Ecumeny & Law

Vol. 11 (1)

Marriage Processes in the 21st Century

UNIWERSYTET ŚLĄSKI
WYDAWNICTWO

Ecumeny and Law

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Wydawnictwo Uniwersytetu Śląskiego · Katowice 2023

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Ecumeny and Law, vol. 11(1) (2023), pp. 7—31
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.01

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The *Fides—Sacramentum Matrimonii* Relationship in the Post-Synodal Era (2015—) A New Concept of Response to Doctrinal Impulses

Abstract: In 2020 the International Theological Commission published an important document: *The Reciprocity Between Faith and Sacraments in the Sacramental Economy*. The document is a presentation of six years of expert work on exploring the relationship between faith and the sacraments. The original theological justification, offered here, of the specific role of faith in the validity and fruitfulness of each sacrament culminates, in some ways, in a focus on an ecclesiastically sensitive "area" (*Ecclesia domestica*) — which is already foreshadowed by the initial declarations under the "emphatic" subtitle: *Faith and the Sacraments: A Reciprocity in Crisis*. What is addressed here is a serious scholarly proposal for further reintegration of the doctrine of de *sacramento matrimonii*, with a nodal understanding of the issue of the sacramental dignity of marriage — a study strongly awaited since it is set in the context of the two memorable assemblies of the Synod of Bishops, of 2014 and 2015.

Adopting the hypothesis of justifiability of the title demarcation line (2015—), marking the "post-synodal era," bestowed upon the author of this study — consequently — a need to comprehensively examine how the International Theological Commission implemented *in concreto* the synodal appeals of bishops in 2014 — the first appeal (from *Instrumentum laboris* of the Third Extraordinary General Assembly of the Synod of Bishops): "there is a need to deepen the question of the relationship between faith and the Sacrament of Matrimony"; and a later appeal (from *Relatio Synodi* of the Third Extraordinary General Assembly of the Synod of Bishops): "it is necessary to consider the possibility of giving importance to the faith of the nupturients in ascertaining the validity of the Sacrament of Marriage, all the while maintaining that the marriage of two baptized Christians is always a sacrament." In the concluding remarks the author answers the question that preoccupies the canonist: Can it be assumed that the result of the Commission's six-year long work is — important for the canonical doctrine and, above all,

helpful for the consistent jurisprudence — a clarification of the *questio dubia*: "baptized non-believers" and the sacrament of marriage?

Keywords: Synod of Bishops, International Theological Commission, Pope Benedict XVI, relationship between faith and sacraments, sacrament of marriage, sacramentality of marriages of "baptized non-believers", jurisprudence

1. Post-synodal *de sacramento matrimonii* debate on "new tracks" — voice of the International Theological Commission (2020)

In 2020 the International Theological Commission — in its ninth quinquennium, unusually extended by a year due to the celebration of its 50th anniversary — published an important document: "The Reciprocity Between Faith and Sacraments in the Sacramental Economy."[1] Two circumstances reflect the importance of this event. The first one — of a general, formal, and legal nature. As we read in the Apostolic Letter *Tredecim anni*, with which John Paul II definitively approved the Commission's statutes: "It is the duty of the International Theological Commission to study doctrinal problems of great importance, especially those which present new points of view, and in this way to offer its help to the Magisterium of the Church, particularly to the Sacred Congregation for the Doctrine of the Faith to which it is attached."[2] The second, specific circumstance relates to the very subject of the Commission's research. The aforementioned document is a presentation of six years of expert work on exploring the relationship between faith and the sacraments. The original theological justification offered here of the specific role of faith in the validity and fruitfulness of each sacrament culminates, in some ways, in a focus on an ecclesiastically sensitive "area" (*Ecclesia domestica*) — which is already foreshadowed by the initial declarations under the "emphatic" subtitle:

[1] International Theological Commission: *The Reciprocity Between Faith and Sacraments in the Sacramental Economy (2020)*, https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20200303_reciprocita-fede-sacramenti_en.html [accessed 30.01.2023].

[2] John Paul II: *Apostolic Letter in the Form of Motu Proprio "Tredecim anni"* [6.08.1982], n. 1, https://www.vatican.va/content/john-paul-ii/en/motu_proprio/documents/hf_jp-ii_motu-proprio_06081982_tredecim-anni.html [accessed 30.01.2023]. See also Francis: *Apostolic Constitution on the Roman Curia and its Service to the Church in the World "Praedicate Evangelium"* (March 19, 2022), n. 77, https://www.vatican.va/content/francesco/en/apost_constitutions/documents/20220319-costituzione-ap-praedicate-evangelium.html [accessed 30.01.2023].

Faith and the Sacraments: A Reciprocity in Crisis.[3] What is addressed here is a serious scholarly proposal for further reintegration of the doctrine of *de sacramento matrimonii*,[4] with a nodal understanding of the issue of the sacramental dignity of marriage — a study strongly awaited since it is set in the context of the two memorable assemblies of the Synod of Bishops of 2014[5] and 2015.[6] Hence *nota bene* the title demarcation line,[7] marking the "post-synodal era."

As the Commission's secretary Thomas Bonino reports,[8] a significant part of the text is devoted to a pressing theological problem that has substantial pastoral implications today. It concerns the question of the sacramentality of marriage of persons defined by the term "baptized non-believers."[9] In fact, the authors of the text — citing the introduction of the term into the discourse[10] by the International Theological Commission in a previous 1977 document entitled *Propositions on the Doctrine*

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[3] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 12.

[4] Here the reference point invariably remains the source texts: Vatican Council II: *Dogmatic Constitution on the Church "Lumen gentium"* [21.11.1964], n. 11; Vatican Council II: *Pastoral Constitution on the Church "Gaudium et spes"* (December 7, 1965), n. 48. See A. Pastwa: *Istotne elementy małżeństwa. W nurcie odnowy personalistycznej*. Katowice 2007.

[5] Synod of Bishops. III Extraordinary General Assembly: *Relatio Synodi: The Pastoral Challenges of the Family in the Context of Evangelization* [18.10.2014], https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20141018_relatio-synodi-familia_en.html [accessed 30.01.2023].

[6] Synod of Bishops. XIV Ordinary General Assembly: *The Final Report: The Vocation and Mission of the Family in the Church and in the Contemporary World* [24.10.2015], https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20151026_relazione-finale-xiv-assemblea_en.html [accessed 30.01.2023].

[7] "Nella prima Sessione Plenaria della CTI, iniziato il suo nono quinquennio, nel dicembre 2014, è stato approvato per votazione che allo studio vi fosse anche il tema relativo al rapporto »Fede e sacramenti«." "Matrimonio in assenza di fede, documento della Commissione Teologica (Intervista con il teologo gesuita Gabino Uríbarri Bilbao)." *Vatican News*, pubbl. 3.03.2020, https://www.vaticannews.va/it/vaticano/news/2020-03/gabino-uribarri-bilbao-intervista-matrimonio-fede-sacramenti.html [accessed 30.01.2023].

[8] S.-Th. Bonino: "Un parere della Commissione Teologica Internazionale: il matrimonio tra battezzati non credenti." *L'Osservatore Romano*, ed. quotidiana, Anno CLX, no. 51, 2—3/03/2020, p. 7.

[9] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., nn. 143—182. This distinctive name ("baptized non-believers") appears as many as 22 times in the document.

[10] "As early as 1977, the International Theological Commission, referring to the sacrament of marriage, warned of the existence of 'baptized non-believers' who request the sacrament of marriage. This fact, they said, raises profound 'new questions'." Ibidem, n. 3.

of Christian Marriage[11] — spell out this leading thread of research in the following way: "We go a step further (Chapter 4) to address the interrelationship between faith and sacraments in the case of marriage. We dwell on a question that the reciprocity of faith and sacraments, by its very nature, could not leave aside: the elucidation of whether the marriage union between 'baptized non-believers' is to be considered a sacrament. This is a unique case, in which the articulation of the reciprocity between faith and sacraments in the [sacramental — A.P.] economy is truly put to the test."[12] Here the Commission refers to the criteria formulated in Chapter Two, "The Dialogical Character of the Sacramental Economy of Salvation,"[13] which, according to the declaration of Professor Gabino Uríbarri Bilbao of the Comillas Pontifical University in Madrid, is "the true heart of the document."[14]

It is worth mentioning that the comments of the aforementioned expert (both in a commentary published by *L'Osservatore Romano*,[15] as well as in an interview with the Vatican News portal[16]) — by the very virtue of his chairmanship of the subcommittee appointed to direct the study and prepare the document — are of particular value. How significantly they can contribute to reliable/complete information on the process of the Commission's theologians' investigation into the final findings is evidenced by the following premises (indications):

Indication one. The methodology of study common to the sacraments of Christian initiation and the sacrament of marriage is addressed by number 80 of the document. The key here is the "5 steps" scheme:

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[11] It is worth recalling the words of the Commission at the time: "The existence today of 'baptized non-believers' raises a new theological problem and a grave pastoral dilemma, especially when the lack of, or rather the rejection of, the Faith seems clear." International Theological Commission: *Propositions on the Doctrine of Christian Marriage* (1977), n. 2, 3 https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html [accessed 30.01.2023].

[12] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 12.

[13] Ibidem, nn. 15—79. What should be noted at this point — this title, but also the characteristic sentence of the chapter: "All the sacraments are *communicative* actions" (n. 71) signal that the Commission's theological inquiries are situated at the very center of the contemporary trend of communicative theology. See H. O. Meuffels: *Kommunikative Sakramententheologie*. Freiburg—Basel—Wien 1995; B. J. Hilberath, M. Scharer: *Kommunikative Theologie: Grundlagen — Erfahrungen — Klärungen*. Mainz 2012.

[14] G. Uríbarri Bilbao: "Significato e piano del documento 'Reciprocità tra fede e sacramenti nell'economia sacramentale'." *L'Osservatore Romano*, ed. quotidiana, Anno CLX, no. 51, 2—3/03/2020, p. 7.

[15] Ibidem.

[16] "Matrimonio in assenza di fede..." (Intervista con il teologo gesuita Gabino Uríbarri Bilbao).

(1) demonstration of the biblical foundation; (2) study of the relationship between a given sacrament and the appropriate faith for the celebration thereof; (3) unravelling today's problems concerning the issue at hand; (4) selection of elements of tradition that shed light on the relationship between faith and sacrament; (5) presentation of a theological proposal for pastoral care about the faith necessary for the celebration of each sacrament. Importantly, the next two "steps" described in number 134 go some way toward clarifying the sensitive issue of the sacramentality of marriages between "baptized non-believers": (1) reviewing the state of the question, (2) offering a theological proposal for a solution to the issue, in harmony with the current theology of marriage.

Indeed, it is difficult to overlook that the chairman of the subcommittee, Professor Uríbarri, in the aforementioned commentary, directly links the research assumptions formulated in this way with the highlighting of yet another criterion: the adoption of the nodal role of the anthropological paradigm (!). The chairman argues methodically: (1) Marriage is a natural reality, that is, anthropological, and, moreover, in the union of the baptized, a sacramental reality. (2) The axiology of our culture is hostile to the Catholic understanding of natural marriage. (3) Under these circumstances, in view of the lack of faith in baptized non-believers, it is very difficult to assume the guaranteed intention of the party/parties to enter into natural marriage — with the project of realizing the matrimonial goods immanently inscribed in it: indissolubility, unity/fidelity and oblative love (*amor benevolentiae*) underlying the good of the spouses and the good of the offspring.[17]

However, in the document itself — as far as the said clarification of the research methodology is concerned — after a general signaling of the importance of the sacrament-anthropology relationship, in number 20, the reader must wait until number 172[18] for the affirmation of the said principle (anthropological paradigm).

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[17] G. Uríbarri Bilbao: "Significato e piano del documento…," p. 7

[18] It is purposeful to quote *in extenso* the contents of this issue: "The fact that marriage is a creational reality implies that anthropology is an intrinsic part of its essence in a double sense, in which both are closely connected. On the one hand, the conception of what the human person is comes fully into play; the human person is someone who — as a relational being — fulfills his or her own being in self-giving. On the other hand, the essence of marriage is also touched by the understanding of sexual differentiation, male and female, as an element of the divine plan oriented towards procreation and towards the conjugal covenant, as a reflection of the divine covenant: a reflection of God with the people of Israel and of Christ with the Church. Both elements come fully into play in natural marriage. It is indissoluble, exclusive, and focused on the reciprocal good of the spouses, through interpersonal love, as well as on the offspring. Thus, the Church appears, sometimes alone and under attack, as the cultural bulwark that preserves

Indication two. This one, is just as important as the first and just as related to the Commission's research methodology. The chairman of the subcommittee, in the author's cited commentary, clearly declares: "What we defend is consistent with the concept of sacramentality and the dialogical nature of the sacramental economy […]. Our proposal follows in the footsteps of the various interventions of Popes Francis, St. John Paul II and, above all, Benedict XVI; [Pope Benedict XVI — A.P.] offers his contribution to the debate of dogmatic, pastoral, canonical theology and pastoral discernment."[19] The specific priority accorded to the thought of Joseph Ratzinger/Benedict XVI is justified by Gabino Uríbarri by the fact that it was this successor of St. Peter who most clearly articulated in his magisterium the question of the influence of faith on anthropological concepts. "Following Benedict XVI — declares Spanish theologian this time in an interview with Vatican News — we start from the premise that faith determines anthropological concepts in every area of life, including marriage. We ask ourselves whether the consistent lack of faith, typical of those who can be called 'baptized non-believers,' affects their understanding of marriage — keeping in mind that in many places the socially shared understanding of marriage, including legally constituted marriage, is not based on indissolubility (being lifelong), fidelity (exclusivity and the well-being of spouses) and procreation (openness to offspring). We claim, therefore, that in the case of 'baptized non-believers' the intention to enter into a true natural marriage is not guaranteed. Without natural marriage, there is no reality that can be elevated to sacramental marriage: there is no sacramental marriage."[20]

This is how the context and meaning of the reference in the subtitle of this study to "doctrinal impulses" is revealed. After all, it remains a telling fact that the most frequently cited documents of the papal magisterium in the Commission's study (if we do not count the *Catechism of the*

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the natural reality proper to marriage. However, without falling into catastrophic lamentations, a sincere look at our cultural context cannot help but notice how aspects that lead to questioning the anthropological roots of the natural basis marriage are becoming increasingly entrenched as unquestionable axioms in postmodern culture. Thus, without wishing to be exhaustive, the predominant tendency embraces as evident, for example, these widespread, deep-seated, and sometimes legislatively sanctioned convictions that are clearly contrary to the Catholic faith." International Theological Commission: *The Reciprocity Between Faith and Sacraments*…, n. 172.

[19] G. Uríbarri Bilbao: "Significato e piano del documento…," p. 7.

[20] "Matrimonio in assenza di fede…" (Intervista con il teologo gesuita Gabino Uríbarri Bilbao).

Catholic Church[21] and the two Codes: CIC 1983[22] and CCEO[23]) are precisely the texts of Benedict XVI: the famous 2013 "Address to the Roman Rota"[24] (11 times) and the 2007 exhortation *Sacramentum caritatis*[25] (5 times; *nota bene* the same number as Francis' 2016 exhortation *Amoris laetitia*[26]). For the sake of completeness, it should be added that John Paul II's exhortation *Familiaris consorcio* (1981)[27] is cited 4 times (with three references to the important number 68), and the famous 2001 "Address to the Roman Rota"[28] is cited 3 times.

Indication three. It is a sentence from Gabino Uríbarri's interview with the portal Vatican News, also saying a lot about the Commission's method of research work: "Our intention is very far from putting up barriers to the sacraments. On the contrary, we would like the document to help enhance pastoral care and sacramental practice. Taking sacramentality seriously in the history of salvation requires a minimum of faith, so that the celebration of the sacraments does not fall into empty ritualism, magic or a privatization of faith that no longer corresponds to ecclesiastical faith."[29]

The above clarifications pave the way for an attempt to fish out of the "sea of ideas" — which are not lacking in the theologically rich text of the document of the International Theological Commission — the "pearls" of wisdom, giving a full or at least partial answer to the title problem. Yes, in order to "discipline" the discourse we should first complete the explanation of the title (since there was already an opportunity to decode the title formulas: "post-synodal era," "doctrinal impulses") and attempt to outline a working hypothesis. The realization of this intention is facilitated by the Commission itself, determining the course of further reasoning in Chapter IV by putting

[21] *Catechism of the Catholic Church* (*editio typica*: August 15, 1997).

[22] *Codex Iuris Canonici* (*Code of Canon Law*, promulgated: January 25, 1983).

[23] *Codex Canonum Ecclesiarum Orientalium* (*Code of Canons of the Eastern Churches*, promulgated: October 18, 1990).

[24] Benedictus XVI: "Allocutio ad Romanae Rotae Tribunal" [26.01.2013]. *Acta Apostolicae Sedis* [hereinafter: AAS] 105 (2013), pp. 168—172.

[25] Benedict XVI: *Apostolic Exhortation "Sacramentum caritatis"* [22.02.2007].

[26] Francis: *Apostolic Exhortation "Amoris laetitia"* [19.03.2016]. It is noteworthy that Francis' two addresses to the Roman Rota from 2015 and 2016 appear three times each in the footnotes. Idem: "Allocutio ad Sodales Tribunalis Romanae Rotae" [23.01.2015]. AAS 107 (2015), pp. 182—185; Idem: "Allocutio ad Tribunal Rotae Romanae, occasione Innaugurationis Anni Iudicialis" [22.01.2016]. AAS 108 (2016), pp. 136—139.

[27] John Paul II: *Apostolic Exhortation "Familiaris consortio"* [22.11.1981].

[28] Ioannes Paulus II: "Allocutio ad Romanae Rotae tribunal" [1.02.2001]. AAS 93 (2001), pp. 358—365.

[29] "Matrimonio in assenza di fede…" (Intervista con il teologo gesuita Gabino Uríbarri Bilbao).

a *questio dubia* around the sacramentality of marriage of baptized non-believers.[30]

This step — and here one must applaud the ironclad methodology of the Commission's work — is preceded by one objection. In number 133 it says: "we shall focus exclusively on the Latin understanding [of marriage — A.P.]." The justification follows: While there is a common core in the theology of marriage of East and West, there are notable differences between the Latin and Eastern traditions. Namely, while in Latin theology the prevailing understanding is that the spouses are the ministers of the sacrament, on the grounds of their free mutual consent, for the Eastern tradition the blessing of the bishop or priest belongs to the essence of the sacrament. Only the sacred minister has been given the faculty to invoke the Spirit (*epiclesis*) to actualize the sanctification inherent in the sacrament. Indeed, this understanding of the sacrament of marriage is embedded in a theology with its own characteristics and profile, a theology in which the sanctifying effects of the sacrament come to the foreground.[31]

Taking the objection made at face value we can already concentrate on the precise development of the *questio dubia* in the Commission's final remarks for this phase of research contained in number 167 — under the intriguing title: "Possible Theoretical Alternatives to Resolve the Issue." Without going into detail here, one comment seems necessary. The conclusive nature of the alternative theories/concepts cited in the document by not mentioned by names canonists (Winfried Aymans, Sabine Demel, Andreas Schmidt) or theologians (José Granados) — recognized experts who announced or refreshed their theories[32] at the beginning of the Com-

[30] See in Chapter IV, entitled: "The Reciprocity between Faith and Marriage," Section 4.2 entitled: "A *Quaestio Dubia*: The Sacramental Quality of the Marriage of 'Baptized Non-Believers'." International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., nn. 143—167.

[31] Ibidem, n. 133.

[32] W. Aymans: "Sakramentale Ehe. Ein Plädoyer für eine Neubesinnung auf den religiösen Sinn des kirchlichen Eheverständnisses. Ein Zwischenruf zu den Bischofssynoden 2014/1015." *Archiv für katholisches Kirchenrecht* 183 (2014), pp. 123—130; S. Demel: "Mangelnder Glaube und Ehenichtigkeit oder Ehesegen und Trauaufschub? Grundlegende Fragen zum Thema Scheidung und Wiederheirat in der katholischen Kirche." *Anzeiger für die Seelsorge* 124 (2015), pp. 5—9; S. Demel: "Zivile — kirchliche — sakramentale Ehe. Ein Reformvorschlag zur Überwindung rechtlicher Widersprüche in der kirchlichen Ehegesetzgebung." In: *Ius semper reformandum. Reformvorschläge aus der Kirchenrechtswissenschaft*. Eds. M. Pulte, Th. Meckel [Kirchen- und Staatskirchenrecht. Vol. 28]. pp. 85—96. A. Schmidt: "Taufe, Glauben und Unauflöslichkeit der Ehe. Zum inneren Zusammenhang von objektiver Sakramentalität und persönlichem Glaubensvollzug." *Internationale Katholische Zeitschrift Communio* 44 (2015), pp. 427—440, 433—438; A. Schmidt: "Ein Ausweg aus dem 'großen Dilemma'? Perspektiven einer erneuerten Ehepastoral." *Kirche heute*, Januar 2015, pp. 10—13; J. Granados: "The sacramental

mission's work — obviously gave rise to a detailed research query,[33] to at least give credence to the thesis that it is only to the presented theory of the International Theological Commission, and not another, that the words of the title fit: "A New Concept of Response…" It is precisely such an attempt to look at the *questio dubia* — without losing sight of the idea of harmonization *vetera et nova* in the study of matrimony[34] — that constitutes the working hypothesis of the present study.

The aforementioned 167th number is undoubtedly a testimony to the diligent, highly professional work of the theologians. This is evidenced by the Commission's explicitly communicated endeavor for the completeness of the "options" presented here to define the relationship: the faith of the nupturients and the valid reception of the sacrament of marriage; importantly — with precise justification for their rejection (here: four inadequate optics — with more positions not noted in the document[35]) or potential acceptance. As for the latter — the adequate ideological horizon outlined in Chapter 2 of the document guides the Commission to a draft of its own original position, which is fully developed later in the document.

At the beginning, however, it seems appropriate to briefly outline these "theoretical alternatives to resolve the issue" (according to the wording of the title formula), from which the Commission's theologians have distanced themselves. Firstly, it is completely unjustified to force sacramental automatism, in the sense that the mere baptism of the nupturients, regardless of their faith, elevates the marriage contract *eo ipso* to the supernatural reality of a sacrament. Secondly, it is incompatible with current Catholic doctrine *de matrimonio* to accept the possibility of the separation between valid marriage contract and sacrament. While the identity between contract and sacrament has not been solemnly defined, it can be considered as theologically certain. Serious arguments would have to be

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Character of Faith: Consequences for the Question of the Relation between Faith and Marriage." *Communio* 41 (2014), pp. 245—268; J. Granados: "Glaube und Ehesakrament." *Kirche heute*, April 2015, pp. 7—10.

[33] An extensive presentation of the results of this search exceeds the scope of this article, and certainly deserves a separate study.

[34] See A. Pastwa: "'Person' in CIC and CCEO Matrimonial Law. Around the Idea of Vetera et Nova Harmonisation in the Church Doctrine and Jurisprudence." *Semicentennial of Karol Wojtyła's "Person and Act": Ideas — Contexts — Inspirations (II). Philosophy and Canon Law* 7/2 (2021), pp. 1/33.

[35] International Theological Commission: *The Reciprocity Between Faith and Sacraments…*, n. 167. Yes, a certain dissatisfaction may be caused by the general nature of this presentation, namely a cursory overview of "optics" instead of a polemical recounting of specific ideological positions.

made in favour of the opposite position.[36] Thirdly, the dialogical character of the sacramental economy shows that the faith of the Church precedes and accompanies personal faith, but can never supplant it completely. Thus, it is difficult to accept the view that the faith of the Church community would compensate for the complete absence of personal faith of the contracting parties.[37] Fourthly, it is unconvincing, in the Commission's view, to perceive the sacramentality of marriage through the prism of the salvific effect of baptism, or more precisely the efficacy associated with the "character" (*character indelebilis*) imprinted in baptism. Indeed, invoking only this "character" and the acquisition of *habitus fidei* confirms a sacramental communication on the part of God, but the dialogical response of a personal nature on the part of the graced subject is lacking.

What remains is the need to ask, therefore, how the International Theological Commission implemented *in concreto* the synodal appeals of bishops in 2014 — the first appeal (from *Instrumentum laboris* of the Third Extraordinary General Assembly of the Synod of Bishops): "there is a need to deepen the question [Italian *la necessità di approfondire la questione*] of the relationship between faith and the Sacrament of Matrimony"[38]; and a later appeal (from *Relatio Synodi* of the Third Extraordinary General Assembly of the Synod of Bishops:): "it is necessary to consider the possibility of giving importance to the faith of the nupturients [Italian *la possibilità di dare rilevanza al ruolo della fede dei nubendi*] in ascertaining the validity of the Sacrament of Marriage, all the while maintaining that the marriage of two baptized Christians is always a sacrament."[39]

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[36] Ibidem, n. 167b.

[37] Ibidem, n. 167c.

[38] "[…] si indica la necessità di approfondire la questione del rapporto tra fede e sacramento del matrimonio". Synod of Bishops. III Extraordinary General Assembly: *Instrumentum Laboris: The Pastoral Challenges of the Family in the Context of Evangelization* (Juni 26, 2014), n. 96, https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20140626_instrumentum-laboris-familia_en.html [accessed 30.01.2023].

[39] Synod of Bishops. III Extraordinary General Assembly: *Relatio Synodi*…, n. 48. See similarly — Synod of Bishops. XIV Ordinary General Assembly: *Instrumentum Laboris: The Vocation and Mission of the Family in the Church and in the Contemporary World* [23.06.2015], nn. 114—115, https://www.vatican.va/roman_curia/synod/documents/rc_synod_doc_20150623_instrumentum-xiv-assembly_it.html [accessed 30.01.2023]. The author's attempt to respond in detail to the latter appeal is the study — A. Pastwa: "'Love Builds Communion between Persons' (UUS, n. 21). Christological-Ecclesiological Key to Confirm the Identify of Marriages of Baptized Non-Catholics." *Ut Unum Sint (II). Ecumeny and Law* 10/2 (2022), pp. 29—57.

2. Standpoint developed by the International Theological Commission

The initial presentation of the Commission's own standpoint on the issue at hand (faith and the sacrament of marriage) is connected in the document under review (2020) to the disclosure of the existence of a fifth "option" — against the background of the four previously mentioned "theoretical alternatives to resolve the issue." The key to the new concept is the focus of analysis on the concept of "intention."[40] Already in the "programme" Chapter II, clarifications were made to give a solid doctrinal basis and be a prelude to establish a coherent concept for solving the *questio dubia* (the problem of baptized non-believers[41]). One passage from this chapter is particularly worth quoting: "The intention stands at a crucial point. On the one hand, it completely preserves the efficacy *ex opera operato*, that is: the efficacy of sacramental actions is due wholly and exclusively to Christ and not to the faith of either the recipient or the minister of the sacrament. But it also leaves intact the dialogical character of the sacramental event, so that one does not fall into either magic or sacramental automatism. The intention expresses the indispensable minimum of voluntary personal participation in the gratuitous event of the sacramental transmission of saving grace."[42]

These clarifications seem to be sufficient to proceed to tracing the process of the Commission's theologians putting together the substantive puzzle, with the clear intention (in accordance with the detailed research plan adopted[43]) of obtaining the much-desired complete "picture"

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[40] International Theological Commission: *The Reciprocity Between Faith and Sacraments*…, n. 167e.

[41] Ibidem, n. 143.

[42] Ibidem, n. 69. The intention (positive) has already been discussed in an earlier statement by the Commission: "The reception of the sacraments can be valid or invalid, fruitful or fruitless. For an adequate disposition it is not enough to not externally or internally contradict what the sacrament means. In other words, the recipient must believe both in the content (*fides quae*) and existentially (*fides qua*) that which Christ gives him sacramentally through the mediation of the Church. There are varying degrees of conformity with the doctrine. What is decisive here is that the recipient does not reject the Church's teaching at all. There are also degrees of intensity of faith. What is decisive here is the positive disposition to receive what the sacrament signifies. Each fruitful reception of a sacrament is a communicative act and thus part of the dialogue between Christ and the individual believer." Ibidem, n. 68.

[43] "[*Preliminary Formulation of the Question*]. Thus, the question that arises is whether two unmarried baptized non-believers of opposite sexes, who fall into either of the two categories just described, are married by a sacramental celebration or by some

of the issue under study. The following insight into the successive stages of the implementation of the said plan, will make it possible to determine whether the result of the research of the International Theological Commission can really be attributed to the term "new concept":

1. In the first stage, an updated/modernized thesis on the overwhelming influence of the dominant culture on the understanding of marriage is developed (with the designed intention of not striking catastrophic tones after all). The clou of the Commission's theologians' standpoint is conveyed by the categorical statement: "The Church appears, sometimes alone and under attack, as the cultural bulwark that preserves the natural reality proper to marriage."[44] Consistently, the document no longer emphasizes (as it used to) cultural determinants in those parts of the world where there is a tradition of polygamous unions. Here, the legal-canonical judgment (unified in the judicial practice of the ecclesiastical courts) poses little difficulty: if the nupturient lacks "explicit faith"[45] it is very difficult to assume that his intention to enter into marriage accommodates the exclusivity inherent in natural marriage; not to mention the serious threat to the realization of the principle of the equal dignity of man and woman, a principle — as the Commission reminds us — implied by *bonum coniugum*, one of the essential good of marriage.[46] The document, on the other hand, emphasizes the problems associated with our cultural circle, in which the anthropological paradigm is being challenged (on various levels and in many ways),[47] defined primarily by two principles: (1) the human person is a relational entity that is fully realized in the giving of self, (2) marriage as a natural covenant of persons is essentially defined by the sexual difference between a man and a woman and directed towards procreation.[48] Well, in today's rapidly secularizing (or heavily secularized) world, attitudes to life are spreading that are alien to the model of natural marriage.[49] Here the Commission — without claiming complete-

other valid form of union: Is it a sacrament? The topic is the subject of debate and has generated an abundant literature. Its solution is not clear, since several major elements come into play in simultaneous interaction. Next, we shall go through some significant milestones of its development in recent years, in order to responsibly consider the terms of the question." Ibidem, n. 145.

[44] Ibidem, n. 172.

[45] Ibidem.

[46] Ibidem, n. 170.

[47] "[…] the predominant tendency embraces as evident, for example, these widespread, deep-seated, and sometimes legislatively sanctioned convictions that are clearly contrary to the Catholic faith." Ibidem, n. 172.

[48] Ibidem.

[49] Meanwhile, as Benedict XVI taught: "[…] a reaffirmation of the innate human capacity for marriage is itself the starting point for enabling couples to discover the natu-

ness of exposition — presents "the typology"[50] of such attitudes with an appropriate phenomenological description. The list includes seven cases[51]: (a) a focus on one's own self-realization, (b) a "macho" mentality, (c) permeation by "gender ideology," (d) a divorce mentality, (e) a hedonistic approach to one's own body, (f) a dissociation between the conjugal act and procreation, (g) equating with marriage not only de facto unions, but also unions of persons of the same sex.[52]

2. The next stage of formulating conclusions — now directly relevant in the legal-canonical sense — opens up the fundamental question signaled earlier: whether marriage between "baptized non-believers," who mentally and personality-wise correspond to the attitudes of the mentioned typology, can be a sacrament of faith. More specifically, the question is about non-believers whose lifestyle is evidently defined by one or more factors of the mentioned typology. The response of the International Theological Commission is as follows: "The absence of faith may compromise the intention to celebrate a marriage."[53] Two perspectives, closely intertwined in Christian marriage,[54] are meant to highlight, as the Commission's further arguments indicate, the validity of this conclusion. The framework of the first perspective is delineated by the section's title: "The Effect of the Absence of Faith on the Natural Goods of Marriage"[55] — with the arguments included in numbers 174—179 of the document. As it was revealed the Commission dedicated special attention to the two

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ral reality of marriage and its importance for salvation. Ultimately, what is at stake is the truth about marriage itself and its intrinsic juridical nature." Benedictus XVI: "Allocutio ad sodales Tribunalis Rotae Romanae" [29.01.2009]. AAS 101 (2009), pp. 124—128; see also Idem: "Allocutio ad Tribunal Rotae Romanae in inauguratione Anni Iudicialis" [27.01.2007]. AAS 99 (2007), pp. 86—91.

[50] International Theological Commission: *The Reciprocity Between Faith and Sacraments…*, n. 173.

[51] Ibidem, n. 172.

[52] "Thus, not only successive unions, de facto unions, or those without a formal marriage contract, but also unions of persons of the same sex are all spreading. Successive unions de facto deny indissolubility. Temporary or probationary cohabitation disavows indissolubility. Same sex unions do not recognize the anthropological meaning of the difference in sexes (Gn 1:27; 2:22—24) inherent in the natural understanding of marriage, according to the Catholic faith." Ibidem.

[53] Ibidem, n. 173.

[54] "In Christian marriage, there is a bond, much greater than in any other sacrament, between creaturely and supernatural reality and between the order of creation and that of redemption. 'Marriage has been instituted by God the Creator,' and then elevated to the dignity of a sacrament. Given this very close bond, it is understood that a modification of the natural reality of marriage, a departure from the creational project, directly affects the supernatural reality, the sacrament." Ibidem, n. 174.

