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## The Abbreviated Matrimonial Process before the Bishop and Ecclesiastical Divorce in the Orthodox Churches

**Abstract:** The article presents a critical examination of the abbreviated process before the bishop and ecclesiastical divorce in the Orthodox Churches. The basic point of departure for the analysis is the post-synodal Apostolic Exhortation *Amoris laetitia* promulgated by Pope Francis. Article 244 in the subsection entitled “Accompaniment after breakdown and divorce” explains Pope Francis’ motivation behind the modifications to the briefer process before the bishop in line with his Apostolic Letter *motu proprio Mitis et misericors Iesus*. Using a combined method of analysis, synthesis and comparison, the article aims to present a comprehensive theological and judicial view on the abbreviated matrimonial process before the bishop and on the practice of the Orthodox Churches in the process of ecclesiastical divorce. The textual analysis revealed that the primary reason for the modifications was the length of the process as it posed considerable difficulties and exhausted the parties involved. Pope Francis’ recent documents on the subject have resulted in simplification of the procedures eventually granting the declaration of nullity of marriage. These documents have highlighted a very important component of the Second Vatican Council’s teaching that the bishop himself, in his local church over which he has been appointed shepherd and head, is at the same time a judge of the faithful entrusted to him. The article also emphasizes that bishops do not delegate the said ministry entrusted to them to other structures within their eparchies but exercise their ministry personally for the salvation of immortal souls.

**Keywords:** Church, Pope Francis, *motu proprio*, eparchial bishop, marriage, briefer process, divorced and remarried

## Introduction

On August 15, 2015, as the Supreme Legislator of the Catholic Church, the Holy Father Francis signed the Apostolic Letter *Mitis et misericors Iesus* issued *motu proprio*, that is, of his own accord, on the reform of the canonical process pertaining to cases regarding the nullity of marriage in the Code of Canons of Eastern Churches. This document entered into force on December 8, 2015, at the beginning of the Jubilee Year of Mercy.<sup>1</sup>

By happy coincidence with the opening of the said year, the entry into force of the Apostolic Letters *motu proprio Mitis et misericors Iesus* and *Mitis Iudex Dominus Iesus* issued on August 15, 2015 given the purpose of implementing justice and mercy regarding the truth of the bond of those who have experienced the failure of their marriage, poses, among other things, the need to harmonize the updated procedures for cases concerning matrimonial trials with the norms proper to the Roman Rota, pending the reform of the latter.<sup>2</sup>

The new reform has been incorporated into the existing Code of Canons. “Since the Code of Canons of Eastern Churches must be applied in all matters, without prejudice to special norms, even the matrimonial processes in accord with can. 1377, § 3, the present ratio does not intend to explain in detail a summary of the whole process, but more specifically to illustrate the main legislative changes and, where appropriate, to complete it.”<sup>3</sup>

The procedural changes regarding the pre-judicial and pastoral investigation are explained in the Article 3 of the *Mitis et misericors Iesus*: “[...] one eparchy, or several together, according to the present groupings, can form a stable structure through which to provide this service and, if appropriate, a handbook (*vademecum*) containing the elements essential to the most appropriate way of conducting the investigation.”<sup>4</sup>

The important novelty, introduced by Pope Francis in the fifth chapter of his apostolic letter, is the process to declare nullity of marriage

<sup>1</sup> FRANCIS: *Litterae Apostolicae Motu Proprio “Mitis et misericors Iesus” by which the canons of the Code of Canons of Eastern Churches pertaining to cases regarding the nullity of marriage are reformed* [15.08.2015], [https://www.vatican.va/content/francesco/en/motu\\_proprio/documents/papa-francesco-motu-proprio\\_20150815\\_mitis-et-misericors-iesus.html](https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-et-misericors-iesus.html) [accessed 15.05.2022] [hereinafter: MEMI].

<sup>2</sup> FRANCIS: *Rescript of His Holiness Pope Francis regarding the implementation and compliance of the new law for marriage annulment procedures* [7.12.2015], [https://www.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco\\_20151207-rescripto-processo-matrimoniale.html](https://www.vatican.va/content/francesco/en/letters/2015/documents/papa-francesco_20151207-rescripto-processo-matrimoniale.html) [accessed 15.05.2022].

<sup>3</sup> FRANCIS: MEMI.

<sup>4</sup> FRANCIS: MEMI.

called the briefer matrimonial process before the bishop concerning canons 1369 to 1373.<sup>5</sup> The following sections of this article will discuss this process.

## The rationale behind the abbreviated process before the bishop

Although a vocation to holiness exercised in the Church seems to be of a moral nature, it does not lose its judicial nature, since the vocation to holiness participates in the supreme law *salus animarum suprema lex*. The vocation to holiness is closely linked to the salvation of souls. The purpose and the most profound principle of the Church is to save and redeem souls. Faithful in Christ cannot attain holiness unless they respond to their personal calls to holiness and “extend all their energy for the growth of the Church and its continuous sanctification, since this very energy is a gift of the Creator and a blessing of the Redeemer.”<sup>6</sup>

In difficult life situations, one is called upon to improve some generally applicable norms and hold oneself accountable for any concrete changes. The Synod on Family launched a discussion about the Church improving the generally valid legal norms that would help simplify the lengthy process of investigation leading to the declaration of nullity of marriage. The prescriptions of canon law as such serve the Church in applying the truths of faith in concrete situations with pastoral sensitivity while taking into account the spiritual situation of those concerned and remaining faithful to the truths of faith. These prescriptions have been entrusted to the Church, not so that she can change them contrary to the purpose of the Gospel, but so that she can help more effectively in situations that recur repeatedly and do so for the salvation of souls as the highest norm there is among her pastoral norms.<sup>7</sup>

In an opening paragraph of his Apostolic Letter *Mitis et misericors Iesus*, issued *motu proprio*, on the reform of the canonical process pertaining to cases regarding the nullity of marriage, Pope Francis states: “The gentle and merciful Jesus, the Shepherd of our Souls, entrusted to the Apostle Peter and to his successors the power of the keys to carry out the work of

<sup>5</sup> FRANCIS: *Apostolic Exhortation “Amoris laetitia”* [19.03.2016], n. 244.

<sup>6</sup> J. POPOVIČ, F. ČITBAJ: *Kánonické právo 1*. Prešov 2020, pp. 48—49. See also: PAUL VI: *Lumen gentium*, Art. 33, [https://www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19641121\\_lumen-gentium\\_en.html](https://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19641121_lumen-gentium_en.html) [accessed 15.05.2022].

<sup>7</sup> P. AMBROS: *Rodina — světlo v temnotě světa*. Olomouc 2015, p. 29.

truth and justice in the Church; this supreme and universal power of both binding and loosing here on earth asserts, strengthens, and protects the power of Pastors of particular Churches, by virtue of which they have the sacred right and duty before the Lord to enact judgment toward those entrusted to their care.”<sup>8</sup>

In a foreword to the section entitled “The way of proceeding in cases regarding the declaration of the nullity of marriage,” Pope Francis justifies the much needed reform of these norms: “The Third General Assembly of the Extraordinary Synod of Bishops, held in October of 2014, looked into the difficulty the faithful have in approaching church tribunals. Since the bishop, as a good shepherd, must attend to his poor faithful who need particular pastoral care, and given the sure collaboration of the successor of Peter with the bishops in spreading familiarity with the law, it has seemed opportune to offer, together with the detailed norms for the application to the matrimonial process, some tools for the work of the tribunals to respond to the needs of the faithful who seek that the truth about the existence or non-existence of the bond of their failed marriage be declared.”<sup>9</sup> He continues: “[...] from this perspective, it is a very important mission of the bishop — who, according to the teaching of the Eastern fathers, acts as judge and physician — that man, having been wounded and having fallen (*peptokós*) by original sin and his own faults, and thus having been weakened, attains healing and mercy from the medicinal means of penance offered by God and is reconciled with the Church. For indeed the Bishop — having been constituted a model of Christ and standing in his place (*eis typon kai topon Christou*) — is above all a minister of divine mercy; therefore, the exercise of juridical power is a privileged place where, using the laws of *oeconomia*<sup>10</sup> or *acribia*, he himself imparts the Lord’s healing mercy to the Christian faithful in need of it.”<sup>11</sup>

## The role of the eparchial bishop in the process

Pope Francis discusses the role and responsibilities of the bishop in the process for the declaration of nullity of marriage in his post-synodal apos-

<sup>8</sup> FRANCIS: *MEMI*.

