Philosophy & Canon Law

Vol. 6

Between the Culture of the Right to Responsible Parenthood and the Culture of the "New" Human Rights: Reproductive and Sexual (II)

UNIWERSYTET ŚLĄSKI
WYDAWNICTWO

Philosophy and Canon Law

Vol. 6

Between the Culture of the Right to Responsible Parenthood and the Culture of the "New" Human Rights: Reproductive and Sexual (II)

Wydawnictwo Uniwersytetu Śląskiego • Katowice 2020

Contents

Part One
Canon Law

Part Two
Reviews

Part One

Canon Law

Philosophy and Canon Law vol. 6 (2020), pp. 7–21
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.01

Robert Benne
Roanoke College, Salem, Virginia, USA
https://orcid.org/0000-0002-1710-9665

God's Holy Ordinance

It is not your love that sustains the marriage, but
From now on, the marriage that sustains your love.
Dietrich Bonhoeffer,
Wedding Sermon (*Letters and Papers From Prison*)[1]

Abstract: In this article, I argue that the church must build up its theology of marriage in a more disciplined manner because the culture no longer sustains the Christian notion. In making a substantive argument I rely on the Lutheran "two ways that God reigns" approach in which we share "places of responsibility" with all humans, but in which the Christian virtues of faith, love, and hope transform those places into genuine Christian callings. I then contend strongly for the continued rejection of same-sex marriage among orthodox Christians. I conclude with what I hope is a compassionate pastoral approach—gracious tolerance—toward homosexual Christians.

Keywords: individualism, places of responsibility, faith, love, hope, gracious tolerance

I. Our Situation

"What is assumed is not understood," said a wise but anonymous person. That wise saying is certainly applicable to the ethic of sex and marriage. For so long a particular Judeo-Christian version of that ethic was embedded in our culture that few paused to understand and defend it. Even the churches did little to understand it; they, too, floated on the momentum of the culture.

[1] Dietrich Bonfhoeffer, *Letters and Papers from Prison* (London: S.C.M. Press, 1953), 150.

I can remember no one—neither parent, nor church, nor school—instructing me about the immorality of premarital sex, about the indissolubility of the marriage bond, abut sexual fidelity in marriage, about the joyful obligation to have children, and the heterosexual nature of the bond. But I knew what was right, as did my compatriots growing up in the 1950s. Everything in the culture reinforced the ideal, including the popular entertainment of the day. (Ingrid Bergmann had to flee Hollywood when it became known that she had a child out of wedlock.) I astound my students when I tell them that in my growing up years I knew no one whose parents were divorced.

I am not so naïve to think that that ideal was followed scrupulously by everyone. There certainly were those who went astray. My wife and I were attendants in at least one "hurried" matrimony. But the ideal was strong enough that it was not difficult to find a prospective mate who held to those ideals, which we did when we found each other.

The culture has come a long way since then, mostly downward with regards to a wholesome ethic of sex and marriage. One of the most helpful analyses of this culture was offered some time ago, and then updated, by Robert Bellah in his *Habits of the Heart*.[2] In that book he argued that the two great normative visions of life that made up America—what he calls Republican and Biblical virtue—have been subverted by two new forms of radical individualism, the utilitarian and the expressive. The older visions of life bore and were transmitted by practices—including marriage—that enfolded intrinsic goods into their performance. These visions with their attendant practices were carried by communities shaped by formative narratives. The newer individualisms have no narratives that gather them into communities of vision and are corrosive of strong connections among persons and communities.

Utilitarian individualism—aiming at personal success through disciplined self-interest—tends to view marriage as a limited contract between two wary, self-interested parties. (The prenuptial agreement is vividly illustrative of this utilitarian view.) Expressive individualism—devoted to the free expression of internal states—views marriage as desirable only as long as individuals can express and satisfy their needs within a tentative agreement to be together. When the bells no longer ring, it is time to move on.[3]

Since both forms of individualism view institutions with suspicion, since they involve persisting commitments outside the self, they are also wary of marriage. Thus, we get an exponential growth in cohabitation, in which public commitment is not required. Cohabitation is the fitting fruit of both kinds of individualism.

---

[2] Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley, CA: University of California Press, 1985, 1996), 27ff.

[3] Bellah, *Habits of the Heart*, 142ff.

We have also witnessed an exponential growth in sex outside of marriage. Everybody's doing it, says the popular media in every possible way. A Martian visiting the earth from afar might guess that sex only happens outside marriage. In our popular culture, sex has been detached from commitment; it has also been detached from procreation. And, increasingly, it is being detached from bodily form. Sex has been plunged into what Freud called "polymorphous perversity."

We are now aware of the terrible toll that this transformation in sexual behavior has wrought in broken marriages and families, troubled children, venereal diseases, and chaotic personal behavior. No doubt some good has come from this transformation, but on the whole, the effects seem to me to be perverse.

Meanwhile, the church has not taken seriously this powerful cultural shift. The last two generations have been powerfully influenced by the unfolding individualism I spoke of above. They are likely to hold unstable mixtures of Christian and cultural notions of sex and marriage. The church continues to meander along when a dramatic battle is going on for the soul of its young. This complacence is evident in the lack of Christian education programs—including both religious and moral elements—being mounted by our churches. We need much more serious educational formation of our young. A sign of that need is the emergence of home-schooling in our country by serious Christian families. Christian parents have lost trust in both public education and the church when it comes to their children's ethical formation.

At any rate, we now have a world in which the Christian ethic of sex and marriage is neither assumed nor understood. It is time to rebuild our understanding of the Christian marriage and sexual ethic since we can no longer assume one. The following is meant to offer a Christian theological and moral vision of marriage, and by implication, a Christian view of proper sexual norms of behavior. It will discuss homosexual behavior in that larger context.

II. Marriage as a Place of Responsibility

To this day in Germany, one goes to the magistrate for a civil marriage and to the church for a Christian marriage. This duality indicates that Lutherans believe the institution of marriage has a civic status, independent of the church's blessing of same. This is because Lutherans inalterably argue that God has not left the world bereft of his creating, governing and judging presence after the Fall. God has preserved certain forms—called "Orders of Creation"—to order and sustain the human community. In the Old Testament this "First Institution,"

in Luther's words, was founded before the fall.[4] "Therefore a man leaves his father and mother and cleaves to his wife, and they become one flesh. And the man and his wife were both naked, and were not ashamed" (Gen. 2:24).

This "place of responsibility" is something that is shared by the whole world, whether Christian or not. As an estate of God, it is oriented toward preserving and sustaining the creation. It is a dike to sin, it provides for permanent loving unions, it is the place for bearing and nurturing children, and it is a platform for service to the world. Many religions and cultures endorse these basic ends of marriage, though they may define marriage in different ways. Even in our dissembling culture, those ends are still held in high esteem, yet ensconced in law and custom. In all societies it is a crucial institution. That is why there is widespread alarm in almost all the countries of Europe and North America, where marriage is less practiced and less stable than earlier.

The orders of creation and the obligations that go with them—Lutheran version of the natural law—have been thought to be accessible to human reason and experience. But they—like Catholic versions of natural law—are best viewed in the light of the revelation of God in the Old Testament, where God reveals his will for our life together. He wills a covenantal existence for us in the varied places where we live our responsible lives out, marriage being the primal covenant that God offers man and woman in their mutual needs and possibilities. That covenantal existence is ordered by the Law of God, which sometimes operates incognito in the consciences and experiences of people and at other times explicitly through the Commandments of God. The Law of God contends in human existence with human propensities toward sin, so that every concrete historical manifestation of covenantal existence is marred by sin. Even so, all cultures at their best reflect the tug of God's Law by shaping bonds between men and women that are faithful, fruitful, and permanent.

It seems that marriage in the Old Testament gradually moves from polygamy toward monogamy, so that by the time of the New Testament, the latter provides the normative model.[5] That certainly seems to be the moral norm taught by Jesus and Paul. But though there were a variety of models of marriage in Old Testament Judaism, as well as in other world religions, there is overwhelming unanimity that the structure of marriage is heterosexual, again as in all other world religions.

The unanimity on heterosexual marriage is matched by the unanimity of opposition to homosexual relations in general. There is an overwhelming consensus that there is a divinely created structure to sexual life.[6] Women and men are meant to complement each other in sex and marriage. They "fit" together

[4] Martin Luther, *American Edition of Luther's Works*, ed. Jaroslav Pelikan and Helmut Lehmann, (Philadelphia: Fortress Press; St. Louis: Concordia Publishing House, 1955–1986), 1: 103.

[5] See John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition,* 2nd edition (Louisville: John Knox Press, 2012), 43ff.

[6] Witte, *From Sacrament to Contract*, 15.

physically, emotionally, and spiritually. They have the possibility of procreation. Some of this "fit" is of course culturally constructed, but that construction is built on solid biological, even ontological, grounds. Male and female God created them, and they are meant to be together in the bonds of marriage. This is a near universal in human historical and cultural experience. And it is crystal clear in the Hebrew and Christian Scriptures; one does not need proof texts to demonstrate the heterosexual nature of marriage and sexual relations in the Bible. Indeed, that fact is even conceded by the proponents of homosexual unions, only they call the phenomenon "heterosexism."

If what I said is true in Section I, our ideals about and practice of marriage are in disarray, not only in society but also in church. The general agreements suggested in Section II have diminished in normative power. We have weak assumptions and even weaker understandings. The corrosive individualism that disturbs society also affects the people of the church. So it behooves us to come to a better understanding of and training for marriage in the Christian community.

III. Marriage as a Christian Calling

Building on the theological notion that God wills the ordinance of marriage in all the world, we will now move on to a particularly Christian understanding of marriage.

We are now moving from marriage as an ordinance or estate to marriage as a *holy* ordinance or a *holy* estate. Or, we are moving from marriage as a place of responsibility to marriage as a Christian calling.

The church brings three great Christian virtues to bear on the ordinance of marriage to make it a *holy* ordinance—faith, love, and hope. Likewise, well-formed Christians bring those virtues with them as they transform a place of responsibility into a calling.

Faith is first of all faith in the justifying grace of God in Christ that affirms and forgives those who believe in the Gospel promises of God. That grace is radical and universal, offered to all who cast themselves upon the mercy of God in Christ, whether they are married or unmarried, young or old, rich or poor. This is the "vertical" dimension of faith. But for the Christian who receives the Gospel through the power of the Spirit, the same Spirit makes faith practically effective in the world. This is the "horizontal" dimension of faith, if you will.

A. Faith[7]

1. Its first effect is to discern the deeper level of meaning and reality that inheres in the institution of marriage. Marriage is discerned as an estate founded and willed by God. His will undergirds the deep purposes of marriage—faithful union, procreation, and service to the world. Marriage is not simply an emergent of cultural evolution, a purely human construction, or the product of necessary repression for the sake of an orderly civilization. Rather, "The Lord God in his goodness created us male and female, and by the gift of marriage founded human community […]."[8] Jesus quotes Genesis 2:24 as to the divine origin of marriage when he debates the nature of marriage vows with the Pharisees (Mk 10:7–8). Luther affirms that the "lawful joining together of a man and a woman is a divine ordinance and institution."[9] Bonhoeffer certainly delineates the divine, objective character of Christian marriage when he writes to a young couple about to be married:

> Your love is your own private possession, but marriage is more than something personal—it is a status, an office […]. As high as God is above man, so high are the sanctity, the rights, and the promise of marriage above the sanctity, the rights, and the promise of love. It is not your love that sustains the marriage, but from now on, the marriage sustains your love.[10]

The sacred canopy that is marriage hallows our life together, shielding us from the confusion and disorder of the world. It provides the protected space under which marital love can grow. When we live in accordance with God's establishment, we move with God's will; when we ignore it or violate it, we rebel against something more than human convention. Lord help the church that rebels against God's establishment by violating or distorting it.

2. The second practical work of faith is to enable persons entering marriage to see their roles as a calling from God. They come to see themselves playing a role in the covenantal existence that God has provided for them. They enter Christian marriage in a disciplined fashion, responding to God's call to be formed into the Christian vision of marriage.

This Christian vision can be discussed briefly under two rubrics—the context and time frame of the marriage vow. First, let us look at the context. Far from being limited to a private vow between two persons, as our individualistic

---

[7] This exposition of the virtues can be found more fully in my book, *Ordinary Saints: An Introduction to the Christian Life* (Minneapolis: Fortress Press, 1988, 2003), chap. six.

[8] *Lutheran Book of Worship* (Philadelphia: Board of Publication, Lutheran Church in America, 1978), 203.

[9] Luther, *American Edition of Luther's Works*, 1: 134.

[10] Bonhoeffer, *Letters and Papers from Prison*, 150.

culture seems to maintain, Christian promise-keeping has many contexts, all of which are publicly important. Like the public and historical nature of God's vow to Israel and Jesus's vow to the church, Christian marriage vows are historical and public.

There is of course the interpersonal nature of the vow: "I take you to be my wife/husband from this day forward […]." But that is preceded by an *intrapersonal* vow: I promise myself that I take the other in faithfulness. I agree to bind myself to that vow. From there the context broadens. Promises are made before family and friends, who witness its solemnity and vow to support the couple in their life together. Further, the vow is made in the context of the church—the pastor symbolizing that context. Vows are made to conform to this universal community's particular understanding of marriage. That understanding has been blessed by Jesus "who gladdened the wedding at Cana in Galilee."[11] The vows are also made in the legal context of the state, which has an interest in sound and stable marriage. But, finally and most importantly, the vows are made before God, who has ordained this estate and called the participants to play their roles in the institution he has founded.

These ever-widening contexts bestow a powerful social quality on Christian marriage. It renders pale and insufficient current practices of "living together," which lack the objectivity and seriousness of public vows. Christian promises reverberate far beyond the couple alone. They establish the couple within an ongoing community that finally claims divine sanction for its practice.

The time frame of Christian marriage is as long as the context is wide. The marriage that Christians are called to was created from the beginning by the Lord God, "who created our first parents and established them in marriage."[12] That foundation extends continuously throughout history through many generations to the present day.

By vowing to enter this tradition in the present, a Christian couple makes a sharp break with their earlier life by entering into this new covenant. Their vows indicate a powerful rite of passage. After this moment, loyalties are rearranged, financial responsibilities change, a new home is founded, and the "two become one." This moment of transition opens the way for sexual relations; properly so, for it marks the moment of public commitment and validation. It is fitting that the access to the most intimate and life-promising of exchanges be given at that time. Just as priests do not baptize or marry, judges do not render decisions, and presidents do not issue presidential orders until vows are made and validated, so new privileges—as well as responsibilities—come with the vows.

---

[11] *Lutheran Book of Worship*, 201.

[12] *Lutheran Book of Worship*, 203.

Christian marriage has a future dimension as well. There are solemn intentions toward a permanent bond. "I promise to be faithful to you until death parts us." We are to "find delight in each other and grow in holy love until life's end."[13] At the moment of marriage, the partners themselves as well as their mutualities are immature. The vows of permanence are assurances that the partners will give each other and their relationship the time to grow and flourish. They recognize with Jesus that what God who puts together no one should put asunder.

B. Love

The crown of Christian marriage is its affirmation of agape love, a special kind of reflected love that is characterized by unconditionedness, steadfastness, other-regarding faithfulness. Love in marriage is to be modeled after God's faithful love for his people and Jesus's love for others. Married love is to remain constant in the "joys and sorrows that all the years may bring." Fidelity includes commitment to the other's good, even amid the changes that each shall undergo. It includes the willingness to forgive and begin anew. It means affirmation and acceptance of the partner as partner, no matter what the judgments of the world are with regard to life in the world. It obviously means fidelity in sexual matters so that the deepest intimacies are never violated by moving them outside the bond. It means the willingness to become dependent on the other—physically, emotionally, and spiritually. It means enduring partnership in bearing and nurturing children and in broader service to the world.

Married life under the bond of agape love is not all heavy and serious. It is within the comfort and security of faithful love that many kinds of spontaneities can flourish. It provides space for fun, for secure delight in all the pleasures of marital life. This transcendent love builds upon earthly loves—erotic, pragmatic, romantic, and friendship—that the Creator has built into creation to draw woman and man together. A number of these mutual loves have to be strongly present in the relationship of married lovers. But such loves, important as they are, are unstable because of human sin and finitude. Partners change with time, they intentionally and unintentionally violate each other and their relationship, and they have rough edges that never are completely ironed out and thereby become sources of discontent.

Agape provides the capacities for steadfastness and reconciliation that can overcome the turbulence caused by the disruption of mutualities that are bound to occur. Agape disposes each partner to repent, initiate forgiveness, and work at building up the bond that simply cannot be free of problems.

---

[13] *Lutheran Book of Worship.*

Agape also lures both partners from focusing on themselves to caring for others, first to the bearing and nurturing of children, if that is their aim, as well as to the service of others in their callings in work, church, society, and world.

C. Hope

One salutary dimension of Christian hope is that our salvation is finally not dependent on our performance in marriage. Our acceptance by God is dependent on his free grace in Christ, not our work. This is a source of firm hope for several reasons. First, we are freed from placing ultimate trust in a "successful marriage" or even in our spouse. This gives us needed distance from both so that we will not have the wrong kind of expectations of any human connection. We need not frantically grasp at perfection and thereby fail to receive the blessings that have already been given. Second, we are assured of the daily forgiveness of God that enables us to pick up our lives and live them anew every day, even amid our flawed marriages. That gives us the needed hope to continue. We can move into the future.

Because we know we are offered anew this grace every morning, we can hope for a time of completion. Our marriage vows include the supplication that we might "grow in holy love until life's end."[14] Further, they express the hope that "the joy that begins now will be brought to perfection in the life to come," and that we "may at length celebrate with Christ the marriage feast which has no end."[15]

There may be no giving and taking in marriage in heaven, but certainly those bonds of faithful love that have been shaped on earth as a sign of the kingdom will not be lost in the fulfillment of that kingdom. As with all approximations of the kingdom, the bonds of marriage will be drawn by the good power of God to himself in his good time. All the fragile, flawed, and interrupted relations of earth will find their permanence and completion in heaven. In this can we hope.

So, we have faith, love, and hope. According to the measure we have been given by the Spirit, marriage becomes transparent to God's presence and will. Shored up and supported by the Christian community, it becomes a calling that is central to the Christian life.

[14] *Lutheran Book of Worship*, 203.
[15] Ibid.

IV. Homosexuality

Before we move to this highly contested issue, it is important to note that our first priority as a church ought to be addressed to concerns directly surrounding heterosexual marriage—the high incidence of divorce, abortion, pre-marital sex and out-of-wedlock births. As I argued above, the church has not yet come to the realization that it has to form its people in a far more disciplined and intentional way. The culture, instead of supporting the church's vision, is now moving in the opposite direction.

Nevertheless, the topic that challenges us right now is that of homosexuality. Issues surrounding homosexuality—the church's blessing of homosexual marriage and the ordination of open homosexuals—have divided all mainstream Protestant communions. These issues—and the acceptance of homosexual conduct that they assume—are so controversial because they seem to impinge upon the moral core of Christianity. Two of the Commandments, for example, assume and are directed toward the heterosexual structure of creation and marriage that I spoke of earlier. These Commandments seem to indicate that departures from that structure are indeed violations of the core. If my prior argument is biblically and theologically cogent, then there can be no "marriage" of homosexuals. The Bible and tradition seem utterly clear that God intends the heterosexual covenant of marriage as the context for sexual relations. One hardly needs specific prohibitive texts against homosexual behavior, though there are many. (No texts, however, even remotely endorse homosexual relations. That is in contrast with those pertaining to slavery and the status of women, about which there are texts that subvert the dominant practices of that time.)

The proponents of homosexual marriage operate out of two faulty propositions. The first is that faithful love is the only relevant moral principle. Faithful love makes a relationship good and moral, and since homosexuals exhibit faithful love in their relations, that is all that matters. The forms or kinds of persons involved in the relation are not morally relevant. The second is that the homosexual orientation, since it is "given," not chosen, is a gift of God, and therefore good. Though it is a minority orientation, it is just different, not defective. Therefore, the expression of sexual love between persons of such orientation is good and appropriate, if governed by the same norms that govern faithful love among heterosexuals.

To these propositions the classic teaching counters: No, one needs more than love. "All you need is love" is an incomplete ethical principle. Sexual love is appropriate to form, to the kind or form of the persons who engage in it. Thus, the Bible and the Christian moral tradition reject bestiality, incest, pederasty, and homosexuality, even if consent to the relation is present. Such relations are intrinsically disordered and imperfect; they are "unnatural," not according to

some rational law of nature, but according to the Law of God. Love must be appropriate to form.

The same sort of reply is made about the homosexual orientation, whether permanent, involuntary, or not. It is a disordered and imperfect state, and the sexual behavior that flows from it is also disordered and defective. The orientation, if it is permanent, is something of a mini-tragedy. It is not what God intends; it is a symptom of a fallen creation. It impedes the person from pursuing his or her natural sexual *telos*. It blocks one from "knowing" and coming to terms with the "other" of the opposite sex. It leads to a conflict between one's body and one's orientation. It disallows procreation. It leads to a mismatch between sexual natures if the orientation is acted out. Acted out, the orientation often leads to many diseases and infections, and most likely to a shortened life. This does not mean that the homosexual person as person is disordered, only his or her sexuality. Many homosexual persons are healthier and more productive than I. Neither does it mean that there are no "goods" in faithful and loving homosexual relations. There are. But wholehearted approval of these goods is diminished by the disordered sexuality in which some of them are expressed.

There is little warrant, then, for abandoning the "appropriate to form" requirement for the expression of sexual love, neither among Christians in general nor especially among the leadership of the church. This does not mean, however, that Christians cannot have a nuanced and compassionate approach to these controversial issues. Without relaxing its affirmation of only heterosexual sex within the marriage covenant, the church can strongly insist that the Gospel is addressed to all sinners. Homosexual sex is not some especially heinous sin that cuts one off from God's grace. Consistent with this, inclusion within the church and its pastoral care is obligatory.

V. A Pastoral Approach

As with all sin, though, forgiveness follows repentance and leads to efforts to follow God's Commandments. The church should continue to call those are homosexual by orientation—whatever its provenance or duration—to a "heroic" response. That is, they should be called to practice sexual abstinence, sublimating their sexual energies into other pursuits. The church has long honored such "heroic" responses and should continue to do so. It would be naïve to argue that this can be the church's only response for lay Christians. In our present culture, some lay Christians who are homosexual by orientation will engage in sexual relations with members of their own sex. Some will act promiscuously but others will seek more stable unions. Many homosexuals will remain "in the

closet" and participate incognito in church life, but others will insist that the church formally recognize their sexual identity and bless their unions. Gays and lesbians of all sorts of persuasion are present in our churches, and there seems to be widespread confusion about the church's proper pastoral response to this fact. Given the normative teaching outlined above, what pastoral strategy toward homosexuals should be adopted by churches and Christian individuals?

I would propose a strategy of *gracious tolerance*.[16] By "gracious" I mean that the church—both clergy and lay—should greet all persons coming into the fellowship of the church with a warm welcome. After all, we are a company of forgiven sinners. Many homosexuals who prefer to keep their sexual identity private will accept this welcome and participate fully in the life of the church. Those who are in partnered relationships may also wish to keep the sexual nature of their friendships hidden or unclear. As long as such persons do not openly violate or flaunt the normative teachings of the church, they should also be greeted and accepted graciously. The church can even affirm the rich elements of friendship in their ongoing relationship, though not its sexual elements. The latter need not be revealed or probed, and certainly not "blessed." The church does not probe others who do not live up to the moral ideals of the church. Kindliness, inclusion, and support would be the order of the day in these cases, as it is for all the church's members. Repentance, forgiveness, and amendment of life should be left for homosexuals to work out privately, as is the case for other persons who struggle with the demands of the Christian life.

For those who are struggling with sexual identity in their lives, "graciousness" would mean first of all an effort to help them sort out who they are and who they wish to become. Though some homosexuals seem irretrievably caught in their same-sex desires, many young people are simply confused about their sexual identities. It is gracious and helpful to the latter to help them move toward heterosexual desires so that they can grow in that direction in their prospective sexual relationships. For those persons who have inclinations toward same-sex desires but who want to move toward a heterosexual identity, various therapies may be helpful. For both kinds of persons, it is particularly important that the public teaching of the church affirm heterosexual norms.

For those who seem "fixed" in their orientation, it is consistent with our argument above to counsel abstinence. Like other singles, homosexuals are called to refrain from sexual relations. In cases in which abstinence is not being observed, it is gracious privately to encourage sexual fidelity within committed friendships. Such an arrangement is far better than the dangerous promiscuity practiced by a significant portion of the homosexual subculture. From a Christian point of view, it is the lesser of evils. But their sexual relations are still disordered and imperfect, even though other elements in their friendship

[16] A fuller exposition of "gracious toleration" can be found in my *Ordinary Saints*, 155–158.

are admirable. It is important continually to hold up the Christian ideal before such homosexual pairs. Perhaps in time they can work toward celibate friendships. Such an approach assumes a strong pastoral love and commitment to such persons. Without that the pastoral counseling will come across simply as judgmental hectoring.

It would be disastrously wrong publicly to bless such arrangements because we simply have no mandate from scripture to bless that which is not blessable. Further, it would send too many wrong messages to the church. To those who regard homosexual relations as sinful, it would signal that the church blesses sin. To those who are struggling with their own sexual identity, it would put an imprimatur on desires and activities they need to resist. Opposition to public blessing reminds us that there are limits to the church's graciousness. Those limits have to do with tolerance, the second word in our phrase, *gracious tolerance*.

Tolerance does not mean that anything goes, as our permissive culture tends to view it. Tolerance, while it suggests a liberal and open-minded attitude toward persons whose beliefs and actions are different from one's own, also denotes forbearance and endurance. Tolerance, therefore, has its limits. (A bridge, for example, tolerates a certain tonnage but no more.) We tolerate—that is, we forebear and endure—beliefs and actions that diverge from our own. However, if certain beliefs and actions violate our core convictions, we do not tolerate them. We oppose them and act against them. And properly so; personal integrity and courage are at stake. On the other hand, our level of tolerance is more elastic with regards to beliefs and actions that go counter to our less crucial or central values, such as our preferences, tastes, or opinions.

The church, like individuals, can tolerate all sorts of opinions and practices that involve peripheral matters. It can allow a great deal of latitude on how Christians should apply Christian moral teachings to issues of public policy. It can tolerate a number of forms of worship and preaching. It can tolerate sharp disagreements about practical matters that, while important, are not essential to the core teaching and practices of the church. It can even tolerate many persons whose behavior is out of line with its teaching. Indeed, it can—and must—tolerate all of us sinners who fall short of what the commandments of God demand. In a sense, we are all tolerated by the church.

However, the church is the Body of Christ, responsible for maintaining its apostolic religious and moral teaching. It is entrusted by its Lord with the gospel—the full-blown Trinitarian faith, as well as with the central practices that follow from it. Certainly the commandments are included in its moral core. Therefore, direct, public challenges in word and deed to its core convictions and practices simply cannot be tolerated. Challenges to the tradition's teaching on homosexuality are directed at that core.

This does not mean that those core convictions and practices cannot be discussed and debated. There must be a zone of freedom where persons can carry

on spirited conversation on central issues that are puzzling or even offensive to them. The youth of the church must be allowed to ask questions about those key issues. At regional and national levels of the church there is room for such discussion. But the proliferation of opinions on these occasions should not confuse or qualify the normative teaching of the church in its preaching or teaching. At the level of normative official teaching and preaching, the church has a tradition to convey clearly and confidently. It has settled teachings. Official representatives of the church are obligated to preserve and convey that tradition until it is officially changed, and on core issues, that change can only come after decades of reflection, discussion, and prayer.

With regard to these sexuality issues, the church cannot tolerate significant "cultures of dissent" that publicly impugn the teaching of the church by contrary teaching and behavior. Permissiveness toward such dissent makes the church appear hypocritical, ineffectual, or unwilling to hold dissenters accountable to its moral teachings. In recent years it has led to crises of sexual misconduct in both Protestantism and Catholicism. Likewise, if it is to be one church, it cannot tolerate public repudiation of its teachings by individual congregations or regional units. The one church must maintain its normative tradition in a disciplined fashion until it is changed.

Finally, the church cannot tolerate relentless and unceasing challenges to its normative teaching on sexuality. Such is the route to depletion and decrease. There has to be an agreement that its settled convictions cannot be challenged indefinitely. Once a church has re-affirmed its teaching, there has to be a decent interval of surcease from continued challenges.

Bibliography

Bellah, Robert, Richard Madsen, William S. Sullivan, Ann Swidler, and Steven M. Tipton. *Habits of the Heart: Individualism and Commitment in American Life*. Berkeley, CA: University of California Press, 1985, 1996.

Benne, Robert. *Ordinary Saints: An Introduction to the Christian Life.* Minneapolis: Fortress Press, 1988, 2003.

Bonhoeffer, Dietrich. *Letters and Papers from Prison.* London: S.C.M. Press, 1953.

Lutheran Book of Worship. Philadelphia: Board of Publication, Lutheran Church in America, 1978.

Luther, Martin. *American Edition of Luther's Works*. Edited by Jaroslav Pelikan and Helmut Lehmann. Philadelphia: Fortress Press; St. Louis: Concordia Publishing House, 1955–1986.

Robert Benne

Saint Commandement de Dieu

Résumé

Dans cet article, on soutient que l'Église doit ériger la théologie du mariage de manière ordonnée, car la culture n'a plus de fondement dans la pensée chrétienne. L'essence de l'argumentation repose sur la distinction provenant de la tradition luthérienne des « deux voies du royaume de Dieu ». Selon cette distinction, nous partageons avec d'autres personnes des « lieux de responsabilité », mais avec les vertus chrétiennes de foi, d'espérance et d'amour, nous les transformons en lieux du rayonnement du christianisme. Ensuite, je plaide fermement pour le rejet permanent du mariage homosexuel chez les chrétiens orthodoxes. En conclusion, j'inclus ce que j'espère être une approche pastorale compatissante – une tolérance gracieuse – envers les chrétiens homosexuels.