[55] Ibidem.

goods of marriage, inspired by the teachings contained in the Benedict XVI's "Address to the Roman Rota" in 2013,[56] *bonum coniugum* and *bonum sacramenti*. The arguments repeated after the Pope are well-known. At this point it is only worth recalling one characteristic statement closing, as it were, this part of the Commission's concluding findings: "The lack of faith itself includes serious doubts about indissolubility in our cultural context."[57]

3. What remains is the final stage of the way of unraveling the problem, programmed in the International Theological Commission's document: the lack of faith in "baptized non-believers" and the authenticity of the intention to marry. The initial thesis is built by the Commission on the foundation of the principle of *eo ipso sacramentum*. The sacrament of marriage, more than any other sacrament expresses the close connection between the order of creation and redemption, created and supernatural realities; after all, the marriage covenant established by the Creator is elevated between the baptized to the dignity of a sacrament.[58] Since this is the case, on the one hand, any questioning of the natural reality of marriage, which undermines and nullifies the Creator's idea, obviously impinges on the supernatural/sacramental reality, blocking the grace of Christ. But also, on the other hand — if we reverse the "direction" — there is a similar relationship, of which the case of marriages between "baptized non-believers" is a suitable exemplification. A clear rejection of supernatural reality (sacramental dignity of marriage) that occurs in case of such nupturients, resulting either from a complete, in the biographical sense, lack of faith (as we read in the document — the situation of the baptized "who never personally assumed the faith"[59]), or from the abandonment of the faith by, for example, a formal act — can potentially result in the failure to form *in concreto* the "sign" of marriage on the natural plane, as intended by God the Creator.[60] Referring to the Catho-

[56] Benedictus XVI: "Allocutio ad Romanae Rotae Tribunal" [26.01.2013]..., pp. 168—172.

[57] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 178.

[58] CIC 1983, can. 1055: "The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized (§1); For this reason, a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament [*eo ipso sacramentum*] (§ 2)." Cf. CCEO, can. 776 § 2.

[59] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 174.

[60] Ibidem, n. 180.

lic understanding of the sacrament,[61] the Commission adds to the finding the following theological explanation: "For sacramental marriage to take place, a kind of love is required as an external visible reality that, by its particular qualities (goods of marriage: GS 48—50) and together with the help received by grace, can signify the love of God. In other words, a marital bond that does not include indissolubility, fidelity, the sacrificial disposition towards the other spouse, and openness to life would not be a sign that is capable of signifying Christ's love for the Church. The Church understands that in this type of bond the truth of married love does not emerge."[62]

Here the Commission proceeds to formulate its final conclusions, among which attention is drawn by the strong "we affirm" (Italian *affermiamo*): "We affirm that, in the case of an absence of faith as explicit and clear as that of the described baptized non-believers, serious doubts about an intention that includes the goods of natural marriage, as understood by the Church, make it possible to maintain serious reservations about the existence of a sacramental marriage."[63] The "i"s are dotted and "t"s crossed, namely the expected reference by the Commission's theologians to the 68th point in *Familiaris consortio* appears. They finally recalled that the sacramental practice of the Church makes it possible to refuse the sacrament of marriage under the conditions specified by Pope John Paul II.[64]

The picture of the connection between faith and the sacrament of marriage that we get from the direct response of the theologians of the International Theological Commission to the *questio dubia* would be incomplete if we did not include the effects of their earlier reflection on two nodal issues. The first, concerns the understanding of an important statement by the same body in a 1977 document: "The intention of car-

[61] "[*Sacramentality: The Concept*]. There pertains to sacramental logic the inseparable correlation between a signifying reality that has a visible external dimension, e.g. the integral humanity of Christ, and another meaning that has a supernatural, invisible, sanctifying character, e.g. the divinity of Christ. When we speak of sacramentality we are referring to this inseparable relationship, in such a way that the sacramental symbol contains and communicates the symbolized reality. This presupposes that every sacramental reality in itself includes an inseparable relationship with Christ, the source of salvation — and with the Church — the depository and dispenser of Christ's salvation." Ibidem, n. 16.

[62] Ibidem, n. 180.

[63] Ibidem, n. 181.

[64] For the unknown reason, the English edition of the document on the official Vatican website omits this passage (!). The final passus in question in the Italian original is as follows: "È, pertanto, in sintonia con la pratica sacramentale della Chiesa negare il sacramento del matrimonio a coloro che lo chiedono a queste condizioni, come già sosteneva Giovanni Paolo II (cf. §§ 153 e 169)." Ibidem. Cf. ibidem, nn. 153, 169.

rying out what Christ and the Church desire is the minimum condition required before consent is considered to be a 'real human act' on the sacramental plane."[65] The Commission notes that John Paul II had already in the 2001 and 2003 allocutions to the Roman Rota[66] implicitly corrected emerging misinterpretations of this recognized and widely accepted theological opinion. Above all, the essence of the error was demonstrated by Benedict XVI in the 2013 allocution, as he directly quotes the content of this opinion: "The indissoluble pact between a man and a woman does not, for the purposes of the sacrament, require of those engaged to be married, their personal faith; what it does require, as a necessary minimal condition, is the intention to do what the Church does. […] It is important not to confuse the problem of the intention with that of the personal faith of those contracting marriage."[67] It was this magisterial voice that the Commission used to make an unequivocal declaration: "The minimum requirement [Italian *Il minimo indispensabile* (sic! — A.P.)] for there to be a sacrament is the intention to enter into a true natural marriage."[68]

Should this declaration be regarded as an elaborate position on the *questio dubia*? An affirmative answer could even mean an unintentional (certainly) invalidation of part of the Commission's earlier findings on the potential consequences of a complete lack of personal faith. Something else, however, emerges from further passages in the document. Emblematic here is its authors' emphasis on the importance of the words of the

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[65] International Theological Commission: *Propositions on the Doctrine of Christian Marriage*..., n. 2,3; International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 149. The 1977 document goes on to say: "The problem of the intention and that of the personal faith of the contracting parties must not be confused, but they must not be totally separated either. In the last analysis the real intention is born from and feeds on living faith. Where there is no trace of faith (in the sense of 'belief' — being disposed to believe), and no desire for grace or salvation is found, then a real doubt arises as to whether there is the above-mentioned general and truly sacramental intention and whether the contracted marriage is validly contracted or not. As was noted, the personal faith of the contracting parties does not constitute the sacramentality of matrimony, but the absence of personal faith compromises the validity of the sacrament." International Theological Commission: *Propositions on the Doctrine of Christian Marriage*..., n. 2,3

[66] Ioannes Paulus II: "Allocutio ad Romanae Rotae tribunal" [1.02.2001]..., pp. 363—364, n. 8; Idem: "Allocutio ad Romanae Rotae iudices" [30.01.2003]. AAS 95 (2003), p. 397, n. 8.

[67] Benedictus XVI: "Allocutio ad Romanae Rotae Tribunal" [26.01.2013], p. 168, n. 1.

[68] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 166g; cf. ibidem, n. 154.

aforementioned corrective statement by Benedict XVI (quoted in full): "However, if it is important not to confuse the problem of the intention with that of the personal faith of those contracting marriage, it is nonetheless impossible to separate them completely."[69] Consistently following the papal enunciation, the Commission includes a kind of appendix to its earlier declaration (in the closing paragraph of the section "The Terms of the Question"[70]): "In the case of the sacrament of matrimony, faith and intention cannot be identified, but they also cannot be completely separated."[71]

The second nodal issue concerns the principle of *eo ipso sacramentum*[72] — we can boldly say: on the foundation of which the entire system of matrimonial law is built.[73] Consistent with such an assessment, a full/unreserved affirmation of the said principle takes place in the 1977 document of the International Theological Commission: "The Church cannot in any way recognize that two baptized persons are living in a marital state equal to their dignity and their life as 'new creatures in Christ' if they are not united by the sacrament of matrimony."[74] In contrast, the 2020 document under review poses the issue somewhat differently — it is obvious: with some uncertainty about the validity of the *eo ipso sacramentum* principle in the future. As the chairman of the subcommittee, Professor Uríbarri, reveals — not without the influence of Pope Francis' teachings in the exhortation *Amoris laetitia*, which noted the absence of this principle in the matrimonial law of the Eastern Catholic Churches.[75] The words of the Commission's document speak for themselves.

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[69] Benedictus XVI: "Allocutio ad Romanae Rotae Tribunal" [26.01.2013], p. 168, n. 1; International Theological Commission: *The Reciprocity Between Faith and Sacraments…*, n. 158.

[70] The recommendation of the Commission's theologians is hard to overlook at this point: "We propose to delve deeper into this last point for the case of the baptized non-believers described above. This is an aspect that is congruent with the reciprocity between faith and sacraments that we have been defending." Theological Commission: *The Reciprocity Between Faith and Sacraments…*, n. 166h.

[71] Ibidem.

[72] CIC 1983, can. 1055 § 2; cf. CIC 1917, can. 1012 § 2.

[73] See W. Góralski: "Nierozdzielność ważnej umowy małżeńskiej zawartej między ochrzczonymi i sakramentu (kan. 1055 § 2 KPK i kan. 776 § 2 KKKW)." *Ius Matrimoniale* 12 (2007), pp. 7—33.

[74] International Theological Commission: *Propositions on the Doctrine of Christian Marriage…*, n. 3.3 [*Every Marriage between Baptized Persons Must Be Sacramental*].

[75] "Ci sono ancora questioni in sospeso, che le »scienze sacre« dovrebbero chiarire. In primo luogo, la concezione latina dell'inseparabilità tra contratto e sacramento, che è estranea alla concezione delle Chiese cattoliche orientali, come già messo in guardia da Papa Francesco (Esort. apost. *Amoris laetitia* [19 marzo del 2016] 75: AAS 108 [2016] 341)." G. Uríbarri Bilbao: "Significato e piano del documento…," p. 7.

"The most established Catholic doctrine maintains the inseparability between contract and sacrament (cf. § 155). *The definitive clarification of this aspect is still pending* [emphasis mine — A.P.]. The separation between contract and sacrament would have a direct impact on the question we are discussing. Given the present state of Catholic doctrine, we follow the current prevailing view about the inseparability of contract and sacrament."[76]

3. Conclusions

In the concluding, final part of this article, it is appropriate to return to the hypotheses raised earlier in the form of questions: (1) Has the International Theological Commission realized the cited desiderata of the 2014 Synod of Bishops? (2) Has the study of the title issue by a distinguished expert body resulted in a "new concept"; and if so, can it be assumed that the result of the Commission's six-year work is — important for the canonical doctrine and, above all, helpful for the consistent jurisprudence — a clarification of the *questio dubia*: "baptized non-believers" and the sacrament of marriage?

The answer to the first question is not difficult — because it can only be affirmative. The deepening of the issue of the relationship between faith and the sacrament of marriage, as advocated by the synodal fathers, as well as the appreciation of the faith of the nupturients with regard to the validity of the sacrament of marriage within reasonable limits, that is, respecting the principle of *eo ipso sacramentum*, is best demonstrated by: (1) the very thesis contained in the title of the 2020 document (here the validity of the words of chairman Professor Uríbarri should be affirmed: "this document [will contribute — A.P.] to a deeper understanding of the sacramental nature of the Christian faith, based on the reciprocity of faith and sacraments"[77]); (2) a solid theological discourse, focused on the issue of the impact of the lack of faith on the intention of the nupturients, which has been crowned with a clear message: the total lack of personal faith undermines the validity of sacramental marriage to the extent that it can jeopardize the minimal intention of natural marriage.[78]

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[76] International Theological Commission: *The Reciprocity Between Faith and Sacraments*..., n. 166e.

[77] G. Uríbarri Bilbao: "Significato e piano del documento...," p. 7.

[78] Cf. S.-Th. Bonino: "Un parere della Commissione Teologica Internazionale...," p. 7.

The answer to the question of "new concept" is no longer so straightforward. Yes, the "novelty" is highlighted by the achievements of the Commission just presented, and arguments in favor of the legitimacy of talking about the "concept" is provided by a comprehensively laid out, compact and coherent theory explaining the issue marked by the title of the document. However, if we focus our attention on the result of the process of clarifying the *questio dubia* and ask directly: Does the *novum* of theological illumination of the problem, namely, the intention of the "baptized non-believer" and the validity of the sacrament of marriage, foreshadow the significant *novum* of *in iure* argumentation in the judgments of Church courts, which will examine the specific *causa matrimonii* in the subject matter? — what remains is skepticism.

There are at least two reasons that make it difficult (if not impossible) to accept the *novum* thesis. First, the International Theological Commission itself attests that the Tribunal of the Roman Rota has already issued rulings that coincide with the ideological line of the document, according to which a lack of faith can affect the intention to enter into a natural marriage. By way of example, the well-known sentence *coram Stankiewicz* of April 25, 1991[79] is pointed to. Unfortunately, this is the only sentence of the Roman Rota cited in the document, to which, in doing so, the date is erroneously assigned: April 19 (sic!), 1991.[80] To make matters worse, the firmness of the — as it might seem: unconditional — affirmation of the exemplary character of the jurisprudence of the aforementioned apostolic tribunal[81] strongly weakens the categorical tone of the opinion expressed by chairman Gabino Uríbarri. Namely, he claims that the official (implicitly: papal) authorization of the doctrine, developed by the Commission, will entail its transplantation into law and its implementation in the processes of *de nullitate matrimonii*.[82]

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[79] Dec. z 25 IV 1991 r. coram Stankiewicz. RRDec. 83 (1991), pp. 280—290.

[80] International Theological Commission: *The Reciprocity Between Faith and Sacraments…*, n. 156.

[81] Cf. A. Pastwa: *Il bene dei coniugi. L'identificazione dell'elemento ad validitatem nella giurisprudenza della Rota Romana* [Biblioteca Teologica, Sezione Canonistica, 7]. Lugano—Siena 2018, pp. 85—94.

[82] "La regolamentazione canonica della celebrazione e della validità del sacramento del matrimonio si deduce dalla verità dogmatica dello stesso. Se la dottrina che proponiamo viene accettata, ai canonisti toccherà strutturarne la traduzione giuridica nei processi di nullità. Ciò nonostante, desidero sottolineare che il nostro documento ha inteso tener presente la saggezza che il diritto canonico raccoglie, quale scienza sacra. In questo contesto, voglio evidenziare che la giurisprudenza del Tribunale della Rota Romana ha già emesso sentenze nella linea del nostro documento. E cioè, considerando il fatto che la mancanza di fede può pregiudicare l'intenzione di celebrare un matrimonio naturale (per esempio: sentenza *coram* Stankiewicz, 19 aprile

Secondly, the quoted chairman of the subcommittee that prepared the document explicitly admits in a comment to it: "There are still unresolved issues that the 'sacred teachings' should clarify."[83] Among such — in the opinion of the chairman — is the clear discrepancy between the statement of number 16 of the Introduction (*Praenotanda*) to the *Ordo celebrandi matrimonium*: "the sacrament of matrimony presupposes and demands faith"[84] and number 1601 of the CCC, which — citing can. 1055 § 2 of the Code of Canon Law 1983 — says nothing about faith, but only about baptism. Here it becomes clear where the skepticism expressed earlier comes from. Especially this last opinion of the chairman (not original indeed[85]) — concluding: "the tension between the two statements requires a deeper understanding of the role of faith in the sacrament of marriage, not just the role of baptism"[86] — could even lead to putting a question mark in the title of the study ("A New Concept of Response to Doctrinal Impulses?").

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Directing the attention of the recipients of the International Theological Commission's document to "still […] unresolved issues"[87] is very reminiscent of a 2014 statement by Benedict XVI. In the famous text "Zur Frage nach der Unauflöslichkeit der Ehe" (new edition; first version — 1972[88]), the late pope states that the magisterium's examination with

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1991)." "Matrimonio in assenza di fede…" (Intervista con il teologo gesuita Gabino Uríbarri Bilbao).

[83] G. Uríbarri Bilbao: "Significato e piano del documento…," p. 7.

[84] *Ordo celebrandi matrimonium* (editio typica altera: March 19, 1990), [*Praenotanda*], n. 16.

[85] See A. Pastwa: "'Komunia w Duchu'. Małżeństwo a Eucharystia w świetle norm kanonów 1065 § 2 i 1119 KPK." *Ius Matrimoniale* 17 (2012), pp. 7—43.

[86] "Ci sono ancora questioni in sospeso, che le »scienze sacre« dovrebbero chiarire. […] In secondo luogo, il posto della fede nel sacramento del matrimonio dovrebbe essere ulteriormente approfondito. Nei *praenotanda* del rito del matrimonio si dice: 'I pastori, guidati dall'amore di Cristo, accolgano i fidanzati e in primo luogo ridestino e alimentino la loro fede: il sacramento del Matrimonio infatti suppone e richiede la fede' (*Ordo celebrandi matrimonium*, *Praenotanda* § 16 […]). Tuttavia, la definizione di matrimonio nel *Catechismo della Chiesa Cattolica*, § 1601, che cita il *Codice di Diritto Canonico*, canone 1055, § 2, non menziona affatto la fede, ma solo il battesimo. La tensione tra le due affermazioni richiede una comprensione più profonda del ruolo della fede nel sacramento del matrimonio e non solo del ruolo del battesimo." G. Uríbarri Bilbao: "Significato e piano del documento…," p. 7.

[87] Ibidem.

[88] J. Ratzinger: "Zur Frage nach der Unauflöslichkeit der Ehe. Bemerkungen zum dogmengeschichtlichen Befund und zu seiner gegenwärtigen Bedeutung." In: *Ehe und*

"great seriousness" of the title problem encounters a paradoxical situation: "Baptism makes a person a Christian, but without faith he remains a baptized pagan. Canon 1055 § 2 says that a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament. How, then, to assess the situation when a baptized person and a non-believer does not know the sacrament at all? Perhaps he has the will to be inseparable, but does not see, the newness of the Christian faith. The tragedy of this situation becomes especially apparent when baptized pagans convert to the faith and begin a completely new life. This raises questions to which we do not yet have answers and makes the search for them all the more urgent."[89]

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Andrzej Pastwa

Relation *fides—sacramentum matrimonii* à l'ère post-synodale (2015—) Un nouveau concept de réponse aux impulsions doctrinales

Résumé

En 2020, la Commission théologique internationale a publié un document important : *La reciprocità tra fede e sacramenti nell'economia sacramentale*. Ce document est la présentation de six années de travail d'experts sur l'exploration de la relation entre la foi et les sacrements. La justification théologique originale du rôle particulier de la foi dans la validité et la fécondité de chaque sacrement culmine, pour ainsi dire, dans la focalisation sur un « domaine » ecclésialement sensible *(Ecclesia domestica)* — ce qui est déjà annoncé par les déclarations introductives sous le sous-titre « criant » : *Fede e sacramenti* : *una reciprocità in crisi*. Il s'agit d'une proposition scientifique sérieuse pour la réintégration de la doctrine de *sacramento matrimonii*, avec un traitement complexe de la question de la dignité sacramentelle du mariage — une étude très attendue parce qu'elle s'inscrit dans le contexte des deux assemblées mémorables du Synode des évêques de 2014 et de 2015.

Accepter l'hypothèse de la légitimité de la césure du titre (2015-), marquant l' « ère post-synodale », a dicté à l'auteur de la présente étude — par conséquent — une enquête approfondie : comment la Commission théologique internationale a mis en œuvre in concreto les appels synodaux des évêques de 2014 — le premier appel (de l'Instrumentum laboris de la IIIe Assemblée Générale Extraordinaire du Synode des Évêques) « est nécessaire d'approfondir la question du rapport entre la foi et le sacrement du mariage » ; et l'appel suivant (de Relatio Synodi de la IIIe Assemblée Générale Extraordinaire du Synode des Évêques) : « il faudrait aussi considérer la possibilité de mettre en relief, en

fonction de la validité du sacrement du mariage, le rôle de la foi des deux personnes qui avaient demandé le mariage, en tenant compte du fait qu'entre baptisés tous les mariages valides sont sacrament ».

Dans sa conclusion, l'auteur répond à la question qui préoccupe le canoniste : peut-on supposer que le résultat des six années de travail de la Commission est — important pour la canonicité et, surtout, utile pour une jurisprudence uniforme — une clarification de la questio dubia : les « baptisés non-croyants » vis-à-vis du sacrement de mariage ?

Mots-clés : Synode des évêques, Commission théologique internationale, pape Benoît XVI, rapport entre foi et sacrements, sacrement du mariage, sacramentalité du mariage des « baptisés non-croyants », jurisprudence

Andrzej Pastwa

Il rapporto *fides-sacramentum matrimonii* nell'era post-sinodale (2015–) Una nuova concezione di risposta agli impulsi dottrinali

Sommario

Nel 2020 la Commissione Teologica Internazionale ha pubblicato un importante documento: *La reciprocità tra fede e sacramenti nell'economia sacramentale*. Questo documento è una presentazione di sei anni di lavoro degli esperti sull'esplorazione del rapporto tra fede e sacramenti. L'originale giustificazione teologica qui offerta per il peculiare ruolo della fede nella validità e nella fecondità di ciascun sacramento culmina in un certo modo nel focalizzare l'attenzione su un "ambito" ecclesicamente sensibile (*Ecclesia domestica*) — che è già annunciato dalle dichiarazioni introduttive, poste sotto il sottotitolo "urlante": *Fede e sacramenti: una reciprocità in crisi*. Si tratta di una seria proposta scientifica per l'ulteriore reintegrazione della dottrina del de *sacramento matrimonii*, con un approccio chiave al tema della dignità sacramentale del matrimonio — uno studio molto atteso, perché inserito nel contesto di due memorabili riunioni del Sinodo dei Vescovi nel 2014 e nel 2015.

L'elaborazione dell'ipotesi sulla validità della cesura titolare (2015—), che segna l'"era post-sinodale", ha dettato all'autore di questo studio — conseguentemente — un approfondimento di: come la Commissione Teologica Internazionale ha attuato *in concreto* gli appelli sinodali dei vescovi del 2014 — il primo appello (da *Instrumentum laboris* della *III Assemblea Generale Straordinaria* del Sinodo dei Vescovi): "si indica la necessità di approfondire la questione del rapporto tra fede e sacramento del matrimonio"; e il successivo appello (da *Relatio Synodi* della *III Assemblea Generale Straordinaria* del Sinodo dei Vescovi): "andrebbe considerata la possibilità di dare rilevanza al ruolo della fede dei nubendi in ordine alla validità del sacramento del matrimonio, tenendo fermo che tra battezzati tutti i matrimoni validi sono sacramento". Nelle considerazioni finali, l'autore risponde alla domanda che tormenta il canonista: si può presumere che il risultato del sessennio di lavoro della Commissione sia — importante per la canonistica e, soprattutto, utile per la giurisprudenza uniforme — una spiegazione della *questio dubia*: "battezzati non credenti" verso il sacramento del matrimonio?

Parole chiave: Sinodo dei Vescovi, Commissione Teologica Internazionale, Papa Benedetto XVI, rapporto tra fede e sacramenti, sacramento del matrimonio, sacramentalità dei matrimoni di "battezzati non credenti", giurisprudenza

Ecumeny and Law, vol. 11(1) (2023), pp. 33—57
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.02

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Church Tribunals in the Czech Republic during the COVID-19 Epidemic

Abstract: The article aims to summarize the situation in the church justice system in two aspects. From the distance of several years, it briefly evaluates the application of the norms of the 2015 reform of the matrimonial procedural law of the Catholic Church (the dramatic increase in the number of cases after the reform, the stabilization of the situation after the first years, the low use of the possibility of abbreviated proceedings, etc.). It assesses the impact of the imposed limitations (and people's worries) in the Czech society during the COVID-19 epidemic on the activity of church tribunals and the search for alternative ways of processing cases (using the example of the Interdiocesan Tribunal in Olomouc).

Keywords: church tribunals, Czech Republic, nullity of marriage, *Mitis Iudex Dominus Iesus*, religious freedom, restriction of rights, Catholic Church, COVID-19

Introduction

The COVID-19 epidemic has triggered many unprecedented measures around the world in an effort to guarantee the collective and individual safety of the population. These rules were initially more chaotically, then with more rationality, established by states and their authorities, as well as from within the churches themselves. This necessarily gave rise to new rules for the coexistence of churches within the state, interfering with the

exercise of fundamental human freedoms, including freedom of expression and freedom of religion, which are protected both at the level of international law and by the internal regulations of states. These freedoms can only be restricted for reasons established by law — including, *inter alia*, for the protection of public health. The article will attempt to describe the situation of the religious judiciary using the example of a particular tribunal in the Czech Republic at the time of such restrictions. The initial interruption of contact with clients and its consequences (limitations on consultations, hearings, the inability of the senate to meet for sentencing, etc.) were gradually replaced by the search for new forms (especially with the use of new technologies) that would help clients to access justice even in these extraordinary times and at the same time would not imply a detriment to traditional procedural principles and procedures. This situation of limitations also coincides with the first years after the reform of the matrimonial process (2015), in which Pope Francis sought to make these procedures more accessible to persons whose marital situation makes it difficult for them to participate in the active life of the ecclesial community. Therefore, in this article we summarize both topics in an attempt to present the Church's justice system in the European environment, specifically in the Czech Republic. In the two ecclesiastical provinces (Czech and Moravian), there are currently (2022) a total of six Church tribunals: the Metropolitan Tribunal in Prague, the Interdiocesan Tribunal in Olomouc, and the diocesan tribunals in Hradec Králové, Brno, Plzeň and Litoměřice (with its seat in Liberec). Only the České Budějovice and Ostrava-Opava dioceses and the Apostolic Exarchate of the Greek Catholic Church in the Czech Republic do not yet have their own tribunals and their cases are heard by the Metropolitan Tribunal in Prague and the Interdiocesan Tribunal in Olomouc, respectively.

1. The 2015 reform of the Matrimonial Procedure Law of the Catholic Church and its consequences

The reform of the judicial procedure for examining the validity of marriage in the Catholic Church, promulgated by Pope Francis in September 2015 in his motu proprio *Mitis Iudex Dominus Iesus* for the Latin Church, reiterated the connection between the Church's judicial system and the pastoral accompaniment of the divorced and remarried, and recalled the legal tools the Church offers for dealing with their situation. The aim

of the changes was, above all, to make the procedure for the declaration of nullity of marriage faster, simpler and more accessible. In order to compare the effects of the changes before and after the beginning of the reform, it may be helpful to compare the reports that the various tribunals sent annually to the Apostolic Signatura on their activities. On 30 July 2016, the Supreme Tribunal of the Apostolic Signatura issued a Circular Letter,[1] in which it announced the basic criteria of the new procedural principles, stressing the responsibility of the tribunals themselves, but also of the bishops-moderators and the Apostolic Signatura. Then, at the beginning of 2017, it circulated a new form for tribunals to fill in with statistical data on their activities for the past judicial year, entitled *Relatio de statu et activitate tribunalis (pro Ecclesia latina) pro anno 20xx redacta*.

Comparing these reports of the above-mentioned ecclesiastical tribunals in the Czech Republic from 2014 (before the reform) and 2016 (after the reform), we arrive at the following assessment.[2] Almost all of the church tribunals saw an almost 100 percent increase in the number of lawsuits filed and in the number of verdicts handed down during this breakthrough period (the only exception is the Brno diocesan court, where the increase was not as significant).[3] After this increase, the situation stabilised at that higher level in the following years (the highest figures were in 2017) and is no longer increasing.[4]

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[1] Supremum Signaturae Apostolicae Tribunal: *Lettera circolare sullo Statoe L´Attivita dei Tribunali Inter munera* [30.07.2016].

[2] For details see article: M. Menke: "Motu proprio *Mitis Iudex Dominus Iesus* v praxi českých a moravských církevních soudů [Motu Proprio *Mitis Iudex Dominus Iesus* in the Practice of Czech and Moravian Church Tribunals]." *Revue církevního práva* 69/4 (2017), pp. 27—44.

[3] Cf. Tribunale dioecesanum Brno: *Relatio de statu et activitate tribunalis ad Signaturam Apostolicam unoqumque anno mense ianuario mittenta — anno 2016*: the increase of number of cases of this tribunal of only first instance was from 141 to 155. In 2016, the court decided 155 cases, 93 of which concerned the validity of marriage. A total of 28 marriage nullity trials were concluded with a judgment, in 21 cases affirmative.

[4] Tribunale interdioecesanum Olomouc: *Relatio de statu et activitate tribunalis (pro Ecclesia latina) pro anno 2019 redacta,* pp. 5, 9. As an illustration from the pre-COVID-19 era: at the end of 2019, the Olomouc church tribunal was hearing a total of 171 matrimonial cases in the first instance (109 from 2018 with earlier, 58 newly admitted in 2019). By a judgment confirming the nullity of the marriage, 46 of them were terminated, 3 marriages were declared valid, 4 cases were revoked by the parties, and 113 cases were transferred to 2020. In the second instance, this court dealt with a total of 40 appeals (16 from 2018 and earlier and 23 cases received in 2019): of these, it terminated 5 cases by declaring nullity, declared the validity of the marriage in three cases and one case was withdrawn by the appealing party. By 2020, 31 second instance cases had been transferred.

The staffing of the courts in the Czech Republic does not reflect the staffing dimension of the reform (involvement of more lay personnel, creation of a network of consultants, etc.) because most of the lay personnel already working in the tribunals started their service prior to the reform in question and without any connection to this incentive. In addition, the qualifications for certain judicial positions (especially at least a licentiate in canon law for defenders of the bond and judges) are difficult to obtain in the Czech Republic. Studies to obtain the licentiate in canon law are not offered by universities in the Czech Republic, and candidates for these positions are sent to study abroad (Rome, Venice) or have already taken the course for the licentiate, organized twice in cooperation with the Catholic University of Lublin (from 1998 to 2000 and from 2012 to 2016). Laypersons perform directly in the courts the offices of defenders of the bond (can. 1435), experts (art. 205 § 2 of the Instruction *Dignitas connubii*), patrons (advocate and prosecutor), notaries (can. 1437 § 1 and 2; can. 484 § 1—3), in five cases moderators of the court office (art. 61 § 2, art. 91 § 1 and 2 of the Instruction *Dignitas connubii*), interpreters (can. 1471), auditors or *ponente*s (can. 1428 § 2). In the case of the consent of the Bishops' Conference, lay persons may also exercise the office of judge — in the Czech Republic this has been the case since 2004[5] and there are currently five lay judges (two men and three women). However, the ecclesiastical tribunals use a larger number of auditors who conduct hearings (especially of witnesses) closer to their homes, thus speeding up both the work of the tribunals themselves and improving accessibility for clients.

Thanks to the presentation of the motu proprio *Mitis Iudex Dominus Iesus* in the media,[6] but also, thanks to the fact that some pastors of the Church have begun to understand the preliminary consultations on the nullity of marriage proceedings as part of a wider pastoral work, there has certainly been a positive shift in terms of education: people's awareness of the existence of the church tribunals and their workload has improved. It would be more than desirable, however, if there were already sufficient professionals educated in canon law and experienced in pastoral ministry to provide information about the procedure, to write up complaints with

[5] Cf. M. Menke: *Soudnictví římskokatolické církve v českých zemích v období kodifikovaného kanonického práva* [The Judiciary of the Roman Catholic Church in the Czech Lands in the Period of Codified Canon Law]. Olomouc 2015, p. 86.

[6] This level has its negatives. On the one hand, the media have reminded the public of the possibility of annulment proceedings before the courts of the Catholic Church, but on the other hand they have raised unrealistic expectations. There has been only a simplification of the procedure, not its abolition or the abolition of evidence, as clients often mistakenly assume.

clients, and to whom the pastor of the party could refer before the action is brought. We are not aware that any diocese has established a pastoral tool through which advance information and consultation on options for specific cases can be obtained (e.g., consultation offices at the diocesan level, *forane vicariates*, various programme to help spouses).[7] Consultations are provided, as before, either by the staff of the tribunals or by other canonists working in the dioceses — but there are still about the same number of them. The family centres of individual dioceses cannot be used for such activities in the Czech environment because their teams are not staffed by persons educated in canon law. Some of these centres at least refer their clients themselves to staff of the tribunals in specific cases.

The reasons for the nullity of marriage, usual in the European environment, have not changed with the reform and do not change now: most cases are still decided on the basis of canon 1095, paragraphs 2 and 3, or on the basis of the exclusion of the good of the offspring according to canon 1101, section 2. The other grounds occur sporadically, and mostly in combination with the reasons already mentioned.

The abbreviated trial *coram Episcopo* according to the new wording of the provisions of canon 1683 was used only in a few cases (several times in the courts in Pilsen, Brno and once in Olomouc). However, an increase in the number of such proceedings was not expected in our environment, because it is an extraordinary way of examining the nullity of a marriage, in which specific conditions must be met, especially the active participation of the non-plaintiff, which is a significantly limiting element in the conditions of the Czech and Moravian ecclesiastical provinces for the wider application of summary procedure.[8] Another problem with these cases is that they are presumed in situations where the nullity of the marriage is so obvious and for which evidence can be gathered in a single session — such conditions are also rare in the Czech Republic. Nor is the provision of the motu proprio *Mitis Iudex Dominus Iesus* that a bishop who cannot provide for a senate decision in his diocese may, according to the new wording of can. 1673 § 4 to entrust matrimonial matters to a single judge — a cleric, namely, a single judge subordinate to the bishop's responsibility (the principle of *iudex unicus sub Episcopi responsabilitate*) does not apply in the Czech Republic, since the total number of

[7] Cf. Pontificio Consiglio per i testi legislativi: *Istruzione da osservarsi nei Tribunali diocesani e interdiocesani nella trattazione delle cause di nullità del Matrimonio Dignitas connubii*, Art. 113 § 1.

[8] L. Botek: "Praktické otázky aplikace motu proprio *Mitis Iudex Dominus Iesus* [Practical Questions of the Application of the Motu Proprio *Mitis Iudex Dominus Iesus*]." *Revue církevního práva — Church Law Review* 67/2 (2017), p. 59.

professionally trained persons remains almost constant and the network of Church tribunals sufficiently covers the entire territory of the Czech Republic.