<sup>9</sup> FRANCIS: *MEMI*.

<sup>10</sup> P. I. Boumis: *Kánonické právo pravoslávnej cirkvi*. Prešov 1997, pp. 47—48.

<sup>11</sup> FRANCIS: *MEMI*.

toxic exhortation *Amoris laetitia*. He reminds that “my two recent documents dealing with this issue have simplified the procedures for the declarations of matrimonial nullity. With these, I wished to make clear that the bishop himself, in the Church over which he has been appointed shepherd and head, is by that very fact the judge of those faithful entrusted to his care.” Therefore, “the implementation of these documents is therefore a great responsibility for Ordinaries in dioceses, who are called upon to judge some cases themselves and, in every case, to ensure the faithful an easier access to justice.”<sup>12</sup>

In a similar vein, the synod fathers, gathered in synod on the Vocation and Mission of the Family in the Church and in the Contemporary World, declared in their final report that “for many of the faithful who have had an unhappy marital experience, investigating and verifying the invalidity of the marriage represents a possible course of action. The recent *motu proprio* *Mitis Iudex Dominus Iesus* and *Mitis et misericors Iesus* led to a simplification of the procedures in the declaration of nullity of a marriage.”<sup>13</sup>

*Mitis et misericors Iesus* shows the will of the Supreme Legislator for the matrimonial processes to take place within the eparchies. Bishops are to play a crucial role here. Pope Francis refers to the teaching of the Eastern Fathers according to whom the bishop acts at once as a judge and a physician. A person, having been wounded and having fallen (*peptokós*) by original sin and his or her own faults, has become weak. From the remedy of penance he or she attains healing (and forgiveness) from God and is reconciled with the Church.<sup>14</sup>

The bishop himself, in his local church over which he has been appointed shepherd and head, is at the same time a judge of the faithful entrusted to him.<sup>15</sup> The Supreme Legislator hopes that the bishop himself, be it of a large or small eparchy, does not delegate completely his duty of being the judge in marriage cases to the offices of his curia. This is especially vital in the abbreviated process that has been established for handling cases of clear nullity of marriage.

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<sup>12</sup> FRANCIS: *Apostolic Exhortation “Amoris laetitia”* [19.03.2016], n. 244.

<sup>13</sup> The final report of the synod of bishops to the Holy Father, Pope Francis, [https://www.vatican.va/roman\\_curia/synod/documents/rc\\_synod\\_doc\\_20151026\\_relazione-finale-xiv-assemblea\\_en.html](https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20151026_relazione-finale-xiv-assemblea_en.html) [24.11.2015], n. 82 [accessed 15.05.2022].

<sup>14</sup> Cf. FRANCIS: *MEMI*.

<sup>15</sup> *Code of Canons of the Eastern Churches*. Washington 1995, can. 191 § 1. The eparchial bishop governs the eparchy entrusted to him with legislative, executive, and judicial power. § 2. The eparchial bishop personally exercises legislative power; he exercises executive power either personally or through a protosyncellus or syncellus; he exercises judicial power either personally or through a judicial vicar and judges.

In his last address to the Roman Rota (*Rota Romana*) delivered on January 29, 2005, Saint John Paul II mentioned the responsibilities of bishops as judges in their dioceses. He said: “In my annual Addresses to the Roman Rota, I have referred several times to the essential relationship that the process has with the search for objective truth. It is primarily the Bishops, by divine law judges in their own communities, who must be responsible for this. It is on their behalf that the tribunals administer justice. Bishops are therefore called to be personally involved in ensuring the suitability of the members of the tribunals, diocesan or interdiocesan, of which they are the Moderators, and in verifying that the sentences passed conform to right doctrine. Sacred Pastors cannot presume that the activity of their tribunals is merely a ‘technical’ matter from which they can remain detached, entrusting it entirely to their judicial vicars.”<sup>16</sup>

The eparchial bishop is thus entrusted with two types of the process:

- a) the ordinary process
- b) the briefer process.

In the briefer process, as we shall see later, it is the bishop himself who is established as a judge. If the case for nullity of marriage is supported by particularly clear arguments and the bishop reaches moral certitude after a brief investigation, he issues the sentence. It is not the bishop who investigates the cases, but his collaborators: the judicial vicar, assisted by an assessor or another investigating judge. If, on the other hand, there is no immediate clarity of arguments and evidence, the case is referred to the ordinary process.<sup>17</sup>

The new prescriptions do not invalidate the role of existing tribunals and the development of the ordinary process according to the norms of the Title XXIV *De iudiciis in genere* and the Title XXV *De iudicio contentioso* of the CCEO. Nevertheless, cases for the declaration of nullity of marriage cannot be treated in the summary contentious process (CCEO, canons 1343—1356).

Every petition for the declaration of nullity of marriage is addressed to the judicial vicar who decides which of the two types of process will be used to handle the case. The briefer process presupposes the possible presence and consent of both parties and, unlike the ordinary process, is to be resolved within a timeframe of two weeks up to a month. This is a novelty of this type of process.<sup>18</sup>

<sup>16</sup> JOHN PAUL II: “Address to Members of the Tribunal of the Roman Rota” [29.01.2005], n. 4.

<sup>17</sup> Cf. P. BIANCHI: “Průběh zkráceného řízení: důkazní a diskusní fáze.” In: *Reforma mnaželského procesu podle papeža Františka. Průvodce pro každého*. Ed. K. ORLITA. Brno 2016, pp. 79—80.

<sup>18</sup> Cf. A. GIRAUDDO: “Rozhodnutí, zda se má záležitost neplatnosti manželství projednávat v řádném, nebo zkráceném řízení.” In: *Reforma mnaželského procesu podle papeža*

As to the centrality of the bishop in his role as judge, it should be pointed out that in some specific circumstances the bishop himself, as judge and shepherd of his flock, should communicate the sentence declaring the nullity of marriage to the parties involved in person. It would be a sign, in light of the Gospel, of closeness to his faithful who, in many cases, incurred years of suffering. Indeed, the Church is the Mystery and Instrument of the *salus animarum*, and the bishop is the one who accompanies, almost leads by the hand, his faithful: in this sense he is the *mystagogos*.<sup>19</sup>

## The matrimonial process before the bishop

Another important novelty of the new legislation is *the briefer process* established to resolve the most evident cases of nullity. The briefer process is applied, in clear cases of nullity, with the personal intervention of the bishop in a decision-making process. This type of process is applied in cases where the alleged nullity of marriage is supported by particularly clear evidence. This process is conducted by collaborators, but the final decision to declare the nullity of marriage or to refer the case to the ordinary process rests with the bishop himself, who, by virtue of his pastoral office, is the chief guarantor of the Catholic unity in faith and discipline.<sup>20</sup>

This is highlighted in the foreword to *Mitis et misericors Iesus*: “For indeed, in simplifying the ordinary process for handling marriage cases, a sort of briefer process was devised — besides the current documentary procedure — to be applied in those cases where the alleged nullity of marriage is supported by particularly clear arguments.”<sup>21</sup>

Pope Francis also states here that “Nevertheless, we are not unaware of the extent to which the principle of the indissolubility of marriage might be endangered by the briefer process; for this very reason we desire that the bishop himself be established as the judge in this process, who, due

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*Františka. Průvodce pro každého*. Ed. K. ORLITA. Brno 2016, pp. 57—59. Cf. FRANCIS: *MEMI*.

<sup>19</sup> Cf. P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, p. 50.

<sup>20</sup> M. MINGARDI: “Role diecézního biskupa.” In: *Reforma manželského procesu podle papeža Františka. Průvodce pro každého*. Ed. K. ORLITA. Brno 2016, pp. 86—87. Cf. FRANCIS: *MEMI*.

<sup>21</sup> FRANCIS: *MEMI*. Cf. M. MINGARDI: “Role diecézního biskupa...,” pp. 86—87.

to his duty as pastor, has the greatest care for catholic unity with Peter in faith and discipline.”<sup>22</sup> This statement, too, is Pope Francis’ clear response to many questions asked by a number of cardinals in the book titled *Remaining in the Truth of Christ*.<sup>23</sup>

The *Mitis et misericors Iesus* introduces the following changes that have been made to the Code of Canons of the Eastern Churches, namely canons 1369—1373:

Can. 1369 — The eparchial bishop himself is competent to judge cases of the nullity of marriage with the briefer process whenever:

1° the petition is proposed by both spouses or by one of them, with the consent of the other;

2° circumstance of things and persons recur, with substantiating testimonies and records, which do not demand a more accurate inquiry or investigation, and which render the nullity manifest.