Mots-clés: individualisme, lieux de responsabilité, foi, amour, espérance, tolérance gracieuse

Robert Benne

Santo comandamento di Dio

Sommario

In questo articolo si sostiene che la Chiesa deve stabilire la teologia del matrimonio in modo ordinato, perché la cultura non ha più un fondamento nel pensiero cristiano. L'essenza dell'argomentazione si basa sulla distinzione che deriva dalla tradizione luterana delle «due vie del regno di Dio», secondo cui condividiamo con altre persone «luoghi di responsabilità», però li trasformiamo in luoghi di radiosa cristianità con le virtù cristiane di fede, speranza e amore. Si sostiene anche il rifiuto permanente del matrimonio omosessuale tra cristiani ortodossi. In conclusione, si include quello che spero sia un approccio pastorale compassionevole – la graziosa tolleranza – verso i cristiani omosessuali.

Parole chiave: individualismo, luoghi di responsabilità, fede, amore, speranza, graziosa tolleranza

Philosophy and Canon Law vol. 6 (2020), pp. 23–36
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.02

Tomasz Gałkowski
University of Cardinal Stefan Wyszyński, Warsaw, Poland
https://orcid.org/0000-0001-9166-9516

Natural Law and Human Right— The Casus of Contraception (Comments from the Level of Law)

Abstract: The author of the study deliberates whether the right to contraception can be described as a human right. He makes his speculations on the basis of a broader context of reflections concerning the relationship of human rights with the natural law, to which the former ones refer. The point of reference is recognizing the right as a good which co-creates a man. Contraception is not such a good since it is not an ontological value, that is, the one which does not entail anti-values.

Keywords: natural law, human rights, *Humanae Vitae*, UNFPA by choice, not by chance, right to contraception

Can the right to contraception be described as a human right? By asking this question, at the very beginning I wish to emphasize that the idea and reality of a human right will be more important in the response than specific content included in this phrase.

This year, fifty years have passed since the encyclical *Humanae Vitae* of John VI was issued. Throughout this time, there have been many polemical voices referring to the statements included in the encyclical, as well as to those expressed by its critics. However, they did not considerably affect the understanding and acceptance by the faithful of the ecclesial teaching about contraception. Worshippers are not very concerned with the teaching included in it. The fact that discussion on the encyclical faded at the end of the past century does not mean that it appeals to the Catholics and that they accept it. It was rather caused by

the fact that the papal teaching did not become widely respected. The common practice, also among worshippers, and the public message against the teaching of the Church inevitably resulted in limiting the theoretical considerations and contributed to suppression.[1]

However, the theme resurfaces again. An example of this state of affairs was the lecture delivered at the Pontifical Gregorian University (October 14, 2017) by a member of the Pontifical Academy for Life, a priest Maurizio Chiodi, and his critique presented by an Austrian philosopher Josef Seifert. According to Chiodi, in the situation when the natural methods of birth control cannot be applied, on grounds of responsible behavior one can use the methods of artificial contraception. Even in such a situation it is not in conflict with recognizing a child as a gift. He concludes by claiming that moral norms cannot be reduced to rational objectivity. They should be treated as inherent to human life understood as a story of salvation.[2] Seifert defends the existing teaching by referring to the theory of "internally evil" acts, which remain as such regardless of intention and circumstances.[3] How this debate develops will presumably depend on Pope Francis, who established a commission in order to reinterpret *Humanae Vitae*. It is not clear, though, what this reinterpretation is supposed to relate to.

The second fact affecting interest in the issue of contraception which influences human consciousness is the statement included in the annual report of the United Nations Population Fund (UNFPA) of 2012[4] that planning a family is a human right. One of the elements of this human right is universal access to information about the possibilities of using contraception. Contraception has been classified as one of the human rights.

Writing about the rejection of contraception, Paul VI refers to the natural law. The document of the United Nations acknowledges contraception as a human right. It is worth considering both argumentations and asking about the relationship between the natural law and human rights, taking into account the case of contraception. If we assume that the natural law provides rational foundations for human rights,[5] then the question arises whether the same foundation

[1] Barbara Chyrowicz, "Twarda mowa papieża," *W Drodze*, vol. 7 (2018): 29–30.

[2] Maurizio Chiodi, "Re-reading *Humanae Vitae* (1968) in Light of Amoris Laetitia (2016)," https://www.lifesitenews.com/news/new-academy-for-life-member-uses-amoris-to-say-some-circumstances-require-c?utm_source=deon&utm_medium=link_artykul, accessed October 31, 2018.

[3] Josef Seifert, "Comentarios del Profesor Seifert a la «Relectura de Humanae Vitae» del P. Chiodi," http://www.infocatolica.com/?t=opinion&cod=31365, accessed October 31, 2018.

[4] United Nations Population Fund (UNFPA), State of World Population *By choice, not by chance* (09.14.2012), https://www.unfpa.org/sites/default/files/pub-pdf/EN_SWOP2012_Report.pdf, accessed October 31, 2018.

[5] Juan Miguel Palacios, "Problem metafizycznego uzasadnienia praw człowieka," *Ethos*, vol. 12 (1999): 123.

can lead to contradictory conclusions about the admissibility of contraception or its lack in married life.

I do not enter the polemics with one theory or another, but I try to draw conclusions from the presented solutions.

Genetic Connections between Human Rights and the Natural Law

Before the drafted list of human rights was presented to the General Assembly of the United Nations in 1948, an analysis of theoretical problems connected with the declaration based on responses to a questionnaire sent to thinkers from countries belonging to UNESCO had been carried out. What is surprising is the fact of universal agreement with regard to the content of the declaration of people representing different cultures, philosophies, ideologies or legal traditions (Benedetto Croce, Mahatma Gandhi, Aldous Huxley, Harold Laski, Salvador de Madariaga, Teilhard de Chardin, Jacques Maritain). Their agreement regarding the presented catalogue was an expression of the belief of ideological neutrality of law and was based on the declaration's silence concerning the reasons justifying legal significance of the included normative statements. Also, the lack of the question about the acceptance on the part of people expressing their view influenced their approval. A widespread demand for the declaration of these rights put aside the issue of the potential negation of the reasons justifying them.[6]

In the perspective of the content development of human rights and often heated discussion regarding their formulation, the issue of reasons supporting them becomes a requirement facilitating a broad consensus. These reasons might have different sources and result from different and contextual needs. However, I would distinguish here theoretical rights, existing in the idea of the human rights itself and practical reasons for their formulation. The human rights are a result of the necessity provoked by human solidarity. The idea of human rights refers much more to human solidarity than to the category of nature. The unity of the human race based on the categories of solidarity is nonetheless secondary to the primary uniqueness of individuals. Does not this solidarity have a deeper foundation, though? And if it is so, is it unambiguous? Does humanity (termed as human rights) become tangible in individual persons or is it a result of collectivisation and solidarity? These are the questions which triggered discussion

[6] Palacios, "Problem metafizycznego uzasadnienia praw człowieka," 120.

on the reasons justifying the existence of human rights, and above all their introduction or declaration and respecting them.

Today, human rights are universally present in the awareness of the Euro-Atlantic community, which created them. They are widely discussed and promoted. The global consciousness remains silent about the natural law. It remains the domain of doctrine, philosophical or legal explorations. Setting aside the multiplicity of solutions concerning the definition of sources and content of the latter one, this situation was caused by the change triggered by the idea of human rights. Without underestimating of the value of human rights, there can be no denying that they are both a certain ideological, and also legal, construct (related to specific declarations), contrary to the natural law, the reality of which was interpreted or created on the model of a human. The idea of the natural law as a logical existence appeared together with a man and the question about his relations with the nature of the world, about the principles in accordance with which one should make decisions, whereas the human rights have a retrospective character. They show some kind of regression, searching for inspiration for something they regard as universal in human activity. Beginning with an idea one refers to the past to justify them. In search of an explanation for their universality, invariablility or common binding power, one indicates their connection with the law of nature. "The concept of human rights developed in a close relationship with the theory of the law of nature."[7] A dividing line between them was constituted in legal dimension by positivism, which contradicted the natural law and gave rise to the idea of human rights. Justification for human rights sought by their advocates in laws of nature seems highly questionable as it refers to theories from which they receive greatest crtiticism.

Issued on August 26, 1789, the Declaration of the Rights of Man and of the Citizen clearly refers to the laws of nature, which existed and functioned before the emergence of a state organization. Rights such as freedom, ownership, safety, the right to resistance were natural and inalienable. They were supposed to have special state protection. Citizen rights were also of natural character (equality in law, freedom of conscience). Their source is the natural fact of social life.[8] All the natural (inborn) rights resulting from the law of nature are linked to individuals and describe their subject status. In other words, a human was endowed with certain competences (rights) called fundamental rights, which condition natural justice independent of the decisions of positive law.[9] Their inalienable character induces an obligation of appropriate conduct of the

[7] Maria Szyszkowska, *Europejska filozofia prawa* (Warszawa: C.H. Beck, 1995), 115.

[8] Krystyna Rogaczewska, "Prawa człowieka i obywatela do Wielkiej Rewolucji Francuskiej," in *Historia i filozofia praw człowieka*, ed. Agnieszka Florczak and Bartosz Bolechow (Toruń: Wydawnictwo Adam Marszałek, 2006), 32.

[9] Paweł Łyżwa, "Obywatel w teoriach prawa natury," in *Historia i filozofia praw człowieka*, ed. Agnieszka Florczak and Bartosz Bolechow (Toruń: Wydawnictwo Adam Marszałek, 2006), 36.

state authority towards an individual, fundamental rights (= values), which the state finds in a person. However, contemporary involvement in human rights concerns not their ontological justification, but rather their protection and promotion. And it is a political issue rather than a philosophical or legal one.

Despite close contact with theories of the laws of nature, the modern theory of human rights is not close to them. It is much closer to legal positivism than to the natural law. They try to preserve their inherent idea of law far from voluntary concepts (they point to these in theories of natural law as the reason for its disapproval), but they are influenced by other modern ideas. The human rights, despite noble ideas, are embedded in the service of everyday life and the demands of modern life. A difficult and ambiguous term *nature* and its normative element caused that it was replaced with the term *dignity*, which seems to be closer, more clearly definable, thus indicating the independence of human rights from any state authority.

Humanae Vitae—The Sources of Prohibition of Contraception

The issue of regulating conception constitutes a focal point of the papal encyclical. Pope Paul VI defines in it what spouses are morally obliged to and how they should act. He justifies this duty indicating the source of obligation, on which Catholic principles of birth regulation are based. The definition of the source allows to differentiate an ecouragement to specific behavior from the relevant obligation. The pope writes that in passing on life "they are bound to ensure that what they do, corresponds to the will of God the Creator. The very nature of marriage and its use makes His will clear, while the constant teaching of the Church spells it out."[10] For Paul VI the source of obligation is the natural law "illuminated and enriched by divine Revelation,"[11] which is accessible to every human reason, even if it is deprived of the light of the Gospel. The pope emphasizes that "people of our era are especially prepared to understand how much this teaching remains in agreement with the human reason."[12] He realizes that the concept of the natural law is a controversial one also from political and theological point of view, especially because of the ambiguous character of the term *natural law*.

[10] Paulus VI, "Humanae Vitae," *Acta Apostolicae Sedis*, vol. 60 (1968): n. 10.
[11] *Humanae Vitae*, 4.
[12] *Humanae Vitae*, 12.

Referring to the natural law as a source of ecclesial teaching about contraception was subject to criticism. It was pointed out that the interpretation of the natural law the pope relies on is inappropriate since a thesis about inadmissibility of artificial contraception cannot be derived from it, and "prolonged periods of sexual abstinence of the spouses can put to the test their marital love."[13] Anselm Hertz OP, expressed his opinion that the pope's interpretation of the natural law was wrong. He writes: "As a matter of fact, limiting the concept of nature and the natural law to physiological and biological laws and important metaphysical elements related to them, means referring to Aristotle's and Stoic depiction of the natural law."[14] Bernard Häring claims that "the encyclical in its concept of the law of nature remains completely in agreement with *Castii Connubii*. Biological regularity plays an absolute role of an absolute norm for the whole person so that the welfare of the human being and family is subordinate to God's will read from biological knowledge."[15]

It does not seem likely that pointing out to the natural law Paul VI referred to any of its doctrinal concepts. His interpretation does not concern the philosophical dimension but theological one, since it is in accordance with theological cognition and spreading the mission entrusted to the Church by Christ. The pope does not want to reduce the teaching of the Church about the natural law to philosophical speculations which do not have ultimate explanation. He remains on the theological plane. Thus, he becomes independent of any doctrine of the law of nature. He refers to the right of Church to interpret the natural law, because Christ entrusted the Church with the mandate of preaching the whole moral law: evangelical as well as and natural, which "declares the will of God, and its faithful observance is necessary for men's eternal salvation,"[16] since the natural and evangelical orders are in compliance with the supernatural one. His teaching about the natural law corresponds with the entirety of the Magisterium. The Apostles and their followers are therefore "authentic guardians and interpreters of the whole moral law, not only, that is, of the law of the Gospel but also of the natural law."[17]

The Magisterium of the Church preaches about the natural law as an element of the moral law, that is, an objective moral order inherent in human nature. It is an order independent of state authority, permanent, unchanged, relevant to all

[13] Chyrowicz, "Twarda mowa papieża," 27–28.

[14] Paweł VI, "Encyklika *Humanae Vitae* oraz komentarz teologów moralistów środowiska krakowskiego pod kierunkiem Karola kardynała Wojtyły" (przedruk z *Notificationes e curia Metropolitana Cracoviensi*, nr 1–4 A.D. 1969): 35–36. http://kodr.pl/wp-content/uploads/2017/03/humanae_vitae.pdf, accessed October 31, 2018.

[15] Paweł VI, "Encyklika *Humanae Vitae* oraz komentarz teologów moralistów środowiska krakowskiego pod kierunkiem Karola kardynała Wojtyły," 36.

[16] *Humanae Vitae*, 4.

[17] Ibid.

people. Paul VI in the encyclical especially emphasizes the objectiveness of the moral order, that is, the moral order independent of any influence or theory. It is a moral order given to man by the Creator. The idea of objectivity of the natural law is an unchanged and permanent reference of the Magisterium of the Church. That is why the role of the Church is that of a guardian and interpreter of this law. "Since the Church did not make either of these laws, she cannot be their arbiter—only their guardian and interpreter. It could never be right for her to declare lawful what is in fact unlawful, since that, by its very nature, is always opposed to the true good of man."[18]

In such a view of the natural law, the concept of nature is expressed in the historical and redeeming aspect as well as in integral and personal aspect of material and spiritual unity.

The Right of Man to Contraception: Sources

The papal preaching was not received with general acceptance. One can even go further. The attitude of the Church promoting the ban on contraception was criticized by the advocates of recognizing contraception as a permitted means of birth control or a human right. They rely on specific argumentation indicating lack of logic in the approach of the Church. They believe that the objection of the Church to abortion in practice should result in using instruments which would restrict its execution. As an effective instrument they consider free access to contraceptives. Therefore, it seems logical that religious groups should support methods and options which are alternative to sexual restraint and contribute to limiting abortion. At the same time, it is emphasized that the Church does not take into consideration the fact that most unwanted pregnancies happen among unmarried women and that in the twenty-first century extramarital sexual relations are a common fact.[19] Sexuality and sexual acts are a fundamental part of human existence. Depriving people of the possibility to use contraception will not change this fact. Providing a certain level of safety, easy access to contraception makes it possible to plan future family life.[20]

For the first time the United Nations Population Fund officially announced in 2012 that access to contraception is a human right. In the preface to the report

[18] *Humanae Vitae*, 18.

[19] Lilly O'Donnel, "UN Declares Birth Control a Human Right, and America Falls Short," accessed November 2, 2018, https://mic.com/articles/19272/un-declares-birth-control-a-human-right-and-america-falls-short#.01lc8Qkbm.

[20] Chris Tognotti, "How to Argue Birth Control Is a Human Right," accessed November 2, 2018, https://www.bustle.com/p/how-to-argue-birth-control-is-a-human-right-2803746.

"By Choice, but Not by Chance" dr Babatunde Osotimehin, the United Nations Under-Secretary-General and Executive Director of UNFPA, says that family planning is a human right. Therefore, it has to be applicable to everybody who wants it.[21] Reading these words may arouse surprise. Do not human rights apply to everyone, whether they want it or not? Can human will, individual and expressed as the authority, decide about what is independent of it? The statement is at odds with the idea of human rights. So, is this a human right? This issue is expanded in the next sentence. Osotimehin states that this law has not been extended to everyone, especially in the poorest countries.[22] It is the state that is responsible for it, since it refuses to recognize contraception as a human right. According to the proponents of this law, the Church is also to blame, as her influence on the state blocks women's possible access to contraception.[23] Then, it is not about the will to accept the law, but about the possibility to exercise the law and what is its content. Such explanation is in compliance with the structural concept of law, which is also connected with duty. According to the document, this responsibility rests on state authority. It means that people who have the aforementioned right can demand that state authorities fulfill it. The fulfillment of the law itself is connected, however, with the actual possibility of returning the thing belonging to others. So can this duty remain just an empty promise?[24]

Man's right to family planning means that every individual makes a personal, independent decision about their future family. This plan is realized by deciding about the time and number of offspring. Therefore, family planning is dependent on planning the numer of offspring. The family defines and expresses itself through progeny. Thus, can free access to contraception among people who are not planning a family be still recognized as a human right when it is defined through the prism of family? The right to contraception as a human right is only relevant in relation to family.

The right to contraception is an element of reproductive rights resulting from the right to family planning. Justifying this right, the authors of the report put it in a broader context of other human rights, from which they derive it. It includes both freedoms and rights which stem from civil, political, economic, social, and cultural laws. The right to decide about the time and number of offspring

[21] "Family planning is a *human right*. It must therefore be available to all who want it."

[22] "But clearly this right has not yet been extended to all, especially in the poorest countries."

[23] L. O'Donnel gives the Philippines as an example, but he does not indicate the actual ways in which the Church influences the state in this country.

[24] According to UNFPA, 22 million women in the world do not have an opportunity to use contraception. Providing it must absorb 4.1 billion dollars. The necessary funding could come from 5.7-billion-dollar-savings on the healthcare service for mother and child. Thus, contraception could contribute to significant savings.

is an integral part of the structure of reproductive rights and that is why it is directly connected with other fundamental human rights, such as the right to live, to freedom and safety, to health (sexual and reproductive), to marry and to be equal in marriage, to privacy, equality and not to be discriminated against (especially women), freedom from coercion and violence, freedom from torture and inhuman treatment, the right to education (including sexual education), to participation in public affairs, to search and obtain information and the freedom of expression and to make use of the achievements of science.[25]

The right to family planning described as a freedom and a right is expressed in three elements: (1) the possibility to use all kinds of goods and help that enable its fulfilment; (2) access to objective, scientific information and sexual education free from prejudice and discrimination; (3) the possibility to make conscious choices for the benefit of freedom from coercion, violence and discrimination.[26] The right to contraception is in compliance with the first dimension of the right to family planning as it concerns the possibility of using the means, thanks to which one can decide about the time and number of conceived offspring.[27]

Several Comments

The comparison of two such different documents with various conclusions enables formulating a few comments.

Both *Humanae Vitae* and the report "By Choice, Not by Chance" draw attention to family planning and development. Paul VI, however, speaks about responsible parenthood with regard to marriage. The report refers to any family in the human perspective and any man facing a decision about conceiving offspring.

Both documents use similar expressions: responsible parenthood and family planning, in which the attention is focused on the issue of parenthood. Their sources and attitudes are different, though. In *Humanae Vitae* it is the natural law. The report of the United Nations Population Fund refers to human righs.

The same concerns the implementation goals of these laws. In case of family planning the following arguments are put forward: reduction of poverty, health care, promotion of sex equality, helping children to get an education, the opportunity to get a job. These are significant issues with which Church indentifies and promotes. The aim of responsible parenthood is to take into account the

[25] UNFPA, *By choice, not by chance*, 3.
[26] Ibid. 8.
[27] Ibid. 9.

physical, economic, psychological, and social conditions which enable people to accept more children or avoid giving birth to them. At the foundation of such attitude lies the fact that responsible parenthood belongs to an objective moral order and accepting one's duties in relation to God, oneself, family, society "while keeping the appropriate order of things and hierarchy of values."[28] That is why parents cannot freely define the methods of moral conduct and are obliged to "adjust their behaviour to the plan of God the Creator."[29]

1. In the report the aim of family planning and all the circumstances connected with it constitute the foundation of creating laws. Despite referring to other human rights, in which the right to family planning was included and expressed, it does not seem to be a fundamental law. It is their consequence. The right to family planning, as it was defined, appears to be a product of culture and a man immersed in it. Culture does not create the categories of right and wrong, which remain the personal domain of a human being. The appropriate field of operation for culture are the categories of what is normal and what is not. The awareness of responsibility belongs to the structure of practical reason. Is the culture itself enough? As Hegel once said: "There seemed to impend such a peculiar spectacle that we would see a cultural nation without metaphysics like a richly decorated temple without the Blessed Sacrament."[30]
2. The right to family planning is not based on highlighting personal goods but on goals, which can be reached thanks to not so much the right but to the guarantees offered by it and the requirement of responsibility. However, why is the state liable to the freedom of choice which a man is due?
3. Can contraception be a right? In the perspective presented by the report "By Choice, Not by Chance" contraception was shown as a means of achieving the desired and worthy goal. One cannot forget, however, that the behaviors connected with fully benefiting from it are the products of modern culture which is in compliance with the categories of a defined correctness.
4. Searching the sources of law is not only about discovering its purposeful reason but a causative one as well as a reason not contradicting specific legal solutions. I do not find such a reason in the right to contraception.

[28] *Humanae Vitae*, n. 10.

[29] Ibid.

[30] Georg Wilhelm Friedrich Hegel, *Nauka logiki*, trans. Adam Landman (Warszawa: PWN, 1967), vol. I, 4.

The Right to Contraception: Conclusions

If we assume that the natural law lies at the foundation of human rights understood as a right independent of human decision-making, then is the right to contraception as a human right a natural law? If it belongs to the category of human rights, it should be a *common* law (the same for every person regardless of their values and opinions, including religious ones); *inherent* (independent of the state's will and applicable laws, whose aim is to create a system of protecting them); *inalienable* (one cannot waive it or be deprived of it); *inviolable* (they cannot be revoked and arbitrarily regulated by the state); *natural* (possessed because of personal dignity and not because of any assignment or decision); *indivisible* (all of them constitute an integral and indivisible whole); *fundamental* (they are the basis for taking advantage of any other right).[31]

The discussion concerning the possibility of using contraception as an element of a wider in scope right to family planning from two so different points of reference seems inconclusive and thus futile. However, it is worth looking at its subject regardless of the description of the sources of specific solutions, of problems connected with defining the nature and of problems resulting from the justification of morally responsible conduct, or of the aforementioned ideological assumptions indicating the Church as a reason for restricting the possibility of taking advantage of the right to contraception. It is a reawakening of the idea of ideological neutrality of law, which united efforts in favour of defining the human rights.

Another perspective of the mutual encounter of such different rights is their definition through common features. The concept of the human rights (not in specific solutions) includes reference to the law of nature. Their attributes are natural character, inherence, inalienability, which result from human dignity. These are the properties which also define the natural law.[32] The first and significant normative acts containing human rights in the first words refer to nature expressing its unity with the declared rights. Today's abandonment of the argumentation referring to this relationship is caused by the unwillingness to understand the natural law as a moral category, which fully embraces human activity restricting the moral freedom of choice because of its relationship with

[31] Amnesty International, *Co to są prawa człowieka?*, https://amnesty.org.pl/co-robimy/prawa-czlowieka/, accessed November 3, 2018.

[32] "That all men are by nature equally free and independent, and have certain inherent rights" (art. 1). "The Virginia Declaration of Rights" (1776), https://www.archives.gov/founding-docs/virginia-declaration-of-rights, accessed November 2, 2018; „…recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" (Preamble). "Universal Declaration of Human Rights" (1948), http://www.un.org/en/universal-declaration-human-rights/, accessed November 2, 2018.

nature.[33] Forsaking the argumentation referring to the relationship of human rights with the natural law also stems from separating law from morality as two completely distinct normative systems.

This particular connection is emphasized in the teaching of the Church who recognizes in it the possibility of an intercultural and interreligious dialogue capable of fostering universal peace and of avoiding the "clash of civilizations" since "in this way, the natural law meets the demand of reasonable justification of the human rights."[34] The connection between the possibilities of cognitive recognition and the requirements of nature results in the statement that "some sexual practices are directly opposed to the reproductive finalities inscribed in the sexual body of man. By this very fact, they also contradict the interpersonal values that a responsible and fully human sexual life must promote."[35]

Reasoning on the level of morality does not lead to satisfactory solutions or mutual conviction. In the teaching of the Church, there is no right to contraception classified as a human right. Closer to the appropriate definition whether the right to contraception exists is the one which at the starting point will concern the definition of law, whose attribute is the natural character. Since what is sought is the law which is a quality of the human nature (nature of man), and not a moral ability to perform activities whose consequences are protected by the state. The rights which have their source in the human nature coexist with it, are something real, tangible (life, health). They are always someone's rights, whereas the human rights in their idea and historical development are the rights of a (historical) man to perform actions (rights to something), which he recognizes in his way of being a human. The existence of rights as goods of a man means that he implements them in his way of existence. As goods which are one's own and individual competences connected with the human nature and which all the people are eligible for, these goods can be treated as human rights.

The right to contraception is not connected with having contraception as a good. Contraception is not a good which co-creates a man. It is not a value in ontological sense, that is, the one which does not entail an anti-value. Conversely, counter-values, as it occurs in the case of the evaluation of contraception, are characteristic of qualitative values. Contraception is not something that cannot be gained or lost. It is not dependent on human existence.[36] It is a tool

---

[33] Fancesco Compagnoni, *I diritti dell'uomo. Genesi, storia e impegno cristiano* (Milano: San Paolo 1995), 209.

[34] International Theological Commission, *In Search of a Universal Ethic: A New Look at the Natural Law*, n. 35, accessed November 2, 2018, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html#3.4._Ways_towards_a_reconciliation.

[35] International Theological Commission, *In Search of a Universal Ethic: A New Look at the Natural Law*, n. 80.

[36] Palacios, "Problem metafizycznego uzasadnienia praw człowieka," 131.

which allows a man to reach goals which are his own, whose fulfilment or absence causes the activities to expire and so does the necessity to use the tools to satisfy them. The report of 2012 concerns the right to contraception examined in the context of family planning. Out of this context contraception loses its reference to law. Can human rights in their natural reference be dependent on their contextual understanding?

Contraception is a sensitive issue and it divides the sides taking part in the dispute, as some regard it a law while others claim they are against the law. However, to call the right to contraception a human right would have to be put to the test of the natural goods (things) creating what the law refers to. It should be a human right (an actual good of someone) not only by its name. But this is the issue concerning the idea of human rights––how much law there actually is in the concept of human rights.

Bibliography

Chiodi, Maurizio. "Re-reading Humanae Vitae (1968) in light of Amoris Laetitia (2016)". Accessed October 31, 2018. https://www.lifesitenews.com/news/new-academy-for-life-member-uses-amoris-to-say-some-circumstances-require-c?utm_source=deon&utm_medium=link_artykul, Amnesty International, *Co to są prawa człowieka?*. Accesed November 3, 2018. https://amnesty.org.pl/co-robimy/prawa-czlowieka/.

Compagnoni, Francesco. *I diritti dell'uomo. Genesi, storia e impegno cristiano*. Milano: San Paolo 1995.

Chyrowicz, Barbara. "Twarda mowa papieża." *W Drodze*, vol. 7 (2018): 26–35.

Hegel, Georg Wilhelm Friedrich. *Nauka logiki*. Vol. I. Translated by Adam Landman. Warszawa: PWN, 1967.

International Theological Commission. *In Search of a Universal Ethic: A New Look at the Natural Law*. Accessed November 2, 2018. http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_en.html#3.4._Ways_towards_a_reconciliation.

Łyżwa, Paweł. "Obywatel w teoriach prawa natury." In *Historia i filozofia praw człowieka*. Edited by Agnieszka Florczak and Bartosz Bolechow, 35–71. Toruń: Wydawnictwo Adam Marszałek, 2006.

O'Donnel, Lilly. "UN Declares Birth Control a Human Right, and America Falls Short." Accessed November 2, 2018. https://mic.com/articles/19272/un-declares-birth-control-a-human-right-and-america-falls-short#.01lc8Qkbm.

Palacios, Juan Miguel. "Problem metafizycznego uzasadnienia praw człowieka." *Ethos*, vol. 12 (1999): 119–131.

Paulus VI, "Humanae Vitae." *Acta Apostolicae Sedis*, vol. 60 (1968): 481–503.

Paweł VI, "Encyklika *Humanae vitae* oraz komentarz teologów moralistów środowiska krakowskiego pod kierunkiem Karola kardynała Wojtyły" (reprint of *Notificationes e curia Metropolitana Cracoviensi*, nr 1–4 A.D. 1969): 35–36. Accessed October 31, 2018. http://kodr.pl/wp-content/uploads/2017/03/humanae_vitae.pdf.

Rogaczewska, Krystyna. “Prawa człowieka i obywatela do Wielkiej Rewolucji Francuskiej.” In *Historia i filozofia praw człowieka*. Edited by Agnieszka Florczak and Bartosz Bolechow, 7–33. Toruń: Wydawnictwo Adam Marszałek, 2006.

Seifert, Josef. “Comentarios del Profesor Seifert a la «Relectura de Humanae Vitae» del P. Chiodi.” Accessed October 31, 2018. http://www.infocatolica.com/?t=opinion&cod=31365.

Szyszkowska, Maria. *Europejska filozofia prawa*. Warszawa: C.H. Beck, 1995.

Tognotti, Chris. “How to Argue Birth Control Is a Human Right.” Accessed November 2, 2018. https://www.bustle.com/p/how-to-argue-birth-control-is-a-human-right-2803746.

“The Virginia Declaration of Rights” (1776). Accessed November 2, 2018. https://www.archives.gov/founding-docs/virginia-declaration-of-rights.

