting relationship. The inconsistencies between these regulations are therefore a deliberate step to implement the principle of permanence of marriage. However, the opinion expressed in this paper is that some of the defects in a declaration of intent to enter into marriage are regulated too narrowly, which is why the debate over amendments to Article 15<sup>1</sup> § 1 PFGC is well worth continuing. Especially relevant here is the *de lege ferenda* postulate to extend the scope of a defect in a declaration of intent set out in Article 15<sup>1</sup> § 1(1) PFGC

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with the defect of no freedom to declare intent to enter into marriage, as well as the postulate to extend the scope of error set out in Article 15<sup>1</sup> § 1(2) PFGC to include error as to civil identity. However, no reasons could be found to extend the catalogue of defects in a declaration of intent set out in 15<sup>1</sup> § 1 PFGC to include ‘ostensible nature’.

**Keywords:** entry into marriage, defects in a declaration of intent, marriage

## Introduction

Defects in a declaration of intent are set out in a statute and classified into specific types of irregularities that arise when making a decision (expressing intent) or accompany demonstration (declaration) of intent, thereby making such a declaration of intent, as defective, possibly legally ineffective.<sup>1</sup> The provisions of the Polish Civil Code (hereinafter ‘PCC’) governing defects in a declaration of intent are set out in Articles 82–86 and applicable to all legal acts under civil law, with the exception of those legal acts whose effects are regulated by special provisions. This *lex specialis*, whereby it is possible to annul a marriage due to a defect in a declaration of intent, is embodied in Article 15<sup>1</sup> of the Polish Family and Guardianship Code (hereinafter ‘PFGC’).<sup>2</sup> This covers a civil marriage (Article 1 § 1 PFGC) and marriage entered into under canon law or the internal law of any other religious order, and effective under civil law (Article 1 § 2 PFGC). However, the declaration of intent to conclude simultaneously a civil marriage may be defective, not a declaration about concluding a religious marriage.<sup>3</sup>

The catalogue of defects in a declaration of intent under Article 15<sup>1</sup> PFGC, as well as the manner of their regulation, including the scope of individual defects, deviates from the civil code regulation under Articles 82–88 PCC. Under Article 15<sup>1</sup> § 1 PFGC, a marriage may be annulled if the marriage declaration was submitted a) by a person who, for whatever reason, was unable to consciously

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<sup>1</sup> Wolter, A., Ignatowicz, J., Stefaniuk, K., *Prawo cywilne. Zarys części ogólnej*. Warszawa 2018, p. 385.

<sup>2</sup> Separate regulation of defects in a declaration of intent set out in Article 15<sup>1</sup> PFGC is indicative of the belief that entry into marriage constitutes a legal act, though of a special kind. This is questionable, however, as some authors do not classify acts under family law as legal acts – see Zielonacki, A., *Zawarcie małżeństwa*. Wrocław 1982, pp. 175–188 and literature quoted there.

<sup>3</sup> See Domański, M. in: Osajda, K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO*. Warszawa 2015, p. 151.

express his/her intention, b) under an error as to the other party's identity, c) under an unlawful threat from other party or a third party if the circumstances indicate that the person submitting the declaration could fear serious personal danger to himself or another person. In the absence of a specific reference to Articles 82–88 PCC, general provisions cannot be applied, even by analogy.<sup>4</sup>

This paper analyses the issues of the regulation of defects in a declaration of intent to enter into marriage which is different to general provisions set out in Articles 82–88 PCC in the aspect of individual defects as well as reasons for the existing divergences.<sup>5</sup>

### **Separate regulation of defects in a declaration of intent in Article 15<sup>1</sup> § 1 PFGC – general discussion**

At the outset, it is a good idea to try to explain the model applied by the legislator, in which the definition of a defect in a declaration of intent, as set out in Article 15<sup>1</sup> § 1 PFGC, is considerably more narrow than its general regulation known from Articles 82–88 PCC. The rationale for the existing discrepancy should be sought in the nature of the institution of marriage.