One of the intentions of the reform of matrimonial procedural law was to make judicial justice more accessible to the people, that is, closer and cheaper, and thus to make the Church's justice system more efficient. By expanding the criteria for local jurisdiction of the tribunal, this has been done to some extent, as evidenced by the increase in the number of cases in all church tribunals in the Czech Republic, as well as pre-trial consultations (e.g. applicants returning who have already failed once, or who have not found a reason for a trial, sometimes because they are convinced of a general change in the concept of trials). An interesting feature of the Czech Church judiciary is the situation of two courts which are both first instance tribunals (the Metropolitan Tribunal in Prague for the Archdiocese of Prague, the Diocese of České Budějovice and the Apostolic Exarchate, and the Olomouc Interdiocesan Tribunal for the Diocese of Ostrava-Opava and the Archdiocese of Olomouc) and at the same time tribunals of appeal (Prague for the sentences of the 1st instance from Olomouc Interdiocesan Tribunal, and Olomouc for sentences from the Diocesan Tribunal in Brno and Metropolitan Tribunal in Prague). Due to the extension of the criteria for the local competence of the court hearing the nullity of the marriage, applicants can usually choose from more than one court when filing an action: therefore, actions that could have been filed in other courts are now being filed in greater numbers in the Olomouc and Prague tribunals (often in an attempt by the parties to complete the trial faster or cheaper). We do not know whether we can conclude that the reason is their greater experience or pastoral wisdom, but it seems so.

The introduction of the principle that one judgment declaring a nullity of the marriage is executable (*una sententia pro nullitate exsecutiva*) in the absence of an appeal has succeeded in speeding up the proceedings considerably. Since it is no longer necessary to examine *ex lege* the sentences of the courts of first instance declaring the nullity of the marriage, the length of the proceedings has in fact been reduced. In the previous practice, the courts of appeal largely simply confirmed decisions of first instance by decree. The negative side of this provision, however, is the greater complexity of cases considered at second instance. To the tribunals of appeal now tend to be sent cases that are unclear or problematic in substance, that is, cases in which the non-plaintiff was passive in the proceedings before the tribunal of first instance, or caused delays in the proceedings, or felt aggrieved by the judgment. The consequence of this is often protracted correspondence with the appellant

and the need for explanations, which usually results in the decision of the court of first instance being upheld, often after six months of inactivity by the party, or the proceedings being terminated because the party applies to withdraw the appeal.[9] The above situation was therefore the situation in the Czech church judiciary before the COVID-19 epidemic: around 2017, there was a certain stabilization in the number of cases received and judgments handed down; matters used to be resolved within about a year and a half, and the system became somewhat faster and more stable.

The issue of financing of the ecclesiastical tribunals remained a problematic point, as well as the consideration of the Pope's request that proceedings for nullity of marriage should not be burdened with high court fees. The balance between the accessibility of court proceedings and — if not sufficient, at least fair — financial remuneration for the staff of the tribunals is still being sought in the Czech Republic, and the church tribunals are largely financed by the dioceses; the fees cannot cover them. The epidemiological restrictions and the COVID-19 disease itself have intervened in this situation, the consequences of which, as we will describe in the following sections, have again resulted in the prolongation of court proceedings, an increase in the number of pending cases in the church tribunals, and, in some places, a decrease in the number of members of the tribunals.

2. Epidemiological constraints in Czech society at the time of the COVID-19 epidemic and their impact in the religious sphere

In order to restrict the exercise of freedom of religion, which includes collective activities related to the manifestation of faith (such as religious services, prayer meetings, etc.), the conditions set out in Article 16 (4) of the Charter of Fundamental Rights and Freedoms must be met. The restriction must be made solely on the basis of the law, cannot be made by subordinate legislation or individual judicial acts, and must be made under the conditions laid down in the Charter: that is, it must be a measure necessary in a democratic society to protect public security and order, health, morals or the rights and freedoms of others. However, freedom

[9] Cf. M. Menke: "Motu proprio *Mitis Iudex Dominus Iesus*…," pp. 27—44.

of religion must never be restricted in such a way as to make its exercise completely impossible or substantially more difficult.[10]

"COVID" restrictions in the Czech Republic began to be introduced in February 2020 and continued with variable intensity, depending on the arrival of new waves and mutations of the virus, until spring 2022. Initially, these were flight bans from risk areas or quarantine measures for citizens returning from these areas, but these "minor" restrictions did not affect the majority of the population significantly. The restrictions were continued by a decision of the Ministry of Health on 9 March 2020, the Ministry of Health decided to ban visits to patients in inpatient health care facilities and residential social services facilities, and to ban visits to accused persons, convicts and inmates in detention facilities, prisons for the execution of custodial sentences and institutions for the execution of security detention, finally, restricting the free movement of persons, with the exceptions of travel to and from places of work and for the provision of necessary needs and acts, among which were also acts of occupation providing individual spiritual care and spiritual services.[11] A ban was issued on persons in social care facilities (homes for people with disabilities, homes for the elderly, homes with a special regime) from going outside the premises for the duration of the state of emergency.[12] It was also recommended at this stage that seniors over the age of 70 should not go outside their homes for the duration of the state of emergency, except to visit a medical facility for urgent medical care.[13] The most important

[10] Cf. P. Jäger: "Čl. 16 — Právo svobodně projevovat své náboženství a autonomie církví [Article 16 — Right to the Free Exercise of Religion and Autonomy of Churches]." In: *Listina základních práv a svobod. Komentář* [Charter of Fundamental Rights and Freedoms. Commentary]. Eds. E. Wagnerová, V. Šimíček, T. Langášek, I. Pospíšil. Praha 2012, pp. 411—412.

[11] Vláda České republiky [Government of the Czech Republic]: *Usnesení vlády České republiky o přijetí krizových opatření č. 215 ze dne 15. března 2020* (zákaz volného pohybu obyvatel do 24. 3. 2020) [Resolution of the Government of the Czech Republic on the adoption of emergency measures No. 215 of 15 March 2020 (ban on free movement of inhabitants until 24 March 2020)]. Published in the Collection of Laws under no. 85/2020 Sb.

[12] Vláda České republiky: *Usnesení vlády České republiky o přijetí krizových opatření* č. 239 ze dne 16. března 2020 (pokyny poskytovatelům sociálních služeb a jejich klientům) [Resolution of the Government of the Czech Republic on the adoption of crisis measures No. 239 of 16 March 2020 (instructions to social service providers and their clients)]. Published in the Collection of Laws under no. 97/2020 Sb.

[13] Vláda České republiky: *Usnesení vlády České republiky o přijetí krizových opatření* č. 240 ze dne 16. března 2020 (pokyny poskytovatelům sociálních služeb a jejich klientům) [Resolution of the Government of the Czech Republic on the adoption of crisis measures No. 240 of 16 March 2020 (Instructions to social service providers and their clients)]. Published in the Collection of Laws under no. 98/2020 Sb.

measure was the introduction of a nationwide state of emergency,[14] by government resolution of 12 March 2020, initially for a period of 30 days, and repeatedly extended virtually (except for a few interruptions)[15] until 25 December 2021.

Restrictions on the movement of persons did not apply to the provision of individual spiritual care and ministry: it has always been legally possible for clergy (ordained and non-ordained = lay employees of churches) to go out to individual recipients of spiritual care and ministry, in fact while observing the regulations regarding hygienic protection (face masks, disinfection, etc.). It was not so, however, in the case of restrictions on visits to patients and clients of health and social institutions and prison facilities — here visits were only possible in the terminal stage of incurable diseases. In the first wave of the epidemic, this restriction of fundamental rights was not dealt with legally because the population was frightened. But with the length of the restrictions, ways began to be found to allow the exercise of individual but also collective religious freedom. Easter, the most important feast of the entire religious year for Christians, was around 11 April 2020 and no official opportunity for believers to participate in public worship was allowed. Further relaxations began to take place after these feasts: on 15 April 2020, by an extraordinary measure of the Minister of Health, marriages with up to 10 people in attendance were permitted, on 17 April 2020, by an extraordinary measure of the Minister of Health, public services with up to 15 people in attendance were permitted (effective from Monday 27 April 2020), with further relaxations taking place gradually,[16] even if conditions for distances, use of disinfectants, face masks, etc. have been set. The Czech Bishops'

[14] In the Czech Republic, a state of emergency is a state of crisis that is declared when natural disasters, environmental or industrial accidents, accidents or other hazards occur that threaten life, health or property values or internal order and security to a significant extent. Cf. Constitutional Act No. 110/1998 Coll., on the security of the Czech Republic. It is also declared if the resulting emergency cannot be overcome within the framework of the state of danger. Cf. Act No. 240/2000 Coll., on crisis management and on amendments to certain acts (Crisis Act). A state of emergency is declared in the Czech Republic by the Government or the Prime Minister on the basis of the authority granted by Constitutional Act No. 110/1998 Coll., on the security of the Czech Republic. In doing so, it may adopt emergency measures provided for by special laws.

[15] The state of emergency in the Czech Republic due to the pandemic during this time was not only in the period 18 May—4 October 2020 and 12 April 2021—25 November 2021 as can be found in the Collection of Laws of the Czech Republic, available from: https://aplikace.mvcr.cz/sbirka-zakonu/ [accessed 25.10.2022].

[16] Often also because of citizens' dissent or after their attempts to defend their rights, sometimes even in courts of law.

Conference reacted to this with gratitude by announcing a return to the original pre-epidemic liturgical practice in July 2020.[17]

State restrictions were followed by restrictions and recommendations from churches and religious societies. At the level of the entire Catholic Church, these were first the various messages of Pope Francis on the situation and his joining the Day of Prayer and Fasting proclaimed by the Roman Vicariate in March 2020. On March 20, the Apostolic Penitentiary issued a decree allowing people infected with coronavirus, their caregivers and all the faithful who pray for them to receive plenary indulgences. At the same time, a note was also issued reminding that in extreme situations it is possible to grant collective absolution in the case of grave emergency. The note also recalls the possibility of perfect contrition, as stated in the *Catechism of the Catholic Church* (no. 1452), in the case of a dying person who is not assisted by a priest.[18] The Congregation for Divine Worship and the Sacraments, in consultation with the bishops' conferences, has issued general guidelines and instructions for bishops regarding the celebration of Easter during the COVID-19 epidemic in the Latin rite of the Catholic Church[19]: in countries where there are restrictions on the assembling and movement of people, bishops and priests should celebrate the rites of Holy Week without the presence of faithful, in an appropriate place, without concelebration and with the omission of the greeting of peace. The faithful could participate in the rites by means of communication only live, not recorded. In any case, it is important to devote adequate time to prayer and to appreciate especially the prayer of the breviary. The following is a brief description of the changes in the various celebrations of Holy Week. A similar decree has also been issued by the Congregation for the Eastern Catholic Churches.[20] In the Czech Republic,

[17] Česká biskupská konference [Czech Bishops' Conference]: *Sdělení ČBK k omezením v době pandemie ze dne 7. 7. 2020* [Communication of the CBC on pandemic restrictions of 7 July 2020], https://www.cirkev.cz/cs/aktuality/200707sdeleni-cbk-k-zavedenym-omezenim [accessed 24.10.2022].

[18] Penitenzieria Apostolica: *DECRETO circa la concessione di speciali Indulgenze ai fedeli nell'attuale situazione di pandemia* [19.03.2020], *Nota della Penitenziaria Apostolica circa il Sacramento della riconciliazione nell´attuale situazione di Pandemia* [19.03.2020], http://www.penitenzieria.va/content/penitenzieriaapostolica/it.html [accessed 24.10.2022].

[19] Congregazione per il Culto Divino e la Disciplina dei Sacramenti: *DECRETO in tempo di Covid-19 (II)* [25.03.2020], http://www.vatican.va/roman_curia/congregations/ccdds/documents/rc_con_ccdds_doc_20200325_decreto-intempodicovid_it.html [accessed 25.10.2022].

[20] Congregazione per le Chiese Orientali: *Indicazioni della Congregazione per le Chiese Orientali circa le Celebrazioni Pasquali nelle Chiese Orientali Cattoliche* [25.03.2020], https://press.vatican.va/content/salastampa/it/bollettino/pubblico/2020/03/25/0182/00412.html [accessed 25.10.2022].

both the entire Bishops' Conference and individual diocesan bishops have responded to the reality of the situation in their statements.

At the level of the Czech Republic, these were statements by the Bishops' Conference or individual bishops. The first Statement on the risk of COVID-19 was issued by the Bishops' Conference on 6 March 2020, calling the faithful to responsibility.[21] On 10 March 2020, it responded to the Ministry of Health's measure to limit the attendance of persons at religious services (up to 100 persons) with proposals on how to address this situation in practice.[22] At the same time, recommendations were published for priests in parishes on how to behave in this situation, and lists of options for attending Mass via online streaming and other media began to be published. It presented the situation as quite extraordinary, requiring extraordinary steps, and therefore granted a dispensation to all the faithful from physically attending Sunday services for this reason until further notice, with the understanding that services could be viewed on the media and the Lord's Day could be celebrated with family. The possibility of individual reception of the sacraments in churches, which will remain open to the extent possible, will be maintained.[23]

However, already at this time, some people began to defend themselves against restrictions that interfered with fundamental human rights, and they did so in courts. On 23 April 2020, the Municipal Court in Prague issued a judgment on the annulment of four extraordinary measures restricting free movement (with effect from 27 April 2020).[24] The same verdict also found the emergency measures of the Ministry of Health (issued during the state of emergency) to be illegal and unconstitutional in the dimension of restricting religious freedom: the Ministry of Health

[21] Cf. Česká biskupská konference: *Prohlášení ČBK k riziku onemocnění COVID-19* [CBC statement on the risk of COVID-19 disease] [6.03.2020], https://www.cirkev.cz/cs/aktuality/200306prohlaseni-cbk-k-riziku-onemocneni-covid-19 [accessed 24.10.2022].

[22] Česká biskupská konference: *Výzva ČBK v souvislosti s vyhlášením mimořádného opatření Ministerstva zdravotnictví ČR ohledně shromáždění osob* [Appeal of the CBK in Connection with the Announcement of the Emergency Measure of the Ministry of Health of the Czech Republic Regarding the Assembly of Persons] [10.03.2020], https://www.cirkev.cz/cs/aktuality/200310vyzva-cbk-v-souvislosti-s-vyhlasenim-mimoradneho-opatreni-ministerstva-zdravotnictvi-cr-ohledne-shromazdeni-osob [accessed 24.10.2022].

[23] Česká biskupská konference: *Prohlášení českých a moravských biskupů k mimořádnému opatření vlády ze dne 12. března 2020* [Statement of the Czech and Moravian bishops on the government's extraordinary measure of 12 March 2020], https://www.cirkev.cz/cs/aktuality/200312prohlaseni-ceskych-a-moravskych-biskupu-k-mimoradnemu-opatreni-vlady-ze-dne-12-brezna-2020 [accessed 24.10.2022].

[24] Městský soud v Praze [Municipal Court in Prague]. *Rozsudek ke zrušení některých mimořádných opatření č. j. 14 A 41/2020* [Sentence on the Annulment of Certain Extraordinary Measures No. 14 A *41/2020]* [23.04.2020], https://www.fulsoft.cz/?uniqueid=gOkE4NvrWuMkmaNigtjQurEFgoiqcHeUDDulZX7UDBY [accessed 24.10.2022].

acted outside its jurisdiction and competence. Neither the Government nor the Ministry of Health has the power to restrict religious freedom, as this can only be done by law, and moreover only in a situation where it is necessary for the protection of public safety and order, health and morals or the rights and freedoms of others (in this case, even the necessity condition was apparently not met). After a period of calm, lasting until September 2020, the restrictions began to reappear.

The impact of the restrictions on the religious sphere (which, in addition to the public celebration of services, meetings, the administration of the sacraments, visits to churches and places of worship, etc., can also include the sphere of hearings in church tribunals) was the most severe in the first wave until the end of May 2020, then again from October 2020 to May 2021, while the autumn wave of 2021 did not have such an impact. The church tribunals restricted discussions, meetings of judges to discuss judgments and hearings of parties and witnesses the most just in spring 2020 (almost completely stopped activity) and spring 2021 (efforts to consult online, but meetings limited). Church leaders were quite unapologetic at first in submission to government decisions, or actively narrowing the space left to the churches themselves. The faithful were also often afraid of larger meetings, including church attendance, which they perceived at the time as involving risk (albeit less than a visit to a supermarket), and they preferred not to take that risk (often out of some comfort).

By the beginning of the second (autumn) wave of the epidemic in 2020, it was already clear that alternative ways of holding services, catechesis, preaching and meetings would have to be found, as well as how to sustain the church community in times of constraint. How the church's tribunals have learned to deal with this situation will be set out in the next chapter. In this autumn wave, however, the CBC has already begun to comment on state measures with noticeably less caution than in the spring crisis, usually just announcing restrictions without accompanying comment or clarification. The bishops began (after receiving pressure from below from the faithful)[25] to look for possibilities and to try to explain the often inexplicable at the level of negotiations with state officials (that religious communities are different from other gatherings such as sports, culture, business galleries, and that the proportionality

[25] In March 2021, for example, an initiative of the laity in the parish of Třeboň (Třeboňská výzva) was created, addressed to church leaders, which drew attention to discriminatory provisions in the area of collective religious freedom, in the area of burial and others and demanded that the bishops appeal to the government in the direction of relaxing these restrictions. Cf. *Třeboňská výzva* [The Třeboň Challenge] [17.03.2021], trebon.farnost.cz/Trebonska-vyzva_Velikonoce-2021.pdf [accessed 25.10.2022].

and necessity of the measures chosen are not entirely adequate, etc.) and to seek at least partial possibilities for the realization of common external religious expressions for their members.[26] As there is still no valid concordat agreement with the Holy See in the Czech Republic, it was only necessary to refer to basic legal provisions such as the Constitution of the Czech Republic, the Charter of Fundamental Rights and Freedoms, Act No. 3/2002 Sb., on freedom of religion and the status of churches and religious societies and on the amendment of certain acts, or possibly to the decisions of the courts or the legal opinions of individual lawyers and jurists, and here the question was to what extent they would be generally accepted by the leadership of the Church in the Czech Republic.

Finally, in the autumn of 2020, a legal opinion was pushed through that argues that religious assemblies with the participation of the people are assemblies of persons held under the Act on the Right of Assembly[27] (which has been referred to as an exception not covered by the restrictions in many previous regulations), which can be said of any other kind of religious assembly if it can be considered a public manifestation of religion.[28] During 2021, in addition to calling for prayers to end the epidemic and publicizing state measures in the context of religious life, the bishops repeatedly promoted vaccination, presented as the main weapon to stop the epidemic, as did Pope Francis at the time.[29] All restrictions affecting the religious sphere then ended in mid-March 2022, when the bishops reinvited even those faithful who had not done so to return to physical participation in worship, restoring the greeting of peace, bringing offerings,

[26] This situation, however, was not unique: even countries with a greater Christian tradition, such as Poland (or Slovakia, where the situation was even worse than in the Czech Republic), were unable to appreciate the importance of believers' access to spiritual goods through the sacraments or to conduct a mutually intelligible dialogue for the benefit of the general good of society and the particular spiritual good of the individual. Cf. J. Krzewicki: "Relacje Kościoł-Państwo w Polsce wobec Covid-19 [Church-State Relations in Poland vis-à-vis COVID-19]." *Kościół i Prawo* 9/22 (2020), pp. 94, 96—97.

[27] Cf. Act No. 84/1990 Sb., on the right of assembly.

[28] For the first time, the possibility of holding religious services as an exception to the prohibitions of the Ministry of Health with reference to the Law on the Right of Assembly appeared explicitly in Government Resolution No. 1200 of 20 November 2020, point IV. See Vláda České republiky: *Usnesení vlády České republiky o přijetí krizových opatření* č. 1200 ze dne 20. listopadu 2020 (omezení volného pohybu osob) [Resolution of the Government of the Czech Republic on the adoption of crisis measures No. 1200 of 20 November 2020 (Restrictions on the free movement of persons)]. Published in the Collection of Laws under no. 486/2020 Sb.

[29] All statements of the Czech Bishops' Conference could be found here: https://www.cirkev.cz/cs/koronavirus [accessed 24.10.2022]. Unfortunately, this page no longer exists.

and allowing all who wish to receive the Eucharist into their mouths.[30] In retrospect, however, these measures are easier to evaluate than in an acute situation perceived as a threat.

3. The impact of the restrictions on the activities of the church courts and the search for alternative options for hearing cases

As we have already noted, the greatest restrictions on the activities of the church courts in the Czech Republic in relation to the restrictions of the COVID-19 epidemic were in the two spring waves in the spring of 2020 and the spring of 2021. These were two extended periods when there was no personal questioning, members of the tribunals did not meet, there was no discussion over sentences, and therefore no sentences were handed down. The autumn wave of 2021, while arguably the most severe in terms of health consequences, did not so much affect the work of the tribunals, particularly as over a long period of restriction the tribunals had usually already set up mechanisms to ensure that they were not restricted in their activities for a prolonged period of time and across the board. Thus, when face-to-face meetings did take place, they were held under increased epidemiological precautions (use of face masks, ventilation, disinfection, social distancing) or by people who had currently suffered from the disease or had been vaccinated and were assumed to be sufficiently immunized, at least for some time.

As a concrete example, we take the situation of the Olomouc Church Tribunal (the Interdiocesan Tribunal in Olomouc, hereinafter: ITO), which is a court of first instance for the Olomouc Archdiocese and the Ostrava-Opava Diocese. It is also the second instance tribunal of appeal for the first instance tribunals of the Diocese of Brno and the Archdiocese of Prague (the Metropolitan Tribunal of Prague is the first instance tribunal for the Archdiocese of Prague, the Diocese of České Budějovice and the cases of the Apostolic Exarchate established for Eastern Catholics of the Byzantine Rite). At the beginning of the restrictions of COVID-19 in spring 2020, the ITO had 17 members (1 official, 3 vice-officials, 9 judges,

[30] Cf. Česká biskupská konference: *Slovo biskupů k uvolňování pandemických opatření* [Word of the bishops on the release of pandemic measures] [11.03.2022], https://www.cirkev.cz/cs/aktuality/220311slovo-biskupu-k-uvolnovani-pandemickych-opatreni [accessed 25.10.2022].

3 defenders of the bond, 1 notary), as well as several auditors, lawyers and prosecutors.[31] Regularly once a month, the tribunal met for sessions, during which, among other things, discussions were held and judgments were handed down. Outside of these sessions, there were pre-trial and other consultations, meetings with parties, witnesses, depositions, disclosures and other acts requiring personal interaction. This opportunity was abruptly limited by measures that began to be introduced in the Czech Republic in mid-March 2020 and continued with variable intensity until the spring of 2022.

We will now assess the concrete effects on the limitation of the activities of the tribunals. Going through the various procedural steps of the matrimonial trial, we see that those where personal contact occurs have been most affected (and unfortunately often made impossible). Some principles of canonical trial procedure, on the other hand, make this situation easier. This is primarily the principle of the writ,[32] which practically excludes only discussions; furthermore, the principle of non-publicity of the proceedings,[33] which guarantees confidentiality, especially in cases of nullity of marriage. On the other hand, the procedural principle of the senate's decision-making process can be a hindrance in times of restrictions.[34] In any situation, the court should ensure that procedural principles are not violated even in these difficult situations and that the principle of the right of defence is upheld,[35] because the violation of this right constitutes an irreparable defect in the verdict,[36] the principle of equality of parties or the principle of free evaluation of evidence according to the judge's conscience.[37] The first problematic area was the impossibility of pre-trial consultations and drafting of claims with clients in a situation where normal contact was very limited. In the first wave in the spring of 2020, consultations did not take place at all and clients were referred at a more favourable time. As this time lengthened, the practice of consultation by electronic means (Skype, Zoom), telephone or e-mail began to be used: after an initial introduction to how the process works, the applicant usually wrote a report on the course of the acquaintance and mar-

[31] Tribunale interdioecesanum Olomouc: *Relatio de statu et activitate tribunalis (pro Ecclesia latina) pro anno 2019 redacta*. Archive of the Interdiocesan Tribunal Olomouc, pp. 3—4.

[32] Cf. CIC/1983, can. 1472.

[33] Cf. CIC/1983, can. 1470 § 1.

[34] Cf. CIC/1983, can. 1425, 1°, b.

[35] Cf. CIC/1983, can. 1593 § 1.

[36] Cf. CIC/1983, can. 1620 7°; further Cf. I. A. Hrdina: *Kanonické právo: dějiny pramenů, teorie, platné právo* [Canon Law: History of Sources, Theory, Valid Law]. Plzeň 2011, pp. 383—386.

[37] Cf. CIC/1983, can. 1608 § 3.

riage, which was sent to the consultant, sponsor or other member of the court, who advised him to fill in what was missing, to obtain the required annexes and certificates (on the baptism of the parties, on the church marriage, a copy of the divorce decree of the civil court, etc.), which was usually done electronically, and then send everything to the appropriate church tribunal to hear the matter. The parties were then served classically by mail, although during the short period of the first wave of COVID-19, when the Czech Post Office also had problems delivering the documents, the parties were also served by e-mail. This usually sped up negotiations and reduced procedural times, as the parties responded more quickly to electronic communications.

The defender of bond in a particular case is electronically notified by the Olomouc tribunal at the opening of the proceedings on a regular basis because the tribunal has created an internal repository of cases to which every member of the tribunal has access through his or her secure account. Essential substantive matters such as the application, decrees, depositions of parties and witnesses, animadversions of the defender of bond, etc. are stored in this repository; of course, the judges' vetoes and usually the judgment are not shared here, as it is a working tool. Cases are still archived in the classic way — by storing the physical file in the archive of the tribunal (and the electronic working repository is periodically deleted).

After the party or parties responded, or the non-participation of the non-plaintiff was resolved, again the defender of bond drafted questions for the plaintiff's deposition, and the plaintiff was either physically summoned, if that was already possible, or several depositions were conducted via the Zoom platform, with one copy then sent to the party for signature, then returned to the tribunal and additional signatures of the other participants in the deposition (judge, notary, or patron) were added. Witness interviews were conducted in a similar manner.

Then the defender of bond elaborated his *animadversiones* — again thanks to access to the electronic version of the file. The disclosure was again electronic for a long time: if the parties and their lawyers insisted on physically studying the case at the seat of the tribunal, they had to wait for a time when contacts, albeit with limitations, were allowed. If they did not insist on this necessity, to them were sent the *animadversiones* of the defender of bond which usually summarized the essential facts of the hearings and the course of the entire investigation so far, and finally expressed his conclusion as to whether he was defending the validity of the marriage or whether he was entrusting himself to the justice of the judges in a particular case. The parties had the opportunity, not the obligation, to comment on this statement of

the defender of bond within a specified time. Thereafter, the investigative part of the inquiry was concluded and the cases were either physically handed to the judges for the preparation of their votes or, if this was not possible, the judges were encouraged to review the electronic version of the case file in the court's secure repository via personal secure remote access.

After the study and drafting of the votes, the most problematic part came, namely the discussion of the case before the sentencing, which cannot and could not be done except by a personal meeting. Here again there was another lengthy period of delay. As regards the possibility of being heard electronically: we have reached a situation where either the proceedings have been unduly prolonged or the possibility has sometimes been used. As can be seen from the literature, other courts have done so. Referring to canons 1528, 1558 § 3 and 1691 § 1 in the context of this exceptional situation, the Italian author Paolo Palumbo states directly that in the case of a legitimate reason (impossibility, serious inconvenience, urgency…) remote hearing is certainly allowed, referring to the various authorizations of the Apostolic Signatura.[38]

Thus, the activities of the Olomouc court were effectively paralysed only in the two spring waves (2020 and 2021), otherwise the aforementioned means were used to at least partially enable the proceedings to continue. At the same times, the judges also did not meet in regular sittings, nor did they meet over the sentencing. Consequently, delays in judicial activity occurred (especially in the hearings, and more importantly in the discussions and sentencing) and it was not until early 2022 that most (but by no means all) of the backlogs were caught up on.

Other church tribunals in the Czech Republic had similar problems. As far as we know, only the diocesan tribunal in Brno addressed the Apostolic Signatura directly, proposed possible solutions and expected some of them to be approved. The judicial vicar suggested, for example, that the votes of the judges should be sent to the president of the tribunal, who would forward them to the individual judges before the sentencing, which would be given via videoconference. If the vote was unanimous, the judges could be dispensed from the discussion; if dissenting, the discussion would be moved to a more appropriate time after the epidemiological measures. Or, in the case where the defender of the bond entrusts the justice of the court, there would be no need for discussion and only the sending of the courts' votes would suffice.

[38] Cf. P. Palumbo, "Marriage and canonical process in the digital era." *Stato e chiese* (2022), p. 128, fn. 110, which refers to the decision of Supreme tribunal of the Apostolic signatura: *Letter*, 5 October 2020, Prot. n. 4036/20 SAT; *Letter*, 18 March 2021, Prot. n. 3356/21 SAT.

Another option suggested was for only the President of the Tribunal to meet with the reporting judge, with a third judge joining the discussion by video conference, etc. The Apostolic Signatura responded to the Brno official on 5 October 2020, saying that it does not grant a dispensation from the prescription of canon 1609 CIC, that is, the judges must meet at the seat of the tribunal to discuss the case. However, the Signatura also confirmed the possibility of holding the interrogations online while ensuring confidentiality and the relevant regulations regarding the interrogation. This position of the Apostolic Signatura reaffirms the importance of the discussion of the courts prior to sentencing, even in a situation of limited meeting possibilities due to the epidemic. On the basis of communication with the Apostolic Signatura, the judicial vicar of Brno then developed criteria for conducting interviews by telematic means via the Internet.[39]

Formation meetings of judges were also not held for some time. The conferences, which in the Czech Republic and Slovakia serve for formation, meeting and exchange of experience, especially for those working in the ecclesiastical justice system, have been limited or cancelled since spring 2019. In 2019, for the time being, the IV Symposium on Canon Law was held for the last time in Vranov at Brno (the central topic was canon 1095 CIC, which is the most frequently discussed ground for nullity of marriage in the Czech and Moravian church tribunals).[40] There would be no next annual conference in 2021 (and no conference yet). The traditional biennial symposium of canon law, held in Spišské Podhradí, Slovakia, was last held as the XIXth edition on 27—31 August 2018; there was no conference in 2020 (or 2022). The Seminar on Canon Law for the staff of the tribunals of the Czech and Moravian ecclesiastical provinces, usually held annually in spring by the Olomouc church tribunal, was postponed to autumn and held in Olomouc on 14 September 2020 on the topic of offences against the 6th commandment of the Decalogue. The next annual event in 2021 was held online only as a Conference on Canon Law for the staff of the tribunals of the Czech and Moravian Ecclesiastical Province on 24 May 2021 (topic: Particular Law in the Roman Catholic Church with regard to the specifics and needs of the Czech Church and the principles of drafting legislative texts). In 2022,

[39] Cf. K. Orlita: "Diskuze soudců k vynesení rozhodnutí o platnosti manželství v době pandemie [Discussion of the judges' decision on the validity of marriage in a time of pandemic]." *Adnotatio iurisprudentiae* 1 (2020), pp. 113—118. The article contains as an appendix the criteria for conducting interviews online.

[40] Cf. *Symposium kanonického práva — informace* [Symposium on Canon Law — Information], https://www.akademiekp.cz/symposium-kanonickeho-prava-2019/ [accessed 25.10.2022].

this conference was held in late August on the topic of investigations of sexual offences by clerics.[41]

Last but not least, the COVID-19 epidemic also caused staffing problems. There are still a lot of older officials working in the church tribunals in the Czech Republic. As the COVID-19 epidemic has had a more dramatic impact on the elderly and sick population, some courts have not escaped this impact. The diocesan tribunal in Hradec Králové was the most affected. Two senior judges left the court at this time due to age and two more judges died as a result of COVID-19; two female notaries also left. The tribunal therefore had to be restructured by decision of the diocesan bishop in the spring of 2021, which was resolved both by the appointment of the official of the tribunal, Dr. Karel Orlita, who is also the official of the Diocesan Tribunal in Brno, and by the partial loan of some court officers, notaries or judges from the Diocesan Tribunal in Brno, who now act as staff of both appointed tribunals. The Diocesan Tribunal in Plzeň and the Diocesan Tribunal in Litoměřice are also facing a shortage of judges and are borrowing staff mutually. The ITO has not been permanently affected by the COVID-19 staffing situation. One judge left due to age and the majority of the members of the tribunal gradually suffered from the disease, which limited the activities of the tribunal only at the moment. The Prague Metropolitan Tribunal was also not significantly affected by staffing.

The statistics of the Olomouc tribunal for the judicial years 2020 and 2021 show that although the epidemic has ultimately slowed down the activities of the tribunal, alternative solutions and efforts to catch up with the hearing of individual cases are slowly succeeding. In 2020, the court heard a total of 113 cases in the first instance from previous years, accepted 48 new cases in 2020 (for a total of 161 cases), found marriages invalid in 39 cases, declared 2 marriages valid, and carried over 120 cases to 2021. In the second instance, the court heard 31 cases from earlier, accepted 7 new cases in 2020 (a total of 38 cases), affirmatively terminated 5 cases, declared 2 marriages valid, and transferred 24 cases to 2021, other cases were revoked before sentencing.[42] In the judicial year 2021[43] the ITO heard a total of 166 cases at first instance (120 former,

[41] Cf. *Konference sexuální delikty — informace* [Sexual Offences Conference — Information], https://zpravy.cirkev.cz/konference-na-tema-setreni-sexualnich-deliktu-v-cirkvi-se-uskutecni-v-olomouci_11822 [accessed 8.11.2022].