United Nations Population Fund (UNFPA), *State of World Population “By choice, not by chance”* (14.09.2012). Accessed October 31, 2018. https://www.unfpa.org/sites/default/files/pub-pdf/EN_SWOP2012_Report.pdf

“Universal Declaration of Human Rights” (1948). Accessed November 2, 2018. http://www.un.org/en/universal-declaration-human-rights/.

Tomasz Gałkowski

Loi naturelle et loi de l’homme
Un cas de contraception (commentaire légal)

Résumé

L’auteur de l’étude se demande si le droit à la contraception peut être défini comme un droit de l’homme. Ses réflexions tournent dans un contexte plus large concernant la relation entre les droits de l’homme et le droit naturel, duquel relèvent les premiers. Considérer le droit comme un bien co-créé par l’homme est notre point de repère. La contraception n’est pas un bien, car elle n’est pas une valeur au sens d’une valeur ontologique, c’est-à-dire qui n’implique pas d’anti-valeurs.

Mots-clés: loi naturelle, droits de l’homme, *Humanae Vitae*, UNFPA By Choice, not by Chance, droit à la contraception

Tomasz Gałkowski

Legge naturale e legge dell’uomo
Un caso di contraccezione (commento legale)

Sommario

L’autore del presente studio si chiede se il diritto alla contraccezione possa essere definito come un diritto dell’uomo. Le sue riflessioni fanno riferimento al più ampio contesto dei rapporti tra i diritti dell’uomo e il diritto naturale, a cui quelli primi si rifanno. Il punto di riferimento è il riconoscimento del diritto come un bene alla creazione del quale l’uomo compartecipa. Intesta in questi termini, la contraccezione non è un bene concerti cosi, perché non è un valore nel senso di valore ontologico, e cioè che non comporta antivalori.

Parole chiave: diritto naturale, diritti umani, *Humanae Vitae*, *UNFPA By Choice*, non by Chance, diritto alla contraccezione

Philosophy and Canon Law vol. 6 (2020), pp. 37–55
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.03

Andrzej Pastwa
University of Silesia in Katowice, Poland
https://orcid.org/0000-0003-2679-5107

Responsible Procreation— Co-Responsibility of Spouses From Adequate Anthropology to the Legal Anthropology of Matrimony

Abstract: This study successfully verifies the thesis that both eponymous anthropological criteria (responsible procreation and co-responsibility of spouses), referring to the nature of *personae humanae*, have an invaluable epistemological value in the matrimonial law. Opening a wider horizon of cognition and interpretation, they become indispensable in the accurate/reliable deciding of cases concerning the invalidity of marriage. The subsequent stages of the discourse proposed here, step by step from the general guidelines of adequate anthropology to the detailed assumptions of the legal anthropology of matrimony, have very clearly confirmed the words of John Paul II that "[…] an authentically juridical consideration of marriage requires a metaphysical vision of the human person and of the conjugal relationship" (Address to the Roman Rota, 2004).

Keywords: institution of matrimony, theological doctrine *de matrimonio*, adequate anthropology, legal anthropology of matrimony, responsible procreation, co-responsibility of spouses

Impulses to Have a "New Look" on the Natural Determinants of the Essence of Matrimony

In the Address to Participants at the Plenary Session of the International Theological Commission, delivered ten years ago, Benedict XVI presented a very accurate diagnosis of the deepening crisis of the institutions of matrimony and family: "the metaphysical concept of the natural law is [in the contemporary world—A.P.] almost absent, incomprehensible.[1] This trend has to trigger astonishment and anxiety—due to the fact that only "the natural law constitutes the true guarantee offered to each one to live […] in the respect for his dignity as a person."[2] Dedicating this thought to the members of the Commission that prepared an important document entitled: "In Search of a Universal Ethic: New Look on Natural Law" (2009),[3] the pope stressed the necessity and urgency of the theologians' mission: to make the world of science, culture, and politics aware of the inalienable value which is the human being and, consequently, of the ethical and moral message it carries, which, in turn, constitutes the reference point for all possible paths of law.[4]

The fact that this *memento* of the great humanist and emperor of the theological thought was to a large extent intended to determine the debate of the aforementioned prominent body (indeed, already earlier, because since October 2006), is supported by clear 'reflections' of the new (!) illumination of the foundations of natural law, announced by the title of the document being prepared. Indeed, the recipient of the "[…] New Look on Natural Law,"[5] and, especially,

[1] Benedict XVI, "Address to Participants at the Plenary Session of the International Theological Commission" (December 5, 2008), http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/december/documents/hf_ben-xvi_spe_20081205_teologica.html, accessed: December 13, 2018.

[2] Ibid.

[3] International Theological Commission, "In Search of a Universal Ethic: New Look on Natural Law" (2009), http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_pl.html, accessed: December 13, 2018.

[4] Benedict XVI, "Address to Participants at the Plenary Session of the International Theological Commission" (December 5, 2008).

[5] Here we should agree with the opinion of John Berkman and William C. Mattison III, editors of a well-known commentary to the mentioned document: "It is worth nothing that *In Search of a Universal Ethic* is not a new look at a universal ethic, but rather a new look at the natural law." John Berkman and William C. Mattison III, ed., *Searching for a Universal Ethic: Multidisciplinary, Ecumenical, and Interfaith Responses to the Catholic Natural Law Tradition* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2014), Introduction, 2. See also Luc-Tomas Somme, "À propose du document *À la recherche d'une éthique universelle, Nouveau regard*

prepared and equipped with scientific competence, cannot feel disappointed. It is enough to mention some very interesting (and relevant) constatations of the International Theological Commission in a document from 2009.

The norm of natural justice "is not arbitrary: the requirements of justice, which flow from the natural law, are prior to the formulation and enactment of the norm."[6] "Positive law must strive to carry out the norm of natural justice," and it means that "the legislator must [meticulously—A.P.] determine what is just in concrete historical situations."[7] Further on, the words worth paying attention to are: *iura* (*et officia*) *naturalia* ("what is naturally just").[8] "To acknowledge these natural rights of man means to acknowledge the objective order of human relations based on the natural law."[9] Finally, a statement, to some extent crowning the interesting discourse, appears: the norms of natural justice, which are the measures of human relationships, "do not have their source in the fluctuating desires of individuals, but rather in the [personal—A.P.] structure of human beings and their humanizing relations."[10]

Needless to say, these and other decisions of the International Theological Commission correspond perfectly (on the principle of two sides of the same coin) with the passages of the *Veritatis Splendor* Encyclical.[11] Especially in the context of the issue under consideration here, it is worth following the indication of the author himself, John Paul II, who in every attempt to adequately look at

---

sur la loi naturelle," *Revue thomiste*, vol. 109 (2009): 639–646; Serge-Tomas Bonino, "Questions autour du document: À la recherche d'une éthique universelle. Nouveau regard sur la loi naturelle," *Transversalités*, vol. 117, no. 1 (2011): 9–25.

[6] International Theological Commission, "In Search of a Universal Ethic: New Look on Natural Law" (2009), n. 89.

[7] Ibid., n. 91. Earlier the International Theological Commission clearly explains: "The norm of natural justice is never a standard that is fixed once and for all. It results from an appreciation of the changing situations in which people live. It articulates the judgment of practical reason in its estimation of what is just. Such a norm, as the juridical expression of the natural law in the political order, thus appears as the measure of the just relations among the members of the community." Ibid., n. 90.

[8] Ibid., n. 92.

[9] Ibid.

[10] Ibid.

[11] John Paul II, Encyclical Letter *Veritatis Splendor* (August 6, 1993). "*Veritatis splendor* (1993) is the first papal encyclical devoted exclusively to moral theology. The encyclical treats the nature and scope of human agency in light of both the natural and evangelical laws. The International Theological Commission's (ITC) study, *In Search of a Universal Ethic: New Look on Natural Law*, considers natural law as a common component of the great wisdom traditions. The exposition is heavily weighted toward perennial anthropological and metaphysical themes. *Veritatis splendor* looks *ad intra* to the coherence of moral theology, while the ITC looks *ad extra* toward extra-ecclesial dialogue." Cf. Russell Hittinger, "The Situation of Natural Law in Catholic Theology," in *Searching for a Universal Ethic*, 111–112.

matrimony as a natural reality recommends[12] the deep content included in the subchapter of the encyclical entitled: "What the law requires is written on their hearts" (Rom 2:15). The key fragment, which we cannot omit, is worded as follows: "At this point the true meaning of the natural law can be understood: it refers to man's proper and primordial nature, the 'nature of the human person,' which is *the person himself in the unity of soul and body*, in the unity of his spiritual and biological inclinations and of all the other specific characteristics necessary for the pursuit of his end."[13]

At this point, a bridge can already be built between, on the one hand, the ideas of the Magisterium and the theological doctrine that have been quoted, with the general postulate to combine the guarantee of respect for the dignity of the human person and his inalienable rights with the affirmation of natural law and, on the other hand, paradigmatic incarnation of these ideas. Turning to the detailed issue marked by the title, it is appropriate to focus attention on the 'event' which is so civilizationally and culturally significant as far as it is connected with the creation of an elementary social cell, that is, the act of establishing a basic interpersonal relationship, marked by the canon law with the name of *matrimonium in fieri*. The explanation of the question, first of all, what are, in the legal-canonical sense, connected to this matrimonial *fieri*, the titular 'responsible procreation' and 'co-responsibility of the spouses,' and secondly, what is their connection with the key issue of this study: the legal anthropology of marriage, first meets the papal lecture on "moral principles in the transmission of human life" from 50 years ago. It is in the *Humanae Vitae* encyclical, the first authentic interpretation of the Second Vatican Council Magisterium on matrimony,[14] that the word 'responsibility'—almost exclusively in a formula with ethical and moral connotations: 'responsible parenthood'—appears ten times. It is no different than in this context, complemented by authentic "[reference to the authentic—A.P.] requirements of marital love,"[15] that Paul VI's final message resounds: "For man cannot attain that true happiness for which he yearns with all the strength of his spirit, unless he keeps the laws which the Most High God has engraved in his very nature."[16]

On the other hand, it is no surprise that such an oriented legal and natural reflection on the subject of marital responsibility gains a special depth in the magisterial achievements of Pope John Paul II, the teacher of personalism,[17]

---

[12] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 3, http://w2.vatican.va/content/john-paul-ii/en/speeches/2001/february/documents/hf_jp-ii_spe_20010201_rota-romana.html, accessed: December 13, 2018.

[13] *Veritatis Splendor*, n. 50.

[14] Cf. Francis, Apostolic Exhortation *Amoris Laetitia* (April 8, 2016), n. 82.

[15] Paul VI, Encyclical Letter *Humanae Vitae* (July 25, 1968), n. 7; cf. Ibid., nn. 8–9.

[16] *Humanae Vitae*, n. 31.

[17] See John F. Crosby: "The Personalism of John Paul II as the Basis of his Approach to the Teaching of *Humanae Vitae*." *Anthropotes*, vol. 5 (1989): 54–62.

especially in those papal documents, in which the person-centric thought (!) follows the path marked out by monumental works: *Love and Responsibility*[18] and *Acting Person*.[19] These are the unsurpassed *Familiaris Consortio* adhortation (1981)[20] and Letter to the families *Gratissimam Sane* (1994),[21] which comprehensively undertake this discourse, as evidenced by the consistent use of the term responsible parenthood (and its equivalents): in the first document—over 30 times, and in the second—over 20 times.

Taking this last lead, we are free to assume—and this hypothesis will become the subject of verification in this article—that in the lecture of the Pope of the Family,[22] still insufficiently recognized authoritative indications are hidden, indications which are helpful in working out "an authentic juridical anthropology of matrimony"[23]—if we are to use Benedict XVI's words from the memorable (perhaps the most important[24]) 2007 Address to the Roman Rota. Indeed, what is worth mentioning at the very beginning is that the final part of the second to last rotal allocution of the Polish Pope (2014), which, *nota bene*, should be the subject of frequent reading and reflection of all the matrimony researchers, representatives of doctrine and ecclesiastical judicature.

It is about a fragment that shows justice as "essential dimension of […] marriage, which is based on an intrinsically juridical reality."[25] John Paul II clearly states: "[…] an authentically juridical consideration of marriage requires

[18] Karol Wojtyła, *Love and Responsibility*, trans. Harry T. Willetts (San Francisco: Ignatius Press, 1993).

[19] Cardinal Karol Wojtyla, *The Acting Person*, trans. Andrzej Potocki, ed. Anna-Teresa Tymieniecka (Dordrecht: D. Reidel Publishing. Company, 1979).

[20] John Paul II, Apostolic Exhortation *Familiaris Consortio* (November 22, 1981).

[21] John Paul II, Letter to Families *Gratissimam Sane* (February 2, 1994).

[22] Francis, "Homily. Holy Mass and Rite of Canonization of Blesseds John XXIII and John Paul II (April 27, 2014)," http://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140427_omelia-canonizzazioni.html, accessed: December 13, 2018.

[23] Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007), http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070127_roman-rota.html, accessed: December 13, 2018. The very context, in which Benedict XVI's quoted words appeared, says a lot: "The citations of Genesis (1: 27; 2: 24) propose the matrimonial truth of the 'principle' that truth whose fullness is found in connection with Christ's union with the Church (cf. Eph 5: 30–31) and was the object of such broad and deep reflections on the part of Pope John Paul II in his cycles of catecheses on human love in the divine design. On the basis of this dual unity of the human couple, it is possible to work out an authentic *juridical anthropology of marriage*." Ibid.

[24] Cf. Andrzej Pastwa, "Code's Standards Regarding Marriage and the Challenges of Modernity," in *Hodie et Cras. Today and Tomorrow of the 1983 Code of Canon Law Thirty Years after Promulagation*, ed. Krzysztof Burczak (Lublin: Wydawnictwo KUL, 2015), 40.

[25] John Paul II, "Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year" (January 29, 2004), n. 7, http://w2.vatican.va/content/john-paul-ii/en/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rota.html, accessed: December 13, 2018.

a metaphysical vision of the human person and of the conjugal relationship. Without this ontological foundation the institution of marriage becomes merely an extrinsic superstructure, the result of the law and of social conditioning, which limits the freedom of the person to fulfil himself or herself."[26]

In order to finally display the methodology of contemplating the eponymous issues, what seems to be underestimated is the indication of the very John Paul II (we can only be surprised that in the study of canon law this 'key' has not been picked up yet). In the first version of his 2001 Address to the Roman Rota—accurately identified by experts as a very important magisterial study on matrimony as a natural reality[27]—the pope draws attention to two earlier rotal addresses, which he dedicated to the same (!) issues.[28] Since, in the allocutions of 1991[29] and 1999,[30] just as in the 2001 allocution, the *de natura matrimonii* reflections of the truth remain to be analyzed, namely, important components in the contemporary decoding of *ex natura personae humanae* of the image of the substance of matrimony. It is this discovery that encourages us to suggest (here, of course, in outline) a method of a comprehensive look at the foundations of the legal anthropology of marriage through the prism of the two title formulas: 'responsible procreation' and 'co-responsibility of the spouses'; the formulas, which is not insignificant, have already achieved a conceptual autonomy[31] in the most recent study of canon law.

---

[26] Ibid.

[27] Cf. Carlos José Errazuriz Mackenna, "Il senso e il contenuto essenziale del *bonum coniugum*." *Ius Ecclesiae*, vol. 22 (2010): 582.

[28] "I think it appropriate this morning to revisit several themes that I dwelt on in our previous meetings (cf. *Addresses to the Rota*, 28 January 1991: AAS, vol. 83, 947–953; and 21 January 1999: AAS, vol. 91, 622–627), to reaffirm the traditional teaching about the natural dimension of marriage and the family." John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 2.

[29] John Paul II, "Address to the Tribunal of the Roman Rota" (January 28, 1991), http://w2.vatican.va/content/john-paul-ii/en/speeches/1991/january/documents/hf_jp-ii_spe_19910128_roman-rota.html, accessed: December 13, 2018.

[30] John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 1999), http://w2.vatican.va/content/john-paul-ii/en/speeches/1999/january/documents/hf_jp-ii_spe_19990121_rota-romana.html, accessed: December 13, 2018.

[31] It should be enough to refer to the studies of famous canonists: José María Serrano Ruiz, "L'esclusione della prole e la sua assolutezza: il problema della paternità responsabile," in *Prole e matrimonio canonico*, Studi Giuridici, vol. 62 (Città del Vaticano: LEV, 2003), 153–166; Piero Antonio Bonnet, "Il *bonum coniugum* come corresponsabilità degli sposi," *Apollinaris*, vol. 83 (2010): 419–458.

The Context of 'Responsible Procreation'

The two excellent segments of John Paul II's *de matrimonio* require a joint analysis in order not to lose sight of the right perspective, which guarantees (at least by assumption) the effect of the above-mentioned overall perspective. The first segment is an exception from the 1999 Address to the Roman Rota, in which the pope, strictly according to the criteria of rationality and purpose, emphasizes the truth about the natural *realitas* of marriage, on the plane of *matrimonium in fieri*:

> The consent is nothing other than the conscious, *responsible* (emphasis – A.P.) assumption of a commitment through a juridical act by which, in reciprocal self-giving, the spouses promise total and definitive love to each other. They are free to celebrate marriage, after having chosen each other with equal freedom, but as soon as they perform this act, they establish a personal state in which love becomes something that is owed, entailing effects of a juridical nature as well.[32]

Matrimonial consent—the pope adds when referring to the famous passage of the *Humanae Vitae* encyclical—constitutes "the will for a reciprocal gift of love, of exclusive love, of indissoluble love [and] of fruitful love."[33]

It is visible with the naked eye that the 'marital' order of justice depicted in such a way, implied by the natural law, reveals its inalienable (!) anchoring in the "personalistic norm" (K. Wojtyla, *Love and Responsibility*).[34] Indeed, it is not possible to affirm this elementary ethical principle *in matrimonio*, very relevant in Karol Wojtyła's philosophical discourse,[35] without noticing a close connection between justice and love.[36] To put it directly, the "personalistic norm"

[32] John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 1999), n. 4.

[33] Ibid.

[34] The "personalistic norm" in its positive form states: "The person is a good towards which the only proper and adequate attitude is love" (LR, n. 41). This norm, in its negative aspect, confirms that "the person is the kind of good which does not admit of use and cannot be treated as an object of use and as such the means to an end" (Ibid.).

[35] Michael Waldstein, "Three Kinds of Personalism: Kant, Scheler and John Paul II," *Forum Teologiczne*, vol. 10 (2009): 156–157; Jaroslaw Kupczak, *Gift and Communion: John Paul II's Theology of the Body* (Washington, D.C.: The Catholic University of America Press, 2014), 62; see also Kevin Rickert, "Wojtłya's Personalistic Norm: A Thomistic Analysis," *Nova et Vetera*, vol. 7, no. 3 (2009): 653–678;

[36] "A person's rightful due is to be treated as an object of love, not as an object for use. In a sense it can be said that love is a requirement of justice, just as using a person as a means to an end would conflict with justice. In fact, the order of justice is more fundamental than the order of love—and in a sence the first embraces the second inasmuch as love can be a requirement of justice. Surely it is just to love a human being or to love God, to hold a person dear" (*Love and Responsibility*, n. 42). The author of an interesting monograph rightly establishes:

acquires in the matrimony the shape of a love obligation[37] that expresses itself in the responsibility of the man and of the woman for the common good which is the value of the person (John Paul II, *Letter to Families*).[38] It is not difficult to see that the phenomenon of benevolence[39] reveals its potential, which in an anthropological, theological, and legal sense constitutes a real—ontically durable—foundations of this personal and interpersonal *sui iuris* reality.

Therefore, matrimony as an institution of natural law has its foundations in an authentic matrimonial love[40] that affirms the human person.[41] Marital love is rooted in the conjugal covenant of irrevocable personal consent,[42] that is, responsible (conscious and free) act of mutual gift of both persons. In other words, the 'choice love' rooted in will (*dilectio*—according to Thomas Aquinas's definition)[43] reveals its entire immanence in the matrimonial "partnership of the whole of life."[44] In the legal and institutional sense,[45] it means, not more

"For Wojtyla, both love and justice interpenetrate the personalistic norm. […] Justice is one aspect of love; in order to love a person (to affirm their value), one must treat them justly. However, justice is not equated with love, for love does not consist merely in being just." Stephanie Mar Brettmann, *Theories of Justice: A Dialogue with Karol Wojtyla and Karl Barth* (Cambridge, England: James Clarke & Co, 2015), 30.

[37] John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 1999), n. 5; Cf. Javier Hervada, "Obligaciones esenciales del matrimonio," *Ius Canonicum*, vol. 31 (1991): 70–71.

[38] *Gratissimam Sane*, n. 12.

[39] Cf. Wojtyla, *Love and Responsibility*, 82–84.

[40] See Giacomo Bertolini, "Il matrimonio come istituzione: un vincolo di giustizia in quanto verità dell'amore," *Anthropotes*, vol. 31 (2015): 213–252; Andrzej Pastwa, "Il matrimonio: comprensione personalistica e istituzionale," *Ius Ecclesiae*, vol. 25 (2013): 387–408.

[41] The famous expert on the subject matter Livio Melina defines the invaluable input of Karol Wojtyła—John Paul II in the defence and promotion of this paradigm in the face of the ever more aggressive offense of false personalizm in such a way: "All'antropologia individualistica e spiritualistica, potremmo dire neo-gnostica, che in fondo desprezza il corpo e pretende di poterlo manipolara con la tecnologia, a alla concezione scadente della morale, come una serie di prescrizioni legalistiche che opprimono la libertà, ha già risposto con chiarezza e forza di pensiero la »teologia del corpo« di San Giovanni Paolo II, che offre una integrazione profonda tra persona e natura, nella prospettiva di una teologia dell'amore." Livio Melina, "Ecologia dell'amore coniugale: l'*Humanae vitae* nella luce dell'Enciclica *Laudato* si'," *Anthropotes*, vol. 31 (2015): 265.

[42] Vatican Council II, Pastoral Constitution on the Church *Gaudium et Spes* (December 7, 1965), n. 48.

[43] STh, I–II, q. 26, a. 3; "This is the level of the *voluntas et ratio*, in which love becomes the fruit of a free and conscious choice. Thomas calls this love *dilectio* or *benenevolentia*, precisely because it follows upon an *electio*. If the love of desire is an affective *passio*, the love of election is an effective choice." Angelo Scola, *The Nuptial Mystery* (Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2005), 64.

[44] *Code of Canon Law* (promulgated: January 25, 1983) [CIC], can. 1055 § 1; *Code of Canons of the Eastern Churches* (promulgated: October 18, 1990) [CCEO], can. 776 § 1.

[45] Cf. Javier Hervada, "Libertad, naturaleza y compromiso en la sexualidad humana," *Persona y Derecho*, vol. 19 (1988): 106–109.

and not less, that "a love that is due"[46] (orig. *amore dovuto*—John Paul II's definition) identifies—in the 'base' interpersonal relation,[47] established through *actus essentialiter amorosus*[48]—not only the future moral obligations of the spouses, but also the *stricte* juridical[49] obligations present in this act.

Thus, the ontic foundations of matrimony—in the form of direct conclusions from the metaphysical vision of the person and the matrimonial bond—have been presented. Indeed, on such and no other grounds a truly legal analysis of matrimony should be based (if we recall once again the thought of John Paul II from 2004). But that is not all. In detail, these conclusions can be formulated only within the framework of updating the paradigm of anthropological realism, which assumes a realistic perception of the human person.[50] It is about "healthy realism" (again Pope Wojtyła's definition from 1997) in the understanding of the freedom of the human person—which means recognizing, on the one hand, the limits and weaknesses of the human nature burdened with sin, and, on the other hand, the potentially effective help of God's grace in every case.

Within this optics, which is characteristic of Christian anthropology, an awareness of the following necessities is included: the necessity of future offerings and sacrifices, of internal struggle, of the struggle against one's own weaknesses—an awareness which makes consent an act of responsibility and ultimately determines faithfulness to the undertaken matrimonial commitments.[51] It would, therefore, be a mistake to promote an 'idealized' model of interpersonal relationships in which a simple difficulty on the way to fully integrate the spouses would become incapability of assuming their marital responsibilities. The effective expression of an act

---

[46] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 3, http://w2.vatican.va/content/john-paul-ii/en/speeches/1997/january/documents/hf_jp-ii_spe_19970127_rota-romana.html, accessed: December 13, 2018.

[47] It is about 'base' relations located inside the structure of justice implied by matrimonial love. Manuel Lopez Aranda, "La relación interpersonal, base del matrimonio," in *El «consortium totius vitae».* Curso de Derecho matrimonial y procesal canónico para profesionales del foro, vol. 7 (Salamanca: Universidad Pontificia de Salamanca, 1986), 202–203.

[48] Urbano Navarrete, *Structura iuridica matrimonii secundum Concilium Vaticanum II. Momentum iuridicum amoris coniugalis* (Roma: Pontificia Università Gregoriana, 1994[2]), 146.

[49] See John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 1999), n. 3; Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007). Cf. also Andrzej Pastwa, *Prawne znaczenie miłości małżeńskiej* (Katowice: Księgarnia Św. Jacka, 1999).

[50] "The personalist aspect of Christian marriage implies *an integral vision of man* which, in the light of faith, takes up and confirms whatever we can know by our natural powers. It is characterized by a sound realism in its conception of personal freedom, placed between the limits and influences of a human nature burdened by sin and the always sufficient help of divine grace." John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4.

[51] Cf. Wojciech Góralski, "Walor prawny małżeństwa i jego wymiar osobowy. Przemówienie papieża Jana Pawła II do Roty Rzymskiej 27 I 1997 r.," *Ius Matrimoniale*, vol. 2 (1997): 98.

of irrevocable consent must not assume what most people would be unable to do.[52] This is by no means a pragmatic minimalism, but a realistic vision of the human person with all the dynamics of his or her development, that is, realized thanks to the "ontological equipment" (talents, supernatural gifts, etc.) through the vocation of man-husband and woman-wife to make autonomous, responsible choices: with their own effort and with the help of grace.[53]

It should not come as a surprise that the statement presented here—in its detailed version: mainly on the basis of the 1999 Magisterium of the rotal allocution—the anthropology of matrimony, in order for it to deserve the title adjective 'adequate,' needs another, we might say, a key link in order to ensure in the personalistic legal depiction of marriage the representation of the complete chain of natural features of marital love, not only faithful and exclusive, but also fertile.[54] Jurisdictionally, it is all about the full affirmation of the principle: *lex matrimonii est lex amoris coniugalis*.[55]

John Paul II was surely guided by this idea when he supplemented the *de natura matrimonii* teaching of the inaugural speech of the year of judicial work in 1999 with momentous content in the aforementioned 2001 Address to the Roman Rota.

Let us be clear, it was all about focusing the attention of the recipients of the papal teaching on the key (!) contemporary category of legal anthropology of matrimony[56] 'maritality,' namely, a category that brings with it the dimension of potential fatherhood/motherhood[57] and thus introduces into the personal and

[52] See Nikolaus Schöch, *Die kirchenrechtliche Interpretation der Grundprinzipien der christlichen Anthropologie als Voraussetzung für die eheprozessrechtliche Beurteilung der psychischen Ehekonsensunfähigkeit. Eine kanonistische Studie unter besonderer Berücksichtigung der päpstlichen Allokutionen und der Judikatur der Römischen Rota,* Adnotationes in ius canonicum, Bd 15 (Frankfurt am Main–Berlin–Bern–Bruxelles–New York–Wien: Peter Lang, 1999).

[53] John Paul II, "Address to the Tribunal of the Roman Rota" (January 27, 1997), n. 4.

[54] *Humanae Vitae*, n. 9.

[55] The meaning of this principle is as follows: *amor coniugalis* remains in a close relation with the ontic structure of human person and as such immanently defines the legal order of canonical matrimony: Javier Hervada and Pedro Lombardía, *El Derecho del Pueblo de Dios. Hacia un sistema de Derecho canónico*, vol. 3/1: *Derecho Matrimonial* (Pamplona: Ediciones Universidad de Navarra, 1973), 128–129.

[56] Cf. Héctor Franceschi, "Il *bonum prolis* nello stato di vita matrimoniale e le conseguenze canoniche in caso di separazione o di nullità matrimoniale," in *Prole e matrimonio*, 32–33.

[57] In the *fieri* optics of matrimony the potential fatherhood/motherhood is perceived as an integral part of mutual personal gift of the spouses: their giving oneself to each other and acceptance of masculinity/femininity. Cf. Juan Ignacio Bañares, "Persona y sexualidad humanas: de la antropología al derecho," in *El matrimonio y su expresión canónica ante el III milenio*. X Congreso Internacional de Derecho Canónico, ed. Pedro-Juan Viladrich, Javier Escrivá-Ivars, Juan Ignacio Bañares, and Jorge Miras (Pamplona: Ediciones Universidad de Navarra. EUNSA, 2000), 45–59; see also Héctor Franceschi and Joan Carreras, *Antropología jurídica de la sexualidad. Fundamentos para un derecho de familia* (Caracas: Centro de Educación para la Familia y el Trabajo, 2000).

interpersonal matrimonial relationship—if we may use the 'matrix' of interpersonality[58] in the description of matrimony—the context of responsible procreation.

That is why the passage derived from the mentioned rotal address is so crucial (2001):

> The natural consideration of marriage shows us that husband and wife are joined precisely as sexually different persons with all the wealth, including spiritual wealth, that this difference has at the human level. Husband and wife are united as a man-person and a woman-person. The reference to the natural dimension of their masculinity and femininity is crucial for understanding the essence of marriage. The personal bond of marriage is established precisely at the natural level of the male or female mode of being a human person.[59]

Further on in the text, the pope emphasized a crucial dimension of fatherhood/motherhood within the mentioned maritality:

> The very act of marital consent is best understood in relation to the natural dimension of the union. For the latter is the objective reference-point by which the individual lives his natural inclination. […] It is a question of seeing whether the persons, in addition to identifying each other's person, have truly grasped the essential natural dimension of their married state, which implies, as an intrinsic requirement, fidelity, indissolubility and potential fatherhood/motherhood as goods that integrate a relationship of justice.[60]

That is how we come to an important moment in the contemplation on the natural determinants of the essence of matrimony, implied by the adequate anthropology, and consequently, the legal anthropology of matrimony. As John Paul II emphasizes, if "man and woman experience in themselves the natural inclination to be joined in marriage,"[61] then the specific program of the "partnership of the whole of life," [62] created in the matrimonial consent act, has its only chance to be realized with respect for the integral truth about the human person, that is, above all with sexuality (!) as its communion[63] dimension—when at the beginning of the interpersonal matrimonial relationship the *ius responsabile*[64] lies. This last right/obligation can be safely called the nucleus of the ethical and legal determi-

[58] Cf. Serrano Ruiz, "L'esclusione della prole," 154.