Among the fundamental principles at the core of Article 18 of the Polish Constitution<sup>6</sup> and provisions set out in the family and guardianship code is the principle of protection of marriage as a lasting union.<sup>7</sup> Marriage is legally designed to be a stable institution due to its role in society. The reason for this is that marriage involves one of the most private spheres of human life, and entry into a marital union determines the person's legal situation, for example, by creating a new marital status of a husband and a wife, and also because marriage is the nucleus of the basic building block of society – the family.<sup>8</sup> Special protections applied to marriage call for a detailed definition of protected conditions.

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<sup>4</sup> Gajda, J., in: Smoczyński, T. (ed.), *System Prawa Prywatnego. Prawo rodzinne i opiekuńcze*. Warszawa 2014, p. 184.

<sup>5</sup> This article omits questions relating to discrepancies as to sanctions, which – though interesting as research subjects – would go far beyond the scope of this paper.

<sup>6</sup> Thus in Kalus, S., *Konstytucyjne źródła zasad polskiego prawa rodzinnego*, in: *Prawo a wartości. Księga jubileuszowa Profesora Józefa Nowackiego*. Kraków 2003, p. 107.

<sup>7</sup> The principle of permanence of marriage is singled out by numerous authors, such as Ignatowicz, J. and Nazar, M., *Prawo rodzinne*. Warszawa 2016, p. 102.

<sup>8</sup> Cf. Piasecki, K., *Prawo małżeńskie*. Warszawa 2011, p. 148.

Without that, these protections would often be pointless. Therefore, if the principle of permanence of marriage can be derived from legal provisions, then it must be given extraordinary axiological, functional and hierarchical importance against other legal regulations.<sup>9</sup> As a consequence, due to the principle of permanence of marriage's expressing essential values which underlay the legislator's introduction of given regulations, their interpretation should be carried out with taking it into account.

The presented reasoning for the legislative framework governing defects in a declaration of intent in the PFGC is additionally supported by a historical analysis. The institution of defects in a declaration of intent when entering into marriage was only introduced to the family and guardianship code by an amendment of 24 July 1998<sup>10</sup> (over 20 years ago).<sup>11</sup> Since the entry into force of the PFGC, in the absence of possibilities to apply a general code regulation, the only way to dissolve a defective marriage has been by divorce, as the possibility of applying analogy with Article 82–88 PCC has been rejected.<sup>12</sup> This clearly shows that the legislator's intention there was for marriage to be dissoluble only in extraordinary circumstances. With respect to marriage as a lasting union, it should be stressed that the legal instruments capable of contesting a marriage's right to exist should be carefully limited by the legislator and availed of under valid circumstances.

At the same time, we cannot ignore the fact that, as there was a lack of regulations of defects in a declaration of intent, legal scholars have been involved in a debate over the need to take them into consideration.<sup>13</sup> It has been rightly pointed out that the absence of regulations on defects in a declaration of intent in PFGC is somehow detrimental to the principle of marital permanence, because

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<sup>9</sup> Cf. Leszczyński, L. and Maroń, G., *Pojęcie i treść zasad prawnych oraz generalnych klauzul odsyłających. Uwagi porównawcze*, "Annales Universitatis Mariae Curie-Skłodowska" 2013, No. LX(1), p. 83.

<sup>10</sup> Dz. U. (Journal of Laws) of 1998, No. 117 item 757.

<sup>11</sup> Defects in a declaration of intent were covered under previous regulations; for example, Article 5 of the Decree of 25 September 1945 stipulates marriage is validly concluded if the spouses' declarations of intent to enter into marital relations are free from defects and made in a manner provided for in the law. The Family Code of 1950 made no mention of defects in a declaration of intent.

<sup>12</sup> See Supreme Court judgment of 8 October 1952, C 1809/51, NP 1953, No. 6, p. 56.