The fact that the petition has to be proposed by both spouses or by one of them with the consent of the other is indeed to safeguard the indissolubility of the sacred bond of marriage and to confirm that the petition is supported by particularly clear arguments.<sup>24</sup>

Can. 1370. The *libellus* introducing the briefer process, in addition to those things enumerated in can. 1187, must:

1° set forth briefly, fully, and clearly the facts on which the petition is based;

2° indicate the proofs, which can be immediately collected by the judge;

3° exhibit the documents, in an attachment, upon which the petition is based.

Can. 1371. The judicial vicar, by the same decree which determines the formula of the doubt, having named an instructor and an assessor, cites all who must take part to a session, which in turn must be held within thirty days according to can. 1372.

Can. 1372. The instructor, insofar as possible, collects the proofs in a single session and establishes a time limit of fifteen days to present the observations in favour of the bond and the defence briefs of the parties, if there are any.

<sup>22</sup> Cf. FRANCIS: *MEMI*.

<sup>23</sup> G. L. MÜLLER: “Nerozlučiteľnosť manželstva a diskusia o sviatostiach vo vzťahu k rozvedeným a znovu zosobášeným.” In: *Vytrvať v Kristovej pravde*. Ed. R. DORADO. Kežmarok 2015, pp. 122—135. Cf. R. L. BURKE: “Proces vyhlásenia kánonickej neplatnosti manželstva ako hľadanie pravdy.” In: *Vytrvať v Kristovej pravde*. Ed. R. DORADO. Kežmarok 2015, pp. 173—195.

<sup>24</sup> Cf. FRANCIS: *MEMI*. Cf. M. MINGARDI: “Role diecézného biskupa...,” pp. 86—90.



Can. 1373 § 1. After he has received the acts, the eparchial bishop, having consulted with the instructor and the assessor, and having considered the observations of the defender of the bond and, if there are any, the defence briefs of the parties, is to issue the sentence if moral certitude about the nullity of marriage is reached. Otherwise, he refers the case to the ordinary method.

§ 2. The full text of the sentence, with the reasons expressed, is to be communicated to the parties as swiftly as possible.

§ 3. An appeal against the sentence of the bishop is made to the metropolitan or to the Roman Rota; if, however, the sentence was rendered by a metropolitan or another eparchial bishop who does not have a superior authority below the Roman Pontiff, the appeal is made to a bishop selected by him in a stable manner after consultation with the Patriarch or Hierarch as indicated in canon 175.<sup>25</sup>

An ordinary tribunal for the patriarchal Church is distinct from the tribunal of the patriarch's eparchy. It is the appellate tribunal in second instance; this tribunal has also rights of a metropolitan tribunal in those parts of the patriarchal Church where provinces have not been established (can. 1063 § 3). In the patriarchal Churches, the right to appeal to the ordinary tribunal is a sign of synodality in the Eastern Churches and should be supported and maintained.

This is validated by Pope Francis in the foreword to *Mitis et misericors Iesus*: "In accord with a revered and ancient right, it is still necessary to retain the appeal to the ordinary tribunal of the Holy See, namely the Roman Rota, so as to strengthen the bond between the See of Peter and the particular churches, with due care, however, to keep in check any abuse of the practice of this appeal, lest the salvation of souls should be jeopardized."<sup>26</sup>

However, if the appeal clearly appears as purely dilatory, the metropolitan, the bishop or the dean of Roman Rota should reject it by his decree right at the outset. If the appeal has been admitted, however, the case is then put forward to the ordinary method at the second level.<sup>27</sup>

The novelty of the whole reform of norms lies in the defining role of the eparchial bishop in court hearings on nullity of marriage. He is directly involved in the process, if the case comes before him after it has been determined that the conditions for the application of the briefer process have been met. In this instance, the bishop has the right not only

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<sup>25</sup> Ibidem, pp. 90—95.

<sup>26</sup> Cf. FRANCIS: *MEMI*.

<sup>27</sup> Can. 1373 § 4.

to intervene in the decision-making phase of the process, but he must do so directly in the position of a single judge.<sup>28</sup>

It should be made clear that the bishop enters into this process exclusively in its decision-making phase, not before. This means that the bishop does not usually have a direct contact with the parties involved. With that said, any misinterpretations and rumours that the spouses come before the bishop, explain their situation and he simply confirms that their marriage is invalid are unfounded.<sup>29</sup>

The new prescriptions of the canons clearly state that the process for the declaration of nullity of marriage starts with an introductory phase when a petition — *libellus* is presented. It must include a clear and more detailed statement of facts and proofs in comparison to the petition presented in the ordinary process. The *libellus* is not presented directly to the eparchial bishop, but to the judicial Vicar. His duty is to consider whether the case may be treated with the briefer process or refer it to the ordinary process.<sup>30</sup>

It is very important that the eparchial bishop understands that it his own decision that concludes this type of a process and it is the responsibility he simply cannot evade. Canon 1373 § 1 states: “After he has received the acts, the eparchial bishop, having consulted with the instructor and the assessor, and having considered the observations of the defender of the bond and, if there are any, the defence briefs of the parties, is to issue the sentence if moral certitude about the nullity of marriage is reached. Otherwise, he refers the case to the ordinary method.”<sup>31</sup>

This canon describes how the eparchial bishop fulfils his role in the process. There are four steps involved: becoming acquainted with the acts of the case; considering the observations of the defender of the bond; consulting with the instructor and assessor and reaching moral certitude.<sup>32</sup>

It is essential that the eparchial bishop consults the case personally with the instructor and the assessor. This consultation is not the same as the decision-making of a collegial tribunal. The decision must be made by the bishop himself. During the consultation, the bishop has the opportunity to address any ambiguities and doubts that may have arisen while reading the acts of the case and learning about the observations put forward by the defender of the bond, or by the parties involved.<sup>33</sup>

<sup>28</sup> M. MINGARDI: “Role diecézního biskupa...,” p. 90. Cf. FRANCIS: *MEMI*.

<sup>29</sup> Cf. M. MINGARDI: “Role diecézního biskupa...,” p. 91.

<sup>30</sup> FRANCIS: *MEMI*. Cf. M. MINGARDI: “Role diecézního biskupa...,” p. 91.

<sup>31</sup> FRANCIS: *MEMI*.

<sup>32</sup> Z. GROCHOLEWSKI: “Cirkevná spravodlivosť a pravda.” In: *IUS ET IUSTIA Acta IV. Sympozii iuris canonici anni 1994*. Ed. J. DUDA. Spišské podhradie 1995, pp. 17–18.

<sup>33</sup> Cf. FRANCIS: *MEMI*.

The bishop can reach only two conclusions: either he reaches moral certitude about the nullity of marriage and delivers an affirmative sentence; or he does not reach moral certitude and refers the case to the ordinary method. A negative sentence is inadmissible in this type of process.<sup>34</sup>

It is very important that eparchial bishops clearly understand that it is *their own* decision that concludes this type of judicial process. It is therefore unacceptable for the bishop to delegate the investigation of the case to someone else and then just uncritically accept their assessment. Such a practice would otherwise devalue one of the main objectives of this reform that is also discussed in the procedural principles for the hearing of cases for declaration of nullity of marriage. These principles ascertain that in the briefer process it is key to avoid overly general judgments that could, in some cases, result in compromising the very principle of the indissolubility of marriage: “In terms of doctrine, the MP *Mitis et misericors Iesus* affirms that the Eastern Catholic Churches, in unity with the teachings of the Lord, the Apostles and the Holy Fathers, confess and proclaim the conjugal unity and indissolubility which, in the marriage of the baptized, attain a special stability that results from the sacrament. The doctrine of the indissolubility of marriage remains always intact, because it is for all Catholics, Eastern and Western, a truth which we believe through the Divine and Catholic Faith, even this doctrine comes reinforced from the central position of the eparchial bishop, who, in communion with the Bishop of Rome, the successor of Peter, is the guarantor in his particular Church of the unity of faith and doctrine.”<sup>35</sup>

The Holy Father is aware of this danger and desires that bishops themselves be established as judges in this process. Therefore, it is essential that bishops eagerly accepted this challenge.