[59] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 5.

[60] Ibid., n. 7.

[61] Ibid., n. 4.

[62] CIC, can. 1055 § 1; CCEO, can. 776 § 1.

[63] Cf. Piero Antonio Bonnet, "Das Wesen der Ehe und das Bonum Coniugum – eine Perspektive," *De processibus matrimonialibus*, vol. 6 (1999): 30–32.

[64] Cf. Serrano Ruiz, "L'esclusione della prole," 162.

nants of the matrimonial covenant. Suffice it to say that in the area determined by the matrimonial purpose: to direct toward giving birth to and upbringing of children (*ordinatio ad bo-num prolis*, *ordinatio ad familiam*), it is the element of responsibility that fully reveals its structural profile and creative potential.

Here we can already recall the concept of *procreatio responsabilis*[65] developed in the post-conciliar study of canon law, genetically connected with the famous formula of the Pastoral Constitution on the Church: *paternitas responsabilis*.[66] Let us initially note that the concept of responsible procreation does not designate moral criteria for the planning by the spouses (already in matrimony!) of offspring and their number. This formula is about determining the legally relevant opening of the spouses to procreation, in accordance with the natural purpose of matrimony. Needless to say, the first segment of the reinterpreted conciliar formula makes it possible, in the constitutive act of the matrimonial covenant—among the immanent attributes of that act: the inalienable values that lie at the structure of matrimony—to see all too clearly the fundamental value of responsibility.[67]

In order to understand how important is the role of the legal category of responsible procreation in the sector of the essence of matrimony as defined by the *ordinatio ad prolis generationem et educationem*,[68] it is necessary to recall once again the structural formation of the matrimonial *communio personarum* according to the paradigm of benevolence. First of all, this personalistic depiction of matrimony allows us to go beyond the abstract and ontologized concepts of offspring as a good in itself, which is and remains a domain of morality.[69] Secondly, this clarification makes it possible, on a legal plane, to state that responsible procreation must be present in the matrimonial consent act.[70] What is important, consensual responsibility is not only an individualized, true will to procreate *modo humano seu responsabiliter*, but becomes above all a common and communal project of spouses, defined in its essence by a paradigmatically understood 'matrimony.'[71] Thus, the key words of the *Gaudium et Spes* Con-

[65] See Andrzej Pastwa, "*Odpowiedzialna prokreacja* personalistyczną inkarnacją *bonum prolis*?," in *Vir Ecclesiae deditus. Księga dla uczczenia Księdza Profesora Edwarda Góreckiego.* ed. Waldemar Irek (Wrocław: Papieski Wydział Teologiczny, 2011), 205–226.

[66] *Gratissimam Sane*, nn. 50–51.

[67] Cf. Serrano Ruiz, "L'esclusione della prole," 166.

[68] CIC, can. 1055 § 1; CCEO, can. 776 § 1.

[69] Cf. Klaus Lüdicke, "Die Ehezwecke im nachkonziliaren Eherecht – Wunsch und Wirklichkeit," *De processibus matrimonialibus*, vol. 3 (1996): 49–52.

[70] Cf. Serrano Ruiz, "L'esclusione della prole," 158.

[71] "The natural character of marriage is better understood when it is not separated from the family. Marriage and the family are inseparable, because the masculinity and femininity of the married couple are constitutively open to the gift of children. Without this openness there could not even be a good of the spouses worthy of the name." John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 5.

stitution regarding responsible planning of offspring: *communi consilio atque conatu* ["by common counsel and effort"],[72] should be treated as a 'personalistic' criterion, which defines the strictly legal requirement of an integrated marital co-responsibility for the birth and bringing up offspring.

It can be assumed that the importance of this finding will be best illustrated by the final statement. More than half a century after the Second Vatican Council, there should be no more doubt that in a situation where the spouse in the matrimonial consent act seriously violates the procreative (co-)responsibility, radically depriving the other party of the right to the integral—and therefore also religious/Catholic—education of offspring, thus excluding the essential element mentioned in the can. 1101 § 2 CIC and can. 824 § 2 CCEO, he or she concludes an invalid marriage.

The Context of Co-responsibility of Spouses

In order to have a comprehensive overview of the rudiments of the legal anthropology of matrimony it seems necessary in the last part of this study—consistently following the thought of the great teacher of personalism—to shed a little more light on the above-mentioned phenomenon of co-responsibility of spouses. In the famous 2001 Address to the Roman Rota, quoted in the fifth and seventh issue of the document, John Paul II focuses his attention—invariably in the optics of a renewed understanding of nature (i.e., "nature of the human person")[73]—on the causative reason of matrimony. Here, a *stricte* personal profile of consent (*consensus personalis*[74]) is emphasized as an act of self-determination of two people (meeting of two freedoms), an act which gives rise to marriage and family:

[72] "Parents should regard as their proper mission the task of transmitting human life and educating those to whom it has been transmitted. They should realize that they are thereby cooperators with the love of God the Creator, and are, so to speak, the interpreters of that love. Thus, they will fulfil their task with human and Christian responsibility, and, with docile reverence toward God, *will make decisions by common counsel and effort* [emphasis—A.P.]. Let them thoughtfully take into account both their own welfare and that of their children, those already born and those which the future may bring." *Gratissimam Sane*, n. 50.

[73] Cf. Errazuriz Mackenna, "Il senso e il contenuto essenziale del *bonum coniugum*," 583.

[74] *Gratissimam Sane*, n. 48. Cf. Andrzej Pastwa, "*Amor benevolentiae – ius responsabile*: oś interpersonalnego projektu małżeńsko-rodzinnego," in *Miłość i odpowiedzialność – wyznaczniki kanonicznego przygotowania do małżeństwa*, ed. Andrzej Pastwa and Monika Gwóźdź (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2013), 25–26.

> The scope of action for the couple and, therefore, of their matrimonial rights and duties follows from that of their being and has its true foundation in the latter. […] The very act of marital consent is best understood in relation to the natural dimension of the union. For the latter is the objective reference-point by which the individual lives his natural inclination. Hence the normality and simplicity of true consent.[75]

After all, we cannot forget, adds the pope in the 1999 rotal allocution, that this love act of consent "between two persons of equal dignity"[76] is always an "obligation towards the other person."[77] Only when this commitment is made *in consensu* and accepted by the other party, does personal consent become marital and never loses its character again. The same issue is raised by the Holy Father in his 1991 allocution, when he emphasizes several times the truth about the equal *ex natura* dignity of man (husband) and woman (wife) and the resulting equality of their rights in matrimony.[78]

If, therefore, the structure and dynamics of the *maritality*[79] appears first of all in the gender-determined dialectic of 'me' and 'you'—that is, in the mutual complementation of the betrothed/spouses on the grounds of bipolar differences and the complementarity of their nature, then in the defined—the same way by nature[80]—horizon of mutual personal responsibility[81] it is the affirmation of the person's values that comes to the foreground.[82] In the latter case, it is a consensual project of opening the betrothed/spouses to dialogue and integration, towards the realization of their good (personal perfection) and the good of their children.

We thus may ask what it means that a concrete 'matrimonial' project harmoniously reproduces the natural relational structure: the structure of justice. At the elementary level the answer is self-imposed: the individual 'I' expresses the will to be united into a unitary 'we'[83]—but always (!) with mutual respect for dignity, autonomy, and subjective powers concerning the community of matrimonial life.

---

[75] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001), n. 5.

[76] John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 1999), n. 3.

[77] Ibid.

[78] John Paul II, "Address to the Tribunal of the Roman Rota" (January 28, 1991), nn. 5–6.

[79] Cf. Errazuriz Mackenna, "Il senso e il contenuto essenziale del *bonum coniugum*," 582–583.

[80] Here it is worth reminding: it is about "the 'nature of the human person,' which is *the person himself in the unity of soul and body*, in the unity of his spiritual and biological inclinations and of all the other specific characteristics necessary for the pursuit of his end." *Veritatis Splendor*, n. 50.

[81] *Matrimonium* […] *non potest habere alium finem quam bonum personarum*. Navarrete, *Structura iuridica matrimonii*, 130.

[82] Cf. *Gratissimam Sane*, n. 12.

[83] Cf. Bonnet, "Il *bonum coniugum* come corresponsabilità," 435.

In this way, we gain one more, perhaps the best explanation of why the *Gaudium et Spes* Constitution, and consequently the post-conciliar papal Magisterium, connects the project and updating of the natural orientation of each specific *community of entire life* towards the good of the spouses and the good of the offspring with the potential causative power of benevolence. Indeed, the love act of covenant, ontically orienting the betrothed/spouses towards the realization of the good of the person (spouse, child), indicates the basic structural element of the matrimonial community of fate (*consortium*). It is a 'community' with a personalistic qualifier, in the form of the principle of equality of marital rights.[84]

It is not difficult to guess what effect a radical questioning by either side of the benevolence will have at the time of the constituting the matrimony. Whoever, in a matrimonial consent act, reserves the right to carry out his will unilaterally, with extreme disregard for the other person's position (or planning to act against his will), that is, refuses to allow the spouse to co-decide on an equal footing: *if* and *how*, with a scope of a necessary minimum to direct 'community of the entire life' towards the purpose of matrimony: the good of the spouses or the good of the offspring, excludes an essential element of 'community' and therefore concludes an invalid matrimony.[85]

Conclusions

To sum up, we can consider it a true thesis that both presented anthropological criteria, referring to the nature of *personae humanae*, have an invaluable epistemological value in the matrimonial law. Opening a wider horizon of cognition and interpretation, they become indispensable in the accurate/reliable deciding of cases concerning the invalidity of marriage. The subsequent stages of the discourse proposed here, step by step from the general guidelines of adequate anthropology to the detailed assumptions of the legal anthropology of matrimony, have very clearly confirmed the words of John Paul II that "[…] an authentically juridical consideration of marriage requires a metaphysical vision of the human person and of the conjugal relationship."[86]

[84] Cf. Klaus Lüdicke, "Matrimonial Consent in Light of a Personalist Concept of Marriage: On the Council's New Way of Thinking about Marriage." *Studia Canonica*, vol. 33 (1999): 501.

[85] Por. Norbert Lüdecke, "Der Ausschluss des *bonum coniugum*. Ein Ehenichtigkeitsgrund mit Startschwierigkeiten," *De processibus matrimonialibus*, vol. 2 (1995): 179–182.

[86] John Paul II, "Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year" (January 29, 2004), n. 7.

Bibliography

Bañares, Juan Ignacio. "Persona y sexualidad humanas: de la antropología al derecho." In *El matrimonio y su expresión canónica ante el III milenio*. X Congreso Internacional de Derecho Canónico, edited by Pedro-Juan Viladrich, Javier Escrivá-Ivars, Juan Ignacio Bañares, and Jorge Miras (Pamplona: Ediciones Universidad de Navarra. EUNSA, 2000), 45–59.

Benedict XVI. "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007). http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070127_roman-rota.html. Accessed: December 13, 2018.

Benedict XVI. "Address to Participants at the Plenary Session of the International Theological Commission" (December 5, 2008). http://w2.vatican.va/content/benedict-xvi/en/speeches/2008/december/documents/hf_ben-xvi_spe_20081205_teologica.html. Accessed: December 13, 2018.

Berkman, John, and William C. Mattison III, ed. *Searching for a Universal Ethic: Multidisciplinary, Ecumenical, and Interfaith Responses to the Catholic Natural Law Tradition*. Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2014.

Bertolini, Giacomo. "Il matrimonio come istituzione: un vincolo di giustizia in quanto verità dell'amore." *Anthropotes*, vol. 31 (2015): 213–252.

Bonino, Serge-Tomas. "Questions autour du document: À la recherche d'une éthique universelle. Nouveau regard sur la loi naturelle." *Transversalités*, vol. 117, no. 1 (2011): 9–25.

Bonnet, Piero Antonio. "Il *bonum coniugum* come corresponsabilità degli sposi." *Apollinaris*, vol. 83 (2010): 419–458.

Bonnet, Piero Antonio. "Das Wesen der Ehe und das Bonum Coniugum – eine Perspektive." *De processibus matrimonialibus*, vol. 6 (1999): 27–37.

Brettmann, Stephanie Mar. *Theories of Justice: A Dialogue with Karol Wojtyla and Karl Barth*. Cambridge, England: James Clarke & Co, 2015.

Code of Canon Law (promulgated: January 25, 1983).

Code of Canons of the Eastern Churches (promulgated: October 18, 1990).

Crosby John F. "The Personalism of John Paul II as the Basis of His Approach to the Teaching of *Humanae vitae*." *Anthropotes*, vol. 5 (1989): 54–62.

Errazuriz Mackenna, Carlos José. "Il senso e il contenuto essenziale del *bonum coniugum*." *Ius Ecclesiae*, vol. 22 (2010): 573–590.

Franceschi, Héctor. "Il *bonum prolis* nello stato di vita matrimoniale e le conseguenze canoniche in caso di separazione o di nullità matrimoniale." In *Prole e matrimonio canonico*, Studi Giuridici, vol. 62 (Città del Vaticano: LEV, 2003), 29–64.

Franceschi, Héctor, and Joan Carreras. *Antropología jurídica de la sexualidad. Fundamentos para un derecho de familia*. Caracas: Centro de Educación para la Familia y el Trabajo, 2000.

Francis, Pope. Apostolic Exhortation *Amoris Laetitia* (April 8, 2016). AAS, vol. 108 (2016): 311–446.

Francis, Pope. "Homily. Holy Mass and Rite of Canonization of Blesseds John XXIII and John Paul II (April 27, 2014)." http://w2.vatican.va/content/francesco/en/homilies/2014/documents/papa-francesco_20140427_omelia-canonizzazioni.html. Accessed: December 13, 2018.

Góralski, Wojciech. "Walor prawny małżeństwa i jego wymiar osobowy. Przemówienie papieża Jana Pawła II do Roty Rzymskiej 27 I 1997 r." *Ius Matrimoniale*, vol. 2 (1997): 95–100.

Hervada, Javier. "Libertad, naturaleza y compromiso en la sexualidad humana." *Persona y Derecho*, vol. 19 (1988): 99–119.

Hervada, Javier. "*Obligaciones esenciales del matrimonio*." *Ius Canonicum*, vol. 31 (1991): 59–83.

Hervada, Javier, and Pedro Lombardía. *El Derecho del Pueblo de Dios. Hacia un sistema de Derecho canónico*, vol. 3/1: *Derecho Matrimonial* (Pamplona: Ediciones Universidad de Navarra, 1973).

Hittinger, Russell. "The Situation of Natural Law in Catholic Theology." In *Searching for a Universal Ethic: Multidisciplinary, Ecumenical, and Interfaith Responses to the Catholic Natural Law Tradition*, edited by John Berkman and William C. Mattison III, 111–122. Grand Rapids, MI: Wm. B. Eerdmans Publishing Co., 2014.

International Theological Commission. "In Search of a Universal Ethic: New Look on Natural Law" (2009). http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20090520_legge-naturale_pl.html. Accessed: December 13, 2018.

John Paul II. "Address to the Members of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year" (January 29, 2004). http://w2.vatican.va/content/john-paul-ii/en/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rota.html. Accessed: December 13, 2018.

John Paul II. "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (February 1, 2001). http://w2.vatican.va/content/john-paul-ii/en/speeches/2001/february/documents/hf_jp-ii_spe_20010201_rota-romana.html. Accessed: December 13, 2018.

John Paul II. "Address to the Tribunal of the Roman Rota" (January 28, 1991). http://w2.vatican.va/content/john-paul-ii/en/speeches/1991/january/documents/hf_jp-ii_spe_19910128_roman-rota.html. Accessed: December 13, 2018.

John Paul II. "Address to the Tribunal of the Roman Rota" (January 27, 1997). http://w2.vatican.va/content/john-paul-ii/en/speeches/1997/january/documents/hf_jp-ii_spe_19970127_rota-romana.html. Accessed: December 13, 2018.

John Paul II. "Address to the Tribunal of the Roman Rota" (January 21, 1999). http://w2.vatican.va/content/john-paul-ii/en/speeches/1999/january/documents/hf_jp-ii_spe_19990121_rota-romana.html. Accessed: December 13, 2018.

John Paul II. Apostolic Exhortation *Familiaris Consortio* (November 22, 1981). AAS, vol. 73 (1982): 81–191.

John Paul II. Encyclical Letter *Veritatis Splendor* (August 6, 1993). AAS, vol. 85 (1993): 1133–1228.

John Paul II. Letter to Families *Gratissimam Sane* (February 2, 1994). AAS, vol. 86 (1994): 868–925.

Kupczak, Jaroslaw. *Gift and Communion: John Paul II's Theology of the Body*. Washington, D.C.: The Catholic University of America Press, 2014.

Lopez Aranda, Manuel. "La relación interpersonal, base del matrimonio." In *El «consortium totius vitae».* Curso de Derecho matrimonial y procesal canónico para profesionales del foro, vol. 7 (Salamanca: Universidad Pontificia de Salamanca, 1986), 189–238.

Lüdecke, Norbert. "Der Ausschluss des *bonum coniugum*. Ein Ehenichtigkeitsgrund mit Startschwierigkeiten." *De processibus matrimonialibus*, vol. 2 (1995): 117–192.

Lüdicke, Klaus. "Die Ehezwecke im nachkonziliaren Eherecht – Wunsch und Wirklichkeit." *De processibus matrimonialibus*, vol. 3 (1996): 39–58.

Lüdicke, Klaus. "Matrimonial Consent in Light of a Personalist Concept of Marriage: On the Council's New Way of Thinking about Marriage." *Studia Canonica*, vol. 33 (1999): 473–503.

Melina, Livio. "Ecologia dell'amore coniugale: l'*Humanae vitae* nella luce dell'Enciclica *Laudato* si.'" *Anthropotes*, vol. 31 (2015): 255–269.

Navarrete, Urbano. *Structura iuridica matrimonii secundum Concilium Vaticanum II. Momentum iuridicum amoris coniugalis*. Roma: Pontificia Università Gregoriana, 1994[2].

Pastwa, Andrzej. "*Amor benevolentiae – ius responsabile*: oś interpersonalnego projektu małżeńsko-rodzinnego." In *Miłość i odpowiedzialność – wyznaczniki kanonicznego przygotowania do małżeństwa*, edited by Andrzej Pastwa and Monika Gwóźdź, 13–31. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2013.

Pastwa, Andrzej. "Code's Standards Regarding Marriage and the Hallenges." In *Hodie et Cras. Today and Tomorrow of the 1983 Code of Canon Law Thirty Years after Promulagation*, edited by Krzysztof Burczak, 35–52. Lublin: Wydawnictwo KUL, 2015.

Pastwa, Andrzej. "Il matrimonio: comprensione personalistica e istituzionale." *Ius Ecclesiae*, vol. 25 (2013): 387–408.

Pastwa, Andrzej. "*Odpowiedzialna prokreacja* personalistyczną inkarnacją *bonum prolis*?" In *Vir Ecclesiae deditus. Księga dla uczczenia Księdza Profesora Edwarda Góreckiego*, edited by Waldemar Irek, 205–226. Wrocław: Papieski Wydział Teologiczny, 2011.

Pastwa, Andrzej. *Prawne znaczenie miłości małżeńskiej.*Katowice: Księgarnia Św. Jacka, 1999.

Paul VI. Encyclical Letter *Humanae Vitae* (Juny 25, 1968). AAS, vol. 60 (1968): 481–503.

Rickert, Kevin. "Wojtlya's Personalistic Norm: A Thomistic Analysis." *Nova et Vetera*, vol. 7, no. 3 (2009): 653–678.

Schöch, Nikolaus. *Die kirchenrechtliche Interpretation der Grundprinzipien der christlichen Anthropologie als Voraussetzung für die eheprozessrechtliche Beurteilung der psychischen Ehekonsensunfähigkeit. Eine kanonistische Studie unter besonderer Berücksichtigung der päpstlichen Allokutionen und der Judikatur der Römischen Rota.* Adnotationes in ius canonicum, Bd 15. Frankfurt am Main–Berlin–Bern–Bruxelles–New York–Wien: Peter Lang, 1999.

Serrano Ruiz, José María. "L'esclusione della prole e la sua assolutezza: il problema della paternità responsabile." In *Prole e matrimonio canonico*, Studi Giuridici, vol. 62, 153–166. Città del Vaticano: LEV, 2003.

Somme, Luc-Tomas. "À propos du document *À la recherche d'une éthique universelle, Nouveau regard sur la loi naturelle*." *Revue thomiste*, vol. 109 (2009): 639–646.

Thomas Aquinas. *Summa theologica*. Paris: P. Lethielleux, 1886.

Vatican Council II. Pastoral Constitution on the Church *Gaudium et Spes* (December 7, 1965). AAS, vol. 58 (1966): 1025–1115.

Waldstein, Michael. "Three Kinds of Personalism: Kant, Scheler and John Paul II." *Forum Teologiczne*, vol. 10 (2009): 151–171.

Wojtyla, Karol, Cardinal. *The Acting Person*. Translated by Andrzej Potocki and edited by Anna-Teresa Tymieniecka. Dordrecht: D. Reidel Publishing. Company, 1979.

Wojtyla, Karol. *Love and Responsibility*. Translated by Harry T. Willetts. San Francisco: Ignatius Press, 1993.

Andrzej Pastwa

Procréation responsable – coresponsabilité des époux
De l'anthropologie adéquate à l'anthropologie juridique du mariage

Résumé

Cette étude vérifie la thèse selon laquelle les deux critères anthropologiques parus dans l'intitulé (procréation responsable, coresponsabilité des époux), se référant à la nature de *personae*

humanae, ont une valeur épistémologique inestimable en droit du mariage. En effet, ouvrant un horizon cognitif et interprétatif plus large, ces deux critères sont désormais indispensables à l'évaluation exacte / fiable / correcte des juges en cas de nullité du mariage. Etape par étape, le discours proposé ici à partir des lignes directrices générales d'une anthropologie adéquate jusqu'aux hypothèses détaillées de l'anthropologie juridique du mariage, confirme clairement les propos de Jean-Paul II, selon qui « [...] une analyse véritablement juridique du mariage doit être fondée sur une vision métaphysique de l'homme et du lien conjugal » (Discours à la Rota romaine, 2004).

Mots-clés : institution du mariage, doctrine théologique de *matrimonio*, anthropologie adéquate, anthropologie juridique du mariage, procréation responsable, coresponsabilité des époux

Andrzej Pastwa

Procreazione responsabile – coresponsabilità degli sposi
Dall'antropologia adeguata all'antropologia giuridica del matrimonio

Sommario

Il presente studio verifica la tesi che entrambi i criteri antropologici inclusi nel titolo (procreazione responsabile, corresponsabilità degli sposi), riferiti alla natura di *personae humanae*, hanno un valore epistemologico inestimabile nel diritto matrimoniale. Questo perché aprendo un orizzonte cognitivo e interpretativo più ampio, sono oggi indispensabili nella valutazione giuridica corretta / attendibile nei casi di nullità di matrimonio. Le parti successive del discorso qui proposto – passo dopo passo – dagli orientamenti generali di un'antropologia adeguata agli assunti dettagliati dell'antropologia giuridica del matrimonio, hanno chiaramente confermato le parole di Giovanni Paolo II che «[...] un'analisi veramente giuridica del matrimonio deve essere basata su una visione metafisica dell'uomo e del vincolo matrimoniale» (Discorso alla Rota Romana, 2004).

Parole chiave: istituzione del matrimonio, dottrina teologica del *matrimonio*, antropologia adeguata, antropologia giuridica del matrimonio, procreazione responsabile, corresponsabilità degli sposi

Philosophy and Canon Law vol. 6 (2020), pp. 57–71
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.04

Lucjan Świto
University of Warmia and Mazury in Olsztyn
Department of Philosophy and Canon Law
https://orcid.org/0000-0002-6392-4599

"New Human Rights" and the Ban on Sexual Intercourse between Relatives Legal Contemplation

Abstract: The classic conception of human rights, expressed in the Universal Declaration of Human Rights signed in Paris on December 10, 1948, has been receiving attempts at reinterpretation in the recent 50 years. The appearance of the concept of "new human rights" in the public sphere serves as an example here. However, the scope of the term "new rights" and the precise meaning of "reproductive and sexual rights" are not entirely known. The change in perception of human sexuality, the affirmation of sexual liberation, and the acceptance of violating social taboo in the name of the "new human rights" invites reflection on how the concept of sexual rights relates to the ban on sexual contacts between relatives. Does a ban on incest lose its rationale in modern times, and does the penalisation of such acts constitute merely anachronistic oppression? Are the currently enforced normative solutions clear and free of questions and controversy in this matter? Lastly, one is compelled to inquire whether sexual contacts between relatives are perhaps already among the "new human rights." The present article endeavours to answer these questions.

Keywords: human rights, incest, sexual decency, feminism

Introduction

Human rights are a group of individual rights to which all humans are entitled by virtue of the unique value of the human person. Every human being is vested with them because he "is a person, that is, his nature is endowed with intel-

ligence and free will. Indeed, precisely because he is a person he has rights and obligations flowing directly and simultaneously from his very nature."[1] These rights rest on a certain consensus which overarches ideologies, as well as on foundational, common values belonging to the universal heritage of humankind. They are inalienable, inviolable, and independent of any lawgiving power, since they are primary and superior to such a power. The direct source of these rights is the dignity of the human person.[2]

The classic conception of human rights presented above, expressed in the Universal Declaration of Human Rights signed in Paris on December 10, 1948,[3] has received attempts at reinterpretation in the last 50 years, exemplified in the appearance of "new human rights." The term is derived from "sexual and reproductive rights," which appeared in the late 1960s driven by women's liberation movement and sexual revolution. Although the term itself was officially introduced to the international discourse only at the International Conference on Population and Development held in Cairo in 1994,[4] the concept of reproductive and sexual rights appeared for the first time in the Proclamation of Teheran, which was a resolution passed at the conclusion of the first International Conference on Human Rights held by the United Nations in Teheran in 1986.[5] Currently, the concept of these rights functions not only in the forum of the United Nations, but has also been implemented in the language used by other international organisations, including the European Union, which—as is worth noting— in the first half of 2015 alone passed four resolutions referring to the mentioned rights.[6]

---

[1] John XXIII (1963), *Pacem in Terris*, Diocese of Davenport. Archived from the original on 12 May 2008, accessed April 30, 2019, § 9.

[2] For more see i.a. Henryk Skorowski, *Problematyka praw człowieka* (Warszawa: Wydawnictwo UKSW, 2005), 10–26.

[3] Among the universal human rights, the Declaration names the right to life, liberty, and personal safety, the right to property, the right to freedom of thought, conscience, and religion. The Declaration does not grant these rights, but recognizes their existence as inherent in the nature of the human person, see Franciszek Greniuk, *Od Powszechnej Deklaracji Praw Człowieka do Karty Praw Podstawowych*, in *Prawa człowieka. Przesłanie moralne Kościoła*, ed. K. Jeżyna and T. Zadykowicz (Lublin: Wydawnictwo KUL, 2010), 16–17.

[4] International Conference on Population and Development Programme of Action adopted at the International Conference on Population and Development Cairo, 5–13 September 1994, 20th Anniversary Edition, http://www.unfpa.org/publications/international-conference-population-and-development-programme-action#sthash.DrDJT1pf.dpuf, 58–74, accessed June 20, 2015.

[5] Point 16 of the Proclamation of Teheran, a document adopted on 2 April 1968 during the United Nations International Conference on Human Rights in Teheran, U.N. Doc. A/CONF. 32/41 at 3, https://www1.umn.edu/humanrts/instree/l2ptichr.htm, accessed June 20, 2015.

[6] See: European Parliament Resolution of 10 March 2015 on progress on equality between women and men in the European Union, 2014/2217(INI); European Parliament Resolution of 20 February 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter, 2014/2216(INI); European Parliament Reso-

The scope of the term "new rights" and the precise meaning of "reproductive and sexual rights" are not entirely known.[7] However, the indefiniteness of the term is not accidental, as these rights undergo constant changes, depending on emerging possibilities connected with, for example, the development of so-called assisted reproductive technology, or artificial reproduction. Whether the analysed term includes the "right to abortion"[8] is still a controversial issue. Nevertheless, it is commonly accepted that reproductive and sexual rights mean the right of "couples and individuals"[9] to make decisions concerning the creation of offspring and its number, the right to choose sexual orientation and sexual partners, the right to choose the form of protection against unwanted pregnancy and sexually transmitted infections, unrestricted access to information, contraception, sterilisation, and above all the free choice of sexual behaviour, that is, the right to make unrestricted use of one's sexuality.

The change in perception of human sexuality, the affirmation of sexual liberation, and the acceptance of violating social taboo in the name of the "new human rights" invites reflection on how the concept of sexual rights relates to the ban on sexual contacts between relatives, which until recently was firmly and quite ubiquitously established in public awareness. Does a ban on incest lose its rationale in modern times, and does the penalisation of such acts constitute merely anachronistic oppression? Are the currently enforced normative solutions clear and free of questions and controversy in this matter? Lastly, one is compelled to inquire whether sexual contact between relatives is perhaps already among the "new human rights."

lution of 9 June 2015 on the EU Strategy for equality between women and men post 2015, 2014/2152(INI).

[7] For more, see i.a. Karolina Dobrowolska, "Prawa reprodukcyjne i seksualne w ONZ i ich doktrynalne uwarunkowania," *Zeszyty Prawnicze*, vol. 16 (2) (2016): 163–181.