<sup>13</sup> See more on the subject in Pietrzykowski, K., *Wpływ wad oświadczenia woli nupturientów na ważność małżeństwa*, "Studia Prawnicze" 1980, No. 2, pp. 132–136 and literature quoted there. The author makes *de lege ferenda* postulates for introducing such regulations – p. 153.

a larger number of marriages are then dissolved by divorce.<sup>14</sup> However, the introduction of the proposed legislation had to harmonize with the essence of marriage and fundamental principles of marital law, hence the departure from the model provisions set out in Article 82-88 PCC was justified.

Considering this, it should be assumed that, firstly, the regulation of defects in a declaration of intent, as laid down in PFGC, is justified by its preventive function.<sup>15</sup> Secondly, the essence of marriage and its role in society accounts for the limitation of the scope of defects in a declaration of intent, as compared with general regulations laid down in PCC. However, this does exclude the validity of an in-depth analysis of defects in a declaration of intent set out in Article 15<sup>1</sup> § 1 PFGC as compared to PCC provisions, including through an assessment of detailed arrangements presented below.

### **Inability to consciously express intent**

The first defect in a declaration of intent set out in Article 15<sup>1</sup> § 1(1) PFGC is inability to consciously express intent.<sup>16</sup> A declaration of intent to enter into marital relations is deemed to be defective if made by a person who, for whatever reason, was unable to consciously express his/her intention. Within the meaning of this provision, the inability to consciously express one's intention refers to the declaration of intent to enter into marriage and therefore not to formalities preceding entry into marriage, including the grant of a power of attorney to enter into marriage. In the second case, however, the principal may assert nullity of the power of attorney on general terms set out in PCC. What should be noted with respect to Article 82 PCC is the different construal of the discussed declaration of intent whereby 'defect' extends to cover not only a condition precluding conscious and free decision-making but also expression of intention.

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<sup>14</sup> See Ignatowicz J., in: Piątowski, J. (ed.), *System prawa rodzinnego i opiekuńczego*. Warszawa–Łódź 1985, p. 140.

<sup>15</sup> *Ibidem*, p. 166.

<sup>16</sup> The sanction prescribed in the event of defects set out in Article 15<sup>1</sup> PFGC is the possibility of invalidating the marriage, which is in support of the Supreme Court's opinion that no valid claim can be made to establish the non-existence of a marriage so concluded by asserting failure to make a declaration of intent to enter into marriage due to being in a state precluding a conscious expression of will (Article 151 § 1(1) of PFGC) – Supreme Court judgment of 22 February 2012, IV CSK 240/11, LEX no. 1217052.

An investigation of the decision-making stage suggests that the PFGC model, whereby decision-making done not consciously or freely is legally irrelevant, is sensible. This is because the law provides for effective and arguably sufficient measures to prevent decisions to enter into marriage in such a condition. These measures are set out particularly in Article 4 PFGC where a 1-month waiting period must expire before marriage can be effected, and Article 12 PFGC listing mental illness and mental retardation as impediments to marriage.<sup>17</sup> Additionally, it should be appreciated that the plea of lack of consciousness or lack of freedom could be abused by parties wishing to release themselves from the legal effects of marriage. The subsequent stage of expressing intent certainly verifies the validity of the first, decision-making stage.

In the light of Article 15<sup>1</sup> § 1 PFGC lack of consciousness is legally relevant for making a declaration of intent to enter into marriage, i.e. making a declaration to the registrar of vital records or an officiating clergyman. The legislator is silent on the causes of lack of consciousness, meaning that it could be any circumstance e.g. arising out of the declaring party's old-age dementia or abuse of psychoactive substances, such as medications, alcohol or drugs. Fault or complicity in bringing about the absence of consciousness of the person making a declaration of intent is immaterial, as is also the question whether the cause of lack of consciousness is of permanent or temporary duration.<sup>18</sup> Satisfaction of conditions set out in Article 12 PFGC bars Article 15<sup>1</sup> § 1 (1) PFGC and so the grounds for nullifying marriage are provided by the impediment of mental illness or mental retardation. As a consequence, it is not necessary to determine whether the declaring party made the declaration in a condition precluding conscious expression of will.<sup>19</sup>