## Ecclesiastical divorce in the Orthodox Churches

In examining the topic concerning dissolution of marriage and ecclesiastical divorce, we will not explore in much detail historical circumstances or the influence of Roman law and other facts that have had a considerable impact on how indissolubility of marriage is understood in Orthodox Churches and the Catholic Church.

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<sup>34</sup> Cf. M. MINGARDI: “Role diecézního biskupa...,” p. 93.

<sup>35</sup> FRANCIS: *MEMI*. Cf. M. MINGARDI: “Role diecézního biskupa...,” p. 93.

The article introduces divorces of marriage under Roman law and ecclesiastical divorces in the Orthodox Churches. At the very beginning, we encounter a terminological problem as explained by Professor Cyril Vasil'. The canonical terminology of the Catholic Church and the Orthodox Churches itself presents some challenges.<sup>36</sup> This fact is confirmed by Professor Penagiotis I. Boumis of the University of Athens, who, within the chapter on dissolution of marriage, also includes divorce.<sup>37</sup>

In the past, the topics discussed in this article were topics of interest only within limited circles of Catholic theologians and canonists. As a result of growing migration, pastors of the Catholic Church have been confronted with the need to address the problems of mixed marriages. There are many challenges associated with preparation of a new marriage, in which one of the parties is Catholic and the other Orthodox. Oftentimes, the Orthodox party admits to having previously contracted a marriage in the Orthodox Church. Their marriage did not last and was dissolved in a civil divorce. The competent ecclesiastical authority of the Orthodox Church may release documents declaring that the religious marriage has been dissolved and is no longer valid. The Orthodox party is therefore free to remarry. An urgent question then arises for the Catholic party who wishes to enter into a marriage with such a person and for pastors of the Catholic Church, too. How are they to understand and interpret this practice of the Orthodox Church? What are the consequences for the Catholic party who wishes to marry a divorced Orthodox party who declares to be "free to marry"?<sup>38</sup>

Another motive for increasing interest is the debate following Cardinal Kasper's address to the Extraordinary Consistory on Family delivered on February 24, 2014, in which he proposed application of this practice in the Catholic Church.<sup>39</sup>

The Eastern Orthodox, as well as the Catholic Church, understands marriage in relation to the mystery of the Incarnation and the coming of Jesus Christ into the world. This salvific event freed marriage from sin and radically transformed its tormented and painful condition caused by sin and the subsequent fall of our ancestors. This also marked a new beginning in the understanding of the holy mystery of matrimony in that the

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<sup>36</sup> C. VASIE: "Odlúčenie, rozviazanie manželského zväzku, rozvod a nový sobáš. Teologický a praktický postoj pravoslávnych cirkvi — otázky a odpovede pre katolícku prax." In: *Vytrvať v Kristovej pravde*. Ed. R. DORADO. Kežmarok 2015, p. 80.

<sup>37</sup> P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, p. 122.

<sup>38</sup> C. VASIE: "Odlúčenie, rozviazanie manželského zväzku..." p. 77.

<sup>39</sup> J. M. RIST: "Rozvod a druhe manželstvo v cirkvi v stredoveku: Historické a kultúrne úvahy." In: *Vytrvať v Kristovej pravde*. Ed. R. DORADO. Kežmarok 2015, p. 52. Cf. P. AMBROS: *Rodina — svetlo v temnotě sveta...*, pp. 20—48.

one who brings the spouses to the altar is Jesus Christ Himself. The fact that Jesus was present at the wedding in Cana in Galilee shows us that he alone is the one who can offer the new wine of his love, profoundly transform the lives of the spouses, and truly unite them into one body. Paul the Apostle is the one who links marriage to life in Christ emphasizing that the great mystery of the union between man and woman is made anew and elevated in the relationship of Christ towards the Church.<sup>40</sup>

The new central element of marriage is love, the equality of spouses, the mutuality and man—woman reciprocity in marriage. The spouses bear in mind the prototype of marriage, which is the relationship between Christ and the Church. They ought to liken their marriage to that relationship. From this point of view, marriage becomes a miniature of the Church — her microcosmos. Drawing on and living from the experience and grace of the Church, marriage assumes an essentially charismatic character. Paul the Apostle recalls the mystical character of marriage accentuating that marriage should be contracted only in the Lord,<sup>41</sup> proclaiming the indissolubility of conjugal union that is higher and holier than the union of ancestors in Paradise. However, one cannot image this communion of love without the liturgical blessing of the Church and without the subsequent life without her nourishment — the Eucharist — the perfect culmination of the celebration of every holy mystery.<sup>42</sup>

The Orthodox theology sees marriage as a mystery of love, an icon of the triune God, God's kingdom and the Church. Love as an essence of every marriage requires a procedural understanding of the mystery. Once the marriage ceases to be a mystical communion, the Orthodox Church does not insist on the continuation of the seeming marriage bond. It is worth noting that legal terminology hardly encapsulates this reality. How does one understand the loss of mystery that contains so much grace? This question is very important in terms of Catholic theology, which sees the sacraments as *mysterium sacramentum* — as efficacious signs of inward and invisible grace instituted by Christ. Does one need to count on human liberty that grace can reject or is unable to accept since it is immature? The Church then confirms that there are marriages that lack the grace of mystery.<sup>43</sup>

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<sup>40</sup> Cf. Š. ŠAK, P. KOCHAN, J. PILKO: *Manželstvo ako obraz jednoty medzi mužom a ženou*. Prešov 2020, pp. 64—65.

<sup>41</sup> Cf. 1 Kor 7: 39. A wife is bound to her husband as long as he lives. But if her husband dies, she is free to be married to whom she wishes, only in the Lord.

<sup>42</sup> Cf. Š. ŠAK, P. KOCHAN, J. PILKO: *Manželstvo ako obraz jednoty...*, pp. 66—69.

<sup>43</sup> G. BRAUNSTEINER: "Milosrdenstvo a/alebo spravodlivosť." In: *Slovo nádeje*. Ed. L. CSONTOS. Trnava 2010, p. 70. Cf. C. VASIE: "Odlúčenie, rozviazanie manželského zväzku..." p. 101.

When seeking a common Orthodox doctrine on indissolubility of marriage, divorce and remarriage of divorced persons, we are confronted with a question of whether it is possible to speak of a common magisterium of the Orthodox Churches or we can only speak of the practices of individual Churches, bishops or even the opinions of individual theologians.<sup>44</sup>

Generally, in the first five centuries, the Church Fathers clearly supported the principle of the indissolubility of marriage and the illegitimacy of remarriage if the spouses were separated because of the adultery of one of them. This radical position, brought about by the Christian understanding of marriage, is also confirmed by the Church legislation of the first centuries, which was established on the grounds of local synods and ecumenical councils.<sup>45</sup> The prescriptions on marriage are found in the following canons of the Apostles: 5,<sup>46</sup> 7,<sup>47</sup> 19,<sup>48</sup> 26,<sup>49</sup> 48,<sup>50</sup> 51<sup>51</sup> and the prescriptions of the Council of Chalcedon in canons 14,<sup>52</sup> 16,<sup>53</sup> 27.<sup>54</sup> The prescriptions on indissolubility of marriage and the impropriety of

<sup>44</sup> Ibidem, p. 98.

<sup>45</sup> Ibidem, p. 81.

<sup>46</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles]. Екатеринбург 2019, p. 190.

<sup>47</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], pp. 211—215.

<sup>48</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], 216—217.

<sup>49</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], 226—227.

<sup>50</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], 284—291.

<sup>51</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], 298—294.

<sup>52</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 2 [The Rules of the Orthodox Church with interpretations], Правила Вселенских соборов [The Rules of the Ecumenical Councils]. Екатеринбург 2019, pp. 153—155.

<sup>53</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 2 [The Rules of the Orthodox Church with interpretations], Правила Вселенских соборов [The Rules of the Ecumenical Councils], 136—159.