[8] Jane Adolphe, "'Gender' Wars at the United Nations," *Ave Maria Law Review* vol. 11 (2012): 1. In the literature it is remarked that the current concept of reproductive rights formed on the basis of the provisions of the Cairo Conference did not include the "right to abortion," however, the question is constantly brought up—calls for revision of the international consensus in this matter are regularly repeated in the forum of the United Nations, see Dobrowolska, "Prawa," 175–176.

[9] World Population Plan of Action, August 1976, Adopted by the World Population Conference Bucharest, 1974, Agency for International Development Washington, D.C. 20523, pt. B(f), http://www.population-security.org/27-APP1.html#C.1.f, accessed September 25, 2018.

Ban on Incest[10] in Public Discourse

Lifting the ban on incest is not a purely abstract and hypothetical topic, but a question undergoing lively debate in the public sphere, and even undertaken by widely publicized films.[11] Catchy titles in the press and on the Internet almost jump out at the reader: "Kazirodztwo – co w tym złego?" [Incest – What Is Wrong about It?],[12] "Z siostrą to nie grzech" [It's Not a Sin If She's Your Sister],[13] "Karać czy nie karać za kazirodztwo w XXI wieku?" [Should We Punish Incest in the 21st Century?],[14] "W Niemczech chcą zalegalizować kazirodztwo" [Germany Wants to Legalise Incest].[15]

The last title refers to the opinion of the German Ethics Council associated with the Bundestag that "criminal law is not the appropriate means to preserve a social taboo." In its lengthy report on incest, the Council recommended a partial amendment to article 173 of the criminal code (which existed in German law since 1871, the early times of Bismarck), which stipulates three years' imprisonment for intercourse with a family member, even if it was mutually consensual. Fourteen council members were in favor of the indicated change, nine were opposed, and two abstained. It should be added that the discussion was not purely academic, but precipitated by the specific case of Patrick Stübing and his sister Susan Karolewski, who at that time had four children together. The siblings were separated as children, found each other after the years, and became romantically involved. Their story precipitated a country-wide discussion on incest. Jerzy Montag, legal expert for the Green Party parliamentary faction, said in defence of the siblings that article 173 was contrary to the spirit of the 21st century. We must not establish social mores with the criminal code.

The story from Germany is not an exception. In 2012, a similar discussion erupted in Denmark, sparked by Niklas and Sofie, siblings from Aarhus, who

[10] It must be noted that the Polish word "kazirodztwo," translated here as "incest," is used colloquially, even by lawyers, but is not part of legislative language. "Incest" itself is borrowed from Latin *incestum*, meaning "impurity," "obscenity," or "blemish," and was used in a broader sense than just intercourse between relatives. The term is found in Western terminology (Fr. *inceste*, Sp. *incesto*, Ger. *Inzest*), See: Andrzej Sakowicz, *Prawnokarne gwarancje prywatności* (Kraków: Zakamycze, 2006). See also Małgorzata Szwejkowska and Bronisław Sitek, "Karnoprawny zakaz stosunków kazirodczych," *Studia Prawnoustrojowe*, vol. 23 (2014): 31–47.

[11] In Poland, one of the films with this theme was Filip Marczewski's *Shameless* of 2012.

[12] https://www.wiatrak.nl/57127/kazirodztwo-co-w-tym-zlego, accessed September 25, 2018.

[13] https://www.wprost.pl/tylko-u-nas/334836/Z-siostra-to-nie-grzech.html, accessed September 25, 2018.

[14] http://wyborcza.pl/1,76842,12858518,Karac_czy_nie_karac_za_kazirodztwo_w_XXI_wieku__W.html, accessed September 25, 2018.

[15] https://wiadomosci.wp.pl/w-niemczech-chca-zalegalizowac-kazirodztwo-6027652193174145a, accessed September 25,2018.

had a daughter together. That time as well, the rationale of penalizing intercourse between two consenting adults was put into question. "The government should not be overseeing who has children with whom," as a Member of Parliament Pernille Skipper said to the daily "Politiken." She called penalizing sexual relations between relatives "an old-fashioned and grotesque approach to sex and family."

Analogous arguments were made in a debate which took place in Switzerland. In 2010, the Minister of Justice from the Social Democratic Party, Simonetta Sommaruga, declared that the ban on incest "infringes on people's autonomy" and proposed a change in the law.

A discussion in a similar "European" spirit takes place in Poland as well. In 2014, in his blog hosted by the weekly *Polityka*, professor Jan Hartman—then a member of the Ethics Committee for the Ministry of Health—wrote that if the motherly, or brotherly-sisterly love could be harmoniously melded with erotic love, a new, higher quality of love and relationship was achieved.[16] Hartman continued that in the age of effective contraception, it was time to ask ourselves the question of what could be the justification of a ban on incest today. He noted that the doctrine behind the strict treatment of incest is completely inconsistent with the modern jurisprudence, since one set of the arguments levelled is religious, and another—"eugenic" which is not employed elsewhere. He wrote that the point was that children from such relationships could be born disabled and other couples at risk of such a problem were not met with this argument.

Ban on Incest in Criminal Law

Staying with national discourse, it is worth noting that the matter is raised not only in the media, but in the domain of criminal law. This is due to the fact that the *ratio legis* of the ban on incest is not clearly defined and has been interpreted in various ways for years. Whereas eugenic considerations and the proper functioning of the family, as well as decency in sexual matters, have been the standard justification for penalizing incest until the second half of the 20th century, they have since diminished in significance, although not disappeared entirely.[17] As an example, such a stance is represented by Juliusz Leszczyński,

[16] This particular statement was deleted from the blog. https://hartman.blog.polityka.pl/2014/09/29/palenie-meskiej-czarownicy.

[17] For more, see Małgorzta Tomkiewicz "Kazirodztwo a prawnokarna ochrona rodziny w Polsce," *Polityka Społeczna i Resocjalizacyjna*, vol. 21 (2013): 32. The author points out that the sexual bond in an incestuous relationship creates an arrangement which is opposed to other family members and sets itself apart as a subsystem in the family structure which, in turn,

according to whom a ban on incest is still justified by eugenic concerns and the necessity to protect public decency.[18] Marek Bojarski also opines that the ban on incest aims to protect decency shaped by years of tradition, while taking into account arguments of eugenic nature.[19]

Legal doctrine also includes the view proposed by Andrzej Zoll,[20] Mateusz Rodzynkiewicz,[21] Jan Baranowski,[22] and Małgorzata Tomkiewicz[23] that incest disrupts the functioning of a particular family as a social subsystem.

According to Mieczysław Surkont, incest is a crime against decency, whereas the concern for the health of potential offspring, even though it does have some significance, is an entirely secondary justification for the ban.[24] For Oktawia Górniok,[25] Marek Mozgawa,[26] and Andrzej Marek,[27] the protected object of the crime of incest is solely decency, while for Igor Andrejew incest "offends public morality."[28]

For Lech Gardocki "the reasons to punish incest have an emotional character, and the reason for this emotion is not entirely clear."[29] For Marian Filar, the

---

leads to unclear family roles, blurring their boundaries, conflicts, stress and social isolation of the family.

[18] See Juliusz Leszczyński "O projektach reformy przepisów dotyczących przestępstw seksualnych," *Państwo i Prawo*, vol. 2 (1992): 83–84.

[19] See Marek Bojarski, *Prawo karne materialne. Część ogólna i szczególna* (Warszawa: Wolters Kluwer, 2004), 452.

[20] See Andrzej Zoll "Ochrona prywatności w prawie karnym," *Czasopismo Prawa Karnego i Nauk Penalnych*, vol. 4, no. 1 (2000): 225.

[21] See Mateusz Rodzynkiewicz, *Przestępstwa przeciwko wolności seksualnej*, in *Kodeks karny. Część szczególna. Komentarz do art. 117–277*, vol. 2, ed. Andrzej Zoll (Kraków: Kantor Wydawniczy Zakamczyce. Oddział Polskich Wydawnictw Profesjonalnych, 2006), 659.

[22] According to Jan Baranowski, three meanings of the term "family" as a good protected by law should be differentiated: (1) family in the specific sense—as the particular functioning unit, a social subsystem, whose functioning may become disrupted by incestuous relations; (2) family in the abstract sense—as a symbol and value, in which case what is protected is not a particular family, but rather the social family structure—it is permissible to disrupt or even destroy a given family through criminal law intervention if there exist incestuous relations, in order to bolster family as an abstract symbol or value; (3) the true protected good is not family itself, but certain elements of moral doctrines as part of various ideologies, see Jan Baranowski, "Ratio legis prawnokarnego zakazu kazirodztwa," *Przegląd Prawa Karnego* vol. 3, (1990), 67.

[23] Tomkiewicz, "Kazirodztwo," 32.

[24] Mirosław Surkont, *Prawo karne. Podręcznik dla studentów administracji* (Sopot: Wydawnictwo Praw. Lex, 1998), 173.

[25] Oktawia Górniok, Stanisław Hoc, and Stanisław Przyjemski, *Kodeks karny: komentarz*, vol. 3. (Gdańsk: Wydawnictwo Arche, 1999), 171.

[26] See Marek Mozgawa, *Przestępstwa przeciwko wolności seksualnej i obyczajności*, in *Kodeks karny. Komentarz*, ed. Marek Mozgawa (Warszawa: Wolters Kluwer, 2014), 516.

[27] See Andrzej Marek, *Kodeks karny. Komentarz* (Warszawa: Wolters Kluwer, 2010).

[28] Igor Andrejew, *Polskie prawo karne w zarysie* (Warszawa: PWN, 1989), 421.

[29] Lech Gardocki, *Prawo karne* (Warszawa: PWN, 1998), 243.

protected object in the case of incest is "sexual decency understood in moralistic terms."[30]

On the other hand, according to Jarosław Warylewski, the concern for moral and physical health of society only reinforces legislative paternalism, and does not serve the members of society, who often know best how to take care of themselves. The need to protect the family also does not support keeping the ban on incest, since, as the author claims, family dysfunction is almost never caused by incestuous relations, which appear only as a consequence of other pathologizing factors. Because of these doubts as to the eugenic and family-oriented reasons for the incest ban, and the untenability of protection for decency alone, the author postulates lifting the ban on incest, considering it a completely superfluous criminal law regulation of consensual sexual relations between adult relatives. Only that—he claims—would put criminal law on a more rational footing.

Warylewski also postulates that the ban on incest is a violation of the right to privacy as defined, i.a. in Article 8 of the European Convention on Human Rights. Therefore, the mentioned author is convinced that requesting the legislature to decriminalize incest is a voice in defence of both sexual freedom and all those human freedoms being curtailed and usurped by the government.[31]

A similar position is taken by Katarzyna Banasik,[32] who views the ban on incest as a violation of sexual freedom, and by Andrzej Sakowicz, according to whom criminalizing incestuous relations is an example of criminal law overreach into the private sphere, and of granting primacy to the phenomenon of legal paternalism. He opines that the Polish legislature has not presented any arguments which would justify maintaining the ban on consensual incestuous relations between adults, which might prompt a discussion of legal grounds for decriminalizing sexual intercourse between relatives.

[30] Marian Filar, "Przestępstwa seksualne w nowym kodeksie karnym," in *Nowa kodyfikacja karna. Krótkie komentarze*, vol. 2, ed. A. Leciak (Warszawa: Ministerstwo Sprawiedliwości. Departament Kadr i Szkolenia, 1997), 45.

[31] Ibid., 96–97.

[32] Katarzyna Banasik, "W kwestii penalizacji kazirodztwa," *Prokuratura i Prawo*, vol. 4 (2011): 65–72; Katarzyna Banasik, "Karalność kazirodztwa jako naruszenie wolności seksualnej," in *Konteksty prawa i praw człowieka*, ed. Zyta Maria Dymińska (Kraków: Oficyna Wydawnicza AFM, 2012), 37–46.

Ban on Incest in Canon Law, Polish Law, and European Law

Liaisons between closely-related persons have been a point of concern for church legislators for centuries, and the care for purity of family relations and of sexual life has been and still is prominent in the teaching of Church fathers.[33] This care found its expression, i.a. in defining the degree of consanguinity as an impediment to marriage. Initially, consanguinity was calculated drawing from the principles of Roman law, but since the 8th century, the German computation was canonically adopted, de facto resulting in a extension of the impediment to marriage to more distant relatives. The culmination in restrictive definitions of incest and marriage impediments came with the changes introduced by synods in the 10th century. Prohibition of consanguineous marriage was then extended to and including the 7th degree of consanguinity in the collateral line, and it was only Innocent III at the Second Council of the Lateran in 1215 who reduced the consanguinity impediment back to the fourth degree. This regulation endured till the 21st century.[34]

The ban on incest also has a long tradition in Polish law. These kinds of sexual behaviors are penalized in Art. 206 of the Criminal Code of 1932,[35] as well as Art. 175 of the Criminal Code of 1969,[36] and in Art. 201 of the Criminal Code of 1997.[37]

In the current Polish criminal law, the ban on incest is found in Art. 201 of the Criminal Code. The law reads as follows: Whoever has sexual intercourse with an ascendant, descendant, or a person being an adopted, adopting relation or brother or sister shall be subject to the penalty of the deprivation of liberty for a term of between three months and five years—which would seem to be clear and understandable. The problem, however—as rightly pointed out by Małgorzata Tomkiewicz, among others—is that such a penalization of incest has clear limitations of both objective and subjective character.[38]

---

[33] Elizabeth Archibald, *Incest and the Medieval Imagination* (Oxford: Oxford University Press, 2001), 20.

[34] Wojciech Góralski, *Kanoniczne prawo małżeńskie* (Warszawa: Polskie Wydawnictwo Prawnicze Iuris, 2000), 69–76.

[35] Decree of the President of Poland of 11 July 1932, Criminal Code (Dz.U.1932.60.571, Art. 206): "Whoever has intercourse with a direct relative, brother, or sister, shall be subject to the penalty of the deprivation of liberty for up to 5 years."

[36] Act of 19 April 1969, Criminal Code (Dz.U.1969.13.94, Art. 175): "Whoever has sexual intercourse with a direct relative, brother, or sister, or a person adopting or being adopted, shall be subject to the penalty of the deprivation of liberty from 6 months to 5 years."

[37] Act of 6 June 1997, Criminal Code (Dz.U.1997.88.553; consolidated text: Dz.U.2018.1600).

[38] Tomkiewicz, "Kazirodztwo," 32.

First of all, as the mentioned author also stresses, the prohibition present in the adduced Art. 201 pertains only to "sexual intercourse." The article does not criminalize "other sexual acts," whose term denotes behaviors beyond the meaning of sexual intercourse which are involved in the broadly understood human sexual life, consisting in bodily contact of the offender with the victim, or at least in bodily and sexual involvement of the victim. The term covers situations in which the offender, with the purpose of arousing or satisfying their own drive, not only touches the victim's sexual organs (even through clothes), but also undertakes other acts in contact with their body.[39]

On this point alone, it must be admitted that the Polish legislature does not prohibit all forms of sexual activity between the persons specified in Art. 201, but only sexual intercourse. This means that arousing and satisfying the sexual drive between closest relatives, unless it crosses the boundary of sexual intercourse, is legally irrelevant.

As far as the subjective applicability of the ban is concerned, it must be noted that the crime of incest has been reduced by the legislator to a very narrow set of family members, the principle of which is not entirely understandable. The subjects named in the regulation do not include direct affinity, while it strictly limits the list of included persons. It is, therefore, not penalized, for example, if a parent-in-law has intercourse with a child-in-law, or if an adult stepchild has intercourse with a stepparent, or a person has intercourse with a person adopted[40] by their spouse. The analyzed scope of incest also does not include intercourse between unrelated persons adopted by the same person, or between a natural child of the person adopting and the person being adopted.

In European countries, there are various standards regarding incest. In France, the penalty for such relations was lifted back in 1810 by Napoleon Bonaparte. Incestuous liaisons are also not prosecuted in Spain, Portugal, Luxembourg, the Netherlands, and Belgium.

The diversity in European state laws towards the phenomenon of incest has been noted by the European Court of Human Rights, which analysed the ban on incest between siblings in its reasoning of the judgment of 12 April 2012, case

[39] See Supreme Court decision of 21 May 2008 in the case VKK 139/08, *Prokuratura i Prawo*, no. 12 (2008): 8.

[40] An attempt to extend the ban on incest to relations between the adopted and natural child of the same person analogous to the ban existing between siblings is not a sound move because Polish family law, beside *adoptio plena* includes also *adoptio minus plena*, which stipulates precisely that the adopted person is not fully included (in legal terms) in the family of the adopting person, and does not become a brother or sister for the natural children of the adopting person. *Adoptio plena*, on the other hand, does create a legal relationship of parent and child, and the adopted person does acquire rights and duties resulting from consanguinity towards the relatives of the adopting person, but even that kind of adoption does not create a relation of consanguinity, see Kaziemierz Piasecki (ed.), *Kodeks rodzinny i opiekuńczy. Komentarz* (Warszawa: LexisNexis, 2009), 101.

number 43547/08 Stübing v. Germany.[41] In the ruling, ECHR explicitly states that there is no consensus among the Council of Europe Member States regarding penalization of consensual intercourse between adult siblings. In its conclusion, ECHR does admit that national courts sentencing for incest are within their margin of discretion, which does not violate Art. 8 of the Convention, but focuses, in its opinion, not on circumstances which could justify penalizing incest, as such, but on psychological and motivational determinants of Stübing's partner at the moment of deciding to enter into sexual relations with her half-brother.

The problem of incest has not been the subject matter of other ECHR decisions, but announcements of the Court in other cases regarding sexual matters clearly point to an interpretative direction. As an example, in the A.D.T. vs. Great Britain decision of 31 July 2000, ECHR rested its argumentation on the statement in the Dudgeon case, where it remarked: "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[42] In E.B. vs. France of 22 January 2008[43] the Court stated that the autonomy of persons participating in emotional relationships should be given special protection, recognizing the special importance of sexual life to the full realization of human personality, tied to the person's identity.[900]

Based on Art. 8.2 of the European Convention on Human Rights, the court indicated many times that public interest expressed in moral norms must give way to rights to privacy and autonomy in the sexual sphere. Particularly, it is consistently considered a violation of the Convention to criminalize, based on moral grounds, homosexual intercourse in conditions of full privacy between adults acting in full knowledge.[44]

Conclusions

Fifty years ago, in 1968, as Pope Paul VI published his encyclical *Humanae Vitae* on moral principles guiding the transmission of human life, in which he restated the teachings of Second Vatican Council on spousal love and responsible reproduction, indissolubility of marriage, and the unifying and reproductive

[41] See LEX No. 1130518.

[42] See § 60.

[43] Complaint No. 43546/02.

[44] Marek Nowicki, *Europejska Konwencja Praw Człowieka* (Warszawa: Oficyna Wolters Kluwer, 2007), 31.

importance of the conjugal act,[45] at the United Nations conference in Teheran, a debate was held on the dangers of world overpopulation and the necessity of controlling the birth rate. This debate, as evidenced in the following years, resulted in the consolidation of anthropological changes, leading to the formation of a new cultural model of the human being. This new human is characterized by a radical individualism and subjectivism, for whom the only value is that which brings him benefit or pleasure, and who considers it his fundamental right to satisfy his individual desires, demanding they be authorized by positive law.[46] An expression of these are the "new human rights" analyzed here.

The "new rights" are established without reference to objective norms, solely based on subjective convictions of the persons establishing them. These individual choices become a reference point for a "new" legal system. The postmodern principle of free choice leads to a climate which permits thought, speech, and action outside of the framework of logic, morality, and tradition. Man, in order to avail himself of this right to choose, must liberate himself from all limitations, be they normative, ontological, ethical, cultural or religious. In this "liberation," his liberty is expressed. He can even choose sexual orientation and the form of his family, as well as change those in response to his latest needs.[47]

The implementation of these rights happens through cultural transformation, underpinned by a change of laws and policies of the state regarding healthcare, education, and above all, the social mentality. The social taboo surrounding incest is ever bolder entering public debate, and the rationale behind its prohibition is questioned with increasing vigour and radicality, all under the banners of human autonomy and freedom. This phenomenon is fully in line with the view of Gerald Dworkin, who "proclaimed that the individual was morally autonomous if, and only if, their moral principles were exclusively their own. The individual must not be relieved, replaced or limited in their moral choice by the state. Actions by the legislator which remove individual moral autonomy in the name of the competing value of public morality expressing public interest are a manifestation of moralizing, paternalizm, and a violation of the right to privacy."[48] A violation of sexual autonomy is, in the light of this theory, the most egregious form of privacy violation.

[45] The document states decisively that "it is necessary that each and every marriage act remain ordered *per se* to the procreation of human life" (No. 11), although it does allow regulation of conceptions (No. 16), while it forbids any contraceptive or interceptive methods (therefore, any artificial methods for preventing pregnancy – No. 14).

[46] Cf. Michael Schooyans, *Ukryte oblicze ONZ* (Toruń: Wydawnictwo Wyższej Szkoły Kultury Społecznej i Medialnej, 2001), 53–54.

[47] Bożena Bassa, "Prawa reprodukcyjne i seksualne jako 'nowe prawa' człowieka," *Studia nad Rodziną*, vol. 30–31, n. 1–2 (2012): 368.

[48] See Tom Gerety, "Redefining Privacy," *Harvard Civil Rights – Civil Liberties Law Review* vol. 12, no. 2, (1977): 1–23; Joanna Braciak, *Prawo do prywatności* (Warszawa: Wydawnictwo Sejmowe, 2004), 317.

In the context of the above, it is impossible not to note that the "new rights" are in fact a deformed version of human rights,[49] as they stand in opposition to natural law, and are at their core expressions of mere hedonism. What should be the reason for most concern is the fact that reproductive and sexual rights penetrate ever deeper into the structure of societies and lead to changes in behavior, set new priorities, lead to school program reforms, new policies of governments and various organizations, as well as new laws.

Coming back to legislation, it should be noted that although the law of the Catholic Church still unequivocally considers incest a moral evil, which corrupts a person, the legal systems of individual European states are undergoing distinct liberalization, and the jurisprudence of the ECHR seems to support that trend. In the Polish criminal law, the ban on incest is still present, but its objective and subjective limitations make it less than robust. Eliminating direct affinity from qualification, and limiting it only to the adopting and adopted person, threatens both the proper family relations and their decency, and also blurs the basic family structures. Limiting the ban on incest to sexual intercourse alone legitimizes all other forms of sexual involvement among family members, which is hard to reconcile either with the axiology of family functions or with decency. It seems—and it should be stated clearly—that the "softening" of both doctrine and the law, indicated above, which is expressed not only as tolerance but indeed as increasing approval for incestuous behaviors, is an action directed and intended towards weakening the family. It is hard not to perceive it as an echo of the agenda of the second and third wave feminist movements.[50]

Are contacts between related persons, then, able to be viewed as "new human rights"? In attempting to answer this question, one must admit—however improbable this might have seemed only a decade or two ago—that nowadays the affirmative answer is not out of the question. This conclusion is supported primarily by the fact that it is currently the cultural trend to demand as many rights as there are possible choices.[51] It is also supported by the ever bolder proposals raised in the media and in academic discussions to entirely de-penalize incest, and views which explicitly regard these kinds of sexual behaviors as the expression of human rights.

By way of conclusion, it should be noted that even in the national literature on this subject, there is no shortage of voices saying that there is nothing standing in the way of including incest undertaken by adults capable of recognizing

[49] Schooyans, *Ukryte*, 49.

[50] The development of feminist thought is commonly divided into three phases: the so-called first wave, shaped in the 19th century, which fought for formal equality between women and men, including suffrage; the second wave, beginning approximately in the 1960s; and the third wave (postmodernist), which flourished in the 1990s, see Dobrowolska, *Prawa*, 164.

[51] Bassa, "Prawa," 368.

the significance of their actions and of directing their behaviour *in the list of human rights*.[52]

If one were to assume that the sole criteria legitimizing sexual contacts are age of majority and consent, and everything that man is capable of inventing to satisfy his desires is his right, then—to stay within this narrative frame—one must only signal that human rights thus understood in principle have no bounds. Apart from incest, another avenue for discussing human sexual freedom and human rights may soon (provided that the consenting person leaves such disposition regarding their body) also include necrophilia, but that is a topic for another article.

Bibliography

John XXIII. Encyklika *Pacem in Terris*. Kraków: Wydawnictwo M, 2003.

Supreme Court decision of 21 May 2008 in the case VKK 139/08, *Prokuratura i Prawo* 2008, No. 12.

European Parliament Resolution of 10 March 2015 on progress on equality between women and men in the European Union, 2014/2217(INI).

European Parliament Resolution of 20 February 2015 on the Annual Report on Human Rights and Democracy in the World 2013 and the European Union's policy on the matter, 2014/2216(INI).

European Parliament Resolution of 9 June 2015 on the EU Strategy for equality between women and men, post 2015, 2014/2152(INI).

Decree of the President of Poland of 11 July 1932, Criminal Code (Dz.U.1932. 60.571).

Act of 19 April 1969, Criminal Code (Dz.U.1969.13.94).

Act of 6 June 1997, Criminal Code (Dz.U.1997.88.553; consolidated text: Dz.U.2018.1600).

ECHR decision of 22 January 2008 in case No. 43546/02 E.B. v. France.

ECHR decision of 12 April 2012 in case No. 43547/08 Stübing v. Germany, LEX No. 1130518.

Adolphe, Jane. "'Gender' Wars at the United Nations," *Ave Maria Law Review*, vol. 11 (2012): 1–31.

Andrejew, Igor. *Polskie prawo karne w zarysie*. Warszawa: PWN, 1989.

Archibald, Elizabeth. *Incest and the Medieval Imagination*. Oxford: Oxford University Press, 2001.

Banasik, Katarzyna. "Karalność kazirodztwa jako naruszenie wolności seksualnej," in *Konteksty prawa i praw człowieka*, edited by Zyta Maria Dymińska, 37–46. Kraków: Oficyna Wydawnicza AFM, 2012.

Banasik, Katarzyna. "W kwestii penalizacji kazirodztwa," *Prokuratura i Prawo*, vol. 4 (2011): 65–72.

Baranowski, Jan. "Ratio legis prawnokarnego zakazu kazirodztwa," *Przegląd Prawa Karnego*, n. 3 (1990): 62–66.

Bassa, Bożena. "Prawa reprodukcyjne i seksualne jako 'nowe prawa' człowieka," *Studia nad Rodziną*, vol. 30–31(2012), n. 1–2, 363–377.

[52] Sakowicz, *Prawnokarne*, 32. The author views *incest* as an element of the right to privacy.

Bojarski, Marek. *Prawo karne materialne. Część ogólna i szczególna*. Warszawa: Wolters Kluwer, 2004.

Braciak, Joanna. *Prawo do prywatności*. Warszawa: Wydawnictwo Sejmowe, 2004.

Dobrowolska, Karolina. "Prawa reprodukcyjne i seksualne w ONZ i ich doktrynalne uwarunkowania," *Zeszyty Prawnicze*, vol. 16, no. 2 (2016): 163–181.

Filar, Marian. *Przestępstwa seksualne w nowym kodeksie karnym*. In *Nowa kodyfikacja karna. Krótkie komentarze*, edited by Andrzej Leciak. Ministerstwo Sprawiedliwości. Departament Kadr i Szkolenia, Warszawa 1997, z 2, 45.

Gardocki, Lech. *Prawo karne*. Warszawa: C.H. BECK, 1998.

Gerety, Tom. "Redefining Privacy," *Harvard Civil Rights – Civil Liberties Law Review*, vol. 12, no. 2 (1977): 1–23.

Góralski, Wojciech. *Kanoniczne prawo małżeńskie*. Warszawa: Polskie Wydawnictwo Prawnicze Iuris, 2000.

Górniok Oktawia, Hoc Stanisław, and Przyjemski Stanisław. *Kodeks karny: komentarz*, vol. 3. Gdańsk: Wydawnictwo ARCHE, 1999.

Greniuk, Franciszek. "Od Powszechnej Deklaracji Praw Człowieka do Karty Praw Podstawowych." In *Prawa człowieka. Przesłanie moralne Kościoła*, edited by Krzysztof Jeżyna and Tadeusz Zadykowicz, 16–17. Lublin: Wydawnictwo KUL, 2010.

Leszczyński, Juliusz. "O projektach reformy przepisów dotyczących przestępstw seksualnych," *Państwo i Prawo*, vol. 2 (1992): 80–84.

Marek, Andrzej. *Kodeks karny. Komentarz*. Warszawa: Wolters Kluwer, 2010.

Mozgawa, Marek, ed. *Kodeks karny. Komentarz*. Warszawa: Wolters Kluwer, 2014.

Nowicki, Marek. *Europejska Konwencja Praw Człowieka*. Warszawa: Oficyna Wolters Kluwer, 2007.

Piasecki, Kazimierz, ed. *Kodeks rodzinny i opiekuńczy. Komentarz*. Warszawa: LexisNexis, 2009.

Rodzynkiewicz, Mateusz. "Przestępstwa przeciwko wolności seksualnej." In *Kodeks karny. Część szczególna. Komentarz do art. 117–277*, vol. 2, edited by Andrzej Zoll. Kraków: Kantor Wydawniczy Zakamycze. Oddział Polskich Wydawnictw Profesjonalnych, 2006.

Sakowicz, Andrzej. *Prawnokarne gwarancje prywatności*. Kraków: Zakamycze, 2006.

Schooyans, Michael. *Ukryte oblicze ONZ*. Toruń: Wydawnictwo Wyższej Szkoły Kultury Społecznej i Medialnej, 2002.

Skorowski, Henryk. *Problematyka praw człowieka*. Warszawa: Wydawnictwo UKSW, 2005.

Surkont, Mirosław. *Prawo karne. Podręcznik dla studentów administracji*. Sopot: Wydawnictwo Prawnicze Lex, 1998.

Szwejkowska, Małgorzata, and Bronisław Sitek. "Karnoprawny zakaz stosunków kazirodczych." *Studia Prawnoustrojowe*, vol. 23 (2014): 31–47.