A doubt appears with respect to Article 15<sup>1</sup> § 1 PFGC whether failure to qualify a condition in which one is not free to express one's will as defective is a purposeful step. The quality of 'consciousness' is substantially different from 'freedom' as confirmed by the use of both these terms in Article 82 PCC. PFGC's omission of the defect of lack of freedom is noteworthy, for the inability to act freely does not always mean the inability to consciously express one's

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<sup>17</sup> See Smyczyński, T., *Nowelizacja prawa małżeńskiego*, "Państwo i Prawo" 1999, No. 1, p. 30.

<sup>18</sup> See Domański, M., *op. cit.*, p. 152.

<sup>19</sup> Thus in Borysiak, W., in: Wierciński, J. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa 2014, p. 167.

intentions.<sup>20</sup> Consciousness understood as the ‘the ability to perceive’<sup>21</sup> presupposes making a declaration of intent with full cognizance of its legal effects. Freedom in turn assures making unrestricted declarations of intent without being bound by any constraints.<sup>22</sup> It is rightly pointed out that in the light of Article 15<sup>1</sup> § 1(1) PFGC making a declaration of intent to enter into marriage, made in a state of drug hunger (a condition excluding free declaration of intent) would not necessarily constitute grounds for nullifying the marriage (for it does not always exclude conscious declaration of intent). However, Article 82 PCC would allow invalidating a declaration of intent so made.<sup>23</sup>

After examining this issue, we cannot help but agree that it is rather questionable to narrow down this defect in a declaration of intent to refer only to a lack of consciousness when making a declaration of intent to enter into marriage.<sup>24</sup> Controversies arise as to its compatibility with the New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962, to which Poland is a party.<sup>25</sup> Under the Convention’s Article 1, consent to marriage should be full and free. Therefore, extending the scope of a defect by the quality of ‘lack of freedom’ is justified in the context of model general provisions in Article 82 PCC, as well as obligations under international law. It would be difficult to find legitimate reasons to omit the defect of ‘lack of freedom’ when performing this particular legal act, that is entering into marriage. In this case, marriage is established by a declaration of intent made by a person limited in his actions, whose conduct is restrained by internal or external factors, and as such results in a defective declaration of intent. The principle of permanence of marriage should not allow the existence of relationships established under such conditions.

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<sup>20</sup> See Balwicka-Szczyrba, M., *Wady oświadczenia woli przy zawarciu małżeństwa oraz zawarcie małżeństwa przez pełnomocnika na tle problematyki migracji zarobkowej* in: Stadniczeńko, S., Gołwkin-Hudała, M., Wilk, A. (eds.), *Prawnorożne i społeczne konsekwencje migracji zarobkowej. Wybrane zagadnienia*. Opole 2009, p. 91.

<sup>21</sup> Szymczak, M. (ed.), *Słownik Języka Polskiego PWN, R–Z*. Warszawa 1999, p. 426.

<sup>22</sup> Cf. the definition of ‘freedom’ – *ibidem*, p. 350.

<sup>23</sup> Ignatowicz, J. and Nazar, M. *Prawo rodzinne*. Warszawa 2004, p. 104.

<sup>24</sup> Thus *ibidem*, p. 104.

<sup>25</sup> Dz. U. (Journal of Laws) of 1965, No. 9, item 53. Poland ratified the Convention in 1964.

## Error

Under Article 15<sup>1</sup> § 1(2) PFGC, marriage can be invalidated if the declaration of entry into marriage was made under an error as to the other party's identity. At the same time, PFGC does not provide for deceit as a separate category of error.