<sup>54</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 2 [The Rules of the Orthodox Church with interpretations], Правила Вселенских соборов [The Rules of the Ecumenical Councils], 170—171.

remarriage after the spouses have been separated based on the adultery committed by one of them are included in other canons, too.<sup>55</sup>

In the introduction to this chapter, we stated that we would not discuss the influence of Roman law in too much or analyse the various forms of exegesis of the Matthew's clause — with an exception of adultery. However, we will briefly outline the perception of the indissolubility of marriage from the perspective of the Orthodox Church that is different to that of the Catholic Church. A detailed explanation of this issue can be found in prescriptions of Pedalion Nicodemus of St. Gregory. This, however, exceeds the scope of this article.<sup>56</sup>

Christian emperors were very cautious about divorces under classical Roman law in cases when the husband lost affection and will (*afectio maritalis*) to live in conjugal union.<sup>57</sup>

In his Constitution, the emperor Theodosius specifies that divorce is only possible if there is a just reason, pointing to examples of adultery,

<sup>55</sup> Ecumenical Council in Trullo (year 691, can. 3, 4, 6, 12, 13, 26, 30, 40, 42, 47, 48, 53, 54, 72, 80, 87, 92, 93, 98) and the Second Council of Nicaea (year 787, can. 22);

Local synods: Anckyra (year 314, can. 10—12, 16, 17, 19, 20, 25), Nocézarea (year 314, can. 1, 10, 31, 52, 54), Gangra (year 340, can. 1, 4, 9, 10, 14, 21), Laodicia (year 364, can. 1, 10, 31, 52, 54), Carthage (year 419, can. 4, 16, 21, 25, 102);

Church Fathers: St. Dionysus of Alexandria (+ 385, can. 2, 3), St. Basil the Great (+ 379, can. 4, 6, 9, 12, 18, 22, 27, 30, 33—42, 48—50, 52, 53, 58, 67—69, 77, 78, 87, 88), St. Timothy of Alexandria (+ 385, can. 5, 11, 13, 15), blessed Theofan (+ 412, can. 5, 13). Cf. C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...,” p. 81.

<sup>56</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], pp. 285—291: “Since the Lord Himself in the Gospel proclaimed: Whoever divorces his wife, except for the guilt of adultery, causes her to commit adultery; and whoever marries a divorced woman commits adultery (Matt. 5:32; 19:9), so the divine apostles, following the commandment of the Lord, say in this rule: the layman who divorces his wife not fornication, that is, adultery (because the evangelist here by fornication he means adultery, see on this the 4th rule of St. Gregory of Nice), and takes another who is free from the bonds of marriage, shall be excommunicated. In the same way, let him be excommunicated if, after having divorced his wife not because of fornication, he takes another wife, also divorced from her husband not because of fornication, that is, adultery. What we have said about the man should also apply to the woman who leaves her husband for reasons other than fornication and marries another man. A man or woman who divorces without a valid reason and enters into a second marriage should by rule be excommunicated for seven years as fornicators, according to VI Vs. 87, Ancyr. 20, rules 77 and 37 of Basil the Great. Read also the rule of Kartago 113, which determines that if the spouses are separated not because of fornication, they should either remain celibate or be reconciled and united, as ap. Paul also says in ch. 7 of his First Epistle to the Corinthians.” Cf. C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...,” pp. 78—79.

<sup>57</sup> K. REBRO, P. BLAHO: *Rímske právo*. Plzeň 2019, p. 140.

attempted murder of a spouse, desecration of tomb.<sup>58</sup> The greatest reformer of Roman law, Emperor Justinian, wished his reform of matrimonial law to be implemented in the Church.<sup>59</sup> Despite Justinian abolishing the possibility of divorce through mutual agreement in Novel 111<sup>60</sup> and Novel 117<sup>61</sup> transgression of these Novels was punished by Novel 134, set forth in the year 556, with the penalty of confinement to a monastery.<sup>62</sup>

This Justinian reform divided possible grounds for divorce in two categories. The first category included *bona gratia* causes, whereby spouses could be divorced if there had been no conjugal cohabitation for at least three years or the husband had been imprisoned in war and had not returned home within five years. The only case when marriage could be dissolved by mutual consent was if one spouse showed the intention to enter a monastery. The second category of grounds for divorce were *iusta causa*. Here, man could dismiss a wife who was involved in a conspiracy against the emperor, committed proven adultery, endangered her husband's life or tried to kill him, collaborated with someone who tried to kill her husband, unjustly accused her husband of committing adultery while living as concubine herself. A wife could secure a divorce in cases where her husband endangered her life, accused her of adultery without being able to prove it, while living in contempt himself. To this Justinian's list of grounds for divorce, Emperor Leo VI added insanity, acquired mental illness, and voluntary abortion.<sup>63</sup> In many cases, the Byzantine Church justified differences in the application of civil and ecclesiastical laws as late as in the 17th century. This was expressed by the application of Canon 87 at the Council of Trullo, which states that leniency should be shown to men whose wives have left them without cause, that is, if they have not left because their husbands have committed adultery or otherwise lived dishonourably. Therefore, these men are free to remarry.<sup>64</sup>

<sup>58</sup> Cf. C. VASIE: "Odlúčenie, rozviazanie manželského zväzku..." p. 82.

<sup>59</sup> Ibidem.

<sup>60</sup> The novels of Justinian, [https://droitromain.univ-grenoble-alpes.fr/Anglica/N111\\_Scott.htm](https://droitromain.univ-grenoble-alpes.fr/Anglica/N111_Scott.htm) [accessed 15.05.2022].

<sup>61</sup> Ibidem. Cf. Н. Святогорец: "Пидалион." Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], p. 287.

<sup>62</sup> C. VASIE: "Odlúčenie, rozviazanie manželského zväzku..." p. 82.

<sup>63</sup> Н. Святогорец: "Пидалион." Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], pp. 289, 291. Cf. C. VASIE: "Odlúčenie, rozviazanie manželského zväzku..." pp. 82—83.

<sup>64</sup> Н. Святогорец: "Пидалион." Правила православной церкви с толкованиями, том. 2 [The Rules of the Orthodox Church with interpretations], Правила Вселенских соборов [The Rules of the Ecumenical Councils], pp. 335—336.



Marriage in the Orthodox Church is contracted for life. Only death of one of the spouses is considered the natural dissolution of marriage. Since the Christian ideal is a strictly monogamous marriage, the possibility of any remarriage is excluded. However, due to a wakened human nature, the Orthodox Church allows a second marriage after the death of the spouse referring to Paul the Apostle: “A woman is bound as long as her husband lives. When her husband dies, she is free to marry whomever she wishes, but only in the Lord” (1 Cor 7: 39).<sup>65</sup>

In addition to natural dissolution of marriage, the Orthodox Church also permits the dissolution of marriage by divorce for adultery. Jesus said: “And I say to you, whoever shall divorce his wife except for sexual immorality, and shall marry another, commits adultery” (Mt 19: 9). Divorce, unless based on canonical grounds, is a serious sin, even a crime. Therefore, the Orthodox Church never permits it without serious cause and hastily. The Church first takes steps to remedy marriage, if possible. There is one instance when the Orthodox Church command the dissolution of a marriage and that is when it concerns a cleric whose wife has been guilty of adultery.<sup>66</sup> In doing so, the Orthodox Church refers to Canon 8 of the Council of Neocaesarea: “If the wife of a layman has committed adultery and been clearly convicted, such a husband cannot enter the ministry; and if she commit adultery after his ordination, he must put her away; but if he retain her, he can have no part in the ministry committed to him.” Should such a cleric decide to remain with his adulterous wife, he must renounce the ministry entrusted to him because adultery and the priesthood are incompatible.<sup>67</sup>

The Orthodox Church also allows divorce in the case of a cleric-priest who is called to the episcopal see. The Church refers to canon 48 of the Council of Trullo, which declared: “The wife of him who is advanced to the Episcopal dignity, shall be separated from her husband by their mutual consent, and after his ordination and consecration to the episcopate she shall enter a monastery situated at a distance from the abode of the bishop, and there let her enjoy the bishop’s provision.” This canon prescribes that if a married priest is to become a bishop, he must first separate from his wife before he can receive episcopal consecration, and his wife is to enter a monastery to be suited at a distance from her husband’s episcopal residence so that they not see one another, reminiscence about their past life together, and not be consumed by carnal passions.

<sup>65</sup> Cf. P. KORMANÍK: *Základné sväté tajiny pravoslávnej cirkvi*. Prešov 1996, p. 136.

<sup>66</sup> Cf. J. JACOŠ: *Cirkevné právo*. Prešov 2006, pp. 139—140.

<sup>67</sup> Н. Святогорец: “Пидалион.” *Правила православной церкви с толкованиями*, том. 3 [The Rules of the Orthodox Church with interpretations], *Правила Поместных Соборов* [The Rules of the Local Councils], Екатеринбург 2019, pp. 94—95.