Tomkiewicz, Małgorzata. "Kazirodztwo a prawnokarna ochrona rodziny w Polsce." *Polityka Społeczna i Resocjalizacyjna*, vol. 21 (2013): 25–44.

Warylewski, Jarosław. "Zakaz kazirodztwa w kodeksie karnym oraz w ujęciu porównawczym," *Przegląd Sądowy*, vol. 5 (2001): 66–97.

Zoll, Andrzej. "Ochrona prywatności w prawie karnym. " *Czasopismo Prawa Karnego i Nauk Penalnych*, vol. 1 (2000): 221–228.

Lucjan Świto

« Nouveaux droits » de l'homme et interdiction des contacts sexuels entre les personnes qui ont des liens de consanguinité Réflexion juridique

Résumé

Le concept classique des droits de l'homme, exprimé dans la Déclaration universelle des droits de l'homme signée à Paris le 10 décembre 1948, a fait l'objet de plusieurs tentatives de réinterprétation au cours des cinquante dernières années. L'apparition du concept de « nouveaux droits de l'homme » dans l'espace public en est une preuve éclatante. Cependant, les réponses aux questions, à savoir quelle est la portée du sens du terme « nouveaux droits », et surtout ce que signifie exactement « droits reproductifs et sexuels », ne sont pas entièrement connue. Le changement de perception de la sexualité humaine, l'affirmation de la libération sexuelle et le consentement à briser les tabous sociaux au nom des « nouveaux droits » humains provoquent une réflexion aux questions suivantes : comment le concept de droits sexuels se rapporte-t-il à l'interdiction des contacts sexuels entre les personnes qui ont des liens de consanguinité?; l'interdiction de l'inceste dans la réalité contemporaine perd-elle sa raison d'être et sa pénalisation n'est-il pas en train d'être réduit au symptôme d'un anachronisme oppressif ?; les solutions normatives actuellement contraignantes en la matière sont-elles claires et exemptes de questions et de controverses? Enfin, il est impossible de ne pas se demander si les contacts sexuels entre les personnes qui ont des liens de consanguinité ne font pas partie des « nouveaux droits » de l'homme? Le présent article tente de répondre aux questions posées.

Mots-clés : droits de l'homme, inceste, moralité sexuelle, féminisme

Lucjan Świto

«Nuovi diritti» dell'uomo e divieto di contatti sessuali tra parenti Una riflessione legale

Sommario

Il concetto di diritti umani classico, espresso nella Dichiarazione universale dei diritti dell'uomo firmata a Parigi il 10 dicembre 1948, è stato oggetto di molte reinterpretazioni negli ultimi cinquant'anni. L'apparizione del concetto di «nuovi diritti umani» nello spazio pubblico ne è una prova lampante. Tuttavia, non è completamente esplicitato qual sia la portata del significato del termine «nuovi diritti», e in particolare che cosa significhi esattamente «diritti riproduttivi e sessuali». Il cambiamento nella percezione della sessualità umana, l'affermazione della liberazione sessuale e il consenso a infrangere i tabù sociali in nome dei «nuovi diritti» umani provocano una riflessione basata sulle domande seguenti: come capire il concetto di diritti sessuali in riferimento al divieto di contatti sessuali tra parenti? Il divieto dell'incesto nella realtà contemporanea perde la sua ragion d'essere e la sua penalizzazione diventa solo sintomo di un anacronismo oppressivo? Le soluzioni normative attualmente vincolanti in questa materia sono chiare e libere da domande e controversie? Infine, è impossibile non chiedersi se i rapporti sessuali tra parenti non appartengano ai «nuovi diritti» dell'uomo? Il presente articolo è un tentativo di rispondere alle domande poste.

Parole chiave: diritti umani, incesto, moralità sessuale, femminismo

Philosophy and Canon Law vol. 6 (2020), pp. 73–95
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.05

Stanislav Přibyl
University of South Bohemia in České Budějovice
https://orcid.org/0000-0002-2470-1405

Fundamental Rights: Comparison of the Approaches in the Canon Law and in the Civil Law

Abstract: The Code of Canon Law of 1983 came up with a list of obligations and duties of the Catholic faithful. This list is analogical to those of the charters of fundamental rights and freedoms found in the documents of international law and in the constitutions of democratic countries. the inspiration of church law by civilian law was a reality from the very beginnings of the development of Canon Law: first by Roman Law, in the modern world by complex codifications of civil law, and after Vatican II also the idea of universal human rights. The specifics of the Catholic Church in relation to a democratic state is the incorporation of the subject of law into the Church through baptism which brings, above all, duties and obligations. Thus the catalogue which may now be seen in the Code contains first and foremost a list of duties, not rights, which are not stressed in the modern state. In fact, the modern state has very few demands; often just the payment of taxes and compulsory school attendance. The article deals with the individual obligations and rights found in the Code of Canon Law and compares them with their analogies in constitutions. The concept of civil and canonical norms tends to get closer primarily in the case of inspiration by natural law, whereas the obligations of the faithful represent a specifically ecclesiastical goals, for which no analogy in civil law can be found. After all, the supreme law of the Church is the salvation of souls, indeed, the state does not have such a supernatural goal.

Keywords: Church law, civil law, natural law, human rights, fundamental rights and freedoms, duties and rights of the faithful, constitution, the Code of Canon Law, salvation, law, law making, Christians, Catholic Church, rule of law

The Church Inspired by Civil Law

The Canon Law of the Catholic Church is manifestly inspired by the legal thought and legal provisions adopted from the environment in which the church is active. Historically speaking, the impact of the Roman Law—as expressed in the principle *Ecclesia vivit lege romana* (*Ecclesia vivit iure romano*)—has been of crucial significance. The inspiration is external and contentual. In the age of the Roman Dominate, the regional administrative units were known as the dioceses or eparchies, that is, the same terms used for the local churches in the Canon Law of the Roman church, or in the Oriental churches, respectively. The hierarchs of the church still issue its own decrees or rescripts, as it was practiced by the emperors in ancient Rome. There are numerous instances of such terminological overlaps. However, not just ancient Roman terminology but the general Roman approach to the application of law made an impact on the Canon Law, so the trial is aptly called Roman-canonical trial.[1] The Justinian codification *Corpus iuris civilis* inspired the idea and title of the *Corpus iuris canonici*. It seems as if the ancient Roman civil law was a sort of a mirror for the ecclesiastical jurisprudence; the Church understood itself as a continuator of the best traditions of Roman legal culture, just like it managed to "christen" the Greek philosophers Plato and Aristotle. The pagan Rome of the emperors was replaced with the Christian Rome of the popes.

In the later modern age, voluminous codifications of civil law started to be issued. Those served as an inspiration for the Church which expressed the wish to create a comprehensive and well-arranged codification of all its law. Pius X declared his intention to prepare such a complex regulation of the Canon Law in 1904,[2] that is, four years after the release of the famous German civil code.[3] However, as the title of the codification suggests, the Church was inspired by the monumental Justinian legacy; this time the collection is entitled *Codex iuris canonici*.[4]

[1] "The system of Canon Law based on the impact of Roman Law (which can still be seen in the trials before ecclesiastical courts) is gradually being perfected. Nevertheless, in the fields of public law, the Canon Law developed its own framework, independent on Roman Law." Jiří Rajmund Tretera and, Záboj Horák, *Církevní právo* (Praha: Leges, 2016), 46.

[2] Motu proprio *Arduum sane munus*, in *Acta Sanctae Sedis*, vol. 36 (1903–1904): 549–551.

[3] "The first proposal of the codification commission from 1887–1888 was refused as it was deemed to be non-German (i.e., too Romance-like) and anti-social. In 1895, the commission came up with a new draft, which the Reichstag approved of as the German Civil Code (BGB, Bürgerliches Gesetzbuch für das Deutsche Reich). The new Code came into force in 1900 and soon became one of the most important codifications of civil law." Karel Schelle et al. *Právní dějiny* (Plzeň: Aleš Čeněk, 2007), 270.

[4] "The new collection of emperor's constitutions was being drafted already in 528. The *Codex Iustinianus* was issued a year later as an official and exclusive collection for this source of

Nevertheless, the development which crucially helped define the legal profile of the Euro-American civilization was the concept of fundamental rights and freedoms. The concept was clearly inspired by the Christian faith and natural law; it did not, however, advance within the domain of the Catholic church and its legal and social thought. The Church adopted it fully as a result of the general paradigm shift which took place at Vatican II. Up until that moment, the Church had been very cautious, if not altogether disapproving of the concept. It was considered a legacy of the French Revolution, that is, inimical to the Church: indeed, the ethos of the Revolution inspired the famous Declaration of the Rights of Man and of the Citizen (1789). The Declaration calls human rights "natural, inalienable and sacred,"[5] however, the Jacobin reign of terror sowed a lasting suspicion against revolutionary changes. The liberalism of the 19th century was fiercely anti-Catholic and was not willing to respect the Catholic concept. However, the events of the Second World War led the Catholic Church much closer to the concept of the fundamental rights and freedoms in the form articulated in the Universal Declaration of Human Rights from December 10, 1948. This move was expressed later explicitly by Pope John XXIII in his encyclical *Pacem in Terris*:

> Any well-regulated and productive association of men in society demands the acceptance of one fundamental principle: that each individual man is truly a person. His is a nature, that is, endowed with intelligence and free will. As such he has rights and duties, which together flow as a direct consequence from his nature. These rights and duties are universal and inviolable, and therefore altogether inalienable.[6]

This statement was made at a time in which the world was divided into two irreconcilable blocks, one of which led by the Soviet Union disrespected the concept of fundamental rights and freedoms and refused the doctrine behind them. In contrast to the "bourgeois" political human rights, the socialist notion favored various social laws, especially the right to work. However, this right entailed also as an obligation.[7] Even today, in a multipolar world, the notion

law." Kolektiv autorů Právnické fakulty UK, *Dějiny evropského kontinentálního práva* (Praha: Leges, 2018), 92.

[5] Cf. Věra Jirásková, *Dokumenty k ústavním systémům* (Praha: Karolinum, 1996), 35.

[6] *Pacem in Terris*, 9.

[7] "The social rights have a crucial importance in the system of constitutional rights and freedoms because they condition the realization of other rights and define the framework of civil duties in the interest of development and satisfaction of the needs of the entire society. The most important and primary right of all citizens is the right to work and to a reward for the realized work according to its quantity, quality and social significance. This right is guaranteed by the entire socialist world in which individuals mature to a full development of their own skills and where they realize their interest, especially with a due share on the social work." Vladimír Flegl, *Ústavní základy Československé socialistické republiky* (Praha: Svoboda, 1981), 28–29.

of human rights is not recognized generally and universally, although its advocates present it as an incontestable and lasting civilization achievement.[8] The fundamental rights are rooted, especially in the key documents of international law and in the constitutions of the countries that have embraced a democratic and pluralistic system. This is also the case of the Czechoslovak Charter of Fundamental Rights and Freedoms from 1991, which since then has been the backbone of the Czech constitutional order.[9]

The Ecclesiastical Transposition of the Concept of Human Rights

Human rights and fundamental freedoms have a special status in the doctrine and practice of the Catholic Church. They have been the subject of reflection in Catholic moral theology and, specifically, the social doctrine of the Church, which has had a practical impact on the activities of the Church ad extra. The modern concept of human rights came to exist as a realization of the right to religious freedom, as it can be retrospectively seen from the First Amendment of the Constitution of the United States of America, the so-called *establishment clause*, which stipulates that the freedom of religion is superior to all the other civil rights: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."[10] The issue of the

[8] "The universality of the importance of human rights and freedoms should bridge the still recognizable difference between the Western (democratic and individualistic) attitude to the Eastern (i.e., paternalistic) concept, influenced by the Eastern religions (i.e., Islam, Hinduism, Confucianism, Taoism, Buddhism, and others) or undemocratic authoritarianizm (as, for example, in Communist China)." Vladimír Zoubek, *Právověda a státověda. Úvod do právního a státovědního myšlení* (Plzeň: Aleš Čeněk, 2010), 85.

[9] Constitutional Act No. 23/1991 Coll. which introduces the Charter of Fundamental Rights and Freedoms as a constitutional act of the Czech and Slovak Federative Republic, promulgated as a part of the constitutional order of the Czech Republic from 16 December 1992 as Constitutional Act No. 2/1993 Coll. (as amended in the Constitutional Act No. 162/1993 Coll.) [Ústavní zákon č. 23/1991 Sb., kterým se uvozuje Listina základních práv a svobod jako ústavní zákon České a Slovenské federativní republiky, vyhlášena součástí ústavního pořádku České republiky usnesením předsednictva České národní rady ze dne 16. prosince 1992 jako Ústavní zákon č. 2/1993 Sb. (ve znění ústavního zákona č. 162/1998 Sb)].

[10] Josef Blahož, *Dokumenty ke státnímu právu kapitalistických zemí* (Praha: Panorama, 1985), 20.

freedom of religion, the role of the Catholic Church and the state in order to secure this freedom became the subject of the declaration *Dignitatis Humanae* of Vatican II on religious freedom. While the earlier concept was based on the right of the Church to be respected by the state which thereby recognized the Catholic Church as the bearer of the one and exclusive truth, the document of the Council focuses on the human person and his/her right to truth, but also on the necessity to seek the truth.[11] The necessary external conditions that favor this quest are identical with the very preconditions of religious freedom: "This freedom means that all men are to be immune from coercion on the part of individuals or of social groups and of any human power."[12]

After that, a further step was taken in relation to the reflection of the fundamental rights and freedoms in the Catholic Church. The making of the post-conciliar legislation and the Code of Canon Law in particular confronted the Church with the question whether the Church should or should not formulate an analogical catalogue to the list of the fundamental civil rights. This initiated the concept of the Fundamental Law of the Church (*Lex Ecclesiae fundamentalis*), that is, a project addressed to all Catholics regardless of their ritual affiliation. This was to be followed by the promulgation of the new Code for the Latin Church and a special one for the Oriental Catholic churches. Apart from the constitutional grounding of the very fundamentals of the hierarchical institution of the Church, this fundamental law was also supposed to contain a list of the fundamental obligations and rights of all the Catholic faithful. However, the draft of this autonomous ecclesiastical constitution was not authorized[13] and the constitutional norms of the Catholic Church are spread in both codes, that is, in the Code of Canon Law for the Latin Church[14] and in the Code of Canons of the Oriental Catholic Churches.[15] The very idea that one can identify the norms that play a fundamental role in terms of the structure of the Church and in the legally relevant activities of the faithful prove the Church was inspired by secular constitutions and the notion of the fundamental rights and freedoms.

[11] "For centuries, it had been held that error has no right. This approach was replaced with the idea based on the right of the human person that his or her is violated whenever the right to religious freedom cannot be realized." Helmut Weber, *Všeobecná morální teologie* (Praha: Zvon, Vyšehrad, 1998), 153.

[12] *Dignitatis Humanae*, 2.

[13] "Although this project was already prepared in 'paragraphed wording,' Pope John Paul II unexpectedly crossed it out; perhaps, he found it sufficiently ripe. Thus, the norms of "constitutional" character were finally incorporated ("dissolved") into both Codes, the Western and the Eastern one, respectively." Ignác Antonín Hrdina and, Miloš Szabo, *Teorie kanonického práva* (Praha: Karolinum, 2018), 201–202.

[14] *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus*. In *Acta Apostolicae Sedis*, vol. 75, Pars II (1983): 1–317.

[15] *Codex canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus*. In *Acta Apostolicae Sedis*, vol. 82 (1990): 1033–1363.

However, its transposition into the canonical reader cannot be mechanical; it shows numerous particularities which graphically illustrate the character of the Church in comparison to the secular sphere.

The Salvation of the Church as the Supreme Law in the Church

In fact, the first peculiarity is the very goal of the Canon Law, as formulated in the final code of the Code of Canon Law, that is, "the salvation of souls, which must always be the supreme law in the Church (*salus animarum, quae in Ecclesia suprema semper lex esse debet*)."[16] The mutual parallelism of the secular legal systems and the ecclesiastical system is due to the fact that the Church on this earth is "constituted and organized in this world as a society (*ut societas constituita et ordinata*),"[17] however, the supernatural goal of the eternal salvation of the faithful is the core distinction and peculiarity of the Canon Law. Therefore, one can understand that the salvation of the souls is a crucial constitutional principle of all Canon Law of the Catholic Church: all the other constitutional and legal norms of the Church, as well as its practice are subordinate to this principle. Although secular jurisprudence recognizes a similar principle in the concept of the *salus publica*[18] and the philosophical reflection also thematizes the common good (*bonum commune*), the canonical *salus animarum* is primarily a theological, not a legal term.

The regard to the salvation of the souls in the practical realization of the Canon Law is multifarious. The Code of Canon Law from 1983 pays attention not only to the purely legal requisites of the legal acts in relation to their validity (*validitas*) or licitness (*liceitas*), but also to the spiritual utility (*utilitas*) or fruitfulness (*fructuositas*). For example, the celebration of matrimony must be carried out in a valid and licit way. However, given the sacramental nature of marriage, that is, it sanctifies both spouses in order for them to reach salvation, a necessary element is "a fruitful (*fructuosa*) liturgical celebration of marriage which is to show that the spouses signify and share in the mystery of the unity and fruitful love between Christ and the Church."[19]

[16] Cf. CIC/1983, Canon 1752.

[17] Cf. CIC/1983, Canon 204 § 2.

[18] "*Salus animarum* is the supreme law of the Church, beyond all the other individual provisions […]. Traditionally, in secular legal one mentions the following, analogically worded principle: *salus publica suprema lex esto*." Redazione di Quaderni di dirtto ecclesiale, *Codice di Diritto Canonico commentato* (Milano: Àncora editrice, 2017), 1389.

[19] Cf. CIC/1983, Canon 1063 3°.

Striking and immediately related to the eternal salvation of the faithful are those regulations, which limit the otherwise legally binding requirements to a minimum in the cases of the imminent danger of death (*in periculo mortis*). This is typically the case of the confession: "Even though a priest lacks the faculty to hear confessions, he absolves validly and licitly any penitents whatsoever in danger of death from any censures and sins, even if an approved priest is present."[20] Clearly, civil law cannot dispose of an analogical regulation because supernatural goals are beyond its reach, even though in the constitutions of some countries there is, indeed, a reference to the supernatural authority of God in the preamble (*invocatio Dei*), for example, in the German Fundamental law (*Grundgesetz*), whose legislators declared in the opening preamble that they agreed on it "conscious of (their) responsibility before God and the people."[21]

Fundamental Rights in the Ecclesiastical Legislature

State constitutions contain, above all, the foundations for the regulations of the political system as well as lists of the fundamental rights and obligations of the citizens. If the Church believes that the very core of its structure was not created by itself and thus it cannot manipulate the norms, the constitutional character of such norms—in the absence of a specific fundamental law of the Church—can be discerned from the very diction of the canon. The legislator, for example, explicitly declares the fundamentally constitutional theological thesis: "Just as by the Lord's decision Saint Peter and the other Apostles constitute one college, so in a like manner the Roman Pontiff, the successor of Peter, and the bishops, the successors of the Apostles, are united among themselves."[22] The diction allows to discern that "the bishops are the successors of the apostles by the divine dispensation through the Holy Spirit," that is, they represent an immediate part of the constitution of the Church as given by Christ. However, "the Bishops' Conference as a standing institution of the bishops from a particular country or a specific region" has not been instituted by Christ, and thus it is an institution of purely ecclesiastical law created mainly for practical purposes.[23]

[20] CIC/1983, Canon 976.

[21] Cf. Josef Blahož, *Dokumenty ke státnímu právu*, 40.

[22] CIC/1983, Canon 330.

[23] "The establishment of bishops' conferences goes back to the positive experience the bishops had with the spontaneous encounters with their brothers from the neighbouring area. These encounters started in central Europe from the turn of the 18th and 19th centuries, i.e. in

The basis of the constitutional regulation of the ecclesiastical organism is closely linked to the problem of the fundamental rights and obligations of the faithful, because the essential guarantors of its realization are those who have been entrusted with the pastoral care for both the universal Church (i.e., the pope and the bishops) and the local churches (i.e., the individual diocesan bishops), respectively.

In the analogous concept of the fundamental rights in the ecclesiastical context, one can claim an essential overturning of their mutual sequence with the obligations. In fact, the faithful of the Catholic Church are above all the addressees of the obligations towards their Church; their fulfilment qualifies them to hold a fundamental mandate which defines the space of their freedom within the Church. The Code in the heading of Book II, can. 208–223 thus does not pinpoint "rights," or "rights and obligations": its title is "The Obligations and Rights of All the Christian Faithful."[24] In fact, contemporary democratic rule-of-law countries gradually abandon practically all obligations of the citizens towards the state. An important turning point in this development was granting the possibility to avoid service in the military in favor of an alternative civilian service and, subsequently, a complete dissolution of any service.[25] In relation to the state, the citizens are therefore obliged only to pay taxes and to follow compulsory elementary education.

If the foundational connection of an individual towards the state is quite necessarily his or her own nationality, the primary relation of an individual towards the Church is baptism as the sacramental sign of God's undeserved grace. However, it is the basis of a lifelong obligation. The Code expresses this relation as a general legal obligation of the Catholic faithful: "With great diligence they

---

a period in which it was vital to agree on a joint strategy to tackle the struggle with the modern state, partially inimical to the Church." Sabine Demel, *Handbuch Kirchenrecht. Grundbegriffe für Studium und Praxis* (Freiburg im Breisgau: Herder, 2010), 87.

[24] In the constitutions of countries where the main goal is to make sure the citizen has the broadest possible space for individual autonomy and thus should not be bothered with a number of obligations and sacrifices that come before the rights, since according to the supreme precept of love, all Christians are called give, rather than accept (based on the logion of Christ quoted by Paul in Acts 20,35). If it is necessary, he/she should adopt an attitude of generous self-sacrifice, whereby public good is given precedence over individual advantage in agreement with the superior precepts of brotherly solidarity." Luigi Chiappetta, *Il Codice di Diritto Canonico. Commento giuridico-pastorale I* (Napoli: Edizioni Dehoniane, 1988), 273.

[25] This is, for example, the case in the Czech Republic: "Another type of service in place of the obligatory military service was the so-called civilian service for those who rejected military service on the basis of conscience and religious persuasion on the basis of a now abrogated act No. 18/1992 Coll about civilian service in relation to the fundamental right to reject military service according to art. 15 paragraph 3 of the Charter […]. However, due to the professionalisation of the army, this provision is no longer used." Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil, et al. *Listina základních práv a svobod. Komentář* (Praha: Wolters Kluwer, 2012), 269–270.

are to fulfil the duties which they owe to the universal Church and the particular church to which they belong according to the prescripts of the law."[26] For the lay faithful, there is a special emphasis on the sacrament of confirmation,[27] which makes them capable of autonomous development of their individual talents in the Church: "Since, like all the Christian faithful, lay persons are designated by God for the apostolate through baptism and confirmation, they are bound by the general obligation and possess the right as individuals, or joined in associations, to work so that the divine message of salvation is made known and accepted by all persons everywhere in the world. This obligation is even more compelling in those circumstances in which only through them can people hear the gospel and know Christ."[28] There is a special catalog of the obligations and rights of the lay faithful,[29] which goes beyond the general framework addressed to all the faithful: "In addition to those obligations and rights which are common to all the Christian faithful and those which are established in other canons, the lay Christian faithful are bound by the obligations and possess the rights which are enumerated in the canons of this title."[30]

Natural Law as the Inspiration for Some of the Rights

As regards the origin of the fundamental rights of a Catholic Christian, the canonical jurisprudence does not refer to the natural, pre-existent rights which should be enjoyed by all, as it is the case in the "rights of man and citizen" in the civil right doctrine. The basic rights of the faithful are defined by the dignity of Christians reborn in the sacrament of baptism to eternal salvation. The possibility to realize them is thus given through his or her baptism, not by the sheer fact of his or her existence.[31] However, this implies that some of the fundamen-

[26] CIC/1983, Canon 209 § 2.

[27] "Mark that testimony may have two forms. The first is simple presence of Christians who witness Christ where they live and fill the world with the spirit of the Gospel. The second is based on the special mission to witness Christ actively. In both cases, Christians provide their testimony using two means: their life and their words." Benedikt Mohelník, *Pečeť daru Ducha Svatého. Teologie svátosti biřmování* (Praha: Krystal, 2012), 47–48.

[28] CIC/1983, Canon 225 § 1.

[29] CIC/1983, Canon 224–231.

[30] CIC/1983, Canon 224.

[31] "The fundamental rights of the citizens that anchor the constitutional systems of modern states are original, universal and inalienable rights that appertain to the human person on the basis of his or her very dignity and nature. Their existence precedes the state and in their essence and basic contents they are not dependent on any positive law. The specifically Christian rights

tal rights, as listed in the Code of Canon Law, are not based on natural law. Such rights find their equivalents in the constitutions and legislature of democratic rule-of-law countries, typically, for example, the right to a good reputation and privacy: "No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy."[32] This is also the case with the right to choose one's own state in life. Of course, this right belongs to the ones inspired by natural law: "All the Christian faithful have the right to be free from any kind of coercion in choosing a state of life."[33] However, the canonical legal order shows how much it differs from its realization compared to the civil law, for example, the right to conclude marriages in the Canon Law is enveloped in a sophisticated system of obstacles for marriage[34] that protect the sanctity of marriage as a specific quality which civil law does not recognize. The legal systems of a number of states obviously do not recognize irregularities and obstacles for a clerical state or in consecrated state of men and women religious; these are legal provisions specifically concerned with the inner structure of the Church itself.

The origin in natural law can also be seen in the principle of the legality of punishments (*nulla poena sine lege*) which the Canon Law of the Catholic Church faithfully reproduces at the level of the fundamental right of all faithful: "The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law."[35] However, even in this case, there is an exception stipulated by the so-called general or penal law (*norma generalis*): "In addition to the cases established here or in other laws, the external violation of a divine or canonical law can be punished by a just penalty only when the special gravity of the violation demands punishment and there is an urgent need to prevent or repair scandals."[36] This violation of the legality of imposing punishments is certainly not the expression of intentional arbitrariness. One should rather refer to the supernatural goal of canonical legislature, namely, *salus animarum*. Indeed, some unexpected or unforeseeable conduct of the offender could jeopardize on only public order, but also the very salvation of the faithful.[37]

---

do not precede the existence of the persona but are activated in the life of the Church as mediated through baptism." Luigi Chiappetta, *Il Codice di Diritto Canonico*, 273.

[32] CIC/1983, Canon 220.

[33] CIC/1983, Canon 219.

[34] Srov. CIC/1983, Canon 1083–1094.

[35] CIC/1983, Canon 221 § 3.

[36] CIC/1983, Canon 1399.

[37] "There exists a variety of views in relation to the significance of this exception. Some stress its legitimacy as regards the specifics of the canonical legal order, where the enforcement of the supreme law of the salvation must not be prevented. In some situations, however, this may involve the use of penal sanctions, even though the law did not stipulate the use of punishment." – Redazione di *Quaderni di diritto ecclesiale*, *Codice di Diritto Canonico*, 1126–1127.

The Addressees of the Obligations and Rights in the Church

The addressees of the list of obligations and rights are only the baptized Catholics: "Merely ecclesiastical laws bind those who have been baptized in the Catholic Church or received into it, possess the efficient use of reason, and, unless the law expressly provides otherwise, have completed seven years of age."[38] In comparison with the previous Code of Canon Law, which extended its personal sphere of effect on all the baptized,[39] because it based its concept on the notion of the illegitimacy of all the other churches. The post-conciliar Code is content with the sphere of effect related only to the Catholics, with the obvious exception of natural law where the sphere is extended to include everybody.

The people of God assembled in the Catholic Church is divided into two entirely fundamental groups, that is, the clerics and the lay people. This is a constitutional division: "By divine institution, there are among the Christian faithful in the Church sacred ministers who in law are also called clerics; the other members of the Christian faithful are called lay persons."[40] However, the Code postulates equality amongst all Catholic Christians as a prerequisite for the realization of their rights: "From their rebirth in Christ, there exists among all the Christian faithful a true equality regarding dignity and action by which they all cooperate in the building up of the Body of Christ according to each one's own condition and function."[41] Thus, the fundamental equality of Christians in the hierarchical community of the Church (*communio hierarchica*) does not mean that everyone has the right to do anything without any difference; it depends on the actual status of the Christian and his or her specific tasks in the Church (*condicio et munus*), which define the inner diversification of the individual groups in the people of God. For example, the Czech Charter of Fundamental Rights and Freedoms introduces the list of the rights with the following axiom: "All people are free and equal in their dignity and in their rights."[42] Clearly, the legislators of the Constitution do not intend to define a mechanically understood concept of equality; above all, they are aware of the fact that a space of equality needs to be created. The concrete realization of this equality is then given in the list of the constitutionally grounded and guaranteed rights.[43]

[38] CIC/1983, Canon 11.

[39] Srov. CIC/1917, Canon 12.

[40] CIC/1983, Canon 207 § 1.

[41] CIC/1983, Canon 208.

[42] Cf. Charter of the Fundamental Rights and Freedoms of the Czech Republic, art. 1.

[43] "In the traditional communities, the dominant concept was the concept of honour, closely linked with inequality. In fact, honour is never enjoyed by everybody, but only by some people

The fundamental equality of Catholic Christians, however, does not guarantee only rights: in fact, the rights represent that initial state which also involves obligations. The foundation is the external attitude which goes beyond the merely civil loyalty found at the citizens of a state: "The Christian faithful, even in their own manner of acting, are always obliged to maintain communion with the Church."[44] This unity is not only internal, that is, emotional. It is the basis of a community (*communio*), which is essentially a theological term: Nevertheless, in connection with the external manifestation of the life of the Church and its faithful, it acquires legal relevance. As regards sacramental life, the most profound and intense manifestation of this community is taking part on the eucharistic communion (*communio eucharistica*); in the visible manifestations of the life in the Church, any faithful can commit a delict which excludes him from the community. The actual excommunication, however, is a "medicinal" punishment (*poena medicinalis*): its goal is to move the sinner to re-enter the Church.[45]

This community is defined by three bonds (*tria vincula*) which tie a Catholic Christian to his or her Church: "Those baptized are fully in the communion of the Catholic Church on this earth who are joined with Christ in its visible structure by the bonds of the profession of faith, the sacraments, and ecclesiastical governance."[46] In the Counter-Reformation context, this position was formulated by Cardinal Robert Bellarmine (1542–1621). It is still an essential element of the fundamentals of the legal order in the Catholic Church. The structure of these "bonds" reflect the three missions of Christ (*tria munera Christi*) performed by the mystical body of Christ: the bond of faith manifests Christ's mission of a prophet and teacher; the bond of the sacraments is the manifestation of his sanctifying mission, the bond of the church governance manifests his kingly, ruling mission.