In the context of general principles, the idea of 'error' may be understood in multiple ways. This being said, not every error is material under the applicable law. Article 84 PCC makes a distinction of errors in legal acts between material errors of fact and immaterial errors, the latter type being legally irrelevant.<sup>26</sup> The error in a legal act performed against payment should be asserted by the disadvantaged party even where he was not at fault for the error, or conscious or able to easily notice the error. The law also requires the error to be objectively substantial in such a way that no reasonable person would make a declaration of intent if he knew the true state of affairs.<sup>27</sup>

The concept of error in entry into marriage raises doubts as to its scope. Error as to person can be understood as error about the person's civil and physical identity.<sup>28</sup> Error about physical identity occurs where marriage is concluded with either the would-be spouse's twin sibling or attorney-in-fact acting on behalf of someone with exactly the same name.<sup>29</sup> Error about civil identity relates to the future spouse's marital and personal status. In addition to these, an error about quality may also be asserted whereby one of the spouses is mistaken as to the other spouse's personal characteristics, such as sexual orientation, ability to have sex or dependence on intoxicating substances.

Jurisprudence sways in favour of the view that the legislator in Article 15<sup>1</sup> § 1 (2) PFGC refers only to the error as to the other person's identity.<sup>30</sup> If 'iden-

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<sup>26</sup> The legislator takes this into account in matters of succession (Article 945 § 1 PCC) and in the case of deceit (Article 86 PCC).

<sup>27</sup> Wolter, A., Ignatowicz, J., Stefaniuk, K, op. cit., pp. 309–310.

<sup>28</sup> An extensive discussion of errors in entry into marriage is found in Pietrzykowski, K., in: *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa 2018, pp. 224–226.

<sup>29</sup> See Preussner-Zamorska, J., *Wady oświadczenia woli na gruncie prawa rodzinnego (ocena aktualnego stanu prawnego i wnioski de lege ferenda)*, in: Sołtysiński, S. (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy)*. Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego. Poznań 1990, pp. 543–544.

<sup>30</sup> Thus in Strzebińczyk, J., *Prawo rodzinne*. Kraków 2003, p. 112; Balwicka-Szczyrba, M., op. cit., p. 93.



tity' means being the same, or identical<sup>31</sup>, the error is construed very narrowly. In this line of argument, error under Article 15<sup>1</sup> PFGC does not include a misconception about the other person's marital or personal status<sup>32</sup>, not to mention the ability to have sex, homosexuality or pathological genetic heritage<sup>33</sup>, which can only be cited as a cause of cessation of marital relations and therefore a ground for divorce. The predominating view is that the provision cannot be explained in more detail, although there are minority opinions to the contrary.<sup>34</sup>

In view of the provisions of Article 1 of the New York Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 10 December 1962 which mention full and free consent to marriage, it is clear that PFGC does not exhaustively transpose these provisions. A survey of foreign legislation also suggests a significantly broader understanding of error as a defect in a declaration of intent.<sup>35</sup> For example, in the French legal system, defects in a declaration of intent to enter into marriage include error as to person or personal characteristic (Article 180.2 of BGB). Similarly, Swiss law also includes error as to person or material characteristics of the person as defects. This is also the case for marriages entered into without intention.<sup>36</sup>

A broad interpretation of error also follows from a survey of canon law.<sup>37</sup> For the purpose of comparison, it is good to point out that assertion of nullity of marriage under canon law as a result of error is one of the most frequently invoked premises for decisions of ecclesiastical courts.<sup>38</sup> Canon law specifies three types of error: error about a person (canon 1097 § 1); error about a quality of the person (canon 1097 § 2); error about a quality of the person as a result of

<sup>31</sup> Szymczak, M. (ed.), op. cit., p. 481.

<sup>32</sup> See in Haak, H., *Nowelizacja prawa rodzinnego*, "Monitor Prawniczy" 1999, No. 33, p. 158.

<sup>33</sup> See in Smyczyński, T., op. cit., p. 31.