The husband is to continue to support and provide for his “former wife” even though she has entered the convent. The rule implies that wives separated from their priest husbands are not advised to remarry.<sup>68</sup>

We see the first change in the edition of the *Nomocanon* of 14 titles written by Photius in 883. This collection, on the one hand, affirms the rule of indissolubility of marriage. On the other hand, it contains a list of grounds on which marriage can be legally divorced that was introduced by Justinian’s legislation. The further developments in Byzantium strengthened the role of the Church. On the other hand, however, this opened the way to overlapping competencies of the two institutions, the State and the Church. In its reworking of Justinian’s *Corpus Iuris Civilis*, the new compilation of *Basilicà* legislation attempted to omit some problematic points that were contrary to the position of the Church.<sup>69</sup> Nevertheless, some of the prescriptions of Justinian’s *Codex Basilicum* remained.<sup>70</sup>

But the so-called *Folio Nomocanon*, which was approved as the official collection of laws of Byzantium at the Synod of Constantinople in 920, accepted some of the possibilities of divorce for the reasons given by the Roman law. Until the end of the 9th century, marriage could only be entered into with a civil ceremony. In 895, *Novela* 89 of Emperor Leo VI established that the Church became the only competent institution to solemnize marriage. Therefore, the Church became the guarantor of marriage as a social institution in the eyes of the public. The Church tribunals gradually and definitively accepted the exclusive competence to examine matrimonial causes from 1086 onwards. Thus, the Church had to work in a manner consistent with existing state and civil legislation. When civil legislation began to grant permission for divorce and subsequent marriages, the Church was called to consider the possibility of divorce and remarriage.<sup>71</sup>

Later, well-known 12th-century commentators, such as Zonaras, Aristenes, and Balsamone underlined that marriage cannot be dissolved just by anyone and for any reason, but that the conditions laid down by law must be met for divorce to be granted. In practice it was an extension and paraphrasing of Canon of the Apostles No. 48, which stipulates

<sup>68</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 2 [The Rules of the Orthodox Church with interpretations], Правила Вселенских соборов [The Rules of the Ecumenical Councils], pp. 277—280

<sup>69</sup> С. VASIE: “Odlúčenie, rozviazanie manželského zväzku...,” p. 84.

<sup>70</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], p. 287.

<sup>71</sup> С. VASIE: “Odlúčenie, rozviazanie manželského zväzku...,” pp. 84—85.

the penalty of excommunication for a layman who dared to put away his own wife for reasons other than those recognized by law.<sup>72</sup>

These commentators have failed to consider the fact that the Church was forced to accept a broader list of legislative grounds for divorce. This list was not inspired by the Holy Spirit, but rather by civil law, which was often based on the hardness of human hearts.<sup>73</sup> Gregory the Theologian says that prescription of Roman civil law on divorce of marriage made their way into ecclesiastical regulations on that matter.<sup>74</sup>

The subsequent spread of Christianity from the Constantinopolitan centre to other mission territories and to other peoples brought with it an expansion of the tradition of disciplinary legal practice and of the theological principles on which that practice was based. Today we see different Orthodox Churches that, although institutionally and hierarchically separate, retain the same disciplinary and spiritual principles.<sup>75</sup>

The Orthodox Church presents motives for the dissolution of marriage that are recognized by Holy Scriptures and the Holy Canons “with certainty” and those that fall within the “framework of *oikonomia*”<sup>76</sup> and can be revoked at any time and reverted back to canonical certainty. It is not merely a legal norm, such as the dispensation used in the Catholic Church, where it means the relaxation of a purely ecclesiastical law in an individual case. *Oikonomia*, although close in meaning to dispensation, is broader in its application, since it is also applied to the sacraments.

<sup>72</sup> Ibidem, p. 85. Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], pp. 284—286.

<sup>73</sup> C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...,” pp., 85—86.

<sup>74</sup> Н. Святогорец: “Пидалион.” Правила православной церкви с толкованиями, том. 1 [The Rules of the Orthodox Church with interpretations], Правила святых апостолов [The Rules of the Holy Apostles], p. 285.

<sup>75</sup> C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...,” p. 86.

<sup>76</sup> The Greek word *oikonomia* itself has three basic meanings in Eastern theology. The term itself means stewardship or wise and responsible leadership. The second meaning is doctrinal, in the sense of God’s plan of incarnation and salvation history. Central to this theological meaning is the relationship between a just God and sinful man who expects God to grant grace and mercy. *Oikonomos* is the steward, the holy and merciful God who grants wisdom from his divine treasure. The culmination of God’s stewardship and bestowal of grace is the sacrifice of his own Son. Revelation and the sacraments are also considered as expressions of God’s *oikonomia*. The third meaning points to a moral retreat from the strict application of the law. Eastern writers explain *oikonomia* as the canonical power of the church to permit, under certain circumstances, a failure to observe the strict letter of the law. The intent is to circumvent the strict law and thereby remove the obstacle to salvation that would result from its rigid legalistic application. V. THURZO: “Otázka použitia ikonomieae a epikie ako nástrojov milosrdenstva pre civilne rozvedených a znovuzosobášených.” *Acta* 1 (2016), pp. 70—78, [https://frcth.uniba.sk/fileadmin/rkcmf/casopis\\_acta/ACTA-2016\\_1-extrakt.pdf](https://frcth.uniba.sk/fileadmin/rkcmf/casopis_acta/ACTA-2016_1-extrakt.pdf) [accessed 15.05.2022].

*Oikonomia* is considered more of a theological than a legal concept. The basic meaning of *oikonomia* in the context of law indicates the duty of the hierarch to decide in ecclesiastical matters in accordance with God's plan, aimed at the salvation of humanity, in the spirit of God's love and wisdom.<sup>77</sup>

In terms of *oikonomia*, we are not talking about an exception to a rule, but about an action directed to the very goal of each rule, which is the building up of the God's house, the Church. Not to apply the strict letter of the law when *oikonomia* requires it is the privilege of the bishop. The pastoral principle of *oikonomia* is not intended for human ends, but for God's ends, that is, the salvation of souls, especially to help the straying sheep to return to the fold and to heal them from the consequences of sin. For the Eastern Church, the pastoral work of St. Basil the Great is a very important source of the doctrine of *oikonomia*. When St. Basil the Great was considering what ways to receive erring and schismatic heretics into the Church, giving as an example the *khataroi*, he held that it was right to re-baptize heretics. On the other hand, he was aware that several of the Fathers in Asia recognized a form of baptism administered by apostates. For the sake of *oikonomia*, or the building up of the Church, then, St. Basil the Great considered it admissible to accept their baptism in order to be closer to the other Fathers.<sup>78</sup> St. Basil teaches that the bishop as judge will not apply mercy or justice without discernment, but only after careful examination of the state of the Christian's spiritual health. Having established the correct "diagnosis" of the spiritual malady, the bishop will administer the appropriate spiritual medicine for the treatment of the sick person. In the matrimonial process, the bishop will apply *acribeia* when fidelity to the faith requires it. Contrary to that, the bishop will apply *oikonomia* when the nullity is obviously based on an examination of the cause and having in mind the will of the believer, who has failed in the matrimonial bond, to repent and be healed.<sup>79</sup>

The Orthodox Church recognizes as natural and inevitable only one form of dissolution of marriage that has been canonically contracted. It is the death of one of the spouses. Such a cessation of marriage is not

<sup>77</sup> Cf. P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, pp. 50—51. Cf. V. THURZO: "Otázka použitia ikonomieae a epikie...", pp. 70—78, [https://frcth.uniba.sk/fileadmin/rkcmbf/casopis\\_acta/ACTA-2016\\_1-xtrakt.pdf](https://frcth.uniba.sk/fileadmin/rkcmbf/casopis_acta/ACTA-2016_1-xtrakt.pdf) [accessed 15.05.2022]. Cf. G.D. MOS: "Is 'sacramental oikonomia' a coherent and faithful expression of orthodox ecclesiology and is it useful for its ecumenical vocation? reflections on some theological conceptions and official statements." In: *Tradiția canonică și misiunea bisericii*. Ed. P. VLAICU, R. PERȘA. Cluj-Napoca 2018, pp. 74—100.