[42] Tribunale interdioecesanum Olomouc: *Relatio de statu et activitate tribunalis (pro Ecclesia latina) pro anno 2020 redacta*. Archive of the Interdiocesan Tribunal Olomouc.

[43] Tribunale interdioecesanum Olomouc: *Relatio de statu et activitate tribunalis (pro Ecclesia latina) pro anno 2021 redacta*. Archive of the Interdiocesan Tribunal Olomouc.

46 newly admitted), found the marriage null in 43 cases, two marriages were declared valid and 4 cases were revoked by the parties before sentencing. Finally, the court also dealt with one case, originally heard as a summary proceeding *coram Episcopo*, which was referred by the bishop for a proper hearing. There are 120 first instance cases moving into the 2022 judicial year. In the second instance, the ITO handled a total of 34 cases (24 formerly, 10 newly admitted in 2021), finding nullity of marriage in 12 cases, validity in three, and 19 cases carrying over to 2022.

Conclusions

We can conclude that the experience of the Church in general and the church tribunals in particular expanded after this period of restrictions. We have learned to make use of what were, until then, rather unconventional electronic means of communicating the Church's message, celebrating worship, and contacting the faithful. We also learned to communicate in a new way in the procedural matters of marriage trials, in an extraordinary situation when it was not possible to use the traditional means of meeting and communication. The Church has remembered again the need to defend its rights and freedoms in a space and time of constraints, albeit primarily aimed at the "greater good," that is, the protection of health. However, Church leaders and authorities were also confronted with what Pope John Paul II had already spoken about in 2002, namely that "electronically mediated relations can never replace direct human contact."[44]

Some authors[45] also recall the necessity or advisability of establishing official rules for the computerization of the ecclesiastical marriage trial and the need to train the staff of the ecclesiastical tribunals in the use of this type of communication in order to ensure the legitimate and legal acquisition of evidence in this way. It would be possible to draw on experience in this area, for example, from secular civil and similar proceedings, or to set up a commission in the church environment to address this issue. Then the matrimonial trial can again become closer to the clients of the tribunals or to their witnesses, thus facilitating access to judicial jus-

[44] Giovanni Paolo II: *Messaggio del Santo Padre per la XXXVI giornata mondiale delle Comunicazioni sociali* de die 12 maggio 2002, n. 5, https://www.vatican.va/content/john-paul-ii/it/messages/communications/documents/hf_jp-ii_mes_20020122_world-communications-day.html [accessed 25.10.2022].

[45] Cf. P. Palumbo: "Marriage and canonical process in the digital era…," p. 131.

tice in general, as Pope Francis envisaged in his 2015 reform. The Pope's reform itself caused a sharp increase in the number of cases in our courts at first, but around 2017 the situation calmed down and stabilized at current levels. Thanks to the now no longer necessary sending of affirmatively decided cases to the second instance, judicial investigations have been accelerated. The possibility of abbreviated trial *coram Episcopo* has practically not affected the speed of the courts in the Czech Republic due to the negligible number of such cases. One can only hope that even after several waves of epidemic restrictions, the courts will quickly get back to dealing with matrimonial and other matters more rapidly.

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Česká biskupská konference: *Prohlášení českých a moravských biskupů k mimořádnému opatření vlády ze dne 12. března 2020* [Statement of the Czech and Moravian bishops on the government's extraordinary measure of 12 March 2020], https://www.cirkev.cz/cs/aktuality/200312prohlaseni-ceskych-a-moravskych-biskupu-k-mimoradnemu-opatreni-vlady-ze-dne-12-brezna-2020 [accessed 24.10.2022].

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Tribunaux ecclésiastiques en République tchèque pendant l'épidémie de COVID-19

Résumé

L'article vise à résumer la situation du système judiciaire ecclésiastique sous deux aspects. Il évalue brièvement, à quelques années de distance, l'application des normes de la réforme de 2015 du droit procédural matrimonial de l'Eglise catholique (augmentation spectaculaire du nombre de causes après la réforme, stabilisation de la situation après les premières années, faible recours à la possibilité d'une procédure simplifiée, etc.) Il estime l'impact des contraintes épidémiques (et des craintes de la population) dans la société tchèque pendant l'épidémie de COVID-19 sur les activités des tribunaux ecclésiastiques

et la recherche de modes alternatifs de traitement des affaires (en utilisant l'exemple du tribunal interdiocésain d'Olomouc).

Mots-clés : tribunaux ecclésiastiques, République tchèque, nullité de mariage, Mitis Iudex Dominus Iesus, liberté religieuse, restriction des droits, Eglise catholique, COVID-19

Monika Menke, Damián Němec

I tribunali ecclesiastici nella Repubblica Ceca durante l'epidemia di COVID-19

Sommario

L'articolo si propone di sintetizzare la situazione del sistema dei tribunali ecclesiastici sotto due aspetti. A distanza di qualche anno, valuta brevemente l'applicazione delle norme della riforma del 2015 del diritto processuale matrimoniale della Chiesa cattolica (forte aumento del numero delle cause dopo la riforma, stabilizzazione della situazione dopo i primi anni, scarso ricorso alla possibilità di procedimenti abbreviati ecc.). Valuta l'impatto delle restrizioni epidemiche (e dei timori dell'opinione pubblica) nella società ceca durante l'epidemia di Covid-19 sull'attività dei tribunali ecclesiastici e la ricerca di modalità procedurali alternative (in base all'esempio del Tribunale interdiocesano di Olomouc).

Parole chiave: tribunali ecclesiastici, Repubblica Ceca, nullità del matrimonio, Mitis Iudex Dominus Iesus, libertà religiosa, restrizione dei diritti, Chiesa cattolica, COVID-19

Ecumeny and Law, vol. 11(1) (2023), pp. 59—87
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.03

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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.[1]

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.[2]

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."[3]

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."[4]

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

[1] 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 [accessed 15.05.2022] [hereinafter: *MEMI*].

[2] 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_rescritto-processo-matrimoniale.html [accessed 15.05.2022].

[3] Francis: *MEMI*.

[4] Francis: *MEMI*.

called the briefer matrimonial process before the bishop concerning canons 1369 to 1373.[5] 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."[6]

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.[7]

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

[5] Francis: *Apostolic Exhortation "Amoris laetitia"* [19.03.2016], n. 244.

[6] 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 [accessed 15.05.2022].

[7] 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."[8]

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."[9] 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*[10] or *acribia*, he himself imparts the Lord's healing mercy to the Christian faithful in need of it."[11]

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-

[8] Francis: *MEMI*.
[9] Francis: *MEMI*.
[10] P. I. Boumis: *Kánonické právo pravoslávnej cirkvi*. Prešov 1997, pp. 47—48.
[11] Francis: *MEMI*.

tolic 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."[12]

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 proprios *Mitis Iudex Dominus Iesus* and *Mitis et misericors Iesus* led to a simplification of the procedures in the declaration of nullity of a marriage."[13]

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.[14]

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.[15] 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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[12] Francis: *Apostolic Exhortation "Amoris laetitia"* [19.03.2016], n. 244.

[13] 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 [24.11.2015], n. 82 [accessed 15.05.2022].

[14] Cf. Francis: *MEMI*.

[15] *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."[16]

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.[17]

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.[18]

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[16] John Paul II: "Address to Members of the Tribunal of the Roman Rota" [29.01.2005], n. 4.

[17] 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.

[18] Cf. A. Giraudo: "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*.[19]

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.[20]

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."[21]

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*.

[19] Cf. P. I. Boumis: *Kánonické právo pravoslávnej cirkvi…*, p. 50.

[20] 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*.

[21] 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."[22] 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*.[23]

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.[24]

> 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.

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[22] Cf. Francis: *MEMI*.

[23] 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.

[24] Cf. Francis: *MEMI*. Cf. M. Mingardi: "Role diecézního 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.[25]

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."[26]

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.[27]

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

[25] Ibidem, pp. 90—95.
[26] Cf. Francis: *MEMI*.
[27] 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.[28]

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.[29]

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.[30]

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."[31]

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.[32]

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.[33]

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[28] M. Mingardi: "Role diecézního biskupa…," p. 90. Cf. Francis: *MEMI*.

[29] Cf. M. Mingardi: "Role diecézního biskupa…," p. 91.

[30] Francis: *MEMI*. Cf. M. Mingardi: "Role diecézního biskupa…," p. 91.

[31] Francis: *MEMI*.

[32] 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.

[33] 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.[34]

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."[35]

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.

[34] Cf. M. Mingardi: "Role diecézního biskupa…," p. 93.

[35] 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 Vasiľ. The canonical terminology of the Catholic Church and the Orthodox Churches itself presents some challenges.[36] 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.[37]

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"?[38]

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.[39]

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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[36] C. Vasiľ: "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.

[37] P. I. Boumis: *Kánonické právo pravoslávnej cirkvi*…, p. 122.

[38] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 77.

[39] 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 — světlo v temnotě světa*…, 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.[40]

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,[41] 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.[42]

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.[43]

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[40] Cf. Š. Šak, P. Kochan, J. Pilko: *Manželstvo ako obraz jednoty medzi mužom a ženou*. Prešov 2020, pp. 64—65.

[41] 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.

[42] Cf. Cf. Š. Šak, P. Kochan, J. Pilko: *Manželstvo ako obraz jednoty…*, pp. 66—69.

[43] G. Braunsteiner: "Milosrdenstvo a/alebo spravodlivosť." In: *Slovo nádeje*. Ed. L. Csontos. Trnava 2010, p. 70. Cf. C. Vasiľ: "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.[44]

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.[45] The prescriptions on marriage are found in the following canons of the Apostles: 5,[46] 7,[47] 19,[48] 26,[49] 48,[50] 51[51] and the prescriptions of the Council of Chalcedon in canons 14,[52] 16,[53] 27.[54] The prescriptions on indissolubility of marriage and the impropriety of

[44] Ibidem, p. 98.

[45] Ibidem, p. 81.

[46] 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.

[47] 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.

[48] 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.

[49] 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.

[50] 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.

[51] 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.

[52] 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.

[53] 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.

[54] 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.[55]

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.[56]

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.[57]

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

[55] 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 Alxandria (+ 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. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 81.

[56] 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. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," pp. 78—79.

[57] K. Rebro, P. Blaho: *Rímske právo*. Plzeň 2019, p. 140.

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

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.[63] 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.[64]

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[58] Cf. C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 82.

[59] Ibidem.

[60] The novels of Justinian, https://droitromain.univ-grenoble-alpes.fr/Anglica/N111_Scott.htm [accessed 15.05.2022].

[61] 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.

[62] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 82.

[63] 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. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," pp. 82—83.

[64] 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).[65]

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.[66] 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.[67]

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.

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[65] Cf. P. Kormaník: *Základné sväté tajiny pravoslávnej cirkvi*. Prešov 1996, p. 136.

[66] Cf. J. Jacoš: *Cirkevné právo*. Prešov2006, pp. 139—140.

[67] 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.[68]

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.[69] Nevertheless, some of the prescriptions of Justinian's *Codex Basilicum* remained.[70]

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.[71]

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

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[68] 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

[69] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 84.

[70] 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.

[71] C. Vasiľ: "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.[72]

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.[73] Gregory the Theologian says that prescription of Roman civil law on divorce of marriage made their way into ecclesiastical regulations on that matter.[74]

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.[75]

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*"[76] 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.

[72] 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.

[73] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," pp., 85—86.

[74] 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.

[75] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 86.

[76] 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/rkcmbf/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.[77]

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.[78] 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.[79]

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

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[77] 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 [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.

[78] Svätý Bazil: *Povzbudenie mladým Listy I* (R. 357—374). Prešov 1999, pp. 264—267.

[79] 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."[80] Other dissolutions of marriage are accepted by the Church application of the principle of *oikonomia*."[81]

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.[82]

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.

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[80] 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.

[81] 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 οἰκονομία nel diritto canonico ortodosso: l'applicazione misericordiosa della legge." In: *Stato, Chiese e pluralismo confessionale, Rivista telematica*, n. 19 (2017), pp. 1—18.

[82] E. Martinelli: "Divorzio e οἰκονομία 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.[83]

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;[84]

2. if the wife committed adultery;[85]

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.[86]

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

[83] P. I. Boumis:: *Kánonické právo pravoslávnej cirkvi*..., p. 124.
[84] C. Vasie: "Odlúčenie, rozviazanie manželského zväzku...," pp. 86—87.
[85] P. I. Boumis: *Kánonické právo pravoslávnej cirkvi*..., p. 124.
[86] 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.[87]

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.[88]

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.[89]

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[87] Cf. J. Jacoš: *Cirkevné právo*…, pp. 140—141. Cf. C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 89.

[88] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku…," p. 89. Cf. "Развод по — христиански," https://www.pravmir.ru/razvod-po-xristianski [accessed 15.05.2022].

[89] C. Vasiľ: "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.[90]

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.[91]

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 наличииофициального 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) надлежащим 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."

[90] P. I. Boumis: *Kánonické právo pravoslávnej cirkvi*..., p. 124.

[91] C. Vasiľ: "Odlúčenie, rozviazanie manželského zväzku...," p. 91.

siastical matrimonial bond.[92] 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.[93]

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.[94] The main problem is that there is no distinction between "declaration of nullity,"

[92] Ibidem, p. 104.

[93] 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.

[94] A. Pastwa: "Kanonické paradigma nerozlučitelnosti O vztahu přirozenosti a kultury v katolickém chápání manželství." *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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Jurij Popovič

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

Jurij Popovič

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 motu proprio *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

Ecumeny and Law, vol. 11(1) (2023), pp. 89—99
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.04

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What Can Be Said about the Condition of the Contemporary Polish Family in the Light of Annulment of Marriage in the Catholic Church? The Research Findings*

Abstract: The study of the condition of marriage and family is an essential task of science. This is because the results of this research can be of great importance for the direction and shape of actions taken by secular and Church authorities to protect and for the development of society. This article presents the results of research on contemporary marriage and family in Poland. This research uses an innovative method of obtaining data on marriages as a result of quantitative and qualitative surveys conducted among people who have decided to obtain a declaration of nullity of their marriage in the Catholic Church.

Keywords: marriage, family, nullity of marriage, divorce, family condition

* The article is the result of a project funded by the National Science Center (contract no. UMO-2019/33/B/HS1/00625).

1. Introduction

Marriage is a fundamental institution for society. It serves as the basis for its existence, function, and flourishing. Retaining an interest in this institution is very important for members of any society and those responsible for it. Due to these reasons, the institution of marriage merits more attention from scholars.

There are many ways in which a scholar may approach marriage as a subject. Various academic disciplines have made marriage and family the subject of their research and allow us to learn about and describe the institution of marriage. The subject has a vast literature, which is still growing.[1]

Among many methods, there is also an interdisciplinary one, that is, an approach to a family that makes it possible to combine various methods and scientific viewpoints. We have already described such an interdisciplinary way of studying marriage elsewhere.[2] The said approach made it possible to integrate theological, legal, canonical, and social perspectives using statistical methods. We applied the method in question in our research in the space of Polish society. It was anchored in the specific conditions of this particular society's functioning. It seems that the method may also be suitable for other societies.

Through our research, we utilized an innovative method to provide a comprehensive description of the situational conditions, as well as the social and religious motivations of individuals who initiate the process of declaration of nullity before a diocesan court in the Roman Catholic Church. This information can provide vital support in understanding the state of marriage in Poland. Hence, analyzing the current state of this institution can help in understanding the overall condition of Polish society.

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[1] For example: W. Daszkiewicz: "Małżeństwo i rodzina w badaniach antropologii kulturowej." *Cywilizacja* 34 (2010), pp. 20—31; I. Dzierwa-Pabin: "Współczesne zagrożenia dla trwałości małżeństwa." In: *Kultura bezpieczeństwa. Nauka — praktyka — refleksje*. Lipiec—sierpień 2012, pp. 9—16; D. Gębuś: "Czy grozi nam upadek rodziny? Kondycja rodziny polskiej na tle innych krajów europejskich." *Wychowanie w Rodzinie* XV (2017), pp. 135—144; T. Borutka, T. Kornecki, P. Kroczek: *Rodzina fundamentem społeczeństwa: aspekt społeczno-prawny*. Kraków 2017; J. Struzik, M. Ślusarczyk, P. Pustułka: *Contemporary migrant families: Actors and issues*. Newcastle upon Tyne 2020; T. Szlendak: *Socjologia rodziny. Ewolucja, historia, zróżnicowanie*. Warszawa 2010; M. Bieńko, M. Rosochacka-Gmitrzak, E. Wideł: *Obrazy życia rodzinnego i intymności*. Olsztyn 2020.

[2] P. Kisiel, P. Kroczek, P. Ulman: "Examining the family in the light of marriage annulment as a new research perspective." *Analecta Cracoviensia* 53 (2021), pp. 143—168. DOI: https://doi.org/10.15633/acr.5307 [accessed 12.03.2024].

The primary objective of this article is to present a concise summary of the survey findings.

2. The main research findings

The main results of the research presented below were obtained based on a statistical survey conducted in the period from 2017 to 2021 among people applying to the Ecclesiastical Court of the Archdiocese of Kraków for the nullity of marriage. Finally, 326 questionnaires were collected, most of them fully completed, which became the basis for a statistical analysis.

It is best to present study results by listing specific conclusions and elaborating on individual points if necessary.

1. Respondents' religious formation significantly affects their personal and family life, which should follow the teaching of the Church contained in canon law. This view was substantiated by the statistical survey results when the respondents indicated the level of their faith and their motives for taking action to have their existing marriage declared invalid.

About 74% of the respondents declared that they believe in God and attend celebration of the Eucharist on Sundays and holydays of obligation. Slightly more often, women assessed their faith in this way (see Table 1).

Table 1. The structure of the surveyed respondents due to the assessment of their faith

Sex		Evaluation of the respondent's faith [%]					Total
		no	yes1	yes2	yes3	yes4	
Woman		—	2.05	22.05	35.90	40.00	100.00
Man		—	1.63	27.64	36.59	34.15	100.00
Total		—	1.89	24.21	36.16	37.74	100.00

Answers: no — "I don't believe in God"; yes1 — "I believe in God, but I do not practice my faith in the Church"; yes2 — "I believe in God and participate in the celebration of the Eucharist on some Sundays and only the most important holydays of obligation"; yes3 — "I believe in God and participate in the celebration of the Eucharist every Sunday and every holyday of obligation"; yes4 — "I believe in God and participate in the celebration of the Eucharist every Sunday, every holyday of obligation, and also on weekdays."

Source: Authors' own calculations.

Furthermore, more than 80% of those surveyed said that they came from a family with strong Christian tradition and practiced faith. Among the most important changes in the lives of the respondents after obtaining a ruling on the invalidity of their marriage was the ability to receive the sacraments, to appease their conscience, and to be able to marry (again)

and in accordance with the legal order of the Church (see Table 2). The latter motive seems to be the key one, with more than 48% of respondents indicating it. These results show that the religious formation of the respondents — usually acquired in the family of origin — is the driving force behind their desire to resolve the difficult life situation they found themselves in due to a failed marriage. The results presented in Table 2 also show that, with some degree of caution, it can be concluded that women more often perceive spiritual factors as very important, whereas men value the factors related to social relations within the immediate environment.

Table 2. The importance of factors (areas of life and functioning of the respondents) that will be affected by the decision on the nullity of the marriage — structure according to the respondent's sex (in %)

Factor	Sex	Importance level				
		1	2	3	4	5
Possibility of receiving the sacraments	W	2.12	—	0.53	1.59	95.77
	M	0.85	0.85	1.69	14.41	82.20
	T	1.63	0.00	0.01	6.51	90.55
Possibility of entering into a sacramental marriage	W	1.08	—	5.91	12.37	80.65
	M	2.54	—	1.69	12.71	83.05
	T	1.64	—	4.28	12.50	81.58
Soothing one's conscience	W	2.69	2.15	4.84	17.74	72.58
	M	4.59	1.83	7.34	23.85	62.39
	T	3.39	2.03	5.76	20.00	68.81
Meeting the expectations of loved ones (parents and other relatives)	W	26.44	13.22	24.14	19.54	16.67
	M	19.63	18.69	26.17	16.82	18.69
	T	23.84	15.30	24.91	18.51	17.44
Meeting the expectations of the current partner	W	27.89	10.20	12.24	21.09	28.57
	M	14.56	3.88	7.77	21.36	52.43
	T	22.40	7.60	10.40	21.20	38.40
Improving your image in the living environment	W	37.79	11.63	26.16	11.05	13.37
	M	34.91	12.26	31.13	9.43	12.26
	T	36.69	11.87	28.06	10.43	12.95
To conclude a certain stage of life	W	4.86	3.78	5.95	32.43	52.97
	M	7.27	3.64	11.82	29.09	48.18
	T	5.76	3.73	8.14	31.19	51.19
Setting a good example for the children	W	1.81	—	1.20	15.66	81.33
	M	6.80	0.97	3.88	22.33	66.02
	T	3.72	0.00	2.23	18.22	75.46

Abbreviations: W — woman, M — man, T — total;
1 — definitely not important, 2 — not important, 3 — neutral, 4 — important, 5 — very important.

Source: Authors' own calculations.

2. The recognition of the invalidity of marriage is an essential component of legal (canonical) awareness and knowledge. It was assumed that people with higher education would be more interested in initiating the process of the marriage annulment. However, our research did not provide a definitive conclusion on this matter.

About 80% of the respondents indicated that their knowledge of the possibility of declaring a marriage invalid was at least average and at least good, more than 25% of respondents. The main sources of this knowledge were the Internet, the parish priest, and friends (see Table 3). More than 61% of respondents indicated the Internet as a source of information on the process of a declaration of nullity of their marriage. In comparison, this source was reported in more than 28% of all responses. In the case of a parish priest, these shares amounted to 54% and 25%, respectively.

Table 3. Source of information on the possibility of the marriage nullity process — structure in % according to the respondent's sex (in %)

Source	Sex				Total	
	woman		man			
	answer	case	answer	case	answer	case
Media (radio, television, newspaper)	7.57	16.34	11.79	25.62	9.21	19.81
Internet	29.36	63.37	27.03	57.85	28.49	61.30
A law firm dealing with secular law	2.52	5.45	0.39	0.83	1.73	3.72
A law firm dealing with canon law	5.50	11.88	4.63	9.92	5.18	11.15
Friends	19.95	43.07	18.53	39.67	19.42	41.80
Parish priest	23.85	51.49	27.41	58.68	25.18	54.18
Bishop's court	5.50	11.88	3.86	8.26	4.89	10.53
Other	5.73	12.38	6.18	13.22	5.90	12.69

Explanation: answer — the percentage of indications (responses) for a given source of information in relation to all indications (responses) made by respondents (for all sources of information); case — the percentage of respondents who indicated a given source of information in relation to all surveyed respondents.

Source: Authors' own calculations.

However, it is those with higher education and a stronger commitment to religious practice and Christian tradition who are relatively more interested in launching the process of declaring that their marriage was in fact not valid according to Church law. Among the respondents, those with higher education (more than 45%) and high school education (more than 36%) far outnumbered those with a high school education, which deviates from the educational structure of the general population.[3]

[3] Instytut Statystyki Kościoła Katolickiego SAC, Główny Urząd Statystyczny: *Rocznik statystyczny. Kościół Katolicki w Polsce 1991—2011*. Warszawa 2014, p. 175;

3. The process leading to the declaration of nullity of marriage is not initiated immediately after obtaining a divorce, but with at least a lapse of one year — more than 70% of respondents indicated such a delay. It should be noted that there is no legal (canonical) obligation to connect the process of declaring a marriage null in the Church with a divorce. From the canon law vantage point, it is possible to declare the marriage was not valid according to Church law, while the spouses remain married under state law. However, due to mainly pastoral and practical reasons, church courts accept the case for declaring nullity usually after the divorce judgment becomes final.

4. The most common reasons for the breakup of a marriage are differences between spouses in terms of the preferred model of marriage and family functioning, along with the influence of third parties, such as parents, other relatives, and friends.

Other causes of a breakup, indicated most often by women, are a lack of mutual understanding with the husband, followed by financial disagreements, and the husband putting his own interest in other matters over that of his wife. For men, also the most common reason for marital problems was a lack of mutual understanding, followed by infidelity.

In contrast, economic problems of family functioning are not a significant cause of marital breakdowns. Indeed, financial disagreements were not a key cause of marital problems among the respondents surveyed. Furthermore, more than 38% of the respondents reported that their material situation during their marriage was at least good, and only about 20% indicated that their material situation was rather bad or downright wrong. Thus, economic and material factors should be regarded as mediating the process of marriage breakdown. They might rather be perceived as the impetus that generates the main (direct) causes of divorce.

5. As far as the in-depth psychological characteristics of those willing to initiate a process of annulment of marriage are concerned, the analysis of the collected empirical material clearly indicates the need to consider it in two dimensions. The first dimension is related to the context of the breakup of the bond between the spouses, resulting in the breakup of the relationship in the emotional sense, which can be confirmed by a divorce. The second dimension is related to the context of the decision to initiate canonical proceedings for the marriage nullity. These two dimensions should be analyzed separately, as both the situations in which

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Instytut Statystyki Kościoła Katolickiego SAC: *Annuarium Statisticum Ecclesiae in Polonia AD 2019*. Warszawa 2019, p. 25; Główny Urząd Statystyczny: *Rocznik statystyczny Rzeczypospolitej Polskiej*. Warszawa 2018, p. 218.

the persons involved are placed, and their motivations are significantly different, as the typological descriptions clearly indicate.

6. Analysis of the process of the breakup of the marital bond clearly proves the great importance of the premarital period, during which three types of threats to the proper formation of the marital bond become apparent. These threats are as follows: a) dangers associated with deficits in the social cognitive competence of spouses in their ability to adequately assess people and situations, b) dangers associated with deliberate actions of the future spouse or those around him/her aimed at misleading others, and c) dangers that arise out of the general cultural context.

7. On the other hand, the analysis of the context of the decision to initiate canonical proceedings allowed the construction of a typology consisting of six basic types of social attitudes towards such proceedings. The first type refers to God and the need to maintain an appropriate relationship with Him. The second one refers to the axiology associated with the Catholic faith and membership in the Church (e.g., respecting Catholic teaching regarding marriage and the family). The third type invokes the requirements pertaining to institutional membership in church structures, enabling, among other things, the realization of certain rights of the faithful (e.g., the possibility of receiving the sacraments). The fourth type expresses a pragmatic approach to planning future life in the context of, for example, the possibility of a new marriage in the Church. The fifth one expresses the need to satisfy a sense of security, for which canonical confirmation of definite separation from a violent and often addicted (e.g., to alcohol) spouse is essential. Finally, the sixth type stems primarily from observing the behavior of others, their daily social practices, and their reluctance to exclude any possibilities for the future.

These findings are largely in line with other studies on the motivations of those seeking the declaration of nullity of their marriage.

Thus, with this in mind, it can be concluded that the analyses carried out have made it possible to grasp the profound differentiation of situations and social behavior that result in the breakup of the marital bond and the initiation of canonical proceedings to declare the marriage null. Recognizing this differentiation undoubtedly allows for a better understanding of the phenomenon under study and should allow for more effective remedial measures.

8. It is important to acknowledge that the dissolution of a marriage can be an extremely traumatic experience for those involved. Research has shown that individuals often require assistance, support, and encouragement from others in order to successfully navigate this difficult period and regain their independence. This is especially true during critical moments of the process. The presence of a supportive commu-

nity can make all the difference and constitute "turning points" in the said process.

Such a "turning point" is undoubtedly a situation in which the behavior of an abusive spouse (e.g., physically abusive) has to be perceived as unacceptable, as it may pose a threat to family members (usually the wife and children). The result of such a transformation is a determination to oppose or resist. Sometimes, the catalyst for resistance is the "significant other" (we use this term in the sociological sense given to it by George H. Mead or Peter Berger and Thomas Luckman[4]), who helps make the affected person aware that certain behavior cannot be tolerated.

Such situations are also traumatic because, from that moment, it becomes impossible to rebuild trust between the spouses. A marital relationship devoid of trust forces the affected spouse(s) to redefine themselves in the new situation and prompts them to find solutions to rebuild a sense of stability. In the process of redefining oneself, a key role is played by a process that Anselm Strauss calls "the transformation of identity"[5] and Peter Berger calls "the alternation."[6] This process implies, among other things, the necessity to construct a completely new interpretation of one's past concerning the origins, duration, and dissolution of a marriage. As a result of these reinterpretations, past events start to be perceived in a completely different context, which deepens the traumatic nature of the whole situation.

9. At the same time, it should be emphasized here that for the (religious) faithful, the trauma of divorce is a more acute experience than for non-religious people. For the faithful, the breakup of their marriage is not only an experience of family disintegration but also a crisis of limited rights within the religious community and the impossibility of entering into another marriage. This leads them to seek a solution that will protect them from the negative consequences of the situation in their private and religious life. Such a solution may be the initiation of proceedings for a declaration of nullity, and obtaining such a decision allows them to become once more a full member of the community and to regain their place in the community structures, as well as to remain among the people actively involved in the religious life of the community. This fact undoubtedly proves that the institution of declaring a marriage invalid based on canon law plays an extremely important role in contemporary religious and social life, which is also confirmed by the growing interest of the

[4] See more: G. H. Mead: *Mind, Self and Society*. Chicago 1994 and P. Berger, T. Luckmann: *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*. London 1971.

[5] A. L. Strauss: *Mirrors and Masks. The Search for Identity*. London 2017.

[6] P. Berger: *Invitation to sociology. A Humanistic Perspective*. New York 1963.

faithful in the possibility of verifying the validity of a marriage that ended.

It is worth noting that the aforementioned trend is closely linked to the transition from traditional to contemporary family models. In families that adhere to traditional values, marriages may unravel, but divorce is often shunned, which means there is no need for canonical proceedings. On the other hand, modern families tend to opt for divorces when marriages dissolve, which makes it possible to initiate the relevant canonical proceedings.

3. Conclusions

The empirical data collection stage during our research was not free of difficulties. The subjects of the study were of vital importance, often intimate, and related to one's painful past. This made many potential respondents unwilling to participate due to fear that the survey might bring back often traumatic memories, disrupting their inner balance, which they achieved with great difficulty and effort by themselves and those supporting them.

Although our research is not without limitations and potential misrepresentations, we believe that the knowledge we have acquired is valuable and contributes to the diagnosis of modern marriages and society as a whole. We hope that our conclusions will inspire further studies of the condition of the Polish family from the perspectives of social science and theology.

Research into the condition of the family, which is the basic structure of any society, is a highly momentous problem. It is essential to take into account that both the family and the contemporary religious context in which it is rooted are subject to dynamic processes of social transformation. This means that the issues addressed in the monograph should be continuously monitored, and this requires systematic renewal of research into the problems addressed in this monograph and the realization of research into related phenomena.

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Przemysław Kisiel, Piotr Kroczek, Paweł Ulman

Que peut-on dire de la situation de la famille polonaise contemporaine à la lumière de l'annulation du mariage dans l'Église catholique ? Résultats des recherches

Résumé

L'étude de la situation du mariage et de la famille est une tâche importante de la science. En effet, les résultats de ces recherches peuvent être d'une grande importance pour l'orientation et la forme des actions entreprises par les autorités laïques et ecclésiastiques afin de protéger la société et son développement. Cet article présente les résultats des recherches sur le mariage et la famille contemporains en Pologne. La méthode utilisée dans ces recherches est une méthode innovante qui consiste à obtenir des données sur les mariages par le biais d'enquêtes quantitatives et qualitatives auprès de personnes qui ont choisi de faire déclarer leur mariage invalide par l'Église catholique.

Mots-clés : mariage, famille, annulation, divorce, condition familiale

Przemysław Kisiel, Piotr Kroczek, Paweł Ulman

Che cosa si può dire della condizione della famiglia polacca contemporanea alla luce della dichiarazione di nullità matrimoniale nella Chiesa cattolica? Risultati della ricerca

Sommario

Esplorare la condizione del matrimonio e della famiglia è un compito importante della scienza. I risultati di questa ricerca potrebbero essere di grande importanza per la direzione e la forma delle azioni intraprese dalle autorità secolari ed ecclesiastiche per proteggere la società e il suo sviluppo. Questo articolo presenta i risultati della ricerca sul matrimonio e la famiglia contemporanei in Polonia. La presente ricerca ha utilizzato un metodo innovativo che consiste nell'ottenere dati sui matrimoni come risultato di una ricerca quantitativa e qualitativa condotta tra le persone che hanno deciso di dichiarare la nullità del loro matrimonio nella Chiesa cattolica.

Parole chiave: matrimonio, famiglia, dichiarazione di nullità, divorzio, condizione della famiglia

Ecumeny and Law, vol. 11(1) (2023), pp. 101—135
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.05

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The Importance of the Principles of Social Coexistence for Divorce in the Context of Cultural and Social Changes A Polish Perspective

Abstract: Cultural and social changes may affect the methodology adopted by the courts at a certain time in interpreting and applying the law, in particular provisions containing general clauses. These clauses make the law more flexible, enabling it to adapt to changing conditions. They are treated as a kind of "safety valve" to avoid solutions that are unjust, or ethically and morally unacceptable in society. From this perspective, this article will consider the significance of the general clause of the principles of social coexistence in adjudicating a divorce from the perspective of Polish law. The purpose of this article is to answer the question whether, and in what direction, the cultural and social changes that may be taken into account through the general clause of Article 56 of the Family and Guardianship Code affect the dissolution of a marriage by divorce, namely whether or not they hinder the pronouncement of a divorce where the other prerequisites for divorce are met.