<sup>34</sup> See in Gajda, where error as to physical identity includes error as to marital status – Gajda, J., op. cit., p. 186.

<sup>35</sup> Arguments in comparative law are extensively analysed by Nesterowicz, M., *Błąd co do osoby jako przyczyna unieważnienia małżeństwa (uwagi de lege ferenda)*, "Państwo i Prawo" 2009, No. 4, pp. 20ff.

<sup>36</sup> Ibidem, pp. 22, 26.

<sup>37</sup> More on error in canon law in Pawluk, T., *Prawo kanoniczne według kodeksu Jana Pawła II. Volume III. Prawo małżeńskie*. Olsztyn 1996, p. 160.

<sup>38</sup> Ibidem, p. 160.

deceit (canon 1099); legal error about the unity, inseparability and sacramental dignity of marriage (canon 1098). Marriage made in error about the person is invalid, but the error should be objective, substantial and related to the person taken in matrimony.<sup>39</sup> On the other hand, entry into marriage in error about the person's quality (nationality, marital status, profession) does not affect its validity unless such a quality is explicitly required or essential (canon 1097 § 2).<sup>40</sup> A third type of error recognized in canon law is deceit, which results in the nullity of marriage if it relates to a quality of the party, which by its nature may seriously disrupt marital relations (e.g. infertility). The purpose of deceit is to inveigle the other party into marriage.<sup>41</sup> The last type of error, one relating to the unity, inseparability and dignity of the marital relation, nullifies the marriage if it was relied upon by the declaring party in expressing his/her intent.<sup>42</sup>

With respect to the above reservations relating to the interpretation of provisions in Article 15<sup>1</sup> § 1(2) PFGC as well as arguments in comparative law, calls have been raised in the judiciary community to extend the scope of error as a nullifying premise.<sup>43</sup> This stance should be shared but only in so far as the proposed legislative amendments remain within a strictly designated spectrum. In order to serve the interests of entrants into marriage, an error in making a declaration of intent to enter into marriage as a defect in a declaration of intent should relate to physical and civil identity, including the entrant's physical qualities making up his marital or personal status. In my opinion, it remains doubtful whether the extension of the scope of error should go so far as to cover errors about a quality, for these could be abused by persons unsatisfied with their marriage.<sup>44</sup> Quality is a characteristic feature of a person or of a thing.<sup>45</sup> Such an interpretation of this concept would lead to undesirable effects, espe-

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<sup>39</sup> Ibidem, p. 160.

<sup>40</sup> See Góralski, W., *Błąd co do przymiotu osoby (kan. 1097 § 2 k.p.kan.)*, "Ius matrimoniale" 1994, No. 4, pp. 48–49.

<sup>41</sup> Góralski, W., *Kanoniczne prawo małżeńskie*. Warszawa 2000, p. 98.

<sup>42</sup> Ibidem, p. 98.

<sup>43</sup> Thus in Sokołowski, T., *Zawarcie małżeństwa przez chorego na ciężką chorobę zakaźną*, "Gdańskie Studia Prawnicze" 2003, No. X., p. 16; Nesterowicz, M., op. cit., p. 30.

<sup>44</sup> This problem has been pointed out by Jerzy Strzebińczyk, arguing that if invocations of error as to a quality of a person are allowed, the semantic scope of 'a quality' could be extended to include 'state of health' – Strzebińczyk, J., op. cit., p. 115.

<sup>45</sup> Szymczak, M., op. cit., p. 682.

cially attempts to nullify the marriage by claiming error as to essential personal qualities required by one party but absent from the other despite assurances.