<sup>78</sup> SVĚTÝ BAZIL: *Povzbudenie mladým Listy I* (R. 357—374). Prešov 1999, pp. 264—267.

<sup>79</sup> Ibidem.

against the holy commandment, “What God has joined together, let not man put asunder.” After death, marriage does not continue. In line with the God’s Word, the Orthodox Church also permits divorce and remarriage in case of adultery and fornication. Adultery of one of the spouses is a ground for divorce for the other. In Matthew 5:32, the Lord determined: “But I tell you that anyone who divorces his wife, except for unchastity, makes her the victim of adultery, and anyone who marries a divorced woman commits adultery.”<sup>80</sup> Other dissolutions of marriage are accepted by the Church application of the principle of *oikonomia*.<sup>81</sup>

In the Orthodox Churches, the following are valid motives for divorce:

1. Adultery according to Mt 5:32: “But I tell you that anyone who divorces his wife, except for unchastity, makes her the victim of adultery, and anyone who marries a divorced woman commits adultery.” Adultery of one of the spouses can be a motive for divorce.<sup>82</sup>

2. Bigamy — entering into a marriage with one person before officially ending the previous marriage by death, divorce or annulment.

3. Malicious killing of one spouse by the other. Other cases of malice (for example, endangering the honour of the wife through immorality) may also put a strain on a marriage.

4. Abandonment of a spouse with the intent to relieve oneself of marital duties.

5. Serious upheaval in the marital relationship that is caused by wrongdoings (e.g., intentional abortion) or negligence and faults by one of the spouses that render the coexistence with the other (innocent) spouse impossible. These situations or faults that cause upheaval in the marital relationship cover a large area of existing laws and are taken into consideration by the court.

<sup>80</sup> Н. Святогорец: “Пидалион.” In: Правила православной церкви с толкованиями, том. 2 [The Rules of the Orthodox Church with interpretations], Правила Вселенских соборов [The Rules of the Ecumenical Councils], p. 336. Cf. Н. Святогорец: “Пидалион.” In: Правила православной церкви с толкованиями, том. 4 [The Rules of the Orthodox Church with interpretations], Правила Святых отцов [The Rules of the Holy Fathers], Екатеринбург 2019, p. 162.

<sup>81</sup> D. SALACHAS: “Il sacramento del matrimonio nel Nuovo Diritto Canonico delle Chiese orientali.” Roma 1994, p. 37. Cf. P. MANKOWSKI: “Učenie Pána o rozvode a druhom manželstve: biblické údaje.” In: *Vytrvať v Kristovej pravde*. Ed. R. DORADO. Kežmarok 2015), pp. 29—51. Cf. E. MARTINELLI: “Divorzio e οίκονομία nel diritto canonico ortodosso: l’applicazione misericordiosa della legge.” In: *Stato, Chiese e pluralismo confessionale, Rivista telematica*, n. 19 (2017), pp. 1—18.

<sup>82</sup> E. MARTINELLI: “Divorzio e οίκονομία nel diritto canonico ortodosso: l’applicazione misericordiosa della legge.” In: *Stato, Chiese e pluralismo confessionale, Rivista telematica*, n. 19 (2017), pp. 1—18.

6. The decision, even if only by one spouse, to a monastic life. In this case, the consent of the other spouse is required.

7. Sexual dysfunction — this would have to be unknown to the other spouse and exist prior to marriage. It has lasted for a certain period after the marriage and continues during the divorce proceedings.

8. Mental illnesses that last a long time and do not allow the spiritual coexistence of the spouses.

9. Leprosy — today, this disease is curable and therefore the prevailing opinion is that it is no longer a ground for divorce (this is already incorporated in laws).

10. Prolonged disappearance — if one of the spouses has been declared missing after a special process.<sup>83</sup>

Neither in Russia nor in Byzantium was the chronic illness of one of the spouses considered a motive for divorce. According to the *Ustav* (a collection of laws) of Jaroslav the Wise (ca. 978—1054), sterility on the part of the wife constituted a concrete motive for divorce. Her entrance into monastery was treated as a formal cause. According to the *Ustav*, the husband could divorce:

1. if the wife failed to inform the husband about the intention of a third party regarding a plot against a czar or prince;<sup>84</sup>

2. if the wife committed adultery;<sup>85</sup>

3. because of a plot against the husband by both the wife and by others;

4. if the wife dined with other men or slept outside her home;

5. in the case of the wife's gambling passion;

6. if the wife, alone or with accomplices, robbed her husband or the Church.

Despite this list of motives for which divorce was permitted, during the following centuries, especially in the 16th and 17th, divorces based on mutual consent were also common. In judicial practice, the causes for divorce were mainly adultery committed by the wife, attempted murder and cruel treatment of the wife. From the 18th century, under the influence of the Western canon law, the Orthodox Church included the disappearance of a spouse and criminal conviction.<sup>86</sup>

In 1917—1918, the Russian Orthodox Church held a council in Moscow where divorce in ecclesiastical marriages was discussed. The council adopted the grounds upon which marriages could be divorced. These are: apostasy from Orthodoxy by one of the spouses; adultery and sins

<sup>83</sup> P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, p. 124.

<sup>84</sup> C. VASIE: "Odlúčenie, rozviazanie manželského zväzku...", pp. 86—87.

<sup>85</sup> P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, p. 124.

<sup>86</sup> C. VASIE: "Odlúčenie, rozviazanie manželského zväzku...", p. 87.

against nature; unfitness for conjugal cohabitation which was present before the marriage or which occurred in the marriage as a result of deliberate damage to sexual organs; contracting an infectious disease or syphilis; being missing for a longer period of time; conviction of one of the spouses resulting in the deprivation of civil rights; attempted murder of one of the spouses or serious injury to the health of the wife or children; witchcraft; entry of one of the spouses into a new marriage; severe incurable mental illness and the cruel abandonment of one spouse by the other one.<sup>87</sup>

The decrees from 7th and 20th April 1918 established that a marriage blessed by the Church is indissoluble. Divorce is therefore permissible by the Church only in condescension of human imperfection and out of care for the salvation of humanity. All that under condition that the decision falls under the competence of the ecclesiastical tribunal which handles the request of the spouses and considers the motives.<sup>88</sup>

The Principles of Social Conception of the Russian Orthodox Church issued in 2000 round out the list with the following motives:

- contraction of HIV/AIDS;
- alcoholism or drug addiction confirmed by a physician;
- abortion procured by the wife without the husband's consent

The Russian Orthodox Church today admits fourteen valid motives for divorce.<sup>89</sup>

<sup>87</sup> Cf. J. JACOŠ: *Cirkevné právo...*, pp. 140—141. Cf. C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...” p. 89.

<sup>88</sup> C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...” p. 89. Cf. “Развод по — христиански,” <https://www.pravmir.ru/razvod-po-xristianski> [accessed 15.05.2022].

<sup>89</sup> C. VASIE: “Odlúčenie, rozviazanie manželského zväzku...” p. 90. Cf. Available online: <https://www.pravmir.ru/razvod-po-xristianski/> [accessed 15.05.2022]. “Развод по — христиански.” Согласно церковным канонам брачный союз прекращается со смертью одного из супругов: “Жена связана законом, доколе жив муж ее; если же муж ее умрет, свободна выйти за кого хочет, только в Господе» (1 Кор 7:39). При жизни супругов брак должен сохраняться. Существуют обстоятельства, при которых Церковь признает брак утратившим каноническую силу:

- а)** отпадение одного из супругов от Православия;
- б)** прелюбодеяние (измена) одного из супругов (Мф 19:9) и противоестественные пороки;
- в)** вступление одного из супругов в новый брак в соответствии с гражданским законодательством;
- г)** неспособность одного из супругов к брачному сожитию, явившаяся следствием намеренного самокалечения;
- д)** заболевание одного из супругов, которое при продолжении супружеского сожительства может нанести непоправимый вред другому супругу или детям;
- е)** медицински засвидетельствованные хронический алкоголизм или наркомания супруга, при его отказе от лечения и исправления образа жизни;

Divorce was received into the legislation of the Greek Orthodox Church in the 12th century. New causes for divorce were gradually introduced and modelled on the morals and the situation of society. Today, the motives for the dissolution of marriage are almost identical to those in the Russian Orthodox Church.