Keywords: divorce, divorce rates, general clauses, principles of social coexistence, interpretation, family law, cultural and social context

In omnibus quidem, maxime tamen in iure, aequitas spectanda sit.[1]

[1] "In all things, but especially in law, equity must be observed" — D. Paulus, 17,90.

1. Introduction

Since the second half of the 20th century, we have observed both a decrease in the number of marriages and the increasing divorce rate in Poland,[2] which is also in line with the tendencies observed in other countries with a similar degree of civilisation development[3] (including other EU member states, where, incidentally, there is a clear tendency to liberalise the law on divorce in an attempt to harmonise European family law[4]). According to an analysis prepared by the Public Opinion Research Centre[5] (CBOS),[6] data from Statistics Poland (GUS[7]) indicates that, after an intensive increase in the number of divorces pronounced in Poland, recorded until 2015, this tendency has slowed down and has remained relatively stable in recent years (for several years, courts have been adjudicating approximately 65,000 divorces per year in Poland).[8] On the other hand, the number of concluded marriages decreased significantly

[2] Główny Urząd Statystyczny: *Rocznik Demograficzny / Demographic Yearbook of Poland*. Warszawa 2022, pp. 181, 230, 491—496 (data for 1980—2021), available online: https://stat.gov.pl/en/topics/statistical-yearbooks/statistical-yearbooks/demographic-yearbook-of-poland-2022,3,16.html [accessed 3.03.2023].

[3] See Eurostat data: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Marriage_and_divorce_statistics [accessed 3.03.2023].

[4] See, regarding the attempts made in Europe at the unification of substantive family law as regards divorce by the Commission on European Family Law (CEFL), K. Boele-Woelki: "The principles of European family law: its aims and prospects." *Utrecht Law Review* 1/2 (2005), p. 164. See also, as mentioned by K. Boele-Woelki, "soft law," namely: The Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, Chapter III: Divorce Without The Consent of One of The Spouses, http://ceflonline.net/wp-content/uploads/Principles-English.pdf [accessed 22.03.2023]. This chapter covers much more liberal divorce provisions than Polish law (Art. 56 FGC). According to its Principle 1:8. Factual separation. "Divorce should be permitted without consent of one of the spouses if they have been factually separated for one year." Principle 1:9. Exceptional hardship to the petitioner, in turn, states: "In cases of exceptional hardship to the petitioner the competent authority may grant a divorce where the spouses have not been factually separated for one year."

[5] CBOS's (Centrum Badania Opinii Społecznej — Public Opinion Research Centre) official website: https://www.cbos.pl/EN/home/home.php.

[6] Within the Public Opinion Research Centre (CBOS) R. Boguszewski prepared a report based on data included in: Główny Urząd Statystyczny: *Rocznik Demograficzny 2018*. Warszawa 2018 — "Raport — Stosunek Polaków do rozwodów [Report — Poles' attitudes to divorce]." *Komunikat z badań* 7 (2019), p. 1.

[7] GUS's (Główny Urząd Statystyczny) — Statistics Poland official website: https://stat.gov.pl/en/.

[8] See footnote 6. Please note that in 2019, a total of 65,341 divorces were decreed, while 2020 saw a sharp decline in divorces due to COVID-19, as 51,164 divorces were decreed, see: Główny Urząd Statystyczny: *Rocznik Demograficzny / Demographic*

after 2008. Although the downward trend in this respect has slowed down in recent years, the number of marriages concluded annually remains one of the lowest in history.[9] Reasons for these circumstances should be looked for on various levels, in particular:[10] social, demographic, economic,[11] cultural[12] and religious,[13] as well as legal.[14] In many countries, the impact of various factors on the increase in divorce is a subject of ongoing studies. Some of these studies even address factors whose impact on divorce rates may not seem obvious. In China, for example, studies have been carried out on how the use of the internet and smartphones influences the increase in divorce rates in various areas of the country, which differ from each other in terms of development, access to various types of goods and the importance attached to culture and tradition.[15] Factors affecting the increase in the number of divorces include: increased affluence, women's financial independence and emancipation, greater moral freedom, individualism, the decreasing importance (authority) of religion in social life, cultural changes resulting

Yearbook of Poland. Warszawa 2021, p. 230. Again in 2021, the number of divorces went up to more than 60 thousand.

[9] R. Boguszewski: "Raport — Stosunek Polaków do rozwodów…," p. 1.

[10] See ibidem, *passim*.

[11] See research made by V. Hiller, M. Recoules: "Changes in divorce patterns: Culture and the law." *International Review of Law and Economics* 34 (2013), pp. 77—87, who states that "[e]conomic shocks can destabilise the low-divorce equilibrium: through cultural evolutions, divorce rates increase and divorce law may be modified."

[12] See W. Kulbat: "Społeczno-kulturowe aspekty rozwodów." *Łódzkie Studia Teologiczne* 13 (2004), pp. 127—135.

[13] See S. Cretney: "Breaking the shackles of culture and religion in the field of divorce." In: *Common Core and Better Law in European Family Law*. Ed. K. Boele-Woelki. Utrecht 2005, p. 14, who in context of the project of European Family law states that " 'shackles' restricting freedom in relation to divorce law and its reform are no longer primarily those of religion and culture; they are those of the psychology of individuals and of groups"; W. Kulbat: "Społeczno-kulturowe aspekty rozwodów…," p. 131; also two reports of CBOS developed by R. Boguszewski: "Religijność Polaków i ocena sytuacji Kościoła Katolickiego [Religiousness of Poles and assessment of the situation of the Catholic Church]." *Komunikat z badań* 147 (2018), pp. 2—5 and "Rozwody w osobistych doświadczeniach Polaków [Divorce in the personal experience of Poles]." *Komunikat z badań* 15 (2019), pp. 3, 5.

[14] M. Roth: "Future divorce law. Two types of divorce." In: *Common Core and Better Law in European Family Law*. Ed. K. Boele-Woelki. Utrecht 2005, pp. 53—54, 56—57 shows briefly the divorce law in European national legal orders from comparative perspective in the context of The principles of European family law (see footnote 3).

[15] S. Zheng, Y. Duan, M. R. Ward: "The effect of broadband internet on divorce in China." *Technological Forecasting and Social Change* (2019), vol. 139, pp. 99—114; J. Zhang, M. Cheng, X. Wei, X. Gong: "Does Mobile Phone Penetration Affect Divorce Rate? Evidence from China." *Sustainability* 10 (2018), 3701, https://www.mdpi.com/2071-1050/10/10/3701 doi:10.3390/su10103701 [accessed 22.03.2023].

in greater acceptance of non-formalised relationships and divorce (reflected in various statistics), and population migration. According to a 2019 CBOS report entitled *Poles' attitudes to divorce*, divorce rates in Poland are mostly influenced by worldview, religiosity as measured by participation in religious practices, and political views. The unconditional supporters of divorce include: nearly three-fifths of those who do not practise religion, nearly half of those who practise it several times a year and almost every second respondent declaring left-wing political views. Opposition, on the other hand, is far more often associated with right-wing political orientation and more frequent participation in religious practices.[16]

In this context, a question arises whether legal regulations may facilitate dissolving marriages through divorce[17] by taking into account extra-legal issues (values) stemming from cultural contexts, social or economic conditions, and other factors. General clauses are a kind of gateway through which these elements may enter the law. In Polish law, in the case of pronouncing a divorce, the principles of social coexistence, which are included in Articles 56 § 2 and § 3 of the Polish Family and Guardianship Code (FGC), are relevant.[18] Such a clause was applied in the two

[16] R. Boguszewski: "Raport — Stosunek Polaków do rozwodów…," p. 3.

[17] See the details of the research provided by L. González, T. K. Viitanen: "The effect of divorce laws on divorce rates in Europe." *European Economic Review* 53/2 (2009), pp. 127—138, who analysed the effect on divorce rates of the legal reforms leading to "easier divorce" and estimated that the introduction of no-fault, unilateral divorce increased the divorce rate. However, see C. Coelho, N. Garoupa: "Do Divorce Law Reforms Matter for Divorce Rates? Evidence from Portugal." *Journal of Empirical Legal Studies* 3/3 (2006), pp. 525—542, who came to different conclusions. They find that the introduction of a modern divorce law in the 1970s had a significant effect on the divorce rate, but the changes of the 1990s that effectively implemented a generalised no-fault regime had no statistically significant impact. Their observations suggest that the reforms in the 1990s were likely the response of the legislature to growing divorce rates rather than the cause. Similar results observes K. Mammen: "Effects of Divorce Risk on Women's Labour Supply and Human Capital Investment." *Psychology* 06/11 (2015), pp. 1385—1393, who states that changes in the law in the USA were not a major driver of the divorce rates; see also J. Wolfers: "Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results." *American Economic Review* 96/5 (2006), pp. 1802—1820, who concludes that changes in family law in this direction explain very little of the rise in divorce over the past half-century; and M. Korhonen, M. Puhakka: "The Behaviour of Divorce Rates: A Smooth Transition Regression Approach." *Journal of Time Series Econometrics* 13/1 (2021), pp. 1—19, https://doi.org/10.1515/jtse-2019-0018 [accessed 22.03.2023].

[18] Ustawa z dnia 25 lutego 1964 r. — Kodeks rodzinny i opiekuńczy [The Polish Family and Guardianship Code of 25 February 1964]. *Dziennik Ustaw* (Dz.U.) No 9, item 59, in force from 1 January 1965 (hereinafter: FGC), uniform text, *Dziennik Ustaw* (Dz.U.) 2020 item 1359 as amended.

last paragraphs of Article 56 of the FGC. In this article, I will deliberate on whether and to what extent the general clause applied to take into account non-legal issues affects adjudicating a divorce (namely whether it hinders or facilitates dissolving a marriage by divorce as long as other premises are met). In other words, my study contemplates whether a more liberal approach to marriage in society has been reflected in the methodology of Polish courts interpreting and applying the law and the application of Articles 56 § 2 and § 3 of the FGC since its coming into force on 1 January 1965. The divorce law has survived to this moment in its initial wording, though there have been three attempts already to amend it. The purpose of the attempted amendments was to radically simplify the marriage dissolution procedure. However, none of them were adopted by the Sejm.[19] It should also be added that in the 1960s, when the FGC was adopted, a conviction prevailed that W. Wolfram Müller-Freienfels expressed clearly in words: "[f]amily law concepts are especially open to influence by moral, religious, political and psychological factors; family law tends to become introverted because historical, racial, social and religious considerations differ according to country and produce different family law systems."[20] Three decades later, this view was also referred to by the EU institutions in the context of the harmonisation of family law.[21]

[19] The first attempt to amend Article 56 of the FGC was the parliamentary draft of 16 February of the Act on Amending the Family and Guardianship Code and the Code of Civil Procedure of 28 September 1994, Druk Sejmowy II kadencji No 800, stenographic report from the 43rd Session of the Sejm of the Republic of Poland, Warsaw 1995; discussed critically, among others by E. Holewińska-Łapińska: "Uwagi o poselskim projekcie nowelizacji prawa dotyczące rozwodów." *Przegląd Sądowy* 5 (1996), pp. 17—28; W. Stojanowska: "Poselski projekt prawa rozwodowego a zasada trwałości małżeństwa i rodziny." *Jurysta* 12 (1995), pp. 13—15. The second attempt was the parliamentary draft of the Act on Amending the Family and Guardianship Code and the Law on Civil Status Records, filed on 22 June 2012 to the Sejm of the 7th term (no Sejm print number was assigned and the bill was withdrawn on 18 June 2013); critical of this project were J. Haberko: "Rozwiązanie małżeństwa w drodze 'umowy'? Uwagi na tle projektu zmian Kodeksu rodzinnego i opiekuńczego oraz z ustawy — Prawo o aktach stanu cywilnego." *Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu* 2 (2013), pp. 11—24. The third attempt was the parliamentary draft Act on Amendments to the Family and Guardianship Code, submitted on 12 June 2013 to the Sejm of the 7th Term (no Sejm print number assigned and the draft was withdrawn on 10 April 2014).

[20] W. Müller-Freienfels: "The Unification of Family Law." *The American Journal of Comparative Law* 16 (1968), p. 175.

[21] At the beginning of the 21st century, the European Council stated that family law (as with the marriage law and the law of succession) is "very heavily influenced by the culture and tradition of national (or even religious) legal systems, which could create a number of difficulties in the context of harmonisation." Draft Council report on the need to approximate Member States' legislation in civil matters of 16 November 2001, 13017/01 JUSTCIV 129, p. 3.

Firstly, the divorce law may be liberalised by legislative change (where this is the legislator's clear intention, which is usually politically conditioned[22]). The amendment of the law going in this direction may reflect various types of social changes, namely it may result from these changes or may initiate them. The Polish legislator has not, so far, expressed any such intention to liberalise the law since the date of the Polish Family and Guardianship Code entering into force.[23] Secondly, liberalisation can be achieved by adopting a methodology of interpretation and application of the law in force that serves this purpose. Liberalisation through the interpretation of the law is possible in particular thanks to general clauses. The interpretation of provisions containing general clauses which may change over time, reflecting various types of changes occurring in the society in the country. The second of these issues is the subject of the article and is approached from a Polish perspective.

2. General clauses as a tool that makes the law flexible

General clauses have been the subject of numerous papers from the fields of the theory and philosophy of law, as well as in dogmatic sciences (both in the Polish[24] and foreign doctrines[25]). The Polish doctrine does not offer any consistency as far as the methods of applying general clauses are concerned, nor the type of source pointed by reference from general clauses. Defining a "general clause" as a term and providing its scope is not a simple task either, given the existing discrepancies in the doctrine in this respect. In effect, it is quite questionable whether any uniform, generally adopted definition of general clause exists at all.[26] In any case,

[22] See M. Antokolskaia: "Family law and national culture — Arguing against the cultural constraints argument." *Utrecht Law Review* 4/2 (2008), pp. 25—34, who concludes that "[p]ertinent national family laws are determined by political, rather than cultural factors, and these are fluid."

[23] See footnote 19.

[24] See footnote 12; I also discuss this issue in the monograph, E. Rott-Pietrzyk: *Klauzula generalna rozsądku w prawie prywatnym* [General clause of reasonableness in private law]. Warszawa 2007, pp. 277 ff.

[25] See e.g. S. Grundmann: "General standards and principles in European contract law: a survey" and H. Beale: "General clauses and specific rules in the principles of European contract law: the 'Good Faith' clause." In: *General clauses and standards in European contract law: Comparative law, EC law and contract law codification*. Eds. S. Grundmann, G. Mazeaud. The Hague 2005, pp. 205—218.

[26] See in particular A. Doliwa: *Funkcje zasad współżycia społecznego w prawie cywilnym*. Warszawa 2021, Chapter 2 §1. L. Leszczyński: "Pojęcie klauzuli generalnej."

this article has a somewhat different subject. Here, I assume a slightly simplified approach whereby general clauses are indeterminate phrases found in legal texts. One approach in the doctrine, attempting to explain how general clauses understood in this way operate, stipulates that they express certain evaluations functioning in a certain social group, to which a certain provision refers, by ordering that these clauses are taken into account when determining the facts regulated by the norm in question.[27] This involves moral judgements or other measures, for instance economic and cultural ones. I am closer to a different way of looking at general clauses, whereby legal provisions containing general clauses do not meet the characteristics of a reference. This is because they constitute orders to evaluate independently *in concreto* the actual status, directed to the bodies exercising the law. In other words, these regulations include orders to formulate assessments of the cases at hand and determine the legal effects in line with these assessments, which are reflected in the issued resolution (judgment, decision).[28]

The principles of social coexistence constitute one of many general clauses and are mentioned in many provisions of Polish private law, performing various functions.[29] They appear outside the family law provisions (e.g. regarding marriage) and their application is much wider than simply family law, though the mechanism of applying the provisions containing general clauses is identical. It is worth quoting Władysław Wolter, who stated that the legislator, through the introduction of a general clause ("an unclear statement"), "does not (sometimes cannot) deliberately want to specify the meaning in advance, but only designates a more or less more or less precisely defined 'field' of meaning that is to be filled in only by judicial practice with its individual assessment."[30]

Annales Universitatis Mariae Curie-Skłodowska 1991, no. XXXVIII, pp. 157 ff.; J. Nowacki: *O przepisach zawierających klauzule generalne. Studia z teorii prawa*. Kraków 2003; K. Wójcik: "Klauzule generalne a pojęcia prawne i prawnicze (zasady prawa i społeczne niebezpieczeństwo czynu)." *Studia Prawno-Ekonomiczne* XLV (1990), p. 63; also K. Wójcik: "Teoretyczna konstrukcja klauzuli generalnej." *Studia Prawno-Ekonomiczne* XLIV (1990), pp. 48, 63.

[27] Z. Radwański: *Prawo cywilne — część ogólna*. Warszawa 2003, p. 51.

[28] J. Nowacki: *O przepisach…*, p. 141. Similarly, M. Pawełczyk: "Uwagi o odsyłającym charakterze klauzul generalnych." *Studia Iuridica Silesiana* 9 (1984), pp. 94, 95. See also T. Gizbert-Studnicki: "Zasady i reguły prawne." *Państwo i Prawo* 3 (1988), pp. 21, 25. F. Studnicki: "Znajomość i nieznajomość prawa." *Państwo i Prawo* 4 (1962), p. 593.

[29] More on this subject in my article E. Rott-Pietrzyk: *Klauzula generalna rozsądku…*, pp. 379 ff., with regard to the general clause of reasonableness and principles of social coexistence.

[30] W. Wolter: "Uwagi o znamionach wymagających ilościowej oceny." *Państwo i Prawo* 6 (1976), pp. 25 ff.

There can be little doubt that the law would be unable to survive without an instrument like general clauses, as they belong to a wider category of "indeterminate phrases" (Polish *zwroty niedookreślone*). General clauses allow the law to be more flexible, which is particularly important when applying regulations to non-typical situations, in particular taking into account special circumstances, and primarily taking into account the criteria of reasonableness and equity. These criteria may be perceived differently depending on the external context, for instance cultural, social, economic and political changes. The execution of general clauses may also be described in the following words of Descartes: "[…] I would have seen myself as sinning against good sense if, having once approved of something, I should have found myself obliged to take it to be good later on, when it might have ceased to be so, or I might have ceased to consider it so."[31] An extremely important function of general clauses is, therefore, to correct solutions dictated by the law that are too rigid in some cases (*ius strictum — ius aequum*) and to be able to respond to changing circumstances (external context).[32] This phenomenon was accurately reflected, with respect to equity (*aequitas*, Greek *epieikeia*, επίκεια) by Aristotle in *The Nicomachean Ethics*.[33] He understood equity as a measurement of the fair application of a general legal norm in a single matter, according to the circumstances of the specific case.[34] His approach was in opposition to formalism and strict adherence to the law.

Significantly, general clauses, including the principles of social coexistence, are situational by nature. This means it is not possible to designate their content in a manner that is either general or constant in time. Their content is designated *in concreto*, pursuant to the factual status to which the provision containing a general clause is applied. Legislators do not dictate the criteria that a judge should consider while applying such provisions. The Dutch legislator proved to be an exception here, as it formulated guidance on completing a general clause with content in Article 3:12 of the NBW, stipulating that "when specifying requirements for reasonableness and equity, one must refer to generally accepted principles of law, current legal beliefs in the Netherlands and specific social and individual interests."[35] This provision indicates three criteria

[31] R. Descartes: *A Discourse on the Method*. Trans. I. Maclean. Oxford 2006, p. 22; see also Polish version *Rozprawa o metodzie właściwego kierowania rozumem i poszukiwaniu prawdy w naukach*. Trans. T. Boy-Żeleński. Kraków 2004, p. 21.

[32] See J. Nowacki: *O przepisach…*, pp. 135, 136 and the authors cited there.

[33] Aristotle: *Etyka nikomachejska*. Trans. D. Gromska. Warszawa 1956, vol. 5.

[34] Ibidem, 1137 b 10—30.

[35] See Article 1374 paragraph 3 and Article 1375 *et seq.* of the Dutch Civil Code of 1838.

of specifying what is reasonable and fair (equitable). Firstly, generally accepted principles of law should be taken into account, understood as non-codified rules that may be derived from the law as a whole, and from the axiology on which the whole legal system is based. These principles should at the same time enjoy general social recognition. In other words, they should be generally accepted by society. Secondly, current legal beliefs should be taken into account. This directive includes doctrinal beliefs, jurisdictional opinion and legal beliefs of certain groups of people or social circles that may be of significance in the case at hand. Thirdly, the adjudicating party should take into account specified social and individual interests to which the reviewed case pertains. The criteria formulated normatively in the Netherlands can be used more generally when interpreting provisions containing general clauses also in other legal systems. When interpreting the principles of social coexistence, courts in Poland are guided by similarly general criteria when justifying judgments made on the basis of provisions containing general clauses.

3. General clauses and the methodology of law interpretation and application — general remarks

The methodology of interpreting and applying the law concerning provisions that consist of a general clause is special. It is strongly linked to the discretionary power of the judge, who, in applying such provisions, has a greater degree of discretion.

These clauses are related to moral, ethical and rational behaviour. The morality associated with acting according to the law of nature, seen as equity (*aequitas*), morals (*mores*) and good manners (*boni mores*), already played an important role for the Romans, which can be compared to the function that general clauses perform in today's legal systems.[36] In contrast, rationality, practical reasoning and reason allowed for the establishment of basic fundamental values. The search for this was marked by programmatic objectivity. Basic and fundamental values were found with reference to opinions, views and beliefs generally accepted by all

[36] More in P. Stein: "Equitable Principles in Roman Law." In: *Equity in the World's Legal Systems. A Comparative Study*. Ed. R. A. Newman. Brussels 1973, pp. 75 ff. See also W. Litewski: *Jurysprudencja rzymska*. Kraków 2000, pp. 127, 128.

reasonable (rational) people, or by particular social groups.[37] In adjudication, it has often been argued that choosing a different outcome *in concreto* would lead to absurd results that go against common sense.[38] Already the ancient Greeks said that, "one should not consider important the opinions of people who lack common sense."[39] Analysing the good faith clause in Roman law, Wojciech Dajczak, sees the benefit in the continuing consideration of "objective reasonableness" to determine the content of *bona fides*.[40] Good faith, or any different-sounding equitable idea supplied with objective reasonableness, if it is equated with reason, makes it possible to avoid "legal trickery," "legal ingenuity," and the arbitrariness of judgements.[41] The circumstance that it is not easy (and some even believe that it is not possible) to establish what is objective, should not prevent us from making attempts to this effect. This is because any "decision-making loophole," if stripped of what is objective, due to various arguments, is not conducive to the certainty of law. A number of benefits are associated with the use of objective criteria programmatically provided with impartiality. The overriding benefit is connected with the assumption and postulate (as practice may differ from theory here) that those applying the law should not make arbitrary judgements (which they are at least programmatically forced to do by objective criteria), but should instead take into account the interpretative paradigm adopted in a certain legal system. Postulates formulated in this way lead directly to the status of legal certainty. This interpretative paradigm consists, among other things, of values and moral norms generally accepted in society as a whole, or in particular social groups (e.g. entrepreneurs or consumers), which may be expressed in the legal system (in particular, in the Constitution) and which follow from the legal system or remain outside

[37] W. Litewski: *Jurysprudencja rzymska*..., p. 124; in this context, See the judgment of the Supreme Court of 1 June 2000, I CKN 569/98, Legalis no 210849, in which the Supreme Court referred to the criterion of a "healthy part of the population."

[38] Ibidem.

[39] Focjusz: *Bibioteka. Tom II "Kodeksy" 151—222*, 113 a., covering the J. Stobäus's excerpts of sentences, online edition, http://biblioteka.kijowski.pl/sredniowiecze/focjusz%20-%20kodeksy%20-2.pdf [accessed 10.03.2023].

[40] W. Dajczak: "Problem 'ponadczasowości' zasad prawa rzymskiego. Uwagi w dyskusji o 'nowej europejskiej kulturze prawnej'". *Uniwersytet Kardynała Stefana Wyszyńskiego, Zeszyty Prawnicze* 5/2 (2005), p. 21; W. Dajczak: *Dobra wiara jako symbol europejskiej tożsamości prawa*. Poznań 2006, p. 23.

[41] See R. N. Snyder: *Natural Law and Equity*..., p. 43, who takes the view that it is not possible to make an equitable ruling without taking into account the element of reason. In his view, proper knowledge and an appropriate degree of reason are necessary to recognise and apply what is right. See also W. Litewski: *Jurysprudencja rzymska*..., pp. 127, 128.

the system. Therefore, it is not a question of individual judgements made by individuals (including judges), but of judgements linked to the system of values generally accepted in a particular society or environment.[42] As Józef Nowacki has pointed out many times,[43] it is true that there is no reliable method that would allow a judge to determine what the public, or particular groups of the public, really believe, and no way of verifying the judge's findings in this regard. It must be agreed that the judge will determine these beliefs to the best of their ability and knowledge. By contrast, a judge cannot programmatically afford the comfort of acting solely according to their own subjective feelings. Even if they do so, and if their feelings lead to the values covered by the interpretive paradigm, this is irrelevant from a practical point of view. If, on the other hand, the judge's beliefs fall outside of this paradigm, they should, by definition, be verified in an instance review. In this case, the assessment that the judge's subjectivism is the reason for an arbitrary and erroneous decision will take the form of an allegation that the judge has violated the free assessment of evidence, or has misinterpreted a rule. What use the adjudicator will make of the discretion granted to them in terms of values will be verified through an instance supervision. Therefore, this loophole is a "controlled" one. The independence of the adjudicating judge cannot be, by any means, treated as a tool for transferring subjective assessments to the law, while omitting existing standards in this regard.[44]

It is worth noting that within each legal culture there are different — often incompatible — rules of interpretation, as well as different sets of values and different beliefs about the principles of social coexistence. In this sense, the context of legal texts within one legal system and one legal culture is heterogeneous. The question therefore arises as to which values and beliefs and which people the legislator takes into account when formulating legal acts, if different people accept different beliefs and values. This question must, of course, also be posed with regard to the bodies applying the law in the administration of individual justice. Tomasz Gizbert-Studnicki finds that discrepancies regarding beliefs and values of recipients of a legal text have limits. Despite these discrepancies, one can

[42] See Z. Ziembiński: "Teoria prawa a filozofia prawa i jurysprudencja ogólna." In: *Filozofia prawa a tworzenie i stosowanie prawa*. Ed. B. Czech. Katowice 1992, pp. 87—89.

[43] J. Nowacki: *O przepisach zawierających klauzule generalne. Studia z teorii prawa*. Kraków 2003, pp. 136 ff.

[44] See L. Leszczyński: "O aksjologii stosowania prawa." In: *Filozofia prawa a tworzenie i stosowanie prawa*. Ed. B. Czech. Katowice 1992, pp. 150, 151, according to whom the practical subjecting of these assessments to scrutiny in the course of instance supervision should sensitise the judge to the results of future scrutiny and the practice of justifying the decision as rational and only accurate.

assume the existence of an "interpretation paradigm"[45] that is different for various legal cultures, as well as being historically variable within one legal culture. In Poland, this paradigm changed at the beginning of the 1990s, while since 1 May 2005 our system has become a multi-centric one, which affects the interpretation of its regulations.[46] The interpretive paradigm consists of the commonly accepted and applied interpretive and inferential directives, as well as the commonly accepted values and beliefs on which the application of the interpretive directives is based. If an interpretation of a provision by a law practitioner violates the paradigm ("exceeds the tolerance of the paradigm") it will be considered contrary to reason and impermissible, which will have a certain effect according to accepted procedural norms.[47] Still, establishing the limits of paradigm tolerance is not simple in practice. When a court acts within the framework of a discretionary power expressed in general clauses, it is always assumed to be about an opinion that is common and universally accepted for a community. The objective, on the other hand, is "what is common to the majority of thinking beings and could be common to all,"[48] and "what irresistibly imposes itself on all."[49] In this context, it is worth remembering that the sense of the Greek word εύλογος, which translates as 'generally accepted' or 'worth adopting', has a quality character and is quite close to the term "reasonable."[50]

4. The principles of social coexistence in divorce law

The principles of social coexistence were introduced into Polish legislation in relation to the changes in political system in our country intro-

[45] See T. Gizbert-Studnicki: "Język prawny z perspektywy socjolingwistycznej." *Zeszyty Naukowe Uniwersytetu Jagielońskiego. Prace z Nauk Politycznych* 26 (1986), p. 89.

[46] See E. Łętowska: "'Multicentryczność' systemu prawa i wykładnia jej przyjazna." In: *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*. Eds. L. Ogiegło, W. Popiołek, M. Szpunar. Kraków 2005, pp. 1127 ff.

[47] See in particular Articles 368 and 3931 of the Polish Code of Civil Procedure.

[48] See H. Poincaré: *Wartość nauki*. Trans. L. Silberstein. Warszawa 1908, p. 6 (quoted after C. Perelman: *Imperium retoryki. Retoryka i argumentacja*. Trans. M. Chomicz. Warszawa 2004, p. 36).

[49] See C. Perelman: *Imperium retoryki*..., p. 36. According to the author, language and common sense define objective elements that are irresistibly imposed on all with the words "truth" and "fact."

[50] I refer to the linguistic analysis carried out in C. Perelman: *Imperium retoryki*..., p. 14.

duced after the Second World War.[51] An indication of upcoming changes in the state of general clauses in Polish law was the Decree of 18 July 1950 — the General Provisions of Civil Law (POPC). The principles of social coexistence appeared for the first time in Article 3 of the POPC,[52] then in Article 90 of the Constitution of the People's Republic of Poland from 1952, according to which citizens of the People's Republic are obliged to "respect the principles of social coexistence." The initial template for this clause originated from the "principles of socialist coexistence," which citizens of the Soviet Union were ordered to obey and respect under Article 130[53] of the Constitution of the USSR from 1936.[54] This clause was included in the Civil Code from 1964 and in the Family and Guardianship Code of 1964 and even after many amendments to these codes, the principles of social coexistence have not been removed from the private law codes, despite their Soviet origin. However, they have come to be considered a general clause, deprived of any ideology and equal to other equity clauses, such as the principle of good conduct. These days, they are no longer identified with their ideological roots from the 1950s and 1960s. An ideology-based perception of this general clause was manifested in the guidelines of the justice system and court practice regarding the applica-

[51] See T. Dybowski: "Zasady współżycia społecznego i społeczno-gospodarcze przeznaczenie prawa a prawo własności." *Nowe Prawo* 6 (1967), pp. 723 ff. S. Grzybowski, in: *System prawa cywilnego*. T. I. *Część ogólna*. Ed. Idem. Wrocław 1974, pp. 120—124 and literature quoted there; A. Wolter, J. Ignatowicz, K. Stefaniuk: *Prawo cywilne. Zarys części ogólnej*. Warszawa 1996, pp. 67 ff.; I. C. Kamiński: *Słuszność i prawo. Szkic porównawczy*. Kraków 2003, pp. 62 ff.; B. Janiszewska: "O potrzebie zmiany klauzuli zasad współżycia społecznego (głos w dyskusji)." *Przegląd Ustawodawstwa Gospodarczego* 4 (2003), p. 7 ff. D. Szmyt-Biniaś: "Klauzula zasad współżycia społecznego." *Gdańskie Studia Prawnicze* XIV (2005), p. 868; M. Pyziak-Szafnicka: "Prawo podmiotowe." *Studia Prawa Prywatnego* 1 (2006), p. 108 ff.

[52] See Articles 41 § 1, 47 § 1 and 82 of the General Provisions of Civil Law of 18 July 1950, *Dziennik Ustaw* (Dz. U.) No 34, item 311 as amended.

[53] See also Article 1 of the Civil Code of the Russian Federal Socialist Republic of Councils of 1922, as well as Article 5, sentence 2 of the Principles of Civil Legislation of the USSR and the Union Republics of 1961 and Article 5, sentence 2, of the Civil Code of the RSFRR of 1964, the wording of which was identical. According to the regulation therein, "In exercising their rights and duties, citizens and organisations are obliged to observe the laws, the principles of socialist coexistence and the moral principles of the society building communism." Polish translation by W. Kuryłowicz: *Zasady ustawodawstwa cywilnego ZSRR i Republik Związkowych. Kodeks cywilny Rosyjskiej Federacyjnej Socjalistycznej Republiki Radzieckiej*. Ossolineum 1977.

[54] See S. Grzybowski: "Struktura i treść przepisów prawa cywilnego odsyłających do zasad współżycia społecznego." *Studia Cywilistyczne* VI (1965), pp. 17, 42; J. Litwin: "Zasady współżycia społecznego w orzecznictwie Sądu Najwyższego." *NP* 1953, no. 12, p. 4; S. Szer: *Prawo cywilne. Część ogólna*. Warszawa 1955, pp. 26, 27; A. Wolter: *Prawo cywilne. Część ogólna*. Warszawa 1955, pp. 62, 63.

tion of Articles 56 and 58 of the Family and Guardianship Code (a resolution of the full quorum of the Supreme Court).[55] This is because the guidelines assume that the principles of social coexistence are "an expression of a particular stage of historical development and will undergo further changes and transformations as socialism progresses. The content of the principles of social coexistence in the People's Republic of Poland is defined by the idea of humanism, fundamental for building society through socialism, and the principles of mutual assistance and conscious social discipline serving its implementation."[56] It may seem quite surprising in this context that, even in the 20th century, courts refer to the standpoint of the Supreme Court included in these guidelines. However, after the social, economic, political and legislative changes in Poland after 1989, these references no longer have any ideological context,[57] while many opinions expressed by the Supreme Court in these guidelines are considered quite valid by courts.