---

according to their position on the social ladder. The modern concept of human dignity is founded on universalism and egalitarianism, since the inalienable human dignity offers membership *ex definition* to everybody." Eliška Wagnerová, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil, et al. *Listina základních práv a svobod*, 55.

[44] CIC/1983, Canon 209 § 1.

[45] "*Excommunication* is the separation of the believer from the community of the Church, especially its sacramental life, until he or she repents. The Czech translation *vyobcování* (i.e., literally being out of the community) is possible, however, it is misleading. Using the word *vyloučení* (i.e., *expulsion*) is completely wrong. No one can be expelled from the Church today, nor has it ever been possible in the past, both in terms of doctrine, but also legally. The use of the *anathema sit* (let him or her be expelled) did not entail expulsion, either." Jiří Rajmund Tretera and Záboj Horák, *Církevní právo*, 321.

[46] CIC/1983, Canon 205.

The Fundamental Obligations in an Applied Perspective

The concrete obligations and rights of the faithful are realized within the Framework of the *tria munera*. Not just the clerics, that is, church "professionals" are called to participate on fundamental obligation of the prophetic and kerygmatic mission: "All the Christian faithful have the duty and right to work so that the divine message of salvation more and more reaches all people in every age and in every land."[47] In the field of sanctification, the Catholic faithful are faced with a moral imperative to make their lives conform with the sacramental gifts they participate on: "All the Christian faithful must direct their efforts to lead a holy life and to promote the growth of the Church and its continual sanctification, according to their own condition."[48]

In the field of legal civilistic doctrine, the idea that any law should require or prescribe a certain way of life to its addressees is totally out of the question. Indeed, the main goal of the legal order in a particular state is to allow as much space for individual freedom as possible, that is, the *status negativus*, or *status libertatis*, respectively. However, the Canon Law of the Catholic Church is a religious law where a close link between law and morality seems appropriate. In religious systems, there is no barrier between the religious, moral, and legal provisions. Thus, the thesis about law as the "minimum of morality"[49] can here be tested in a more complex and variegated form without losing the regard to the legal character of norms whose observation in the Canon Law of the Catholic Church is required as obligatory.[50]

Christ's *munus regendi*, that is, the mission of governance and leadership in the Church, is realized by legitimately established pastors who cannot per-

[47] CIC/1983, Canon 211.

[48] CIC/1983, Canon 210.

[49] "In terms of the contents, the norms often correspond to the other norms regulating behavior. In this regard, the closest norms seem to bet the moral ones. Law is often identified with the "minimum of morality." Not all the norms corresponding with the dominant moral consciousness are expressed in the form of law and are thus legally binding. Indeed, law may be more strict than morality as it concerns the consequences of the breaking of the law (enforcement by the power of the state, esp. the legal sanctions). Therefore, it must be at the same time less strict than morality as regards the demands put on the human behavior." Jiří Boguszak, Jiří Čapek, and Aleš Gerloch, *Teorie práva* (Praha: ASPI Publishing, 2004), 36.

[50] "However, this is not in contradiction to the obvious fact that the Canon Law *ex suapte natura* uses—in contrast to secular law non-legal categories like *conscience, sin, remorse, mercy*, etc. However, if judging the human behavior reaches the form of an individual legal act (i.e., a court sentence or administrative decision), it seems necessary to distance oneself from these moral categories and base the judgement solely on legally relevant issues." Ignác Antonín Hrdina and Miloš Szabo, *Teorie kanonického práva*, 347.

form this duty without the appropriate obedience of the faithful. This obedience is placed on the Catholic faithful as an obligation: "Conscious of their own responsibility, the Christian faithful are bound to follow with Christian obedience those things which the sacred pastors, inasmuch as they represent Christ, declare as teachers of the faith or establish as rulers of the Church."[51] Obedience is not just an obligation of the clerics and consecrated persons, it is the basic principle of the harmonious coexistence in the ecclesiastical community: "Be subordinate to one another out of reverence for Christ."[52] However, the pastors represent Christ (*Christum repraesentantes*) and so they are to be properly obeyed, as it is stated directly in the Gospel.[53] Nevertheless, it is clear that the legislator neither refers to nor requires a blind form of obedience, but a truly "Christian" obedience (*christiana oboedientia*) based on a conscience formed by morality, that is, a conscience which does not exclude activity on the part of the obligated addressee.[54] The legislator confirms this concept of obligations in relation to Christian obedience by the inclusion of other rights of the Christians, that is, the petitionary right and the right to openly express one's opinion:

> The Christian faithful are free to make known to the pastors of the Church their needs, especially spiritual ones, and their desires. According to the knowledge, competence, and prestige which they possess, they have the right and even at times the duty to manifest to the sacred pastors their opinion on matters which pertain to the good of the Church and to make their opinion known to the rest of the Christian faithful, without prejudice to the integrity of faith and morals, with reverence toward their pastors, and attentive to common advantage and the dignity of persons.[55]

These rights of the faithful may be understood as a kind of opening of the Church in the direction of modern democracies, in which the broadest possible space of free discussion is guaranteed and the right to voice one's opinion across the board is a matter of course. However, the right to sacramental life and keeping the liturgical order are rights specific to the internal life of the Church:

> The Christian faithful have the right to receive assistance from the sacred pastors out of the spiritual goods of the Church, especially the word of God and the sacraments. The Christian faithful have the right to worship God

[51] CIC/1983, Canon 212 § 1.

[52] Eph 5:21.

[53] Lk 10:16: "The one who hears you hears me, and the one who rejects you rejects me, and the one who rejects me rejects him who sent me."

[54] "The subordinates have the right to express their dissenting opinions; in fact, their responsibility may bind them do so, however, only with the due respect. The final decision may, however, belong to the one and only, namely, to the right and obligations of the superior." Karl-Heinz Peschke, *Křesťanská etika* (Praha: Vyšehrad, 1999), 475–476.

[55] CIC/1983, Canon 212 § 2 and 3.

> according to the prescripts of their own rite approved by the legitimate pastors of the Church and to follow their own form of spiritual life so long as it is consonant with the doctrine of the Church.[56]

The means used to secure such typically internal rights to the faithful are also specific. The period after Vatican II was, for example, often marked by an excessive creativity on the part of the celebrants of the liturgy.[57] The effort of the Apostolic See was thus to create such a disciplinary framework in which the rite is celebrated in conformity with the missal and other liturgical regulations. This is the way the faithful exercise their right for their own rite: "[…] it is the right of all of Christ's faithful that the Liturgy, and in particular the celebration of Holy Mass, should truly be as the Church wishes, according to her stipulations as prescribed in the liturgical books and in the other laws and norms. Likewise, the Catholic people have the right that the Sacrifice of the Holy Mass should be celebrated for them in an integral manner, according to the entire doctrine of the Church's Magisterium."[58] Ruleless improvisation or unregulated liturgical creativity robs the faithful of this right.[59]

Using the optics of the right of association and assembly as formulated in the constitutions of modern states, the Code of Canon Law talks about the everyday manifestations of ecclesiastical life: "The Christian faithful are at liberty freely to found and direct associations for purposes of charity or piety or for the promotion of the Christian vocation in the world and to hold meetings for the common pursuit of these purposes."[60] In this context, it is necessary to clarify the claim that prior to Vatican II, the faithful apparently did not enjoy any rights. Indeed, the Code of 1917 did not explicitly contain a catalog of obligations and rights, however, this by no means suggests they were not subject of rights as stipulated in the Code: "By baptism a person becomes a subject of the Church of Christ, with all the rights and duties of a Christian, unless as far as rights are concerned there is some obstacle impending the bond of communion with the Church, or a censure inflicted by the Church."[61]

---

[56] CIC/1983, Canon 213 and Canon 214.

[57] "I believe the time in which priests in some countries made their own eucharistic prayers, sometimes for every Sunday, is over. In Belgium or Holland at that time, there were sometimes tens or hundreds of them! I personally believe that such a number of eucharistic prayers generates verbosity, since it is hard to imagine how the same theme can be rearticulated so many times to make it always new and not to touch upon orthodoxy." Ladislav Pokorný, *Prostřený stůl* (Praha: Ústřední církevní nakladatelství, 1990), 119.

[58] *Redemptionis Sacramentum*, art. 12.

[59] "This union with the one and only subject of the Church allows a multiplicity of forms and involves a living development. However, it also excludes arbitrariness. This is true for individuals, for the community, for the hierarchy as well as the lay faithful." Josef Ratzinger (Benedikt XVI), *Duch liturgie* (Brno: Barrister & Principal, 2006), 146.

[60] CIC/1983, Canon 215.

[61] CIC/1917, Canon 87; cf. CIC/1983, Canon 96.

With all its openness to free initiatives of the faithful, the Catholic Church protects its own "trademark," that is, the attribute "Catholic": "Since they participate in the mission of the Church, all the Christian faithful have the right to promote or sustain apostolic action even by their own undertakings, according to their own state and condition. Nevertheless, no undertaking is to claim the name Catholic without the consent of competent ecclesiastical authority."[62] This special regulation balances the tension between the freedom of Christians and their authentication on the part of hierarchy of the Church; all Catholic faithful without any difference are free in their activities and initiative, however, if it is to be called "Catholic," it needs to be acknowledged by Church authority.[63] It is clear that a democratic rule-of-law state does not recognize such a guarantee of authenticity: indeed, its goal is to distinguish the sphere of public law and private law. In the private sphere of the citizen, there should be maximum of free space: "The power of the State may be asserted only in cases and within the limits set by law and in a manner determined by law. Everybody may do what is not prohibited by law and nobody may be forced to do what the law does not command."[64]

The fundamental right to education in the Canon Law has a broader perspective, because it is a right to Catholic education: "Since they are called by baptism to lead a life in keeping with the teaching of the gospel, the Christian faithful have the right to a Christian education by which they are to be instructed properly to strive for the maturity of the human person and, at the same time, to know and live the mystery of salvation."[65] This implies that such a complex form of education must include the family, but also the responsible persons and institutional elements in the Church. As regards the individual lay faithful in family life, the Code is more concrete: "Since they have given life to their children, parents have a most grave obligation and possess the right to educate them. Therefore, it is for Christian parents particularly to take care of the Christian education of their children according to the doctrine handed on by

[62] CIC/1983, Canon 216.

[63] "The Christian apostolate is not a monopoly of sacred servants of men religious; if the faithful have the duty to cooperate with the hierarchical apostolate, carried out by the bishops and priests, they also have the right to pursue the apostolate on the basis of their own initiatives (publication activities, educational and sport facilities, health advisory centres, radio and television transmitters, etc.). It is an originary right, because it does not depend on the approval or authorization of Church authority, but it belongs to the faithful through the power of the baptism and confirmation which make them 'participate in the mission of the Church' […]. The initiatives may be a matter of associations, but also individuals, however, the hierarchy obviously has the right to lead them and watch over them. One should avoid harmful confusions and upheavals; thus, the canon stipulates that no work is to be deemed 'Catholic' unless not approved of by the relevant authority of the Church." Luigi Chiappetta, *Il Codice di Diritto Canonico*, 280.

[64] *The Charter of Fundamental Rights and Freedoms*, art. 2, paragraphs 2 a 3.

[65] CIC/1983, Canon 217.

the Church."[66] The Code in its third book pays special attention to the catechetical education[67] and Catholic schools,[68] however, it is important to emphasize that the good will of the legislator can clash with the limited space as defined by the situation in the given country. The constitutional grounding of the fundamental rights cannot cover the lived experience by verbosity. Let us to refer to the grounding of the right to education in the constitution of the USSR from 1977, which wanted to postulate—in contrast to the constitutions of "bourgeois" countries—not just the individual rights, but also list their concrete guarantee:

> The citizens of the USSR have the right to education. This right is ensured by free provision of all forms of education, by the institution of universal, compulsory secondary education, and broad development of vocational, specialized secondary, and higher education, in which instruction is oriented toward practical activity and production; by the development of extramural, correspondence and evening courses, by the provision of state scholarships and grants and privileges for students; by the free issue of school textbooks; by the opportunity to attend a school where teaching is in the native language; and by the provision of facilities for self-education.[69]

In the guarantees of the right to education, the Soviet legislator never mentions the monopoly of the Marxist-Leninist ideology which served as the prerequisite of all the alleged advantages of the Soviet educational system. In the case of the Catholic Church, the faithful should have the right to a truly Catholic and also accessible education in terms of its contents and spirit. The realization of this right should not be passive:

> Parents must possess a true freedom in choosing schools; therefore, the Christian faithful must be concerned that civil society recognizes this freedom for parents and even supports it with subsidies; distributive justice is to be observed. Parents are to entrust their children to those schools which provide a Catholic education. If they are unable to do this, they are obliged to take care that suitable Catholic education is provided for their children outside the schools.[70]

An analogy of the constitutionally grounded freedoms of thought and expression in the Catholic Church is the freedom of theological enquiry, which, however, cannot be unlimited: "Those engaged in the sacred disciplines have

[66] CIC/1983, Canon 226 § 2.

[67] Cf. CIC/1983, Canon 773–780.

[68] Cf. CIC/1983, Canon 796–821.

[69] Sofia Svobodová et al. *Ústavy evropských socialistických států* (Praha: Státní pedagogické nakladatelství, 1984), 16.

[70] CIC/1983, Canon 798 and Canon 799.

a just freedom of inquiry and of expressing their opinion prudently on those matters in which they possess expertise, while observing the submission due to the Magisterium of the Church."[71] Clearly, the Magisterium is not primarily a repressive instance and the incidental administrative or penal sanctions of those who abuse the listed freedoms today are rather the ultimate means (*extrema ratio*).[72] However, the faithful have the right to demand that the instruction and the theological science be in conformity with the teaching of the Church, whereas the mission of a democratic state was to provide as broad a space for the plurality of opinions as possible without any ideological limitations, indeed with the exception of the extremist views calling for violence and thus endangering the very foundations of a free society.

The Problem of Unforceable Duties

The citizens' tax duty also finds an analogy in the Canon Law: "The Christian faithful are obliged to assist with the needs of the Church so that the Church has what is necessary for divine worship, for the works of the apostolate and of charity, and for the decent support of ministers."[73] In contrast to the sanction mechanism of a contemporary state against those who do not comply with the prescribed regulations, the Church has no practical opportunity to force the faithful to fulfil this duty; the fulfilment of this duty thus has the form of a moral obligation. The Canon Law thus transforms the so-called fifth Commandment of the Church whose binding authority is expressed in the Catechism of the Catholic Church: "The faithful also have the duty of providing for the material needs of the Church, each according to his abilities."[74]

Another practically unenforceable duty is the obligation to give to charity programs: "They are also obliged to promote social justice and, mindful of the precept of the Lord, to assist the poor from their own resources."[75] The effort to establish social justice and help the poor in a form of a canonical norm refers

[71] CIC/1983, Canon 218.

[72] "The practice of the Church Magisterium must be oriented towards a conformity with its pastoral character. Its mission, that is, to witness the truth of Jesus Christ, belongs to the broader mission of the care for souls (*cura animarum*). […] A society characterized by pluralism and the Church community with major differences, the Magisterium fulfils its own mission via presenting an argument." Ctirad Václav Pospíšil, *Hermeneutika mystéria. Struktury myšlení v dogmatické teologii* (Praha: Krystal – Kostelní Vydří: Karmelitánské nakladatelství, 2005), 184–185.

[73] CIC/1983, Canon 222 § 1.

[74] *Catechism*, n. 2043.

[75] CIC/1983, Canon 222 § 2.

to the commandment of the Lord Himself, especially in the following logion: "This is my commandment: love one another as I love you."[76] The duty of the faithful to serve the needy is a precept of natural law involving the whole of the human family which in Christianity is stressed by the new commandment of love. This aspect of the activity of the Church and their member was aptly characterized in the encyclical of Pope John Paul II *Sollicitudo Rei Socialis*: "Thus, part of the teaching and most ancient practice of the Church is her conviction that she is obliged by her vocation—she herself, her ministers and each of her members—to relieve the misery of the suffering, both far and near, not only out of her 'abundance' but also out of her 'necessities.'"[77] Not surprisingly, therefore, there arose the idea that the original owners of all the goods of the Church are the poor.[78] Legally speaking, it is impossible to hold, however, it expresses an ideal aspiration for the life of the Church.

The addressees of the canonical norms in the Catholic Church also have the right to have their rights protected at the court: "The Christian faithful can legitimately vindicate and defend the rights which they possess in the Church in the competent ecclesiastical forum according to the norm of law. If they are summoned to a trial by a competent authority, the Christian faithful also have the right to be judged according to the prescripts of the law applied with equity."[79] The canonical equity (*aequitas canonica*) is a key principle in the application of Canon Law which takes into account also those whose right is to be respected and those who are responsible.[80] It also influenced the legal civilistic doctrine in the system of English and later Anglo-American law, whose basic source are court precedents, which, however, were mitigated by a parallel institutionalized judicial system of the Lord Chancellor who judged according to the principle of *equity*.[81]

[76] John 15:12.

[77] *Sollicitudo Rei Socialis*, 31.

[78] "The efforts to see the poor as those to whom belongs the property of the Church have a rather antiquarian interest." Hans Heimerl, Helmuth Pree, and Bruno Primetshofer, *Handbuch des Vermögensrechts der katholischen Kirche* (Regensburg: Pustet Verlag, 1993), 61.

[79] CIC/1983, Canon 221 § 1 a § 2.

[80] "This principle demands that the application of Canon Law should respect its addressees as much as possible. It is applied in a number of fields, mainly in penal law (without the need to be mentioned explicitly). It is broadly used also in relation to the dispensation from purely ecclesiastical laws and, according to the tradition, it reaches to epikia in which the principle *lex non obligat cum gravi incommodo* (No positive law obliges where there is grave inconvenience.)" Ignác Antonín Hrdina and Miloš Szabo, *Teorie kanonického práva*, 45.

[81] "The creation of this term and the connected layers of English law go back to the beginning of the 14th century. At that time, there was an increasing number of people who could not use an analogical writ and thus found justice with authorized courts. Some inconsistencies of common law became manifest, especially too much formalism and the slowness of the decision-making process." Jan Kulklík and Radim Seltenreich, *Dějiny amerického práva* [The History of American Law] (Praha: Linde, 2007), 63.

Conclusion

The concept of the Church as a hierarchical community of all faithful (*communio hierarchica*) is the prerequisite for proper understanding of their fundamental obligations and rights. When defining the obligations, the law is rather vague and respects the apostolic principle "Don't command more than necessary."[82] There is a space of legitimate freedom in the Church, which, however, does not entail infinite toleration of limitless spontaneous initiatives. Contemporary mentality, characterized by a tendency towards limitless freedom is at odds with the precedence of the obligations of the faithful over their rights, or the call to take into account the common good in the act of exercising their rights: "In exercising their rights, the Christian faithful, both as individuals and gathered together in associations, must take into account the common good of the Church, the rights of others, and their own duties toward others."[83] Nevertheless, it is also true that a democratic state is not valueless and that the citizens are pushed to exercise their rights with the boundaries set by the existing legal regulations. A democratic state, based on the rule of law, should not impose a concrete ideological system, as it can be found in the Czech Charter of the Fundamental Rights and Freedoms: "The State is founded on democratic values and must not be bound either by and exclusive ideology or by a particular religion."[84] If, however, the Church is founded on Christ's doctrine and on his love commandment, then the fulfilment of duties and the use of their rights is to be understood as an active contribution to the building of Christ's mysterious body. The difference between obligations and rights has become smaller. Indeed, exercising his or her rights should be primarily seen as the fulfilment of his or her duties and obligations to God and his or her neighbor.

Translated by Tomáš Jajtner

Bibliography

Blahož, Josef. *Dokumenty ke státnímu právu kapitalistických zemí* [Documents to the Constitutional Law of Capitalist Countires]. Praha: Panorama, 1985.

[82] Acts 15:28: "It seemed good to the Holy Spirit and to us not to burden you with anything beyond the following requirements."

[83] CIC/1983, Canon 223 § 1.

[84] The Charter of Fundamental Rights and Freedoms, art. 2, par. 1.

Boguszak, Jiří, Jiří Čapek, and Aleš Gerloch, *Teorie práva* [The Theory of Law]. Praha: ASPI Publishing, 2004.

Catechism of the Catholic Church. London: Bloomsburg Publishing, 2002.

Chiappetta, Luigi, *Il Codice di Diritto Canonico. Commento giuridico-pastorale I*. Napoli: Edizioni Dehoniane, 1988.

Codex canonum Ecclesiarum Orientalium auctoritate Ioannis Pauli PP. II promulgatus. In *Acta Apostolicae Sedis*, vol. 82 (1990): 1033–1363.

Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus. In *Acta Apostolicae Sedis*, vol. 75, Pars II (1983): 1–317.

Demel, Sabine. *Handbuch Kirchenrecht. Grundbegriffe für Studium und Praxis*. Freiburg im Breisgau: Herder, 2010.

Flegl, Vladimír. *Ústavní základy Československé socialistické republiky* [The Constitutional Foundations of the Czechoslovak Socialist Republic]. Praha: Svoboda, 1981.

Heimerl, Hans, Helmuth Pree, and Bruno Primetshofer. *Handbuch des Vermögensrechts der katholischen Kirche*. Regensburg: Pustet Verlag, 1993.

Hrdina, Ignác Antonín, and Miloš Szabo. *Teorie kanonického práva* [The Theory of Canon Law]. Praha: Karolinum, 2018.

Jirásková, Věra. *Dokumenty k ústavním systémům* [Documents to Constitutional Systems]. Praha: Karolinum, 1996.

Kolektiv autorů Právnické fakulty UK. *Dějiny evropského kontinentálního práva* [The History of Continental European Law]. Praha: Leges, 2018.

Kulklík, Jan, and Radim Seltenreich. *Dějiny amerického práva* [The History of American Law]. Praha: Linde, 2007.

Mohelník, Benedikt. *Pečeť daru Ducha Svatého. Teologie svátosti biřmování* [The Seal of the Holy Spirit: On the Theology of the Sacrament of the Confirmation]. Praha: Krystal, 2012.

Peschke, Karl-Heinz. *Křesťanská etika* [Christian Ethics]. Praha: Vyšehrad, 1999.

Pokorný, Ladislav. *Prostřený stůl* [The Laid Table]. Praha: Ústřední církevní nakladatelství, 1990.

Pospíšil, Ctirad Václav. *Hermeneutika mystéria. Struktury myšlení v dogmatické teologii* [The Hermeneutics of Mysterium: The Structures of Thought in Dogmatic Theology]. Praha: Krystal – Kostelní Vydří: Karmelitánské nakladatelství, 2005.

Ratzinger, Josef (Benedikt XVI). *Duch liturgie* [The Spirit of the Liturgy]. Brno: Barrister & Principal, 2006.

Redazione di Quaderni di dirtto ecclesiale. *Codice di Diritto Canonico commentato*, Milano: Àncora editrice, 2017.

Schelle, Karel, et al. *Právní dějiny* [History of Law]. Plzeň: Aleš Čeněk, 2007.

Sociální encykliky 1891–1991 [The Social Encyclicals]. Praha: Zvon, 1996.

Tretera, Jiří Rajmund, and Záboj Horák. *Církevní právo* [Church Law]. Praha: Leges, 2016.

Wagnerová, Eliška, Vojtěch Šimíček, Tomáš Langášek, Ivo Pospíšil et al. *Listina základních práv a svobod. Komentář* [The Charter of Fundemantal Rights and Freedoms: A Commentary]. Praha: Wolters Kluwer, 2012.

Weber, Helmut. *Všeobecná morální teologie* [Universal Moral Theology]. Praha: Zvon – Vyšehrad, 1998.

Zoubek, Vladimír. *Právověda a státověda. Úvod do právního a státovědního myšlení* [Theory of Law and State: An Introduction to Legal and Political Thought]. Plzeň: Aleš Čeněk, 2010.

Stanislav Pribyl

Lois fondamentales : les perspectives du droit canonique et celles du droit civil à comparer

Résumé

Le Code de droit canonique de 1983 a dressé une liste de devoirs et de droits propres aux fidèles laïcs. Elle est analogue aux listes de droits et libertés fondamentaux contenus dans les documents de droit international et dans les constitutions des pays démocratiques. Le fait que l'Église se soit inspirée du droit civil est une réalité qui remonte aux origines du droit canonique : tout d'abord à travers le droit romain, puis, dans le monde moderne, à travers des codifications complexes du droit civil, et après le Concile Vatican II, à travers les idées de droits humains universels. Une caractéristique spécifique de l'Église catholique par rapport à l'État démocratique est l'incorporation du sujet de droit dans l'Église par le baptême, qui entraîne tous un ensemble de droits et obligations. De cette manière, ce catalogue des droits et obligations qui existe désormais dans le code comprend principalement la liste de ces dernières. Ce sont au contraire les droits qui sont mis en évidence par l'État moderne. En fait, l'État moderne impose peu d'obligations à ses citoyens; souvent, il ne s'agit que de payer ses impôts et de suivre l'enseignement obligatoire. L'article traite des obligations et droits individuels contenus dans le Code du droit canon et les compare aux obligations et droits correspondants contenus dans les constitutions. Les concepts de normes civiles et de normes canoniques sont comparables, notamment parce que toutes deux s'inspirent du droit naturel. Les devoirs des fidèles, en revanche, représentent un objectif spécifique de l'Église et, dans ce cas, il est difficile d'établir une analogie avec le droit civil. Par-dessus tout, la loi majeure de l'Église reste le salut des âmes, alors que l'État ne poursuit pas un but surnaturel de ce type.

Mots-clés : droit ecclésial, droit civil, droit naturel, droits de l'homme, droits et libertés fondamentaux, obligations et droits des fidèles, constitution, Code de droit canonique, salut, droit, élaboration des lois, chrétiens, Église catholique, État de droit

Stanislav Pribyl

Leggi fondamentali: confronto di prospettive del diritto canonico e del diritto civile

Sommario

Il Codice di Diritto Canonico del 1983 ha introdotto un elenco di doveri e diritti dei fedeli laici. È analogo agli elenchi caratteristici dei diritti e delle libertà fondamentali contenuti nei documenti di diritto internazionale e nelle costituzioni dei paesi democratici. L'ispirazione della Chiesa al diritto civile è stata una realtà sin dall'inizio del diritto canonico: prima attraverso il diritto romano, poi, nel mondo moderno, attraverso complesse codificazioni del diritto civile, e dopo il Concilio Vaticano II, attraverso le idee dei diritti umani universali. Una caratteristica specifica della Chiesa cattolica rispetto a uno Stato democratico è l'incorporazione del soggetto di diritto nella Chiesa attraverso il battesimo, ciò che porta con sé tutti i diritti e gli obblighi. In questo

modo, il catalogo dei diritti e degli obblighi, che ora esiste nel codice, include principalmente un elenco di questi ultimi. I diritti sono invece messi in evidenza dallo Stato moderno. In effetti, lo Stato moderno impone pochi obblighi ai suoi cittadini; spesso si tratta solo di pagare le tasse e di obbedire alla costrizione dell'istruzione obbligatoria. Il presente articolo tratta dei singoli obblighi e diritti contenuti nel Codice di Diritto Canonico e li confronta con i corrispondenti obblighi e diritti contenuti nelle costituzioni. Il concetto di norme civili e canoniche è simile, soprattutto se ispirato alla legge naturale. I doveri dei fedeli, invece, rappresentano fini ecclesiastici specifici, e in questo caso è difficile stabilire un'analogia con il diritto civile. Soprattutto, la legge suprema della Chiesa è la salvezza delle anime, e lo Stato non ha un obiettivo così soprannaturale.

Parole chiave: diritto ecclesiastico, diritto civile, diritto naturale, diritti umani, diritti e libertà fondamentali, obblighi e diritti dei fedeli, costituzione, codice di diritto canonico, salvezza, diritto, processo legislativo, cristiani, chiesa cattolica, stato di diritto

Philosophy and Canon Law vol. 6 (2020), pp. 97–105
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.06

Piotr Kroczek
Pontifical University of John Paul II, Cracow, Poland
https://orcid.org/0000-0002-6872-2953

Culture as One of the Determinants of Legislation: A Case of Canon Law

Abstract: The aim of this article is to show how culture influences church legislation and to identify possible dangers associated with it. The article illustrates examples of changes in Church law that take place under the influence of culture. The conclusions are as follows: canon law submits to culture and it is a possible threat because it loses its ecclesiastical and salvific character. The legislator should be aware of such a phenomenon and try to preserve specific features, especially the purpose of canon law.

Keywords: canon law, culture, lawmaking principles, art of legislation

The problem of the paper can be formulated in two questions: (1) Is there an impact of the culture on the Catholic Church legislation? and (2) if yes, how does it manifest itself?

To explore the problem and answer the above questions, first, one must establish the relationship of the Church, as a simultaneous creator and recipient of canon law legislation, to the world, as the carrier of culture. Second, it seems necessary to look closer at the culture itself and analyze the phenomenon in question to see how it can determine the legislation understood in this paper both as a process of making law and the outcome of the process. Detailed elements of the influence in question are to be presented in further sections of this article.