### ***Threat***

Under Article 15<sup>1</sup> § 1 (3) PFGC, marriage may be nullified if entered into under unlawful threat by the other party or a third party if it follows from the circumstances that the declaring party had reason to fear that he or another party is in serious danger with regard to person or property. Threat mentioned in Article 15<sup>1</sup> § 1(3) is present when the threat and its execution is determined by the threatening party. A threat is considered to be unlawful if it violates the applicable laws and principles of community life.<sup>46</sup> Such a threat should be serious and rational. It is rightly maintained that any assessment of whether a threat is serious should look at both the subjective and objective side of the situation, in particular the perpetrator's age and mental condition and the kind of impending danger.<sup>47</sup> It is not necessary that the person making a threat directly demand a declaration of intent for such a declaration to be considered to have been made under an unlawful threat; it is sufficient that the declaration was necessary to avoid the effects of the threat.<sup>48</sup>

When comparing a defect in a declaration of intent made under threat as set out in Article 15<sup>1</sup> § 1(3) PFGC with that discussed in Article 87 PCC, it can be observed that these regulations share a great number of similarities. Therefore, the opinion holds true that where detailed issues are concerned it is acceptable to draw upon legal scholarship formed around Article 87 PCC.<sup>49</sup> In PCC, a threat is present when a person, in order to force another person to make a declaration of intent, announces the use of measures that will result in negative consequences for their intended recipient or a third party. The threat mentioned in Article 87 PCC is premised on unlawfulness and the recipient's reasonable fear that he or another person is in danger. In other words, the threat must be serious. The difference between a threat on general terms and threat under Article 15<sup>1</sup> PFGC is that

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<sup>46</sup> Cf. Supreme Court judgment I CKN 1134/99, LEX no. 53282 in which it was pointed out that a threat involves unlawful action or exercising formally lawful actions for a purpose for which they cannot be exercised legally.

<sup>47</sup> Domański, M., op. cit., p. 157.

<sup>48</sup> See Supreme Court decision of 15 October 1946, C III 597/46, OSN 1947, No. 3, item 48.

<sup>49</sup> Thus in Smyczyński, T., op. cit., p. 53.

– pursuant to Article 87 PCC – danger to both the person and property is legally significant, while Article 15<sup>1</sup> § 1(3) PFGC mentions only danger to the person.

Threat defined as including only danger to the person may be a little controversial. Cases exist where a marital union was entered into for fear, sometimes even serious fear, arising from economic motives. In the case of a special legal act, such as entering into marriage, this kind of fear is legally immaterial due to the nature of marriage as establishing personal relations that far outweigh relations of a financial nature. The PFGC treatment of threat as a defect in a declaration of intent should therefore be considered correct.

### *The problem of omission of the defect of ‘ostensible nature’*

Article 15<sup>1</sup> PFGC omits ‘ostensible nature’ as a defect in a declaration of intent and so entry into marriage on false pretences does not allow a *de lege lata* avenue for its invalidation. No grounds exist to justify reference by analogy to Article 83 PCC, for it is difficult to claim a legal loophole in this case.<sup>50</sup> Some scholars are of the opinion that ‘ostensible nature’ should be made a defect in a declaration of intent to enter into marriage, but these are rightly criticized<sup>51</sup> minority views.<sup>52</sup> The view cannot be supported by invoking the Foreigners Act of 12 December 2013<sup>53</sup> due to the different purpose of the act as a whole, and also due to the function of the act’s Article 169 introduced to counteract abuses of law in obtaining residency permits.<sup>54</sup>

It should be noted that ‘ostensible nature’ as defined in Article 83 PCC is in fact at variance with marriage as a specific legal act. This is – firstly – because the model construction of ‘ostensible nature’ relates to bilateral acts, while entry into marriage involves making declarations of intent to the registrar of vital records or an officiating clergyman. Therefore, the participation of an official component

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<sup>50</sup> See Pietrzykowski, K., in: Pietrzykowski, K. (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa 2018, p. 229.

<sup>51</sup> See Pietrzykowski, K., *Wpływ*, p. 149 and the literature quoted there.

<sup>52</sup> Thus in Kozaczka, A., *Wady oświadczenia konsensu z art. 1 kodeksu rodzinnego a nieważność małżeństwa*, “Nowe Prawo” 1957, No. 9, p. 53.