In his defence of the Orthodox Church's approach to the indissolubility of marriage, Professor Boumis states that although the Orthodox Church does not accept the sinful opinion of people that failed sacramental marriages can be easily dissolved, she understands the human nature. In her efforts to avoid worsening of the situation of the involved parties, she has yielded to the needs of society and the state. The Orthodox Church admits the dissolution of marriage in some cases. Divorce was defined as the dissolution of a marriage, which is declared by an irreversible judicial sentence.<sup>90</sup>

The examination of concrete divorce cases, decrees and declarations of divorce issued by the bishops of the Russian Orthodox Church show that there was no canonical investigation involved in the declaration of dissolution of marriage or that the motives enumerated in the Church's legislation were applied as grounds for divorce. Thus, we are often confronted with statements that are simply based on the petition presented by the involved party. As a result, the dissolution of ecclesiastical marriage and permission to remarry are granted.<sup>91</sup>

In practice, many Orthodox Churches only approve the divorce decrees issued by the civil court to dissolve a marriage celebrated in the church. In other Orthodox Churches, for example in the Middle East, the ecclesiastical hierarchy, with an exclusive competency in matrimonial matters, employs the principle of *oikonomia* to declare the dissolution of the eccle-

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**ж)** безвестное отсутствие одного из супругов, если оно продолжается не менее трех лет, при наличии официального свидетельства уполномоченного государственного органа; указанный срок сокращается до двух лет после окончания военных действий для супругов лиц, пропавших без вести в связи с таковыми, и до двух лет для супругов лиц, пропавших без вести в связи с иными бедствиями и чрезвычайными происшествиями;

**з)** злонамеренное оставление одного супруга другим (длительностью не менее года);

**и)** совершение женой аборта при несогласии мужа или принуждение мужем жены к аборту;

**к)** надлежачим образом удостоверенное посягательство одного из супругов на жизнь или здоровье другого супруга либо детей;

**л)** неизлечимая тяжкая душевная болезнь одного из супругов, наступившая в течение брака, подтверждаемая медицинским свидетельством и устраняющая возможность продолжения брачной жизни.”

<sup>90</sup> P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, p. 124.

<sup>91</sup> С. ВАСИЛ: “Odlúčenie, rozviazanie manželského zväzku...,” p. 91.



siastical matrimonial bond.<sup>92</sup> Such a practice is employed in Orthodox Churches in Europe, including Slovakia. In order to declare ecclesiastical divorce, one must submit a divorce petition and provide a divorce decree issued by the civil court.<sup>93</sup>

## Conclusions

The article introduced the briefer process before the bishop and the rationale behind its stipulation in the canonical system of the Catholic Church. This process put into practice one very important part of the teaching of the Second Vatican Council — *the bishop himself is the judge*. The Council ascertained that the eparchial bishop himself was to be established in his particular Church not only as its head and shepherd, but also as the judge for his faithful.

The bishop himself should not delegate this duty of a judge in matters of marriage to other structures, but he must perform this duty personally for the salvation of the immortal souls. We have also looked into the process of ecclesiastical divorce in the Orthodox Churches. We could see that there is no mention of procedural issues in the Orthodox Churches. We did not encounter any role of the judicial vicar, defender of the bond, attorney, or institutions of appeal as we did in the briefer process.

The Catholic Church does not recognize the procedure involved in the declaration of the dissolution of a marital bond, or the divorce on the grounds of adultery as it happens in some of the Orthodox Churches applying the principle of *oikonomia* that the Catholic Church considers in this case to be contrary to Divine Law since such a dissolution presupposes the intervention of ecclesiastical authority in the breakup of a valid marital contract. As such, it gravely violates the canonical doctrine of the Catholic Church on unity and indissolubility of marriage.<sup>94</sup> The main problem is that there is no distinction between “declaration of nullity,”

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<sup>92</sup> Ibidem, p. 104.

<sup>93</sup> The Orthodox Metropolitan in Slovakia, Archbishop Ján responded to an ecclesiastical divorce petition of one of his faithful. He stated that “in response to your petition dated February 2008, we inform you that on the basis of your petition, the decision of the District Court and canons of the Orthodox Church your marriage contracted in the Orthodox Church with XY of Orthodox faith is now considered dissolved.” Cf. Ibidem.

<sup>94</sup> A. PASTWA: “Kanonické paradigma nerozlučiteľnosti O vzťahu prirodzenosti a kultury v katolíckom chápaní manželstvá.” *Studia Theologica* 22/2 (2022), pp. 85—90.

“annulment,” “dissolution” or “divorce” in the declarations issued by the hierarchs of the Orthodox Churches and they often lack any valid reasons for issuing such a declaration. This constitutes a real doubt regarding the motivation and legitimacy of these declarations and their possible applicability in the Catholic Church. Thus, calls for the inspiration and application of the Orthodox canonical discipline would challenge the theological foundations of the unity and indissolubility of marriage and would also fail to provide a pastoral approach that could help resolve the problems of instability of sacramental marriages in the Catholic Church.

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## Processus abrégé devant un évêque et divorce ecclésiastique dans les Églises orthodoxes

### Résumé

Cet article présente une analyse critique du procès abrégé devant un évêque et du divorce ecclésiastique dans les Églises orthodoxes. Le point de départ de l'analyse est l'exhortation apostolique post-synodale *Amoris laetitia* promulguée par le pape François. L'article 244 dans la sous-section intitulée *Accompagnement après la dissolution et le divorce* explique la motivation du pape François occasionnant les modifications du procès devant l'évêque conformément à sa lettre apostolique *motu proprio Mitis et misericors Iesus*. En utilisant une méthode combinée d'analyse, de synthèse et de comparaison, l'article vise à fournir une vision théologique et judiciaire complète du procès de mariage abrégé devant un évêque et de la pratique des Églises orthodoxes dans la procédure de divorce ecclésiastique. L'analyse du texte a montré que la principale raison de la modification était la longueur de la procédure, qui créait des difficultés importantes et épuisait les parties concernées. Les récents documents du pape François sur le sujet ont eu pour effet de simplifier les procédures permettant de décréter définitivement la nullité du mariage. Ces documents ont mis en lumière un élément très important de l'enseignement du Concile Vatican II, selon lequel l'évêque lui-même, dans son Église locale dont il a été nommé le pasteur et le chef, est en même temps le juge des fidèles qui lui sont confiés. L'article souligne également que les évêques ne transmettent pas le ministère qui leur est confié à d'autres structures de leur éparchie, mais exercent personnellement leur ministère pour le salut des âmes immortelles.

**Mots-clés :** Église, pape François, *motu proprio*, évêque éparchial, mariage, procès abrégé, divorcés-remariés

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## Processo abbreviato davanti al vescovo e divorzio ecclesiastico nelle Chiese ortodosse

### Sommario

L'articolo presenta un'analisi critica del processo abbreviato davanti al vescovo e del divorzio ecclesiastico nelle Chiese ortodosse. Il punto di partenza fondamentale per l'analisi è l'esortazione apostolica post-sinodale *Amoris laetitia* promulgata da Papa Francesco. L'articolo 244, nella sottosezione intitolata *Accompagnamento dopo la separazione e il divorzio*, spiega la motivazione di Papa Francesco per aver modificato il processo davanti al vescovo in conformità con la sua lettera apostolica *Mitis et misericors Iesus*. In base a un metodo combinato di analisi, sintesi e confronto, l'articolo si propone di presentare uno sguardo teologico e giudiziario complessivo sul processo matrimoniale abbreviato davanti al vescovo e sulla prassi delle Chiese ortodosse nel processo di divorzio ecclesiastico. L'analisi del testo ha dimostrato che la ragione principale della modifica è stata la lunghezza del processo, poiché ha creato notevoli difficoltà e ha esaurito le parti coinvolte. I recenti documenti di Papa Francesco in materia hanno portato alla semplificazione delle procedure fino alla concessione della dichiarazione di nullità del matrimonio. Questi documenti hanno evidenziato un elemento molto importante dell'insegnamento del Concilio Vaticano II, secondo il quale il vescovo stesso, nella sua Chiesa locale, della quale è stato costituito pastore e capo, è anche giudice dei fedeli a lui affidati. L'articolo sottolinea inoltre che i vescovi non delegano il servizio loro affidato ad altre strutture delle loro eparchie, ma svolgono personalmente il loro servizio per la salvezza delle anime immortali.

**Parole chiave:** Chiesa, Papa Francesco, motu proprio, vescovo eparchiale, matrimonio, processo abbreviato, divorziati risposati