Nowadays, it could be said that the principles of social coexistence should be understood as basic principles of ethical and honest conduct in a social, economic, and cultural context. These are the basic principles of equity, morality and fairness, setting the standards for ethical and honest behaviour in civil law relations.[58] According to the opinion prevailing in the doctrine, the principles of social coexistence can be described in the most concise manner as moral norms referring to relationships between people.[59] The doctrine also stresses that they should be interpreted in line with the principles of the rule of law and human freedoms respected by them, taking into account values constituting both heritage and a component of European culture.[60] With reference to Article 2 of the Constitution of the Republic of Poland, it is assumed that the application of the principles of social coexistence means referring to the idea of equity in law and to the values generally recognised in the culture of our society.[61]

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[55] Resolution of the full quorum of the Supreme Court of 18 March 1968, III CZP 70/66, OSNCP 1968 No 5, item 77.

[56] Ibidem.

[57] This is pointed out, among other things, by K. Gromek: "Rozwód *de lege lata* i *de lege ferenda*." *Monitor Prawniczy* 2 (2004), p. 66.

[58] See the statement of reasons of a judgment by the Court of Appeal in Szczecin of 25 April 2018, I ACa 1022/17, Legalis No 1856585.

[59] See M. Pyziak-Szafnicka: "Rozdział XI. Prawo podmiotowe." In: *Prawo cywilne — część ogólna. System Prawa Prywatnego*. Vol. 1. Ed. M. Safjan. Warszawa 2012, pp. 801—802 and the literature quoted therein.

[60] K. Gromek: "Rozwód *de lege lata*…," p. 66.

[61] Z. Radwański, M. Zieliński: "Rozdział VIII. Stosowanie i wykładnia prawa cywilnego." In: *Prawo cywilne — część ogólna. System Prawa Prywatnego*. Tom 1. Ed. M. Safjan. Warszawa 2012, p. 395.

As already mentioned, the essence and function of general clauses is the possibility to take into account different types of factual circumstances that cannot be assessed universally, identically or in isolation from the circumstances of a specific factual situation. The rationale is related to the need to take into account special situations that the legislator does not intend to normalise specifically, as it is not able to cover them all in advance in normative regulations. The role of the principles of social coexistence is to synchronise the rules of law with the precepts of morality and custom, to make the law more flexible and to prevent a state to which the maxim *summum ius — summa iniuria* applies.[62] On the basis of this maxim, it must be concluded that justice that is too formally administered often becomes injustice, which is precisely what the legislator intends to prevent with the general clause in Article 56 FGC. This regulation specifies positive and negative grounds for divorce.[63] This article uses the general clause of the principles of social coexistence in two ways. Firstly, it is relevant when assessing situations where, despite the complete and irretrievable breakdown of the marriage, and despite the absence of another negative reason for divorce mentioned in this provision (namely the welfare of minor children of both spouses),[64] the principles of social coexistence stipulate against adjudicating a divorce (§ 2 *in fine*). In light of this provision, despite the complete and permanent breakdown of the marriage, divorce is not permissible if its pronouncement would be contrary to the principles of social coexistence. This premise is absolute. The legislator has not laid down any exceptions that would allow a divorce to be adjudicated, despite the fact that it would be contrary to the principles of social coexistence.[65] In this case, this clause creates further negative grounds for divorce. When interpreting this provision, it is disputed in the doctrine whether the court assessing if a divorce is contrary to the principles of social coexistence should examine the reasons for the marriage breaking down. Two extreme positions and an intermediate one have emerged in this respect. Those in favour of the latter accept the examination of these grounds if the spouses request the court not to pronounce fault, or if

[62] See Article 4 of the resolution of the full quorum of the Civil Chamber of the Supreme Court of 18 March 1968, III CZP 70/66, OSNCP No 5/1968, item. 77.

[63] A. Olejniczak: *Materialnoprawne przesłanki udzielenia rozwodu*. Poznań 1980, pp. 14 ff.

[64] With regard to one of the negative premises — the welfare of the joint minor children, also in the context of the principles of social coexistence, see R. Tanajewska: "A ban on an ex-spouse's contact with a minor child in the presence of third parties. Considerations from the perspective of family case-law." *Studia Prawnicze Katolickiego Uniwersytetu Lubelskiego* 4 (2020), pp. 121 ff.

[65] See R. Dubowski: *Materialnoprawne przesłanki rozwodu — analiza krytyczna i postulaty de lege ferenda*. Warszawa 2017, p. 145.

the signs of the marriage breaking down are sufficient to prove that it is complete and permanent.[66] It should be noted that the wording of the provision does not prevent an interpretation to the effect that divorce is also contrary to the principles of social coexistence if the complete and permanent marriage breakdown was caused by such grounds, which also affect the moral assessment of the divorce itself.[67]

Secondly, this clause is relevant in assessing the legitimacy of one spouse's refusal to consent to divorce (principle of recrimination).[68] Pursuant to Article 56 § 3 of the FGC, the court examines whether the refusal in the given circumstances is a breach of the principles of social coexistence. Breaching this principle would lead to the spouse's refusal being dismissed, and in such circumstances the refusal does not prevent adjudicating a divorce. Therefore, a divorce will be granted if all the positive premises of divorce (provided for in Article 56 § 1 of the FGC[69]) are met and no negative premises (described in Article 56 § 2 *in fine* of the FGC) are found.

Due to the general clause being situational by nature, based on the regulations listed above it is not possible to state generally and universally what breaching the principles of social coexistence actually means. The answer to this question must be sought in the body of case law and in the accepted interpretation of the norms of Articles 56 § 2 and § 3 of the FGC, referring to the values represented by these clauses. The guidelines of the judiciary and judicial practice on the application of Articles 56 and 58 of the Family and Guardianship Code remain largely valid.[70] Polish courts continue to invoke them, ignoring the axiology underlying the socialist system.

Polish courts have often discussed the circumstances in which it is not possible to adjudicate a divorce due to a conflict with the principles of social coexistence (Article 56 § 2 *in fine* of the FGC). One of the general issues referred to by the Supreme Court in the 1968 guidelines (which

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[66] These opinions are presented by R. Dubowski, ibidem.

[67] A similar position is presented by A. Olejniczak: *Udzielenia rozwodu*..., pp. 84—86.

[68] More in: K. Kamińska: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), pp. 89—120.

[69] A permanent and complete marriage breakdown constitutes positive grounds for divorce.

[70] In the resolution of the full quorum of the Civil Law Chamber of 18 March 1968, III CZP 70/66, OSNCP 1968 No 5, item 77 — Wytyczne wymiaru sprawiedliwości i praktyki sądowej w zakresie stosowania przepisów art. 56 oraz 58 kodeksu rodzinnego i opiekuńczego — Justice and judicial practice guidelines for the application of Articles 56 and 58 of the Family and Guardianship Code (hereinafter: Guidelines of the Supreme Court of 1968).

still remains fundamentally valid) concerns the exclusion of the premise that the divorce is contrary to the principles of social coexistence. This is the case if the spouse who opposes the divorce is solely at fault, or if, in cases of joint fault, it cannot be assumed that the fault of the spouse seeking the divorce is significantly more severe.[71] In principle, therefore, it may be assumed that the principles of social coexistence are not violated if the divorce is requested by a spouse who is innocent, or whose fault is lesser, or whose fault is the same or only slightly greater.[72] Still, it must be stressed that the gravity of fault does not decide about the positive or negative application of Article 56 § 2 *in fine* of the FGC. The fault constitutes one of the criteria based which the court makes a comprehensive assessment of all the circumstances of the case.

Harm to a spouse caused by divorce is an issue that appears in many court judgements applying Article 56 § 2 *in fine* of the FGC. One of the latest, namely the judgement of the Court of Appeal in Poznan of 12 February 2020,[73] who assumed, in line with guidelines of the Supreme Court from 1968,[74] that this obstacle for adjudicating a divorce exists when these principles would be contrary to the resulting in **gross harm** to the spouse protesting against the divorce, or if serious social and educational considerations exist preventing the divorce, resulting from bad treatment and a malicious attitude of the spouse or children, or due to other demonstrations of disregard for the institution of marriage and the family or for family responsibilities.[75] It has been accepted in the doctrine that considerations of a socio-educational nature may militate against the adjudication of divorce if such a judgement would sanction a factual state created by ill-treatment and malice towards the spouse or children, or other manifestations of disregard for the institution of marriage and the family or family responsibilities.[76]

In the same vein — also on the basis of the previous legal status[77] — in 1947, the Supreme Court adjudicated that the valid principles of ethics and Polish law defending the principles and the welfare of the family, do not allow for a breach of legal obligations to be, if not directly supported,

[71] Guidelines of the Supreme Court of 1968, point II.

[72] See R. Dubowski: *Materialnoprawne przesłanki rozwodu…*, p. 147.

[73] See the judgment of the Supreme Court in Poznan of 12 February 2020, I ACa 230/19, Legalis No 2467650.

[74] Guidelines of the Supreme Court of 1968.

[75] Ibidem.

[76] Similarly, K. Flaga-Gieruszyńska, A. Zieliński: *Rozwód. Materialnoprawne podstawy rozwodu oraz postępowanie odrębne w sprawie o rozwód. Komentarz praktyczny wraz z wzorami pism procesowych*. Warszawa 2021, 3 Edition, Legalis.

[77] See Article 24 Marriage Law Decree of 25 September 1945, *Dziennik Ustaw* (Dz.U.) No 48, item 270.

then at least sanctioned, by adjudicating a divorce to the detriment of the other spouse and the family.[78] Even in the historical context when this judgement was made, and still in today's context, it is somewhat surprising that this judgement contains a statement about, "combatting the evil of marriages in which matrimonial life has ceased by other means, by making citizens aware of their State and social obligations, and of the nature, aims and social significance of the institution of marriage."[79] The court explained that the failure to take into account a refusal to consent to divorce of an innocent spouse (and thus a breach of the principles of social coexistence) could be said to result in the continuation of a "dead" marriage, which is regarded as socially undesirable.[80]

According to Supreme Court guidelines from 1968, gross harm to a spouse should be assessed on the basis of the principles of humanity, taking due account of criteria such as the duration of the marriage, the distribution of its burdens, the situation of both spouses and, in particular, their age, state of health, ability to meet their personal needs and other circumstances that may characterise the material and moral living conditions of both spouses.[81] In the context of Article 56 § 2 of the FGC, the courts have repeatedly referred to the ill health of an injured spouse. It has been accepted in the jurisprudence that a negative prerequisite for divorce can occur when one of the spouses is terminally ill, requires material and moral care from the other, and where divorce would constitute gross harm to the ill spouse.[82]

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[78] See the statement of reasons for the judgment of the Supreme Court of 15 February 1947, C III 913/46, OSN 1948, No 2, item 37, Legalis No 1326562.

[79] Ibidem.

[80] See the judgment of the Court of Appeal in Katowice of 22 August 2018, V ACa 589/17, unpublished.

[81] In guidelines of the Supreme Court of 1968, the court shared the view expressed in case law against the background of the previous state of the law, whereby the illness of one spouse not only does not and should not cause a permanent breakdown of conjugal life, but places an obligation on the other spouse to use all means to restore the sick spouse's health and ability to fulfil conjugal duties. Conduct contrary to these principles is contrary to the generally accepted principles of morality, see ruling of the Supreme Court of 1 September 1948, ToC 184/48, OSN 1949, Nos 2—3, item 38. Prior to the entry into force of the FGC, the position that it would be contrary to the principles of morality to consider the incurable illness of a spouse as a reason for the dissolution of conjugal life, when their condition requires material and moral assistance, was also part of this note. However, this principle may not be applied in the case of mental illness of the spouse (see ruling of the Supreme Court of 2 July 1962, 1 CR 491/61, OSPiKA 1963, No 3, item 68). The exclusion of this rule in cases of mental illness has been criticised by R. Dubowski: *Materialnoprawne przesłanki rozwodu*..., pp. 148, 149.

[82] See the judgment of the Supreme Court of 25 May 1998, I CKN 704/97, Legalis No 336437, in which the court accepted that negative grounds for divorce may arise

The jurisprudence has also considered the situation where the spouse seeking divorce grossly neglects their parental duties, shifting the burden to the other spouse or to other people or social welfare authorities. In such a case, the request for divorce may be contrary to the principles of social coexistence, if even granting the divorce would not further deteriorate the situation of the common minor children of the spouses.[83]

On the other hand, the criterion of age or length of time together were generally not taken into account as circumstances supporting the contradiction of a divorce decree with the principles of social coexistence. The Poznan Court of Appeal held that it is not contrary to the principles of social coexistence to pronounce a divorce on the grounds that the parties are elderly and have been married for a long time (20 years). By requesting a divorce, the husband is not harming his wife, but merely exercising his right. Even if the wife declares her feelings for the claimant, stating that she forgives him and wants to continue to live with him, cannot constitute an argument for dismissing the action on the grounds of the general clause.[84]

The jurisprudence has tended to take the view that not every harm to the spouse is relevant in the context of the principles of social coexistence, but only "gross harm" that would be suffered by the spouse as a result of the dissolution of the marriage.[85] This concept has been further defined in the doctrine, by stating that a spouse may be said to be grossly prejudiced in particular if, as a result of their affliction, they are wholly or partly incapable of gainful employment and living independently. It should be assumed that the negative prerequisite of Article 56 § 2 in fine of the FGC does not, in principle, apply if the spouse who does not consent to divorce is solely at fault, or if, in the event of joint fault, it cannot be assumed that the fault of the spouse requesting divorce is significantly greater.[86] A distinction should be made between situations where, on the one hand, an incurably ill spouse who is wholly or mainly guilty of divorce is opposed to divorce, and, on the other hand, an incurably ill spouse who is innocent or only slightly guilty of divorce is opposed to divorce. It is worth noting, however, that the dismissal of the action (axiologically justified through the general clause) may have the opposite effect. The spouse filing for divorce, instead of showing compassion and

where one of the spouses is terminally ill, in need of material and moral support from their spouse, and where divorce would cause them gross harm.

[83] Guidelines of the Supreme Court of 1968.

[84] Judgment of the Court of Appeal in Poznan of 5 October 2004, I ACa 683/04, *Wokanda* 2005, No 12, p. 43.

[85] Guidelines of the Supreme Court of 1968, point II.

[86] Ibidem.

providing assistance to the ill spouse, will resent them and show hostility towards them for standing in the way of divorce.[87] In this type of situation it is difficult to find the best solution.

The courts have also expressed their opinion on several occasions with regard to the interpretation of the principles of social coexistence relevant to the refusal of one spouse to grant a divorce on the grounds of Article 56 § 3 of the FGC (recrimination principle).[88] The effectiveness of a refusal to grant a divorce must be assessed in practice, taking into account in particular the grounds of the divorce and the circumstances and events arising after the marriage ends, in particular relationships outside the marriage and the children born of them, as well as the social desirability of legalising those unions.[89]

In the jurisprudence of the Supreme Court, the view has become established that a refusal to consent to a divorce of an innocent spouse is a right and the exercise of this right cannot, in principle, be qualified as being contrary to the principles of social coexistence. Here, the jurisprudence adopts the construction of a presumption that anyone who exercises this right does so in a manner compatible with the principles of social coexistence (a presumption of compliance with the principles of social coexistence). Only the existence of special circumstances may speak in favour of rebutting that presumption and qualifying a certain behaviour as an abuse of the right, not deserving support from the point of view of the principles of social coexistence.[90] In this context, it has been held within the case law that a spouse who is solely responsible for the permanent and absolute breakdown of the parties' relationship and seeks divorce is obliged to prove facts that would provide sufficient grounds to assess that the lack of consent to the dissolution of marriage is morally reprehensible for reasons not worthy of social approval on the basis of an objective assessment made from the outside. At the same time, the fact that the innocent spouse exercises their statutory right not to

[87] This is rightly pointed out by R. Dubowski: *Materialnoprawne przesłanki rozwodu*..., p. 151.

[88] The principle of recrimination is analysed in more detail by K. Kamińska: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), pp. 89 ff.

[89] See the judgment of the Supreme Court of 10 May 2000, III CKN 1032/99, OSNC No 7—8/2001, item 102.

[90] See the judgment of the Supreme Court of 26 October 2000, II CKN 956/99, MoP 2001, No 6, p. 352. Similarly the judgment of the Supreme Court of 17 May 1967, III CR 54/67, OSP 1968, No 3, item 57; the judgment of 7 December 1965, III CR 278/65, OSNC 1966, No 7—8, item 130; the judgment of the Supreme Court of 26 October 2000, II CKN 956/99, *Monitor Prawniczy* (2001), No 6, p. 352; the judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551.

consent to the divorce of the marriage requested by the spouse who is solely responsible for the breakdown of the marriage cannot be regarded in itself as contrary to the principles of social coexistence.[91] However, the Supreme Court has held that a conflict of interest does not, as a general rule, arise where the spouse opposing the divorce is solely at fault for the breakdown of the marriage or where, in the case of joint fault, there are no grounds to assume that the spouse who seeks divorce is significantly more at fault.[92]

Initially (immediately after the FGC entered into force), the jurisprudence exposed subjective elements from the perspective of moral principles when assessing a refusal to consent to divorce on the grounds of it being contrary to the principles of social coexistence. Within this line of jurisprudence, in principle, the only necessary condition for declaring a refusal as contrary to principles of social coexistence was a negative moral assessment of the motives driving the spouse refusing to consent to the divorce. This assessment was justified, for example, by not granting divorce, which takes the form of harassment, revenge or an attempt by the spouse to obtain some material benefit in exchange for the consent.[93] Significant weight was then given to ethical issues, including assessments of whether or not the motives for refusal merited moral condemnation. This line of interpretation significantly limited the court's ability to consider a refusal to consent to a divorce as contrary to the principles of social coexistence.[94]

Subsequently, however, the jurisprudence began to move clearly towards the concept of an objective assessment of the behaviour of the spouse entitled to refuse divorce.[95] Nowadays, according to the predomi-

[91] The judgment of the Court of Appeal in Krakow of 10 May 2016, I ACa 85/16, Legalis No 1470082.

[92] Resolution of the full quorum of the Civil Chamber of the Supreme Court of 1 March 1968, III CZP 70/66, OSN 1968, No 5, item 77.

[93] See judgments of the Supreme Court of 18 August 1965, III CR 147/65, OSPiKA No 4/1966, item 93 and of 7 December 1965, III CR 278/65, OSNCP No 7—8/1966, item. 130); see also, most recently, the judgment of the Supreme Court in Katowice of 8 April 2019, I ACa 241/18, Legalis No 2259616, which stated that it is impossible to see harassment in the refusal to consent to divorce on the part of a wife betrayed and abandoned by her husband, who still subjectively believes that the parties' relationship can be reactivated. See also S. Kalus, M. Habdas: *Family and Succession Law in Poland*. Alphen aan den Rijn 2016, p. 84, who also note that spouses who refuse to consent to divorce may do so out of revenge, harassment or personal gain, in the absence of rational and morally acceptable reasons for the refusal.

[94] K. Kamińska: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), p. 100.

[95] See the judgment of the Supreme Court of 17 May 1967, III CR 54/67, OSPiKA No 3/1968, item 57, in which the court accepted that the assessment of the innocent

nant opinion of the jurisprudence, a negative moral qualification of the spouse does not necessarily have to be linked to considering a refusal to divorce as contrary to the rules of social coexistence. According to general arguments, a refusal to consent to a divorce may be dismissed as being contrary to the principles of social coexistence if, under certain circumstances, there are no grounds to assume that a divorce would produce undesirable socio-educational consequences. The most important argument is that the purpose of divorce is to eliminate the harm caused by maintaining a formal marriage when the marriage has broken down. The assessment of the effectiveness of the refusal to consent to divorce is made with reference to the causes of the marriage breakdown between the spouses and taking into account the situation that arose after that breakdown. The jurisprudence draws attention to the existence of extramarital relationships and the children born in them, as well as to the social desirability of legalising these relationships.[96] In this context, the Supreme Court pronounced a judgement that only specific circumstances justifying the advisability of legalising an informal relationship may justify the assessment that the refusal by the innocent spouse to grant the divorce is contrary to the principles of social coexistence.[97]

Thus, in practice, subjective elements and strictly ethical criteria, such as feelings of harm demonstrated by the non-consenting spouse and children, have been given lesser importance. Instead, objective elements have been emphasised, above all the fact that the relationship between the parties has completely ceased, for instance, that the other spouse has left home, is in an informal relationship with another person and has broken off contact with the children, and that this state of affairs is permanent, so that there is no prospect of a return to cohabitation. The courts accept that, although the abandonment of a spouse is not accepted, it is — from a social point of view — difficult to approve the long-term existence of dead marital relationships that do not seem possible to be revived, espe-

spouse's refusal to consent to divorce, as referred to in Article 56 § 3 FGC, must be carried out first and foremost not in terms of the innocent spouse's subjective feeling, but to clarify whether there are objective grounds justifying this refusal in light of the principles of social coexistence. Crucial to this line of case law was the resolution of the full quorum of the Civil Chamber of the Supreme Court of 18 March 1968, III CZP 70/66, OSNCP No 5/1968, item 77 (namely the Guidelines of the Supreme Court of 1968).

[96] See the judgment of the Supreme Court of 27 October 1999, III CKN 412/98, unpublished.; the judgment of the Supreme Court of 10 May 2000, III CKN 1032/99, OSN 2001, nos 7—8, item. 102; the judgment of the Supreme Court of 28 February 2002, III CKN 545/00, Legalis No 59257.

[97] The judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551.

cially when one spouse has established a new informal relationship. The prevailing view is that the essence of the rules of social coexistence is that they are objective rules of conduct for assessing what deserves or does not deserve approval "from the point of view of the views of society, and not of the person concerned."[98] The jurisprudence has endorsed the view that the assessment of the innocent spouse's refusal to consent to grant a divorce should refer to evaluative norms of an objective nature, namely to "those observed by the morally sound part of society."[99] At present, the courts assume that divorce is aimed at eliminating the harm that, from a social point of view, would be caused by maintaining formal marital ties when the marriage has already broken down irretrievably. In one of its judgements, the Supreme Court clearly expressed its disapproval of situations in which the spouse's refusal to consent to divorce stems from their reluctance to legalise the other spouse's *de facto* relationship with another person, without rational reasons justifying the need to protect the interest of the non-consenting spouse. The Supreme Court has taken the view that, when considering the refusal to consent to divorce, it is necessary to take into account the situation created from the point of view of the "social harm" caused by maintaining formal marriages that have no chance of actually functioning, while at the same time there are extramarital relationships that deserve to be legalised.[100]

In this context, it is accepted in the case law that the grounds for refusing a divorce at the request of a spouse who is solely responsible for the breakdown of the family structure are socio-educational reasons that do not allow divorce to be pronounced when it could provide an incentive for the arbitrary breaking up of marriages[101] or would lead to a disregard for family responsibilities (namely in relation to children[102]).

[98] Guidelines of the Supreme Court of 1968, point IV.

[99] The judgment of the Supreme Court of 1 June 2000, I CKN 569/98, Legalis No 210849.

[100] Judgment of the Supreme Court — the Civil Law Chamber of 24 October 2000 V KCN 129/00, Legalis No 290146.

[101] See judgment of the Court of Appeal in Białystok of 2 February 1995, I ACr 13/95, OSA 1997, No 4, item 22), which shared the view presented in the jurisprudence that a specific punishment imposed on a spouse who has wilfully broken off marital relations or disregarded family duties may be neither absolute nor indefinite.

[102] Pursuant to Guidelines of the Supreme Court of 1968, point IV, the effectiveness of a refusal to consent to divorce on the grounds that it is contrary to the principles of social coexistence should not only be assessed on the basis of a comprehensive explanation and consideration of the circumstances of the innocent spouse, but should also take into account the situation of the children of the marriage, taking into account their living conditions, as well as the situation of individuals bound with the spouses.

Situations where there are no children from the marriage, or where the children are already independent, are assessed differently. A refusal to consent to a divorce under such circumstances, which leads to preventing the legalisation of a new harmonious relationship involving minor children (where their interests cannot be weighed against the equal interests of the children of the marriage) is, in principle, not justified by principles of social coexistence. On the other hand, if there are minor children in the marriage, the assessment of the effectiveness of the refusal to consent to divorce depends on a comparison between the position and living conditions of the innocent spouse and the children of the marriage, and the situation of the spouse at sole fault and their *de facto* family. Only the result of this comparison, taking into account other circumstances, in particular the duration of the marriage breakdown or the separation of the spouses, can provide an answer to the question whether the refusal to consent to divorce is compatible with the principles of social coexistence. It could be said that the assessment of a spouse's refusal to divorce concentrates less on the motives driving the innocent spouse and more on the presence or absence of negative consequences of the divorce. In other words, if the dissolution of marriage does not lead to undesirable socio-educational consequences, then divorce is permissible if its effects are judged to be positive, or at least neutral, and thus also approved in the moral perception of society.[103]

Moreover, when considering the incompatibility of a refusal to consent to a divorce with the principles of social coexistence, the criterion of the duration of the marriage, on the one hand, is considered against the duration of the marriage breakdown, on the other. The jurisprudence assumes that the long-term existence of dead marital relationships without prospects of reconciliation should not be approved, especially when one of the spouses has established a new informal relationship.[104] For instance, in a judgement dated 21 November 2002,[105] the Supreme Court assumed that, even though the rights of the innocent party should be respected, this party's attitude (refusing to give consent to a divorce despite

[103] See R. Dubowski: *Materialnoprawne przesłanki rozwodu…*, p. 199.

[104] See K. Gromek: "Rozwód *de lege lata* i *de lege ferenda*." *Monitor Prawniczy* 2 (2004), theses 2—5 and literature quoted by the author.

[105] See the judgment of the Supreme Court of 21 November 2002, III CKN 665/00, Legalis No 58465. A different view was taken in the judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551; the judgment of 12 September 1975, III CR 226/75, unpublished.; the judgment of the Supreme Court of 18 August 1965, III CR 147/65, OSP 1966, No 4, item 93, with the glosses of S. Szer, and A. Wolter: *Orzecznictwo Sądów Polskich* 4 (1966), item 93.

the extensive duration of the break down in their marriage[106]) may raise doubts as to its compliance with the principles of social coexistence. In the opinion of the Supreme Court, the refusal to consent to a divorce aimed only at bringing an advantage over the spouse seeking the divorce and preventing the other spouse from legalising a new relationship, is not worthy of approval. It is contrary to the principles of social coexistence to refuse to consent to a divorce simply to create an obstacle to the legalisation of a *de facto* relationship of the other spouse, or in order to harass or take revenge on the other spouse. The case law also indicates that it is contrary to the principles of social coexistence to refuse to consent to a divorce where there is no emotional bond between the spouses, they have not been in contact for many years, and where one of the spouses seeks to formalise a relationship of several years with another person. The mere duration of the separation of the spouses is not considered to be a circumstance that, in light of Article 56 § 3 of the FGC, would allow the refusal of the innocent spouse to consent to divorce to be assessed as contrary to the principles of social coexistence. Nor does the prolonged separation of the spouses create any presumption that the innocent spouse refusing to consent to the divorce is motivated by a desire to harass the spouse at fault.[107]

When assessing the incompatibility of the refusal to consent to divorce with the principles of social coexistence, the position of the jurisprudence concerning the religious grounds for such a refusal were established, especially in the 1990s. The courts were asked to assess a refusal to consent to divorce in the context of the religious convictions of the refusing spouse. In the reasoning of the judgment of 10 September 1997, the Supreme Court expressed the position that "the religious motivation of the other spouse, who is a believer and practicing person and cannot be reconciled with the divorce of a marriage concluded in a religious form, cannot be regarded as contrary to the principles of social coexistence."[108] The Supreme Court did not share the view that the moral and religious motives for refusing to consent to a divorce should be considered contrary to the principles of social coexistence. The argument that a person who is

[106] In this case, the parties' marriage lasted nearly four decades. The parties had raised and educated children who already have families of their own. The spouses had been separated for more than seven years due to the fault of the claimant.

[107] See the judgment of the Supreme Court of 18 August 1965, III CR 147/65, OSPiKA 1966, No 4, item 93; the judgment of the Supreme Court of 12 December 1975, III CR 226/75, unpublished; the judgment of the Court of Appeal in Lublin of 3 March 1999, I ACa 11/99, 1999, No 2, item 7; judgment of the Supreme Court of 26 February 2002, I CKN 305/01, Legalis No 76551.

[108] See judgment of the Supreme Court of 10 September 1997, II CKN 292/97, Legalis No 343289.

a believer and who got divorced through no fault of their own is not discriminated against in the exercise of their religious practices does not justify considering the refusal to consent to a divorce as contrary to the principles of social coexistence. The Supreme Court also ruled to this effect on 24 April 1997, stating that a spouse's refusal to consent to a divorce on religious grounds cannot be considered contrary to the principles of social coexistence.[109] A similar view was taken by the Court of Appeal in Gdansk in its judgment of 16 June 1999, stating that "a spouse's refusal to consent to a divorce on religious grounds cannot be considered contrary to the principles of social coexistence (Article 56 § 3 of the FGC)."[110] The view has been expressed in the doctrine that, if consent to divorce is refused by a spouse, who requests a decree of separation,[111] justifying this decision on the basis of religious beliefs, such refusal cannot, as a general rule, be regarded as contrary to the principles of social coexistence.[112]

The jurisprudence has also outlined a position in which religious convictions did not lead to an effective refusal to consent to divorce. This is because the refusal was either deemed to be contrary to the principles of social coexistence or, despite the refusal being justified on religious grounds, in addition to other reasons for refusal, the religious grounds were not taken into account. This is what the Supreme Court stated in its judgment of 6 November 1998,[113] adjudicating that "religious beliefs declared by the defendant may be important for her feelings but cannot result in excluding the application of the law." A similar assessment was made in the justification of the judgement dated 8 December 1999. The Supreme Court considered a plea by the defendant, claiming that a divorce judgement was morally and religiously unacceptable for her and would deprive her of the opportunity to practice as a religious education teacher in the future. The Provincial Court and the Court of Appeal accepted that refusal on religious grounds is contrary to principles of social coexistence. The Supreme Court declared in this case that the defendant's refusal to consent to the divorce on other grounds as being contrary to the prin-

[109] The judgment of the Supreme Court of 24 April 1997, II CKN 109/97, Legalis No 336017.

[110] The judgment of the Court of Appeal in Gdansk of 16 June 1999, I ACa 290/99, Legalis No 52343.

[111] Separation was introduced into Polish law by the Act amending the Family and Guardianship Code, the Civil Code, the Civil Procedure Code and certain other acts of 21 May 1999. *Dziennik Ustaw* (Dz.U.) of 1999, No 52, item 532 (in force from 16 December 1999).

[112] See J. Gajda, in: *Kodeks rodzinny i opiekuńczy. Komentarz*. Ed. K. Pietrzykowski. Warszawa 2012, p. 607; P. Kasprzyk: *Separacja prawna małżonków*. Lublin 2003, p. 203.

[113] The judgment of the Supreme Court of 6 November 1998, III CKN 9/98, Legalis No 335205.

ciples of social coexistence. It found that the defendant's refusal to consent to the divorce "did not result from positive feelings, but was caused by the belief that divorce would be an undeserved reward for the claimant, and so is contrary to the principles of social coexistence."[114] In line with this position, an assessment was expressed in the justification of the judgment of the Supreme Court of 26 May 2000[115] (dismissing the cassation), in which the said court presented the assessment of the Provincial Court, accepted by the Court of Appeal, concerning a situation in which the spouses had no ties for nine years, apart from a negative and mutually hostile attitude. In this factual situation, the refusal to consent to the divorce, which was dictated by religious considerations and out of a fear that her financial situation would deteriorate, was judged by the courts to be contrary to the principles of social coexistence.

In the doctrine, the opinion that the negative features of the principle of recrimination expressed in Article 56 § 3 of the FGC outweigh the positive ones has become very strong. According to this opinion, de facto non-existent marriages cause social harm, as they prevent the legalisation of actually existing relationships and preserve the inconsistency between the legal and factual status. In addition, the existence of a "dead marriage" sustains conflict between spouses and a state of tension within the family, both the one with the spouse and the "new" one. It seems illusory to expect that the regulation contained in Article 56 § 3 of the FGC can prevent the violation of the obligations arising from marriage.[116]

It should be added that the interpretation of Article 56 § 3 of the FGC was also referred to by the European Court of Human Rights (ECHR) in the case of *Babiarz* v. *Poland*.[117] In this case the applicant alleged that his right to respect for family life and his right to marry and start a family had been breached. In the case pending before the Polish court, the applicant's wife effectively refused to give consent to the divorce under Article 56 § 3 of the FGC. The applicant complained under Articles 8 and 12 of the Convention that, by refusing to grant him a divorce, the Polish authorities had prevented him from marrying the woman with whom he had been living. The ECHR considered that there had been no violation of the applicant's right to marry and that, in the circumstances of the

[114] The judgment of the Supreme Court of 8 December 1999, II CKN 606/98, Legalis No 357729.

[115] The judgment of the Supreme Court of 26 May 2000, I CKN 1139/99, Legalis No 278876.

[116] See K. Kamińska: "Zasada rekryminacji jako negatywna przesłanka rozwodu." *Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury* 1 (2019), p. 114 and the literature to which the author refers.