<sup>53</sup> Dz. U. (Journal of Laws of 2018), item 2094, consolidated text.

<sup>54</sup> See judgment of the Supreme Administrative Court in Warszawa 19 October 2016, II OSK 2628/15, LEX no. 2169082. A discussion of this issue was taken up by Lewandowska, E., *Pozorność oświadczenia woli. Studium cywilnoprawne*, Olsztyn 2018, pp. 202ff.

precludes such a defect, for entry into marriage is not a purely bilateral construct. Secondly, entering into marriage produces legal effects not only for the parties but for the country and society as a whole. As the nature of marital bonds is not entirely the spouses' private matter, the implicit contract existing between them should be of no legal consequence.<sup>55</sup> Thirdly, it should be assumed that where a will to make a declaration of intent to enter into marriage is absent, it results in making declarations not seriously which then means that no marriage has been formed and there are reasons to regard it as non-existent (*matrimonium non existens*). To resolve this problem, we need to view it on a different level by considering the question of whether or not the marriage exists rather than whether it should be nullified as defective.

With the above arguments in mind, the omission of 'ostensible nature' in Article 15<sup>1</sup> PFGC as a defect in a declaration of intent seems to have been intended by the legislator. The general provisions in Article 83 PCC cannot be applied here, not even by analogy.<sup>56</sup> Legislating on 'ostensible nature' would lead to numerous practical problems where a lot of discontented spouses would attempt to claim that their marriage was concluded as a result of ostensible declarations<sup>57</sup>. Its omission is justified by the principle of permanence of marriage.

## Conclusions

The amendment to the PFGC of 24 July 1998 introduced the possibility of invalidating a marriage in the event of defects in a declaration of intent. Despite the 20-year period that has passed since then, the provisions of Article 15<sup>1</sup> § 1 PFGC continue to give rise to doubts as to their interpretation, in particular due to the different scope of regulation of such defects, compared with general regulations in Articles 82–88 PCC.

The considerations contained in this article suffice to conclude that a limitation of the catalogue of defects in a declaration of intent, and a different definition of the scope of individual defects, is justified by the nature of marriage as

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<sup>55</sup> Pietrzykowski, K., *Wpływ*, p. 149.

<sup>56</sup> See Gajda, J., *op. cit.*, p. 184.

<sup>57</sup> It was noticed as early as in the 1924 Marriage Law bill that 'it is common that reasons based on defects are fictitious' quoted in Kozaczka, A., *op. cit.*, p. 53. The problem of abuse of this legal provision is also pointed out by Strzebińczyk, J., *op. cit.*, p. 112.

a lasting institution. The nature of marriage and its function within society justify the inconsistency in the analysed legal regulations.

This thesis does not, however, prejudice the opinion expressed in this paper, that the regulation of some defects in a declaration of intent to enter into marriage is too narrow and so the debate over amendments to Article 15<sup>1</sup> § 1 PFGC is well worth continuing. Especially relevant here is the *de lege ferenda* postulate for extending the scope of a defect in a declaration of intent as set out in Article 15<sup>1</sup> § 1(1) PFGC by a defect of no freedom of a declaration about entering into marriage, as well as the postulate to extend the scope of error within the meaning of Article 15<sup>1</sup> § 1 (2) PFGC by error as to civil identity. Such a modification of defects would provide entrants into marriage with better protection against the effects of declarations of intent made in a defective manner.

No grounds could be found for extending the catalogue of defects in a declaration of intent set out in Article 15<sup>1</sup> § 1 PFGC to include ‘ostensible nature’. The defect of ostensible nature within the meaning of Article 83 PCC is incompatible as to its substance with the special legal act of entry into marriage if only because of the involvement of the authorities excludes the model construction of a bilateral act. It should be understood that no will to make a declaration of intent to enter into marriage results in making declarations not seriously and therefore marriage never materializes (*matrimonium non existens*).

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## Legislation

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## **Judicial decisions**

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