[117] The ECHR judgment from 10 January 2017, ECHR 13, [2017] 2 FLR 613.

case, the positive obligations arising under Article 8 of the Convention did not impose on the Polish authorities a duty to accept the applicant's petition for divorce.[118]

5. Concluding remarks

The achievements of Polish jurisprudence concerning divorces, as well as the data of Statistics Poland (GUS) and the reports prepared within the framework of the Public Opinion Research Centre (CBOS) justify the statement that the refusal to adjudicate a divorce (including on the grounds of its incompatibility with the principles of social coexistence, or a spouse's refusal to grant a divorce being incompatible with these principles) may have constituted some kind of instrument of repression in the 20th century, when living in an informal relationship (cohabitation) was treated with a kind of social ostracism.[119] Nowadays, on the other hand, informal relationships are widely accepted in society and this kind of sanction no longer has the repressive function it had when the Polish Family and Guardianship Code was enacted. At present, the number of divorce petitions dismissed on the grounds of sole fault of the spouse requesting a divorce, the refusal by the innocent spouse to consent to the divorce

[118] See one of the two dissenting opinions of Judge Pinto Dealbuquerque, who states that, "[…] the Convention is a religion-friendly text, but it does not permit the state imposition of religious or moral values, even when they are shared by the majority of the population. The belief in the sanctity and religious indissolubility of the matrimonial bond, which many millions of Poles and many more millions of Europeans share, may not be imposed by state policy, namely by force of legislative or judicial policy. It could not be otherwise in contemporary, democratic societies, built upon the pillars of State neutrality and religious and moral pluralism." See also position of Judge Sajó, who says: "It might be morally reprehensible that the applicant left his wife after all that she had had to undergo and the conditions under which he left her, but denial of divorce cannot be a punishment for immorality. Of course, the law may determine adverse consequences for such behaviour, but these are unrelated to the possibility of divorce." He also believes that "[t]here is no evidence that the grave interference with the applicant's family life was necessary in a democratic society. Even if one applies a balancing approach the same conclusion is inevitable given that the domestic courts' perception borders on the arbitrary." Both opinions are annexed to the judgment (see footnote 117).

[119] See data relating to the ratio of the total number of divorces in Poland to the number of grounds for divorce dismissed on the grounds of the sole fault of the spouse requesting divorce, the absence of consent of the innocent spouse and the incompatibility of his or her refusal is incompatible with the principles of social life R. Dubowski: *Materialnoprawne przesłanki rozwodu…*, p. 207.

and the conflict of that refusal with the principles of social coexistence is insignificant in relation to the total number of divorces in Poland.[120] Data provided by Statistics Poland (GUS), along with the review of the case law, also illustrates that the specific sanction of Article 56 § 2 and 3 of the FGC is rarely applied. Considering the number of divorces[121] (apart from cases where the petition for divorce was dismissed on other grounds), it should be noted that the sole fault of the spouse seeking divorce (linked to their conduct, which can be regarded as contrary to the principles of social coexistence) constitutes an obstacle to divorce only exceptionally. An analysis of the case law shows that even in the 1990s and until the mid-2020s, the regulation constituted an obstacle to the pronouncement of divorce only in rare cases.[122] Over the past decade and a half, this regulation was used as the basis for a judgment incidentally.[123] Given the number of judgments, it is therefore difficult to confirm the thesis that the liberalisation of social views with regard to divorce, or cultural changes, in particular the more widespread social acceptance of informal relationships, have had a significant impact on making divorce easier to obtain through the interpretation of Article 56 § 2 and 3 of the FGC. These provisions do not constitute either a significant impediment or a special facilitation when divorce is pronounced, in view of the small scale of their use in divorce cases. As a general rule, a petition for divorce will be dismissed on grounds other than its being contrary to the principles of social coexistence. This is the case when, firstly, there are no positive grounds for the divorce, namely there is no permanent and complete breakdown of the marriage. Secondly, another of the negative grounds for divorce listed in Article 56 § 2 of the FGC has occurred, meaning that the welfare of the joint minor children of the spouses would suffer as a result. Similarly, the principle of recrimination in Article 56 § 3 of the FGC is now of marginal importance. Even if the regulations in question were much more widely applicable, the liberalisation of social and cultural norms in recent decades would not lead to an interpretation that would make it significantly more difficult to adjudicate a divorce. Opinion polls regarding socially acceptable behaviours (reflected in the general clauses)

[120] Ibidem.

[121] According to the Central Statistical Office (GUS), 60687 divorces were adjudicated in 2021.

[122] For example in 2014, out of 65,761 divorces, only 102 (no data available for 2015) actions were dismissed altogether on the grounds that the spouse requesting divorce was solely at fault, that the innocent spouse did not consent and that his or her refusal was not incompatible with the principles of social coexistence; according to a summary provided by R. Dubowski: *Materialnoprawne przesłanki rozwodu…*, p. 207.

[123] Based on the judgments available in the database Legalis.

undoubtedly lead to a liberal approach to divorce law in Poland. However, this has not so far been reflected in a liberalisation of the divorce provisions of the Polish Family and Guardianship Code in a direction that would support attempts to harmonise European family law.[124] With the current direction of social and cultural changes, a reversal of the tendency to liberalise divorce law should not be expected. Already in the 1980s, a correlation was generally observed between increasing number of divorces in societies with more liberal, secular, non-religious (especially non-Christian) living patterns. On the other hand, incidents of divorce decrease as the level of religious practice of the spouses increases.[125]

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Ewa Rott-Pietrzyk

Importance des règles de la coexistence sociale lors du prononcé du divorce dans le contexte des changements culturels et sociaux — une perspective polonaise

Résumé

Les changements culturels et sociaux peuvent affecter la méthodologie d'interprétation et d'application du droit adoptée par les tribunaux à un moment donné, en particulier des dispositions impliquant des clauses générales. Ces clauses rendent le droit plus flexible et lui permettent de s'adapter aux conditions changeantes. Elles sont considérées comme une sorte de "soupape de sécurité" permettant d'éviter des solutions erronées, éthiquement et moralement inacceptables dans la société. Dans cette perspective, le présent article examine la signification de la clause générale des règles de coexistence sociale lors du prononcé du divorce du point de vue du droit polonais. L'objectif de cet article est de tenter de répondre à la question suivante : les changements qui peuvent être pris en compte par le biais de la clause générale de l'article 56 du code de la famille et de la tutelle affectent-ils, et dans quel sens, la dissolution du mariage par le divorce, c'est-à-dire entravent-ils ou, au contraire, n'entravent-ils pas la prononciation du divorce, lorsque les autres conditions préalables au divorce sont remplies ?

Mots-clés : divorce, taux de divorce, clause générale, principes de coexistence sociale, interprétation, droit de famille, contexte culturel et social

Ewa Rott-Pietrzyk

L'importanza dei principi della convivenza sociale nella sentenza di divorzio nel contesto dei cambiamenti culturali e sociali: la prospettiva polacca

Sommario

I cambiamenti che si verificano nella cultura e nella società possono influenzare la metodologia di interpretazione e applicazione della legge, in particolare delle disposi-

zioni contenenti clausole generali, adottate dai tribunali in un dato momento. Queste clausole rendono la legge più flessibile, permettendole di adattarsi al mutare delle condizioni. Sono trattati come una sorta di "valvola di sicurezza" per evitare soluzioni ingiuste e inaccettabili eticamente e moralmente nella società. In questa prospettiva, l'articolo considera l'importanza della clausola generale dei principi della convivenza sociale nel pronunciare il divorzio dal punto di vista del diritto polacco. Lo scopo del presente articolo è il tentativo di rispondere alla domanda: se e in che direzione i cambiamenti che possono essere presi in considerazione tramite la clausola generale dell'art. 56 del Codice della famiglia e della tutela, incidono sullo scioglimento del matrimonio mediante divorzio, ossia ostacolano o, al contrario, non impediscono la pronuncia del divorzio quando sono soddisfatte le altre condizioni per il divorzio?

Parole chiave: divorzio, tassi di divorzio, clausola generale, principi di convivenza sociale, interpretazione, diritto di famiglia, contesto culturale e sociale

Ecumeny and Law, vol. 11(1) (2023), pp. 137—154
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.06

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The Right to Marriage according to the Provisions of the Main Legal Instruments of the UN and EU

Abstract: Both in the Universal Declaration of Human Rights (Art. 16) and in the European Convention on Human Rights (Art. 12), the right to marriage is perceived and defined as a fundamental human right, as it was in fact enounced both by *jus divinum* and by *jus naturale*.

Among other things, from the texts of the legal instruments, of prime importance to the nations of the world, one can note that a marriage can be concluded only between a man and a woman, and only if the following indispensable conditions are met, namely: a) the marriageable age laid down in the national law; b) the mutual consent of the future spouses; c) that the race, nationality or religion of the future spouses are not taken into account. Therefore, a valid marriage is concluded only by the persons of different sex (man and woman), and not by the people of any sex, as the Treaty of Nice (2000) stipulated.

In the article, we also highlighted the fact that the right of a man and a woman to have a family is ontologically bound with the marriage. This reality proves in fact, once more, that the marriage and the family were and remain "two main institutions of the mankind."

Keywords: the legal instruments, right to marry, the family, the fundamental human rights

Introduction

The right to the marriage, one of the fundamental human rights,[1] was stipulated in both *jus divinum* (divine law) (according to Gen. I, 27—28; Mt. XIX, 3—6; Jn. 2: 1—10), and *jus naturale* (natural law).[2] In addition, this right has been emphasized since Antiquity, also by *jus consuetudinaris* (customary law) and *jus gentium* (law of nations), as confirmed by *jus romanum*,[3] which expressly refers to both the right to marriage and to found a family.

According to the provisions of classical Roman law (1st—3rd century AD), only the person who fulfils the conditions stipulated by the law (age, parental consent, impediments to marriage, etc.) may conclude a "lawful marriage (*iustae nuptiae*)" (Gaius, *Institutiones*, lb. I, 55).[4]

The new Roman law, known as the Byzantine law, provided also that the "Roman citizens [*cives romanum*] are joined together in lawful wedlock […] they are united according to law [*secundum praecepta legum*],"[5] that is, if they meet the conditions set out therein (e.g., the legal age, the *consensum patres* ('parental consent'), lack of impediments to marriage,

[1] See, N. V. Dură: "Drepturile şi libertăţile omului în gândirea juridică europeană. De la *Justiniani Institutiones* la *Tratatul instituind o Constituţie pentru Europa* [Human rights and freedoms in European legal thinking. From *Justiniani Institutiones* to *The Treaty Establishing a Constitution for Europe*]." *Analele Universităţii Ovidius. Seria: Drept şi Ştiinţe Administrative* 1 (2006), pp. 129—151; N. V. Dură: "The Fundamental Rights and Liberties of Man in the EU Law." *Dionysiana* IV, 1 (2010), pp. 431—464; N. V. Dură, C. Mititelu: "The human fundamental rights and liberties in the Text of some Declarations of the Council of Europe." In: *Exploration, Education and Progress in the Third Millennium*, I, 5. Bucharest 2015, pp. 7—22; N. V. Dură, C. Mititelu: "Human rights and their universality. From the rights of the 'individual' and of the 'citizen' to 'human' rights." In: *Exploration, Education and Progress in the Third Millennium*, I, 4. Galaţi 2012, pp. 103—127.

[2] N. V. Dură: "Loi morale, naturelle, source du Droit naturel et de la Morale chrétienne." In: *La morale au crible des religions*. Ed. M. Th. Urvoy. Paris 2013, pp. 213—233; N. V. Dură: "Law and Morals. Prolegomena (I)." *Acta Universitatis Danubius. Juridica* 2 (2011), pp. 158—173; N. V. Dură: "Law and Morals. Prolegomena (II)." *Acta Universitatis Danubius. Juridica* 3 (2011), pp. 72—84.

[3] N. V. Dură: "The Right and its Nature in the Perception of the Roman Jurisprudence and of the Great Religions of the Antiquity." In: *Rethinking Social Action. Core Values*. Eds. A. Sandu et al. Bologna 2015, pp. 517—524; N. V. Dură, P. Kroczek, C. Mititelu: *Marriage from the Roman Catholic and Orthodox points of view*. Kraków 2017, pp. 117—125.

[4] *The Institutes of Gaius*, https://thelatinlibrary.com/law/gaius1.html [accessed 19.09.2022].

[5] *The Institutes of Justinian*, https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0011 [accessed 10.09.2022].

kinship, etc.). In this regard, the jurists of Emperor Justinian (527—565) stipulated that this is how it must be done, provided that they have "the consent of the parents in whose power they respectively are,"[6] from which stems the necessity that this consent of the parents be "given before the marriage takes place"[7] as it "is recognised no less by natural reason than by law" (Justiniani, *Institutiones*, lb. I, X).[8]

It was therefore also a question of *jus naturale*, that is, of that *naturalis ratio*, which — according to Gaius (*Institutiones*, lb. I, 1) — was the basis of *jus gentium* (law of nations), the forerunner of the international law of our days. Hence, therefore, the need that the right to marriage, stipulated in the main legal instruments of the UN and EU, has to be perceived and defined from the perspective of its evolutionary, conceptual and institutional process, that is, as it was stipulated by *jus divinum*, *jus naturale*, *jus romanum* and *jus Ecclesiae*, that is, by the law of the Church.[9]

1. The Universal Declaration of Human Rights — the main source and reference regarding the right to marry for other main international legal instruments

In the Universal Declaration of Human Rights[10] — adopted by the UN in 1948 — it was stated that, "men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family" (Art. 16 para. 1), and, at the same time, it was specified that the respective "marriage shall be entered into only with the free and full consent of the intending spouses" (Art. 16 para. 2).[11]

As can be seen, two indispensable conditions were laid down for the conclusion of a marriage, namely the legal age of the husband and wife

[6] Ibidem.

[7] Ibidem.

[8] Ibidem.

[9] N. V. Dură, C. Mititelu: *Legislația canonică şi instituțiile juridico-canonice europene, din primul mileniu* [Canon law and canonical legal institutions in Europe in the first millennium]. București 2014, pp. 93—124; N. V. Dură: "Thinking of Some Fathers of the Ecumenical Church on the Law." *Christian Researches* VI (2011), pp. 230—245.

[10] On December 10, 1948, the UN General Assembly adopted and proclaimed the Universal Declaration of Human Rights, apud https://legislatie.just.ro/Public/DetaliiDocumentAfis/22751 [accessed 22.08.2022].

[11] Universal Declaration of Human Rights [hereinafter: UDHR], https://www.un.org/en/about-us/universal-declaration-of-human-rights [accessed 1.08.2022].

and the free consent of the future spouses. In addition to this, any restrictions based on race, nationality or religion were strictly prohibited.[12]

The provisions of principle stated in the Universal Declaration of Human Rights,[13] according to which "everyone has the right to a nationality" (Art. 15, para. 1) and "no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality" (Art. 15, para. 2),[14] was also reiterated in the Convention on the Nationality of Married Women[15] adopted by the United Nations General Assembly on 20 January 1957, which entered into force on 11 August 1958.

The same Convention on the Nationality of Married Women stipulated that "neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife" (Art. 1).[16]

Moreover, the contracting states agreed that "neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national" (Art. 2).[17] Therefore, no one can be deprived — arbitrarily — of their citizenship, nor of its change during the marriage.

On 7 November 1962, the representatives of the Member States of the United Nations signed a "Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,"[18] that entered into force on 9 December 1964.

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[12] See more in N. V. Dură: "'Rights', 'Freedoms' and 'Principles' Set Out in the Charter of Fundamental Rights of the EU." *Journal of Danubius Studies and Research* VI, 2 (2016), pp. 166—175; N. V. Dură: "The Right to the Guarantee and Ensurance of Religious Freedom from 'The Statute for Religious Freedom' of 1786 to the 'Declarations' Issued during the UN Session of 2019." *Bulletin of the Georgian National Academy of Sciences* 1 (2021), pp. 117—127; N. V. Dură: "The Legal Status of 'Migrants' according to the European Union Legislation." *Ecumeny and Law* 9/2 (2021), pp. 105—123.

[13] See N. V. Dură: "The Universal Declaration of Human Rights." In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Galati 2015, pp. 240—247.

[14] UDHR.

[15] Romania acceded to this Convention by Decree no. 339, published in *Official Gazette of Romania*, part I, no. 20 of September 22, 1960.

[16] Convention on the Nationality of Married Women, https://treaties.un.org/doc/Treaties/1958/08/19580811%2001-34%20AM/Ch_XVI_2p.pdf [accessed 19.08.2022].

[17] Ibidem.

[18] The Convention adopted by the United Nations General Assembly on November 7, 1962 (New York) entered into force on December 9, 1964. Romania signed the Convention on December 27, 1963, and ratified it on December 15, 1992 by Law no. 116, published in *Official Gazette of Romania*, part I, no. 330 of December 24, 1992.

From the Preamble to this UN Convention, it can be seen that its authors reiterated the provisions of principle stated in the United Nations Charter on "human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion"[19] and reproduced *ad-litteram* the text on the right to marry, that is, the text of Article 16 of the Universal Declaration of Human Rights.

The same authors of the UN Convention also recalled the fact that, in "Resolution no. 843 (IX) of 17 December 1954, certain customs, ancient laws and practices relating to marriage and the family were inconsistent with the principles set forth in the Charter of the United Nations and in the Universal Declaration of Human Rights" (Preamble).[20]

Moreover, the UN Convention of 9 December 1964 stipulated the obligation of "all States" to take "all appropriate measures with a view to abolishing such customs, ancient laws and practices by ensuring, inter alia, complete freedom in the choice of a spouse, eliminating completely child marriages and the betrothal of young girls before the age of puberty" (Preamble).[21]

Article 1 (para. 1) of the UN Convention (1964) affirms the basic principle of marriage, namely the free consent of the future spouses, which must be expressed "in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law,"[22] that is, of the national law. And, according to Article 2 of the Convention, the UN member states where required to set a "minimum age for marriage," such that "no marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses."[23]

The Convention on the Elimination of All Forms of Discrimination against Women[24] — adopted by the UN General Assembly by Resolution 34/180 of 18 December 1979, which entered into force on 3 September 1981 — also stipulated the obligation of the States Parties to ensure the

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For the Romanian text of the Convention, see: *Main International Instruments on Human Rights to which Romania is a party*, vol. I. 6th edn. Bucharest 2003, pp. 334—337.

[19] Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, https://www.ohchr.org/sites/default/files/convention.pdf [accessed 12.09.2022].

[20] Ibidem.

[21] Ibidem.

[22] Ibidem.

[23] Ibidem.

[24] Romania signed the Convention on November 26, 1981 by Decree no. 342, published in *Official Gazette of Romania*, part I, no. 94 of November 28, 1981. The Romanian text of the Convention is published in: *Main International Instruments on Human Rights to which Romania is a party*, vol. I…, pp. 338—352.

"recognition […] on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (Art. 1).[25]

The same Convention stipulated that "States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband" (Art. 9 para. 1).[26]

The same States Parties agreed to "grant women equal rights with men with respect to the nationality of their children" (Art. 9 para. 2).[27] Hence, the finding that in the text of this Convention adopted by the UN Assembly we find provisions that guarantee that a woman can also marry a foreigner, without being forced to take the nationality of her husband or becoming stateless if her husband changes his nationality during the marriage.

In fact, the provisions of principle set out in the Universal Declaration of Human Rights were reaffirmed in the text of the main international legal instruments, as for example, in some of the Conventions adopted by the UN, namely the Convention on Consent to Marriage, Minimum Age for Marriage and the Registration of Marriages, the Convention on the Nationality of Married Women and the Convention on the Elimination of All Forms of Discrimination against Women, and in the text of European Union legislation and, first and foremost, in the European Convention on Human Rights, which entered into force in 1950.

2. The provisions on marriage of the European Convention on Human Rights and its Protocols

The drafters of the European Convention on Human Rights[28] stipulated and guaranteed the "right to marry" (Art. 12),[29] hence the assertion that — for our days — this Convention remains "the first important

[25] Convention on the Elimination of All Forms of Discrimination against Women, https://www.ohchr.org/sites/default/files/cedaw.pdf [accessed 28.09.2022].

[26] Ibidem.

[27] Ibidem.

[28] See C. Mititelu: "The European Convention on Human Rights." In: *10th Edition of International Conference The European Integration — Realities and Perspectives*. Galați 2015, pp. 243—252.

[29] European Convention on Human Rights, https://www.echr.coe.int/documents/convention_eng.pdf [accessed 17.09.2022].

international document to enshrine this freedom,"[30] that is "the right of a man and a woman to marry after they reached the marriageable age required by the law."[31]

However, we should not ignore the fact that the provisions of this Article (12) of the European Convention on Human Rights are based on the provisions of Article 16 of the Universal Declaration of Human Rights.

It should also be noted that, subsequently, in the "jurisprudence of the bodies of the Convention" reference is made to "two distinct rights regulated by Art. 12: the right to marry and the right to found a family."[32]

In Article 12, the authors of the European Convention on Human Rights stated that "man and woman […] have the right to marry"[33] starting from "marriageable age,"[34] that is, with the matrimonial age established by the "national law," as confirmed, *expressis verbis*, by the very text of Article 12 of this EU Convention, which states that "the exercise of this right,"[35] that is, the right to marriage, must be done "according to the national laws" (Art. 12).[36]

According to the Article 12 of the European Convention on Human Rights, "men and women of full age […] have the right to marry" (Art. 16, para. 1).[37]

Although the Article 12 of the European Convention does not refer to the equal rights of the spouses in the conclusion, on the duration and in the dissolution of a marriage, however, the provision of principle stated in the text of the Universal Declaration "has found its consecration, in the Convention's system, in the provisions of art. 5 of Protocol no. 7 to the Convention, concluded in 1984."[38]

Indeed, in Article 5 of Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms,[39] of 22 November

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[30] R. Chiriță: *Convenția Europeană a Drepturilor Omului. Comentarii şi explicații* [The European Convention on Human Rights. Comments and explanations]. 2nd edn. București 2008, p. 584.

[31] Ibidem.

[32] C. Bîrsan: *Convenția europeană a drepturilor omului. Comentariu pe articole* [European Convention on Human Rights. Comments on articles]. 2nd edn. București 2010, p. 906.

[33] European Convention on Human Rights…

[34] Ibidem.

[35] Ibidem.

[36] Ibidem.

[37] UDHR.

[38] C. Bîrsan: *Convenția europeană*…, p. 905.

[39] Protocol no. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, apud https://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETS117E_ENG.pdf [accessed 12.09.2022].

1984, express reference is made to the "equality between spouses," stating that "spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution" (Art. 5).[40]

Therefore, we have to retain that, according to the provisions of this Article — of Protocol no. 7[41] to the European Convention on Human Rights — "spouses enjoy equal rights and responsibilities in civil matters, between themselves and in their relations with their children during their marriage."[42]

Referring to this legal principle of equality between the spouses in "civil rights and responsibilities," Professor Corneliu Bîrsan considered that "the jurisprudence of the bodies of the Convention regarding the application of art. 5 of Protocol no. 7 is almost negligible"[43]; as an alternative, "the European system of human rights protection enshrines a true subjective right in terms of the equality in civil rights and responsibilities of the spouses."[44]

The same magistrate of the European Court also noted the fact that, regarding the equality in rights and responsibilities, of a civil nature, and also the "dissolution" of the marriage — to which Article 5 of Protocol no. 7 expressly refers — this "cannot be understood in the sense that it would imply any specific obligation on the part of the State, in the Convention area, regarding divorce; as the Court ruled, neither the Convention nor its Additional Protocols recognize the right to divorce. Obviously, states are free to regulate divorce, its conditions and effects,"[45] and "contracting states" may "adopt such regulations as they deem necessary in the best interests of the children."[46]

With regard to the dissolution of marriage via divorce — pursuant to Article 12 of the Convention — the European Court also "showed that the ordinary meaning of the terms 'the right to marry' used in the text refers only to the conclusion of the marriage, not to its dissolution."[47]

In 1994, "Council of Europe's Member States" considered that it was necessary and urgent to strengthen the "efficiency of its protection of

[40] Ibidem.

[41] Protocol no. 7 was concluded in November 22, 1984 and entered into force on November 1, 1988. Romania ratified Protocol no. 7 by Law no. 30 of May 18, 1994, published in the *Official Gazette of Romania*, part I, no. 135 of 31 May 1994.

[42] C. Bîrsan: *Convenţia europeană*..., p. 1868.

[43] Ibidem.

[44] Ibidem.

[45] Ibidem, p. 1870.

[46] Ibidem.

[47] Ibidem, pp. 910—911.

human rights and fundamental freedoms […], established by the Convention (for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950)" (The *Preamble* to Protocol No. 11, Strasbourg on 11 May 1994).[48]

However, strengthening the effectiveness of the defence of fundamental human rights and freedoms — including, at the forefront, the right to marry — can only be achieved by affirming and applying the provisions of principle set out in the text of the European Convention (1950),[49] which was and is — for the Member States of the European Union — the Constitutional Charter of Human Rights and Freedoms, but in which, unfortunately, this right to marriage is often perceived and defined only in terms of *pro domo* interpretations, generated by some ideological, philosophical, sexual guidelines, etc.

With regard to the holders of "the right to marry" — who, according to Article 12 of the Convention, can only be a "man" and a "woman" — it was also noted that "unlike the other rights and freedoms guaranteed by the Convention," regarding whose texts state that they belong to "any person," Article 12 uses the wording according to which upon reaching the legal age of marriage "the man and the woman" have the right to marry; the text does not state that "any person" has the right to marry. The difference is fundamental: it reflects the concept that the right to marry is recognized for the people who have "a different biological sex."[50]

In 2010, the same magistrate of the European Court found that, in its case law, the Court considered only the "traditional marriage," that is, "between two persons of different biological sex,"[51] and therefore not of the same sex.[52]

The "right to marry," stipulated in Article 12 of the European Convention on Human Rights, had also been enshrined in the "classical legal systems,"[53] in which this right was also recognized as having a "contractual or institutional character,"[54] but, "curiously," this character — also

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[48] Published in the *Official Gazette of Romania*, no. 147 of 13 July 1995.

[49] See C. Mititelu: "Provisions of Principle with European Constitutional Value on the 'Person's' Right to Freedom and Security." *Journal of Danubius Studies and Research* VI, 2 (2016), pp. 158—165; M. Marin: "Human Rights Between Abuse And Non-Discrimination." *Managementul Intercultural* XVI, 2 (2014), pp. 209—213.

[50] C. Bîrsan: *Convenţia europeană…*, p. 907.

[51] Ibidem.

[52] See more in C. Mititelu: "About the Right to Same-Sex Marriage. Some Considerations and Interpretations from the Constitutional Law Perspective." *Logos Universality Mentality Education Novelty: Law* 7/2 (2019), pp. 80—88.

[53] J.-L. Charrier, A. Chiriac: *Code de la Convention européenne des droits de l'homme*. Paris 2008, p. 449.

[54] Protocol no. 7. In: *Principalele Instrumente internaţionale privind Drepturile Omului* [The main international human rights instruments], vol. II. Bucureşti 2003, p. 84.

stipulated in Protocol 7 to the European Convention on Human Rights — has disappeared "from the modern Constitutions, so that it does not today have a constitutional protection other than in exceptional cases."[55]

Although in Article 12 of the European Convention "the notions of marriage and family are distinct,"[56] it is *expressis verbis* stated that "there cannot be a family without marriage,"[57] hence the fact that both legal institutions enjoy the same legal protection. However, some European jurists have noted that the Treaty of Nice (7 December 2000) "protects rights that are not covered by the Convention,"[58] that is, the European Convention on Human Rights (Rome, 1950), including the "right to marry" between people of the same sex.

Indeed, the text of Article 12 of the European Convention makes express reference only to the right to marry "recognized exclusively to men and women,"[59] without any specification as to the "sex of the holders,"[60] who can exercise their "right to marry" (Article 9, Treaty of Nice).[61]

It should also be noted that Article 12 of the European Convention on Human Rights, "does not recognize the right of persons of the same sex to marry,"[62] and that, initially, in its decisions, the European Court "refused to recognize the right of transgender people to marry, after a sex change operation, a person of the same biological sex on the grounds that the purpose of the provision (Article 12) is to protect marriage as a foundation of the family."[63]

But, later on, the Court ordered the European Union States to remove this prohibition, although that "Article 12 is strictly applicable to the traditional family of one woman and one man,"[64] and that, consequently, "it is contrary to the purpose of this provision to allow a marriage to continue, when husbands change their sex."[65]

In their Commentary on Article 8 of the European Convention, the Romanian jurists also acknowledge that the authors of the Convention

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[55] Ibidem.

[56] J.-L. Charrier, A. Chiriac: *Code de la Convention européenne*..., p. 450.

[57] Ibidem.

[58] Ibidem, p. 15.

[59] Ibidem.

[60] Ibidem.

[61] Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2016:202:FULL [accessed 7.09.2022].

[62] R. Chiriță: *Convenția Europeană*..., p. 585.

[63] Ibidem, pp. 585—586.

[64] Ibidem, p. 587.

[65] Ibidem.

considered that, in addition "to the right to privacy and family life,"[66] which is indeed expressly provided in Article 8,[67] the Article 12 stipulated and guaranteed the "right to marry" only between a man and a woman.

As it is known, Article 8 of the European Convention on Human Rights is in fact "the first in a series of four texts of the Convention which protect rights that mean social respect due to the individual,"[68] and implicitly stipulates the right of the children "to a family life."[69] Consequently, we might say that, implicitly, Article 8 of the Convention also stipulated and guaranteed the right to marry.

In fact, some constitutionalists from the European Union also wanted to specify the fact that from the analysis of the notion of family, "the provisions of Article 12 of the Convention, enshrining the right to marry, cannot be ignored,"[70] hence the fact that the European Court also conveys great importance not only to the "right to found a family" (according to Art. 8), but also to the right of the "man" and "woman" to marry (according to Art. 12), without which, in fact, there can be no basic cell of human society, the family, but also our descendants, that is, children,[71] resulting from the act of marriage, whose "protection" received from the European Court "a special importance."[72]

The magistrates of the European Court also found that "Article 12 of the Convention does not contain provisions on the limits of the right to marry and to found a family; however, since the text stipulates that this right is exercised in accordance with the provisions of national law, this means that, implicitly, the same provisions also set the limits of its enforcement, which, in this matter, usually means the need to meet certain conditions of substance and form for the marriage."[73]

The same magistrates of the European Court state that, although "in the official text of the Convention, the title of art. 12 is stated as regulat-

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[66] C. Bîrsan: *Convenția europeană*…, p. 596.

[67] According to Article 8 of the European Convention: "Everyone has the right to respect for his private and family life, his home and his correspondence."

[68] C. Bîrsan: *Convenția europeană*…, p. 596.

[69] Ibidem, p. 661.

[70] Ibidem, p. 645.

[71] See N. V. Dură: "Provisions of International Law on the Parents' Right to Provide their Children with a Religious Education." In: *The fundamentals of our spirituality*. Batumi 2018, pp. 240—248; C. Mititelu: "The Children's Rights. Regulations and Rules of International Law." *Ecumeny and Law* 3 (2015), pp. 151—169; N. V. Dură, T. Petrescu: "Children's Rights. Provisions of Certain International Conventions." *Ecumeny and Law* 3 (2015), pp. 127—149.

[72] C. Bîrsan: *Convenția europeană*…, p. 660.

[73] Ibidem, pp. 903—904.

ing the 'right to marry,' in fact, its careful reading leads to the conclusion that the respective article proclaims two closely related rights: the right to marriage and the right to a family."[74]

Indeed, the members of the Commission — who drafted Article 12 of the European Convention — considered "the sole right to marriage and the foundation of a family,"[75] while "the jurisprudence of the Convention's bodies […] assessed the recognition of two distinctly regulated rights of Article 12."[76]

There is no reference — even an allusive one — in the text of the European Convention to the dissolution of a marriage by divorce. Regarding this reality, a magistrate of the European Court wanted to specify that, in the "usual sense of the terms, the "right to marriage" used by the text,"[77] that is, by the text of Article 12 of the Convention, "considers only the conclusion of the marriage, not its dissolution"[78] and that, through divorce, "the very substance of the right to marriage, guaranteed by Art. 12 of the Convention"[79] is affected.

Moreover, the European Court also "considered that this interpretation is in full accordance with the object and purpose of art. 12,"[80] which it "has its origin" in "article 16 of the Universal Declaration of Human Rights."[81]

Indeed, Article 16 of this Declaration stipulates that "of full age […], men and women, […], without any limitation, […] have the right to marry and to found a family," and that "they (our note: the spouses) are entitled to equal rights as to marriage, during marriage and at its dissolution" (Art. 16, para. 1).[82]

Here, then, lies the motivation for which some magistrates of the European Court also wanted to specify that it was not "the intention of the authors of the Convention to include in art. 12 any mention of the dissolution of a marriage by divorce,"[83] but that it must be borne in mind that, "indeed, the Convention is a living instrument,"[84] which can "be interpreted in the light of new realities; … this did not mean — their Lords conclude — that by an evolutionary interpretation the existence of

[74] Ibidem, p. 906.
[75] Ibidem.
[76] Ibidem.
[77] Ibidem, p. 910.
[78] Ibidem, pp. 910—911.
[79] Ibidem, p. 911.
[80] Ibidem.
[81] Ibidem.
[82] UDHR.
[83] C. Bîrsan: *Convenţia europeană*..., p. 911.
[84] Ibidem.

a right which was not inscribed from the beginning in its texts could be omitted, all the more so as the omission was deliberate."[85]

"Protocol no. 11"[86] to the European Convention on Human Rights, which entered into force on 1 November 1998, stipulated that, "men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."[87]

The Article 12 of the European Convention, suggestively entitled *Right to marry*, has therefore found legal consistency through Protocol no. 11,[88] which confirms the fact that, in the text of Article 12 of the Convention, it refers only to the "right to marry," not to the "right to divorce," that is, the right to dissolve a legally concluded marriage.

That Article 12 of the European Convention on Human Rights included "only the right of some persons to marry and to found a family, without having a negative correlation, namely the right to dissolve a marriage and a family by divorce,"[89] is also attested by the jurisprudence of the European Court, in which it was specified that "art, 12 was introduced in the Convention in order to guaranteed the establishment of the conjugal relations, without taking into account their dissolution."[90]

In fact, Article 12 of the Convention "does not guarantee the rights of the spouses during the marriage; their equality with respect to marital rights and duties being covered by the provisions of art. 5 of Protocol no. 7 to the Convention."[91]

Certainly, it has to be also underlined and retained the fact the right to a family, a *sine qua non* condition of family life, is ontologically linked to the right to marriage, and that both rights have been stated explicitly both by the Universal Declaration of Human Rights and some of the international Conventions adopted by the Member States of the United Nations, and by European Convention on Human Rights and its Protocols. And, finally, it has to be mentioned and retained the fact that Article 12 of the European Convention "enshrines the right to marriage, but nothing is stipulated regarding a possible right to divorce,"[92] underling thus the character of the indissolubility of the marriage.

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[85] Ibidem.

[86] A text published in *Tratate ale Consiliului Europei. Texte esențiale* [Council of Europe Treaties. Essential texts]. Bucharest 2002, pp. 29—45.

[87] Ibidem, p. 35.

[88] Ibidem, p. 35, n. 1.

[89] R. Chiriță: *Convenția Europeană…*, p. 587.

[90] Ibidem.

[91] Ibidem.

[92] Ibidem, p. 453.

In lieu of conclusions

As the texts of the main international and European Union instruments proved, the right to marriage and the right to a family were expressly stated by the United Nations — through the Universal Declaration of Human Rights, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the Convention on the Nationality of Married Women and the Convention on the Elimination of All Forms of Discrimination against Women — as well as by the European Union, in particular through the European Convention on Human Rights and its Protocols.

Since the provisions of principle laid down in the text of the main UN and EU instruments,[93] that is the Universal Declaration of Human Rights and the European Convention on Human Rights, including on marriage, have the force of *jus cogens*, the states of the world have therefore the obligation to state them *expressis verbis* in the text of their legislation, and especially in their fundamental laws, that is, in their Constitutions.

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[93] On the importance of their provisions of principle, see more in N. V. Dură: "General Principles of European Union Legislation Regarding the Legal Protection of Human Rights." *Journal of Danubius Studies and Research* III, 2 (2013), pp. 7—14; N. V. Dură: "Despre caracterul prioritar al normelor dreptului internațional, privind drepturile şi libertățile fundamentale ale omului, în raport cu cele ale dreptului național [On the priority character of the norms of international law, regarding the fundamental human rights and freedoms, in relation to those of the national law]." *National Law Review* 7—9 (2018), pp. 54—58.

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Droit au mariage selon les dispositions des principaux instruments juridiques de l'ONU et de l'UE

Résumé

Dans la Déclaration universelle des droits de l'homme (article 16) et la Convention européenne des droits de l'homme (article 12), le droit au mariage est considéré et défini comme un droit humain fondamental, puisqu'il est inscrit dans le *ius divinum* et le *ius naturale*.

Entre autres, sur la base des textes des instruments juridiques d'importance primordiale pour les peuples du monde, on peut remarquer que le mariage ne peut être conclu qu'entre un homme et une femme, et seulement si les conditions nécessaires suivantes sont remplies, à savoir : a) l'âge nubile tel qu'il est défini par la loi nationale ; b) le consentement mutuel des futurs époux ; c) la race, la nationalité ou la religion des futurs époux ne sont pas prises en compte. Par conséquent, un mariage valide n'est conclu que par des personnes de sexe différent (homme et femme) et non par des personnes de n'importe quel sexe, comme le prévoit le traité de Nice (2000).

Dans cet article, nous avons également souligné le fait que le droit d'un homme et d'une femme de fonder une famille est ontologiquement lié au mariage. Cette réalité prouve une fois de plus, que le mariage et la famille ont été et restent « les deux principales institutions de l'humanité ».

Mots-clés : instruments juridiques, droit au mariage, famille, droits humains fondamentaux

Cătălina Mititelu, Bogdan Moise

Il diritto di sposarsi secondo le disposizioni dei principali strumenti giuridici dell'ONU e dell'UE

Sommario

Sia nella Dichiarazione universale dei diritti dell'uomo (articolo 16) che nella Convenzione europea dei diritti dell'uomo (articolo 12), il diritto di sposarsi è visto e definito come un diritto umano fondamentale, come sancito sia dallo *ius divinum* che dallo *ius naturale*.

Sulla base, tra l'altro, dei testi di strumenti giuridici di primaria importanza per i popoli del mondo, si può constatare che il matrimonio può essere concluso solo tra un uomo e una donna, e solo se sono soddisfatte le seguenti condizioni necessarie, vale a dire: a) l'età per contrarre matrimonio stabilita dalla legislazione nazionale; b) mutuo consenso dei futuri sposi; c) non si tiene conto della razza, della nazionalità o della religione dei futuri coniugi. Pertanto, un matrimonio valido è contratto solo da persone di sesso diverso (un uomo e una donna), e non da persone dell'uno o dell'altro sesso, come previsto dal Trattato di Nizza (2000).

Nell'articolo abbiamo anche sottolineato il fatto che il diritto dell'uomo e della donna di fondare una famiglia è ontologicamente legato al matrimonio. Questa realtà dimostra ancora una volta che matrimonio e famiglia erano e restano "le due principali istituzioni dell'umanità".

Parole chiave: strumenti giuridici, diritto di sposarsi, famiglia, diritti umani fondamentali

Part Two

Reviews

Ecumeny and Law, vol. 11(1) (2023), pp. 157—160
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.07

Církevní právo, 2. přepracované a doplněné vydání [Church Law, the 2nd revised and completed edition] Eds. Jiří Rajmund Tretera and Záboj Horák Praha: Leges, 2021

Church law is a field that is considered somewhat specific in the secularised Czech society. Although the Catholic Church is the most widespread church in this territory, the knowledge of its legal system is not much greater than that of other churches and religious societies. Therefore, any survey publication of these fields is welcome. In the Czech Republic, church law is taught at three Catholic theological faculties (the Catholic Faculty of Theology at Charles University, the Cyril and Methodius Faculty of Theology at Palacký University in Olomouc, and the Faculty of Theology at the University of South Bohemia in České Budějovice), usually in particular courses, divided according to the areas of canon law; non-Catholic theological faculties provide an overview of their own legislation, if they have it. However, canon law is also taught at some faculties of law (Prague, Pilsen, Olomouc, Brno: often in the departments of legal theory or legal history) to varying degrees, usually in the context of religion law or in comparison with secular law. The said topic was also comprehensively discussed in two monographs by Professor Tretera and Associate Professor Horák, which were published successively by the publishing house Leges (first *Konfesní právo* [Religion Law] in 2015, then *Církevní právo* [Church Law] in 2016). It was the latter publication that was promptly revised by the authors and its second, updated edition was published in 2021, which I would like to discuss here.

Professor Jiří Rajmund Tretera OP and Associate Professor Záboj Horák are teachers at the Faculty of Law of Charles University in Prague, who promote, develop, and teach to the students the knowledge on the subjects of church and religion law for many years. Professor Tretera was even among the founders of the teaching of church and religion law at the Prague Faculty of Law after the Velvet Revolution in the Czech Republic in 1989. Both authors are also the founders of the professional Society for Church Law, which was established in 1994, and of the peer-reviewed periodical *Revue církevního práva — Church Law Review*, published quarterly by the Society since 1995 (yet initially triannually). The aim of the Society is to promote research and the popularisation of church and religion law issues, which it achieves, among other things, by holding public lectures and discussions and by operating a website. The Society for Church Law is a collective member of the Czech Christian Academy, in which it operates as its legal section. It also maintains contacts with many foreign scholarly societies on church and religion law abroad (including Polish organisations Stowarzyszenie Kanonistów Polskich [Association of Polish Canon Law Scholars] and Polskie Towarzystwo Prawa Wyznaniowego [Polish Society for Religious Law]).

The reviewed monograph on Church law was published for the first time in 2016. The motive for updating the publication in 2021 was, of course, the numerous legislative changes that are taking place during the pontificate of Pope Francis (e.g. the comprehensive change in penal law by the Apostolic Constitution *Pascite gregem Dei* of 1 July 2021, which the publication considers). However, another reason for the update (as the authors themselves note in the preface) was also to take into account their pedagogical experience of using the textbook in teaching and in examining students, which led them to add, expand or shorten some parts of the text in a number of places. The book is presented as an overview not only for students or clergy, not only of the Catholic Church (which also gives it an ecumenical dimension), but also as a terminological platform for dialogue with other humanities disciplines or as an aid for lay lawyers entering into statutory or other (especially property) relations with ecclesial communities, for professional employed in the public media, teachers and others. The book cover depicts the Church of St. Lawrence in Slavice (Tachov district in West Bohemia near Pilsen), which — although it was in a state of near-demise not so long ago — has been restored to its present form and is thus a symbol of the renewal of Christian values in the Czech territory.

The publication is accompanied by a brief guide by the authors on how to approach the text and the study, in which they present the structure of the publication, explain the use of trilingual or polysemous tech-

nical terms and the unusual way of referring to sources and literature. The text is divided into three main units (parts), further subdivided into chapters and subchapters. The first part explains terminology, legal theory, the interrelation between church and religion law and the position of churches and religious societies in the Czech legal system, as well as the relationship of church regulations to secular law. The second (the most extensive) part of the publication is devoted to the canon law of the Catholic Church currently in force — primarily the law of the Latin Church, but the authors also take into account, where appropriate, the particularities of the Eastern Catholic Churches. The first chapter of this part presents to the reader a brief overview of the sources of the Catholic Church from ancient times to the present and describes in detail the most important *fontes cognoscendi* of canon law (*Decretum Gratiani*, *Corpus iuris canonici*, *Codex iuris canonici* of 1917, *Codex iuris canonici* 1983 and *Codex canonum Ecclesiarum orientalium* of 1990). It refers in detail to foreign and Czech publications. The authors then systematically describe the canonical regulations according to the structure of the Code of Canon Law (its individual books) in the following nine subsections. In particular, the section on the hierarchical structure and governance of the Church, including the governance of the Eastern Catholic Churches *sui iuris*, is treated in detail. The text does not omit the basics of the law of religious orders (division of institutes and societies, as well as formation). The next subchapter deals with magisterial law and the teaching function of the Church. The following subchapter is extensive, recapitulating the various sacraments, sacramentals, sacred places, and times, etc., with the most detailed discussion of matrimonial law, including matrimonial procedural law. This is not, however, an exhaustive treatment, which is why the authors refer to special monographs here as well. The area of property law of the Church is not omitted, however, due to its relatively small scope in the CIC not much space is dedicated to it. The following subchapter is concerned with ecclesiastical penal law and thus presents the reader in a clear way with a new text, the amended 6th book of the CIC. The last subchapter of this section is then an overview of the procedural law of the Church (the course of contentious trial, some special processes, a description of the ecclesiastical judicial system). The third part of the publication also summarizes the principles of the church law of other churches. This part is divided into two subchapters: the first is devoted to churches with apostolic succession of the episcopate (Orthodox and ancient oriental churches) and the second to the Reformation churches: the different types of the Reformation, churches from Europe and from the Anglophone environment, and in more detail the own legal regulations of the Evangelical Church of Czech Brethren and the specific Czechoslovak Hus-

site Church (which emerged from Catholicism after the First World War). After the Catholic Church, these are the two most important church congregations in the Czech Republic.

The authors have prepared a comprehensive text, including legislative texts and amendments, taking into account also the case law of the church tribunals, professional foreign and domestic publications, which are referred to both in the notes and in summary at the beginning of the individual units of the text, which is not very usual, but is very practical. Thus, the book assigns specific sources and additional commentaries directly to the specific issue under discussion, not forgetting to include survey materials, sometimes even references to commentaries on the CIC/1917 text, to the study of sources, dictionaries, encyclopaedias and scholarly articles. At the end of the publication, a comprehensive list of sources and literature is included, together with a subject index, which facilitates a quick search for a particular issue, and an index of professional periodicals related to the fields of religion and church law.

The book under review in its second edition (2021) currently forms, together with the publications *Konfesní právo* (2015) and *Právní dějiny církví* (Legal history of the Church 2019), a kind of corpus, presenting the entire material in a comprehensive, clear, and comprehensible way not only to students, but also to various experts and the general public. Thanks to this initiative, the teachers of these disciplines are able to provide students with clear textbooks, considering the legislative changes made during the pontificate of the last Popes, which have already changed the text of the 1983 Code of Canon Law in many places. In the Czech Republic, the Czech translation of the CIC, published by the Bishops' Conference in 1994, is still used, but it no longer takes into account the current regulations of canon law, and these monographs draw attention to the changes (in a systematic way). One may add that soon the new and up-to-date Czech translation of the Code of Canon Law itself will be completed and published, with the incorporated changes (direct and indirect), amendments, including notes and authentic interpretations, which is being worked on by a translation group under the direction of Professor Damián Němec, on behalf of the Czech Bishops' Conference, while the initial translations of the CIC/1983 and similar CCEO texts are being made by Associate Professor Jiří Dvořáček.

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Ecumeny and Law, vol. 11(1) (2023), pp. 161—166
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.08

Ugo Sartorio: *Sinodalità tra democrazia e populismo. Oltre ogni clericalismo* [Synodality between democracy and populism Beyond any clericalism] Padova: Edizioni Messaggero, 2022

The prospect of a Synod of Bishops on the question of the synodality of the Church announced by Pope Francis for 2023, has aroused much excitement regarding the new form of celebration of the Synod, which would consist in initiating it at the level of the particular Churches and involving into it the lay faithful. The practical form of the celebration of the Synod as a novelty, that may have come as a surprise to both the pastors of the Church and the faithful, meant that, along with the questions and solutions proposed by theologians, canonists, and Church historians alike, concerning the understanding of the phenomenon of synodality, have also brought about some queries pertaining to the practical manner of the celebration of the Synod. However, solutions proposed on doctrinal grounds do not always translate into everyday forms of practical life. This is linked to the attempts, prior to developing any solutions, at truly following the path indicated by the pontiff. The variety of measures taken, as the example of the German synodal path shows, provokes reactions from the Roman Curia and the pope himself. For this reason, it is important and desirable to take a doctrinal approach to understanding the synodal way of the Church and to point out the forms of its actualisation that take place in and for the Church. The danger of navigating through erroneous and undesirable pathways on the synodal journey stems from the adoption of concepts and descriptions of reality that are characteristic

of today's world. Transferring them to a community in this world but not of this world and capturing it in the wrong language becomes a source of misunderstanding within the process that is currently taking place in the Church.

This issue is looked at by Ugo Sartorio, who points out that synodality is an issue, not so much one that has its place defined by the limits of how, on the one hand, democracy and, on the other, populism are understood, but rather one that is incompatible with neither democracy nor populism. For an expert reader, the title of the study leaves no doubt. The author addresses issues that misrepresent the phenomenon of synodality, and so are a form of its reduction to weighty and desirable forms of democracy or populism. Nevertheless, the subject matter that the author addresses promises to be more intriguing, which is expressed by the book's subtitle: *Oltre ogni clericalismo* (Beyond any clericalism).

Already in the introduction, Sartorio points out that this short study is a sequel to his earlier, broader work on the subject of synodality (*Sinodalità. Verso un nuovo stile della Chiesa* [Synodality. Towards a new style of the Church], Àncora, Milano 2021). For this reason, the reviewed book does not address the fundamental questions concerning the phenomenon of synodality in its doctrinal approach by discussing the fundamental issues related to it but is devoted to the themes mentioned in the title and, as the author points out, without claiming to provide exhaustive solutions. Indeed, the question of synodality remains open and by its very nature inexhaustible, which stimulates as of yet and probably ever uncompleted transformation of the Church towards a new form of presence in the world. Therefore, the suggestions made by the author may provide a picture of the consciousness of the Church today, but without closing itself off to its further development.

In Chapter I entitled "Sinodalità e democrazia" (Synodality and democracy), the author presents and analyses the views of some theologians and scholars who have commented on the democratisation of the Church in relation to its synodality. This approach reflects the historical moment of change taking place in the world, in which a crisis of democracy is discernible along with the growing role of populist leaders. In both parts of this two-part chapter, the author first presents the views of a number of scholars (K. Rahner, J. Ratzinger, G. Ruggieri, G. Alberigo, E. Corecco. H. Legrand, A. Borras, R. Repole). However, he does so not from the point of view of the diachronic development of democracy and synodality, but rather from the perspective of the relationship between the Church and democracy. The positions of the above mentioned scholars, despite their different sources and ways of understanding the phenomenon of synodality, indicate constancy in their treatment of the issue of the

relationship between the Church and democracy. This is emphasised by U. Sartorio in the second part of the chapter, in which he summarizes previous opinions by the said scholars. He points out that the Church does not deny or reject the sense and value of democracy, but that she herself is not based on democratic structures because of the person of Jesus Christ as Lord, whose presence determines the actions of the Church. The awareness of this truth coexisting with the *sensus fidei* of the baptised on the synodal journey of the all People of God touches upon the question of the common recognition, acknowledgement, and determination of what is right for the Church, where the voice of the people meets the voice of the shepherds. Sartorio indicates that there is not always a balance in this process between the decisions reached and the path leading to reaching it. He accurately observes that this difficulty is not only due to external influences motivating consciousness in the decision-making of the faithful, but also due to a certain ecclesial mentality of insufficiently educated pastors and faithful who do not only decide "on the behalf of the Church," but above all "as the Church." The author points to the insufficient reception of the conciliar teaching and the lack of a proper reflection of the *communio* of all the baptised as the cause of it. At this point, Sartorio concludes, populism meets clericalism, which both are a travesty of the synodal way and shared responsibility for the Church. Indeed, synodality is not a tool for decision-making in the Church along the lines of democratic mechanism, but the way of living of the Christian community that allows everyone to be involved in listening to the word of God. The author has thus indicated the content and sources of democratic and populist inclinations inside the Church, which are caused not only by external factors. For they are present in the community of believers itself, in their understanding of the divine-human community and the role they are obliged to play in it.

In Chapter II, "Chiesa sinodale e populismi" (Synodal Church and populism), the author remains faithful to the methodology present in the previous chapter. He depicts for the reader another relational juxtaposition. It is, on the one hand, a community defined as populist and, on the other, another one guided by the principles of synodality. The point at which the two meet is the question of participation, understood in its own proper sense and characteristic of the two ways of doing it. The analyses carried out lead Sartorio to conclude that democracy is an ambiguous concept, also in the forms of its implementation. Its constant element is the reference to society as the source of its origin. At the same time, he points out that populism itself can be read similarly in terms of the representation of a community by its leader. In this context, he goes on to consider issues, including problematic ones, relating to co-

participation and power in the Church from the perspective of decisions taken. He emphasises that co-participation in the Church is a bond based on mutual trust between members of the community. The means offered by the synodal dimension of the Church should therefore be seen as an expression of the will to build an ever deeper community and shared responsibility. The author focuses his further reflections around the issue of the populist community and the synodal community by first pointing out that populist thinking is concentrated upon the leading figure and the immediacy of his/her actions aiming ultimately at satisfying the needs of the group supporting him/her and ultimately negating social pluralism. The author supports his reflections with statements by Pope Francis, which gives his remarks the value of a view of reality that is independent of politics. He quotes and comments on the pope's vision of the Church as the People of God based on the teaching of the Council, which is far from any form of populism. Francis stresses that in the community of the Church as the People of God there is no place, also because of the role the ecclesiastical hierarchy has in it, for any trace of the characteristics of populism, which boils down to absolutising the will of community and marginalising the elite. In Francis's perspective, the Church is far from any form of populism, since it is part of its nature to have a deep bond existing as a *communio* between the laity and the clergy. Neither group can exercise authority over the other. The Church hierarchs cannot do so if their authority is not evangelical and does not lead to the co-participation of all in the life of the Church. Nor do the laity have uncontrolled authority over the ecclesial community. Of great value for understanding the issue under consideration are the conclusions at the end of the discussed chapter. This is because the author has not only provided an analysis of the issue but has enumerated in a practical way the potential forms of the presence of a populist approach within the ecclesial community.

The chapter which follows is entitled "Sinodalità, oltre ogni clericalismo" (Synodality, beyond any clericalism). The author explains the intention of addressing this topic in the light of the reflections carried out thus far. This makes it possible to understand the content marked in the title of Sartorio's study. The eponymous clericalism is, in Pope Francis's understanding, the interference of the Church in the sphere of politics, the involvement of the clergy in the matters inappropriate to their vocation and role in the Church, up to what he calls the improper, combined with abusive exercise of authority in the Church. Thus, the concept of clericalism has been moved from an external attitude towards the Church to an internal one. It may seem that the author's reflections therein slightly deviate from the main theme of his study. However, he explains that the

issue of clericalism can be looked at in the perspective of the synodality of the Church, since taking the synodality path is at the same time a means of getting rid of the clerical attitude among the clergy in the dimensions that Pope Francis spoke about. The essence of synodality, in the first place, is to listen together to the word of God, which stands in opposition to the unequivocal views expressed either by the clergy or the laity influenced by them on issues related to the life of the Church. At the same time, a true synodal journey instigates the process of transcending the clericalism present in the community.

The final (fourth) chapter of the book is devoted to guidelines for making the common synodal way possible. The author draws attention to the concept of synodality, which remains too vague in its meaning and concepts. He proposes the use of wording that makes participation and shared responsibility clearer (synodal, process, way). He also points to the need to get rid of the slogans that are often uttered about the ecclesial synodal way and replace them with terms that characterise it. The said terms would clarify it and constitute an impulse to undertake the journey together. It is the third element which Sartorio focuses on indicating that it is impossible to speak of the synodal way and have in mind the meaning other than a common path in the sense of taking it with others with all the consequences of journeying together. The synodal way is fraternity, communion, solidarity, which require converting towards what is done together. The author also emphasises that synodality is not an ecclesiological question concerning forms of expression, structures, and procedures in need of improvement, but it is a theological question that requires a constant search for an expression of the Church that is able to reveal the mystery of God present in the Church and the world. Hence, synodality is about listening to the problems of today's man. This leads to the final conclusion and simultaneously to the indication that synodality is at the same time listening to God and to the other person, thus creating a circle of people walking together on a common path. This reality of the Church is far from her dominant vertical dimension. It goes back to the biblical roots, when God reaches out to his people. Synodality, Sartorio concludes, is therefore a continuous journey of conversion.

The study by Ugo Sartorio, in spite of the significant-sounding terms contained in the title: democracy, populism, clericalism, deals with the issue of synodality in the full sense of the word. The three synodality-related issues determine the subject of the study and, at the same time, arouse interest in the problematics encompassed by the meaning of these three concepts. It is a skilful procedure that makes these issues, which are present in public life and at the same time concern the Church herself, to

contribute to the spirit of the text that exposes the misjudgement of the Church in terms of philosophy and politics. This is, however, a secondary topic compared to the more important issue leading to an understanding of the synodal dimension of the Church in today's world.

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Ecumeny and Law, vol. 11(1) (2023), pp. 167—171
ISSN 2391-4327

https://doi.org/10.31261/EaL.2023.11.1.09

Carlo Fantappiè: *Metamorfosi della sinodalità Dal Vaticano II a papa Francesco* [Metamorphosis of synodality From Vatican II to Pope Francis] Venezia: Marcianum Press, 2023

Nowadays, there is no shortage of studies and scientific publications on the issue of synodality in the Church in recent years. The author of the reviewed book, Carlo Fantappiè, mentions it in the introduction (p. 7). Those interested in this issue can consult the many publications available in bookshops. For those unfamiliar with the subject matter, it may come as a surprise that a significant number of authors focus their attention on the changes introduced by Pope Francis, commenting on them, explaining them, or assessing them negatively, while attempting to understand and define the phenomenon of synodality so accentuated in the Church today. Yet, contemporary studies are not merely historical, theological or canonical analyses of synodality. For experts in this field and those trying to explore this issue, each new study will inspire them to see those aspects that have not always been present in their own research work.

There is no doubt that the new process of holding the Synod of Bishops, introduced by Pope Francis, which is beginning at the level of particular Churches with the strong involvement of the lay faithful and dedicated to the theme of the synodal Church, provokes questions about the foundations of this phenomenon, in particular its legitimacy, aiming to understand or even negate it to a certain extent. For every novelty in a legal institution raises questions about its foundations. In the case of the phenomenon of synodality, the legitimacy of its new aspects or forms

can be understood by noticing and emphasising the permanence of the ecclesiastical phenomenon. The historicity of the phenomenon, and this is the case with synodality as an experience present in the Church and prior to the conceptualisation of phenomenon itself, requires its essence to be grasped. For what is present can only be known and understood by taking into account the past. The coexisting elements of permanence and variability should be the object of scientific inquiry and explanation, and thus strengthen the theological basis of the phenomenon, demonstrate canonical solidity and pastoral effectiveness. It is in this perspective that Carlo Fantappiè stresses while considering the scientific matter under discussion (cf. p. 6).

Fantappiè seems to be aware that his study is another one in a series of publications dealing with the theme of synodality. However, in his words to the reader, he explains that in its content the book differs from the others addressing the issue. This had been his intention when he began his research. The attentive reader therefore has the opportunity to look at the phenomenon of synodality in a new perspective. To do this, however, surely requires some familiarity with studies published prior to Fantappiè's book. Further reading, however, deals away with these concerns. The author briefly and concretely presents contemporary developments in the topic of synodality. For a person unfamiliar with the topic of synodality, the author's assumptions addressed at the reader may be an encouragement to take the first steps familiarising oneself with the phenomenon in question. The author indicates this in his opening words when he writes that he will draw attention to the weaknesses of the "synodal programme in the life of the Church" by proposing necessary additions and solutions. Thus, the study will not be a destructive criticism, but rather an expression of constructive criticism in full conformity with the "synodal spirit of the Church." This two-pronged approach: to present the phenomenon of synodality since Vatican II, and thus to point to its foundations, and to analyse its contemporary forms in varying permanence together with an indication of its weak moments, makes the study of Carlo Fantappiè a proposition for both critics and supporters of the synodal process taking place before our eyes. The author's intentions, apart from being an intellectual struggle with today's form of synodality, reach out to those who may not fully understand this phenomenon. This can lead either to indifference, rejection or, to the contrary, may give rise to exaggerated stance of proclaiming erroneous views, or to undertaking inappropriate forms of updating synodality.

A novelty of the synod announced for October 2023, with the second synodal session in October 2024, is the participation of lay faithful from the first stages of the synodal process in the particular churches.

As Fantappiè claims, this is not a sensational novelty, but the result of reflection and pastoral choices aimed at giving the Church a new evangelising impulse. Regardless of the outlook and framing thereof, such a synodal process raises questions of a theological and canonical nature which, in the author's opinion, have not been sufficiently highlighted so far. Carlo Fantappiè devotes his study to these issues.

For the sake of clarity, the author provides elements of the methodology used in the study. With regard to the first two issues, he traces and presents the genesis of the various conceptions of synodality to then indicate the implications that theological and canonist doctrines have had on the understanding of synodality. However, he does not intend to remain at the level of description, but rather to point out the ambiguity that is present in the various approaches to the phenomenon itself and the critical moments of the synodal process, in order to finally propose methodological guarantees that make it possible to update the phenomenon of synodality in the Church.

Already in the introduction, Fantappiè points to what is important in considering synodality, its concept and its significance for the Church. He draws attention to the erroneous approach that seeks the basis of the phenomenon in the early Church, which draws upon today's understanding and framing of the term. In considering the definition and content of synodality, the history of the Church showing her in a specific historical moment cannot be overlooked. The author believes that, for this reason, the starting point for a consideration of synodality should be the image of the Church as it was presented at the last Council. The perspective of contemporary reflections on synodality, its meaning and the limits of understanding is the concept of *communio* in the Church, which is actualised on many different levels: *communio cum Deo et hominibus*, *communio* between the faithful, God, the Church, and the world, *communio ecclesiarum* between the particular Churches and the Church in Rome and between the bishops as their representatives. Furthermore, in the current consideration of the phenomenon of synodality, it is necessary to take into account what is characteristic of today's awareness of ecclesial communion, namely the principle of dignity and equality of rights and duties and shared responsibility for the Church (p. 14).

The methodology and perspective of consideration is therefore precisely defined. The phenomenon of synodality must be approached in the light of what the Church says about herself today. In Chapter I, "Genesi del concetto" (Genesis of the concept), the author presents the first attempts to develop the concept of synodality on the part of theologians and canonists that emerged under the influence of Vatican II (pp. 15–33). He draws attention to the differences in the approach to synodality that

emerged among German, Swiss, and American canonists, who link their understanding of synodality to the concept of *communio*, and the concept present among Italian or Spanish canonists, who see it in the ways in which collegiality is made present in relation to primacy or in relation to questions of rights and duties in the Church.

The second chapter, "Sviluppi dottrinali" (Doctrinal developments) is devoted to the presentation of the further development of the concept of synodality (1978—1993; 2001—2018). The author makes it clear that after Vatican II, despite the many attempts to define synodality, its concept is not unambiguous and even less commonly shared. The author does not stop at merely presenting these concepts. He reflects on the sources of this diversity in understanding of synodality. He points out that the authors of the concepts did not take into account the theories of their predecessors, but instead developed their concepts autonomously based on the accepted criteria. Fantappiè indicates three main groups of reasons (he mentions others when discussing the main ones) for the different conceptions of synodality: 1) synodality existing in a functional sense (*modello funzionale*) in relation to one of the selected elements underlying it (*communio ecclesiarum*, *munus episcopale*, *munus regendi*) or in relation to the life of the Church in her fullness; 2) synodality not only as a constitutive aspect of the Church, but one that includes all the other forms of participation in the governance of the Church (*modello unitario*); 3) synodality derived from the various constitutive realities of the Church such as communion, shared responsibility, collegiality, conciliarity, which remain in relation to one another as concentric circles (*modello plurale*). The author closes the discussion around the understanding of synodality by quoting a document of the International Theological Commission, pointing out the multifaceted and interdisciplinary nature in the quest for its full understanding. This requires combining ecclesiology, theology (Bible, Tradition), the history of ecclesiastical institutions and integrating the conclusions they present with the ecclesiology *communio* of Vatican II, the teaching of Francis and the problems of the contemporary Church. The author emphasises that from the definition of synodality comes the activation of listening to all the members who make up the People of God in the quest for the discernment of truth in the missionary activity of the Church.

The author begins Chapter III, "La recezione dell'idea di 'Chiesa sinodale'" (The reception of the idea of the "synodal Church") by presenting Francis's teaching on synodality and the changes made by the pope to further trace the reception of his teaching. It is not the first time that he highlights the lack of unanimity in the understanding and reception of papal teaching. Fantappiè devotes the next section of the said chapter

to this topic looking at past as well as contemporary understanding of synodality. He analyses each of them, pointing out those elements that pose a danger to a correct understanding of synodality and should be unmasked, which the author himself does in his critical analysis. He does not stop at merely presenting the erroneous elements of the views formed, but in the last point describes the precautions that should be taken into account in today's understanding of synodality and in the practice of the entire synodal process. He points to three of them: 1) the one of a methodological nature (the need to define an operative boundary for the concept of synodality); 2) the one of a doctrinal nature (drawing a clear line between synodality and democracy); 3) the one of an institutional-legal nature (avoiding the violation of the constitutive structure of the Church by the divine decree).

Carlo Fantappiè concludes his study with a question of an ecclesiological nature: In the case of Francis and his doctrine of synodality, are we dealing with a new form of reception of Vatican II or are we rather dealing with a transition from a hierarchical Church to a synodal Church, thus modifying the structure of authority based on the Pope, the Roman Curia or the College of Cardinals. The author remains with this question, which the attentive reader can answer for himself. It is not a doctrinal answer, but a functional one in the dimension of the shared responsibility for ecclesial communion.

Fantappiè, in the publication reviewed here, guides us through the meanders of the richness of community life in the Church. He does not stop at presenting the story of how the phenomenon of synodality has been understood thus far, but points to a process that is constantly alive, not only because we are witnessing it, but as a way of the Church's existence in the world placing clear boundaries between what the Church is and what it is supposed to be according to this world. The publication by Fantappiè is a concise and succinct study, concrete and topical in the Church that talks about synodality but also learns the synodal way.

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Ecumeny and Law, vol. 11(1) (2023), pp. 173—176
ISSN 2391-4327

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The publication is indexed in the following databases:

BazHum

Central and Eastern European Online Library (CEEOL)

Index Copernicus

Worldcat

Erih Plus

Copy editor
Krystian Wojcieszuk

Proofreading
Joanna Zwierzyńska

Cover designer
Paulina Dubiel

Typesetting
Marek Zagniński

Electronic version is the original one. The journal was previously published in printed form with the ISSN 2353-4877.
The journal is distributed free of charge ISSN 2391-4327.

Published by
Wydawnictwo Uniwersytetu Śląskiego
ul. Bankowa 12B, 40-007 Katowice
www.wydawnictwo.us.edu.pl
e-mail: wydawnictwo@us.edu.pl

First impression. Printed sheets: 11.25. Publishing sheets: 12.5.

ISSN 2391-4327
32
9 772391 432302

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