Church–World Relation

From the beginning, Christianity sees itself in a clear-cut but not absolute opposition to the world. The members of the new religion were aware of their distinctness from the world, and the foundation of that distinctness was their faith and its requirements. The followers of Jesus Christ were different from others 1 Cor 5, 12), which is why others called them by the name—Christians (cf. Acts 11, 22). The vision of dualism between the Church and the world is dominant in Christian philosophy and theology. An example of such an understanding of the Church's position to the world is that the Christians of the first centuries used to say that "the world was created for the sake of the Church."[1]

This kind of opposition of Christianity to the world was also visible in the life of the ancient Christians, as the author of *Epistle to Diognetus*[2] noticed:

> For the Christians are distinguished from other men neither by country, nor language, nor the customs which they observe. For they neither inhabit cities of their own, nor employ a peculiar form of speech, nor lead a life which is marked out by any singularity. […]. To sum up all in one word—what the soul is in the body, Christians are in the world. […] The soul dwells in the body, yet is not of the body; and Christians dwell in the world, yet are not of the world.

The characteristic of the relation between the Church and the world, which can be called dualism, comes from religious beliefs. On the one hand, God, the creator, made the world for His glory[3] and, as the Book of Genesis states, made the world good (cf. Gen 1: passim) and the Spirit of the Lord filled the earth (cf. Hab. 2:14 and Wis 1:7). On the other hand, moral theology views the world as one of the primary sources of human sin. Not everything that the world brings can be entirely and without reservation accepted by the Church. For example, St. Paul sharply contrasted "the wisdom of the world" and "the wisdom of the cross" and he recommended to accept only the latter (1 Cor, 1: 17–25).

This duality of foundations of the Church's attitude towards the world makes it difficult to establish this attitude. However, it is necessary to specify this relationship. It is because the Church must carry out her mission in the world and some kind of dialog with it.

---

[1] *Catechism of the Catholic Church* (Vatican: Libreria Editrice Vaticana, 1992), no. 760.

[2] *Epistola ad Diognetum*, *Patrologiae cursus completus.* Series Graeca, ed. Jacques-Paul Migne, vol. 2, col. 1159–1186. Translation taken from by Alexander Roberts and James Donaldson, *Ante-Nicene Fathers*, Vol. 1. Edited by Alexander Roberts, James Donaldson, and A. Cleveland Coxe. Revised and edited for New Advent by Kevin Knight (Buffalo: Christian Literature Publishing Co., 1885.)

[3] *Catechism of the Catholic Church*, no. 293.

Understanding Culture

The element of what is understood by the term "world" in the above paragraph of the paper is the culture. Looking at the commonly used reference books, that is, popular dictionaries, one can see that the term "culture" is defined as the whole of material and spiritual achievements of humankind, and also as shared beliefs, values, customs, practices, and social behavior of a group of people especially transferred and passed along to next generations.[4] This definition is very capacious. It refers mainly to material culture, that is, the achievements that culture consists of.

In *Gaudium et Spes*[5] (no. 53), the Second Vatican Council presented a different understanding of the term culture. It focused on the functions that culture performs. The Council Fathers stated that in general culture means everything that man perfects and develops the manifold talents of his spirit and body. Culture offers means of knowledge and work to subject the world to man's power and makes social life more human, both within the family and in the entire state community, through the progress of customs and institutions. Finally, culture expresses, communicates, and preserves in the course of the centuries the great spiritual experiences and aspirations that serve the progress of many and even of humanity as a whole.

Both definitions of culture presented above, that is, (1) the dictionary definition (material aspect) and (2) conciliar definition (functional aspect) would be useful for the presentation of the reasoning behind this paper. However, what might occur helpful certainly is a distinction between the culture of "an individual person" and "a group of people"—which can be called (1) particular culture and the culture of "all humanity and a whole," that is, (2) universal culture.

The Entanglement of the Legislator

It is widely recognized that no one can stay completely outside the culture of the origin and the culture in which he or she exists. There is no easy escape from the so-called cultural matrix.[6] Both, the material and functional aspects

[4] Cf. Entry: "culture," in *Webster's New World Dictionary*, ed.-in-chief Victoria Neufeldt, 3rd college ed. (Boston: Houghton Mifflin Harcourt, 1994), 337.

[5] Sacrosanctum Concilium Oecumenicum Vaticanum II, "Constitutio pastoralis *Gaudium et spes* de Ecclesia in mundo huius temporis," *Acta Apostolicae Sedis*, vol. 58 (1966): 1025–1115.

[6] Cf. Benranrd Lonergan, *Method in Theology* (Toronto: University of Toronto Press, 1999), XI.

of the culture are almost always seen in the general outlook of the person to everything that is outside and also in the attitude which individuals have for themselves.

It means that also a legislator in the Church is not free from the influence of his culture.[7] It can be said that culture is one of the determinants of the legislative process that the legislator takes. The determinant in question is visible not only in the process of making law but also in the results thereof, namely, in a product of legislative activity. This mechanism of influence makes the law-making process and its results such that the legislator never creates "a pure legal system," but "an entangled legal system." The very mechanism of entanglement results from the specificity, that is, the opportunities and limitations of the individual legislator. This process cannot be a priori seen as unfavorable for the outcome of legislative action, but, as a matter of fact, it can have negative effects.

Looking at the problem from the perspective of the users of law, it is to be said that they can expect that the legislator will show them respect and take into consideration the specifics of their culture in the process of making law.[8] For proper interpretation of the laws and reaching their real sense, the users of law (addressees) are obliged to know the culture in which context the law was formulated.[9] Here it must be noticed that universal canon law, although made for the faithful who live all over the world, that is, in many cultures, is itself made in mainly European one.[10]

Increase of Legal Rules for Relations

The element of universal culture is visible in the observation formulated in the ancient principle *ubi societas, ibi ius*. It expresses the absolute necessity of the existence of law in human society, due to the specific shape of human nature. This principle is today rather an unquestionable axiom and one should agree with it, in theory, but only with reference to the communities other than the Church.

---

[7] Ladislas Örsy, "The Interpreter and His Art," *The Jurist*, vol. 40 (1980): 46.

[8] Myariam Wijlens, "Salus animarum suprema lex": Mercy as a Legal Principle in the Application of Canon Law?" *Jurist*, vol. 54 (1994): 588.

[9] John M. Huels, "Interpreting Canon Law in Diverse Cultures," *Jurist*, vol. 47 (1987): 289–290.

[10] Ladislav Örsy, "The Interpretation of Laws: New Variations on an Old Theme," in *The Art of Interpretation. Selected Studies on the Interpretation of Canon Law* (Washington DC: Canon Law Soc. of America, 1982), 70, ft. 23.

In the case of the Church the principle is limited in translating the phenomenon of law in the Church. It is because it does not exhaust the reality and complexity of the Church as *communio*. The phenomenon of law in the Church emerges from the nature of the Church which is not only sociological, in other words, only human. The Church is not only a society, but also and foremost, communion of the people with God (cf. LG[11] 8).

Today, one can observe in various societies (states) a growing number of areas of life which are regulated by law, and, as a consequence, growing numbers of laws. The relationship among people is regulated more and more by legal norms. Even morality seems to be replaced by the law. It can be said that people do not trust them anymore. The fairness of relations and justice is no longer secured by the personal moral qualities of the parties of the relationship, but by written agreements and the legal institutions called to execute the agreements.

In the Church, one can observe the same processes as it is seen in the other communities. Privacy, for example, was governed among members of the community by law of love as well as such Christian determinants as patience, kindness, goodness, faithfulness, gentleness (cf. Ga 5:22–23). The supreme legislator was of the conviction that it would be enough to formulate in Code of Canon Law a general norm about privacy like can. 220. The rest was left to the law of love.

Unfortunately, currently, even the Church in the European countries, has very detailed laws to protect privacy of the Catholics in the Church, like Polish General Decree on the protection of individuals with regard to the processing of personal data in the Catholic Church.[12] It is surely the influence of the culture, which claims to regulate almost everything exclusively. It can be said that the church legislator is today following the legal idealism of his colleagues and shares the view that the law is the best regulator of human behavior and relations between people.

[11] Sacrosanctum Concilium Oecumenicum Vaticanum II, *Constitutio dogmatica Lumen gentium de Ecclesia*, *Acta Apostolicae Sedis*, vol. 57 (1965): 5–75.

[12] See, for example, "Dekret ogólny w sprawie ochrony osób fizycznych w związku z przetwarzaniem danych osobowych w Kościele katolickim wydany przez Konferencję Episkopatu Polski, w dniu 13 marca 2018 r., podczas 378. Zebrania Plenarnego w Warszawie, na podstawie kan. 455 Kodeksu Prawa Kanonicznego, w związku z art. 18 Statutu KEP, po uzyskaniu specjalnego zezwolenia Stolicy Apostolskiej z dnia 3 czerwca 2017 r.," *Akta Konferencji Episkopatu Polski*, vol. 30 (2018): 31–54.

Absolutely Normative Character of Law

The next issue which is widely recognized in the universal culture and used as common principle of legislation, is the conviction of the ancient lawyers that *ius non docet sed iubet* or *lex moneat, non doceat*. It means that rules contained in law must have only an absolutely normative character because law is a form of expression of legislator's will, which must be an authoritarian one.

The conviction is based on the fact that the human community, in general, expects that the law would perform certain functions that humanity needs at a given stage of its development. The main of these functions is regulation of human activity. Only through this function the law protects some rights and imposes some duties on the individual and community. This is important for the functioning of an individual member of the community and of the community as a whole. It means that culture determines the normative character of the law.

However, in the case of the Church it should be slightly different. It is true that the faithful also expect the normativity of law, but the character in question must be specifically understood and applied in the Church.

Canon law is to impose the will of the legislator and, at the same time, it is his doctrinal teaching. The Church legislator is both a lawgiver and a teacher of the faith. The second aspect requires that he must take into account the contemporary church doctrine of religious freedom developed at the Second Vatican Council.

The church legislator cannot overlook that the Church is not like a state—a compulsory society. A man is free in choosing the religion and way of worship. As a result, the church legislator is allowed and even should create law in the form of good advice, encouragement, whishes or exhortations. Some canons of Code of Canon Law are indeed exhortations. It means that they express what the legislator desires, but they do not create right and duty situations and should not be changed into binding obligations. But, on the other hand, it must be remembered that the will of the legislator binds even if it is not a right and duty situation. He has power. He represents the authority of Christ and his Church. Exhortations are norms for the believers, but they are considered not as legal norms but moral norms.

Unfortunately, the number of laws enacted by a particular church legislator in Poland and the form in which they are formulated show that the normative character of law present in the culture is also becoming a main characteristic of canon law. Even a simple and not very important norms are guarded by sanctions. For instance, in the case of the cited Polish General Decree on the protection of individuals with regard to the processing of personal data in the Catholic Church, there is art. 42. The article consists of a variety of sanctions, which are of (1) civil, (2) administrative, (3) criminal, and (4) discipli-

nary nature. On the other hand, there is no single exhortation to the addresses to respect the privacy of others.

The Scope of Subject Matter of Law

As far as the scope of the subject matter of law is concerned, the particular culture imposes a certain scope of legal regulations. What needs to be regulated and the way in which it is regulated is declared by the *demos* (people)—the majority of the people. The legislator, usually bound by an election cycle, is dependent on the people's will. So, one can say, travestying the Roman maxim: *Quod demi squareit, legis habet vigorem* ("What pleases the people, enjoys the value of the law"). When one looks at today's subject matters regulated by law, for example, EU law or European countries, for instance, regulations concerning homosexual marriages, adoption of children by homosexual couples, etc., one can see that the subject of regulation is clearly influenced by culture.

When it comes to the issue of the influence of culture on the subject of the regulation of canon law, it can be seen very clearly on the particular level of this law. Canon law, for example in Poland, no longer develops internal and ecclesiastical matters, such as sacraments. To provide some illustration of this matter, one can mention that the instruction on the baptism of children was issued in 1975, and the one concerning marriage was enacted in 1986.[13] However, at the same time, the affairs of the world entered into the church legislation. The two examples are the General decree issued by the Polish Episcopal Conference: (1) on the protection of individuals with regard to the processing of personal data in the Catholic Church and (2) on the preparation and modification of the baptismal act in connection with adoption.

It should be remembered that from the beginning the Church has had her own law, separate from the secular one, embedded in the religion and closely connected with the church matters. Canon law is to be an endogenous regulator of the religious life of the faithful. It was precisely this kind of lawmaking that exposed Christians to the reaction of the Romans. It was one of the charges against Christians: *leges sibi fecerunt* ("they made laws") and the argument for persecution of them.

[13] In June 2020, new decree in this matter came into force, that is: Dekret ogólny Konferencji Episkopatu Polski o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego z dnia 8 października 2019 r., *Akta Konferencji Episkopatu Polski*, vol. 31 (2019): 28–93.

Conclusion

The legislator in his legislative action is not free from various influences, including culture. The cultural context is also present in the outcome of his legislative activity. Such influence is a natural thing. Also, the role of culture as a determinant of canon law is significant. It is manifested in the form of (1) the fact of regulating many areas of the life of the faithful, (2) the strictly normative form of regulation, and (3) specific scope of the subject matter of regulations.

The ecclesiastical legislator should also be aware of the fact that he has not a human, but a divine mandate to perform his function, and thus not human interests or human expectations are the main determinants of his actions. Culture is a product of a sinful man, and by itself, it is tainted. As a result, it seems that the attitude of the Church to such a culture cannot be an attitude of either a priori and full acceptance or a priori full rejection of its material achievements or functions. It should be an attitude of dynamic, that is, variable in scope, rational and critical openness.

Acceptance of what the culture of the world carries, including the culture of law in canon law, should reflect the relationship of the Church to the world, that is, an attitude of rational, dynamic, and critical openness. If not, culture can be a threat to the canon law identity. The ecclesiastical legislator should remember that although it is a canonical law, that is, true law and subject to sociological mechanisms, the main determinant for canonical law should remain theology.

Bibliography

Catechism of the Catholic Church. Vatican: Libreria Editrice Vaticana, 1992.

Dekret ogólny Konferencji Episkopatu Polski o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego z dnia 8 października 2019 r., *Akta Konferencji Episkopatu Polski*, vol. 31 (2019), 28–93.

Epistola ad Diognetum. *Patrologiae cursus completus*. Series Graeca, edited by J.-P. Migne, vol. 2, col. 1159–1186. Translation taken from by Alexander Roberts and James Donaldson, *Ante-Nicene Fathers*, Vol. 1. Edited by Alexander Roberts, James Donaldson, and A. Cleveland Coxe. Revised and edited for New Advent by Kevin Knight. Buffalo: Christian Literature Publishing Co., 1885.

Huels, John M. "Interpreting Canon Law in Diverse Cultures." *Jurist*, vol. 47 (1987): 289–290.

Lonergan, Benrnard. *Method in Theology*. Toronto: University of Toronto Press, 1999.

Örsy, Ladislav. "The Interpretation of Laws: New Variations on an Old Theme." In *The Art of Interpretation. Selected Studies on the Interpretation of Canon Law*, 47–82. Washington DC: Canon Law Soc. of America, 1982.

Örsy, Ladislav. "The Interpreter and His Art." *The Jurist*, vol. 40 (1980): 27–56.

Robitaille, Lynda. "Consent, Culture and the Code." *Studia Canonica*, vol. 33 (1999): 125–138.
Sacrosanctum Concilium Oecumenicum Vaticanum II. "Constitutio dogmatica Lumen gentium de Ecclesia." *Acta Apostolicae Sedis*, vol. 57 (1965): 5–75.
Sacrosanctum Concilium Oecumenicum Vaticanum II. "Constitutio pastoralis Gaudium et spes de Ecclesia in mundo huius temporis." *Acta Apostolicae Sedis*, vol. 58 (1966): 1025–1115.
Webster's New World Dictionary, edited by Victoria Neufeldt, 3rd college ed. Boston: Houghton Mifflin Harcourt, 1994.
Wijlens, Myariam. "Salus animarum suprema lex: Mercy as a Legal Principle in the Application of Canon Law?" *Jurist*, vol. 54 (1994): 560–590.

Piotr Kroczek

La culture comme déterminant de la législation
Le cas du droit canonique

Résumé

L'ambition de cet article est de montrer l'influence de la culture sur la législation de l'Église et d'indiquer les menaces possibles liées à ce phénomène. L'article examine, à titre d'illustrations, des exemples de changements dans la loi de l'Église; il s'agit de changements influencés par la culture. Les conclusions sont les suivantes : le droit canonique succombe à la culture et il existe donc une menace réelle qu'il perde de son caractère ecclésial et rédempteur. Le législateur doit être conscient de ce phénomène et essayer de maintenir les spécificités du droit canonique, en particulier l'objectif du droit canonique.

Mots-clés : droit canonique, culture, règles de droit, art législatif

Piotr Kroczek

La cultura come fattore determinante della legislazione
Il caso del diritto canonico

Sommario

Lo scopo dell'articolo è mostrare l'influenza della cultura sulla legislazione ecclesiastica e indicare le possibili minacce legate a questo fenomeno. L'articolo illustra esempi di cambiamenti nella legge ecclesiastica che sono influenzati dalla cultura. Le conclusioni sono le seguenti: il diritto canonico soccombe alla cultura e quindi c'è una reale minaccia che perda il suo carattere ecclesiale e salvifico. Il legislatore dovrebbe essere consapevole di questo fenomeno e cercare di mantenere le caratteristiche specifiche del diritto canonico, in particolare lo scopo del diritto canonico.

Parole chiave: diritto canonico, cultura, norme del diritto, arte legislativa

Part Two

Reviews

Philosophy and Canon Law vol. 6 (2020), pp. 109–111
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.07

Andrzej Pastwa, *Il bene dei coniugi. L'identificazione dell'elemento ad validitatem nella giurisprudenza della Rota Romana*, Biblioteca Teologica, Sezione Canonistica, 7, Eupress FTL–Edizioni Cantagalli, Lugano–Siena 2018, 458 pp.

Bonum coniugum, the joint and mutual good of spouses, is one of the two principal ends of marriage, according to the valid Code of Canon Law of 1983. Even within the text of code canon 1055 § 1, there is a mention of the traditional end of marriage, that is, the conception and raising of children. The good of the spouses, on the other hand, is a concept newly formed. Nevertheless, involving a remarkable amount of potential, which may be utilized in the theoretical evaluation of the institution of marriage itself, as well as in judicial practice seen within ecclesiastical tribunals. Andrzej Pastwa, professor at the Department of Canon Law and Ecumenism at the Theological Faculty of the University of Silesia in Katowice, Poland, took it upon himself to fully explore the rich potential of this perception. From the speeches of Pope John Paul II and Benedict XVI, the author of the book derives basic view that adequate hermeneutics of *bonum coniugum* represents one of the key tasks of the interpretation of marital law by ecclesiastical judges.

The book, which has natural framework including an introduction and conclusion, is divided into two extensive chapters, the first of which discusses the evaluation criteria of the formula of *bonum coniugum*, and the second with its formal classification and legal significance. The chapters are, however, internally divided, the latter even falls into five separate subchapters.

In the first chapter, the author primarily reflects the philosophical-legal doctrine of such canonical authorities as Ombretta Fumagalli Carulli, Jose Maria Serrano Ruiz, and Carlos Jose Errazuriz Mackenna as well as many others. The list of applied literature includes 424 works, which speaks for itself. According to the author, the contribution of canonist Fumagalli Carulli lies in defining three complementary aspects that are principal for the *bonum coniugum*: human dignity, the value of communion and mutual personal communication, and finally the ethical imperative of requiring good for the other person. Alternatively, Serrano Ruiz emphasizes values as characteristics, such as truthfulness, responsibility and oblativity, the ability of self-surrender and sacrifice. From the author's presentation of the scholarly concepts of individual representatives of canonical jurisprudence, it is evident that a pure ecclesiastical legal doctrine of marriage requires, above all, proper anthropology, which must be based on a deeply Christian and personalistic view of the human person.

The second chapter examines the internal logic of the judgments of the Roman Rota in cases where the issue of the good of the spouses appears in a form that allows it to be examined in a more thorough manner. The author's interest concerns a total of 191 judgments and five decrees. Through their careful selection, the author points to the organic continuity of ecclesiastical judicial practices. The oldest cited judgement comes from 1933, the latest are already reaching the verge of Pope Francis's current pontificate. Amongst the papal allocutions and official documents, the oldest are from the pontificate of Pius X. The Church's doctrine is also significantly aided in a more detailed qualification of bonum coniugum by the classical scheme of Saint Augustine of the three good ends of marriage— *proles*, *fides*, *sacramentum*. Considering that the papal speeches concern the legal aspects of marriage, they may surprise with their way of thought that is not close to the present-day conception of marriage. The author points out that, for example, John Paul II speaks of the legal value of marital love (*amor coniugalis*). Clearly, former concepts of mutual sustenance of spouses (*mutuum adiutorium*) was legally more comprehensible, but the doctrine of John Paul II with his holistic view of the human person overcomes this concept, which today seems too reductive. A great deal of doctrinal weight must be attached to every papal speech before the Roman Rota judges, in correlation with this, the author points out that this is a document containing the doctrine of faith and can be classified as *actus sollemnis sensu latiore*.

The author's approach is characterized by emphasizing the close connection and cooperation between doctrine and legal practice. It was precisely this process of mutual interaction that led to the personalistic ideas, contained within the Council documents and further deepened by the doctrine of the popes, to be applied in legal practice in the spirit of the harmonization of the old and the new—the *vetera et nova*. The optimal umbrella for this process is the papal speeches to the Roman Rota as an expression of the extraordinary nature of the

papal magisterial office. These provide an optimal methodological assistance in the formation of the judiciary concept of *essentialia in matrimonio*. In terms of ideas, they express a movement along the axis: anthropological realis—legal realism.

The book contains a very rich footnote apparatus, revealing meticulous work, which shows not only the author's kowledge of literature but, above all, his ability to grasp the issue analytically and mutually logically and thematically to sort judicial interpretations and papal doctrine. The book assumes the reader is an expert, as it also contains longer quotations from the judgments of the Roman Rota judges in their original Latin form.

The book was originally written in Polish and contains a summary in Italian, German, and English. (*Doboro małżonków. Identyfikacja elementu ad validitatem w orzecznictwie Roty Rzymskiej*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2016). Although Polish canonical legal science is world renowned and could develop relatively freely (for example, unlike in the former socialist Czechoslovakia) during the reign of the totalitarian communist regime, a language barrier could not allow the wider world canonical scientific community to read Professor Pastwa's book and to appreciate its contribution. It is, therefore, a good thing that it was completely translated into Italian and published by the Siena publishing house Cantagalli.

Stanislav Přibyl
University of South Bohemia in České Budějovice
https://orcid.org/0000-0002-2470-1405

Philosophy and Canon Law vol. 6 (2020), pp. 113–114
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.08

Mária Potočárová, *Etika v rodinných vzťahoch*. Bratislava: Univerzita Komenského v Bratislave, Vydavateľstvo UK, 2018, 228 pp.

Upbringing and education rank among the most important and the most challenging of human activities. They have a profound influence on our social existence and are generally interrelated with the family environment. The author of the presented monograph intends to accompany a reader on his or her journey to a deeper understanding of contemporary family and its place in modern society. She explores family life and relationships in the context of family pedagogy. The approach that she adopted to achieve her goal is reminiscent of the ancient concept of *paideia* and its emphasis on holistic investigation of the interdisciplinary contexts.

The immediate relevance of the monograph is accentuated by the fact that traditional family functions have been continuously eroded by the social changes of our "fluid present," the fact that is, for instance, manifested through disintegrating interests of individual members within a nuclear family unit. Redefining family, its proper form and conditions for fulfilling its irreplaceable functions in the context of education is a matter of the utmost urgency. The author confronts her research findings with both domestic and foreign sources that are listed at the end of each chapter. It makes it easier for attentive readers to compare the content of individual chapters with similar works published in the field.

The book is well balanced in terms of content and it meets the quantitative criteria of a research monograph. It is written in a comprehensive and clear manner and in a style that appeals to the reader. It consists of six chapters: 1. Family in a whirlwind of change, 2. Human being, human person and relationships from the perspective of philosophy, 3. The phenomenon of love and its conceptualization in family relationships, 4. Human sexuality in the mosaic of

family relationships, 5. Complementarity in a relationship between a man and a woman, 6. Education for partnership, marriage and parenthood. Sex education.

In the first section of the book, the author presents a philosophical-ethical excursion into the very essence and role of education for parenthood as a general introduction for further and more detailed analyses. Emphasizing the interconnectedness of an individual and society, she discusses the anthropological, axiological, and ethical dimensions of education for marriage and parenthood. The carefully chosen content of the individual chapters allows the author to explore relational and familial dimensions of a human being. The author framed her monograph in a coherent structure developing the main concept in a very natural manner. The final chapter emphasizes the educational mode of a person with its specific sexual consequences. The author also touches on the subject of value orientation and considers building the relationship between a man and a woman as an essential part of their human vocation with a great ethical imperative.

An appropriate number of thematically concise subchapters underlines a logical continuity of a variety of explored topics that are neatly summarized at the end of each chapter. The monograph classifies, generalizes, and shares the current knowledge in a close link to higher education in the fields of social and education sciences and humanities.

Professor Potočárová points out that education for marriage and parenthood in the school setting is commonly carried out, in one way or another, as *sex education*. In her monograph, she presents her own purposeful process of education in this area, with a very specific content, well-chosen form and methods, which, however, lacks a broader context for philosophical and ethical reflections. The presented monograph has the ambition to remedy the deficiencies in education for parenthood and sex education. Rather than offering any ready-made solutions, the author's intention was to provide an impulse that prompts forward and creative thinking aimed at personal development. She touches upon the issues of value orientation, morality, freedom and responsibility in education for parenthood.

In terms of its content and structure, the publication is suitable not only for professionals in the field of education sciences, but also for students in teacher training or anybody interested in education for parenthood. The reviewed manuscript is a valuable contribution to the body of knowledge in the field of family ethics and education sciences.

Pavol Dancák
Univeristy of Presov in Presov
https://orcid.org/0000-0002-8067-5651

Philosophy and Canon Law vol. 6 (2020), pp. 115–117
ISSN 2451-2141

https://doi.org/10.31261/PaCL.2020.06.09

Carlo Fantappiè, *Per un cambio di paradigma. Diritto canonico, teologia e riforme nella Chiesa*. Bologna: EDB, 2019, 191 pp.

The discussed scientific work by Carlo Fantappiè complements his two previous elaborations (*Chiesa romana e modernita giuridica* – 2008, *Ecclesiologia e canonistica* – 2015). The results of scientific research presented earlier allowed him to develop and express his own reflections concerning the situation of canon law and its role in the current situation of the Church. He aims to show the value of canon tradition in relation to theology as a reference point for present problems deriving from the situation of the Church, which result in considerable changes occurring in the Code of Canon Law. Thus, he indicates the insufficiency not so much of legal solutions but as, first of all, the code form, in which they are contained. He presents the causes of this state of affairs referring to historical circumstances, which led to codification in the Church. He shows both its positive and negative elements. Among the latter ones, he emphasizes the loss of relationship between law and theology. He points out that the return to close cooperation of law and theology in the Church is not only a temporary requirement but a desirable means, which in the past resulted in doctrinal unity affecting institutional reforms. In present times, the cooperation of theologians and canonists should focus on the issue of reforms in the Church introduced by Pope Francis. There is a need of doctrinal and institutional unity, which will be able to justify and influence the implementation of the changes.

Pope Francis, emphasizing the synodal character of the Church, which is its path, indicated the need of close cooperation of theology and canon law, while maintaining their own methodological and content autonomy. From this perspective, only the synodal path seems to be right for the implementation of reforms in the Church. It requires deepening of the synodal reality of the Church, which should lead to institutional solutions. Carlo Fantappiè points at

two essential areas of cooperation between theologians and experts on canon law. The first one concerns deepening and drawing on the richness of synodal tradition in the Latin Church and the Eastern Church, critical reflection on the variety of its forms, compatibility assessment with the current requirements and changes occurring in the society, suggesting new forms of expression. The latter one refers to initial doctrinal and institutional justifications, which underlie the undertaken reforms. Indicating the need of cooperation of theology and canon law, the author of the study refers to the history of great reforms in the Church, which were accomplished on the basis of relation between current problems and challenges and the creative power of its own tradition. He suggests looking at today's particular challenges in this way, seeking similar situations and solutions in the past, exploring theological doctrines, the Church's discipline and practice, indicating principles regardless of their application, justifying the undertaken actions.

The analysis of the situation and presented paths which should be taken in order to introduce reforms in the Church together with the changes occurring in the Code of Canon Law lead Fantappiè to present a new paradigm in the field of theology and canon law. The first one results from the necessity of co-operation between theology and canon law as an effective condition explaining and justifying undertaking particular actions. However, it is connected with the necessity to renew the view on canon law itself and the way of its expression in the code form, which has been influenced by contemporary legal sciences. In the next three chapters, the Author individualizes, discusses, and presents the results of these influences on canon law. Its consequence is distancing from or even breaking the links with canon tradition in the Church and adopting ways of reasoning characteristic for secular sciences. Critical reconstruction of the influence of modern ways of thinking on canon law in the historical dimension leads the Author not so much to indicating the reasons and understanding the current situation of canon law as to reflection aimed at overcoming them. Three new paradigms pointed out by Fantappiè are supposed to serve this purpose. The first one concerns regaining the flexibility of canon law. It can be done by restoring the meaning of legal principles as a source of the legal system in the Church, which will allow exceeding normative limitations of the codification paradigm. The second paradigm should concern balancing in terms of the sources of law and limiting them in terms of either sources of existence or knowledge to merely regulatory activity and its consequences in the form of legislative products. Balance between the sources should concern skilful use of both doctrinal and legislative as well as jurisprudence sources. The science of canon law faces the challenge of developing a hermeneutical theory of canon law in harmony with the methodology of theological sciences and dialog with the current doctrine of legal sciences. The last paradigm of new approach to canon law results from the two previous ones. Indicating legal principles and redefinition of interpretative

context emphasize the necessity to agree on a systematic and deductive method, which is at odds with hermeneutical and argumentative methods. The negative consequence of the codification paradigm was adopting abstract logic far from the particularity of the case being resolved. The new paradigm points at the method of topics and dialectics of decretists and decretalists in combination with jurisprudential approach of medieval popes, who paid attention to new situations and defined norms on the basis of the principles and values of canon law. This procedure would greatly emphasize the personalistic principle which lies at the foundations of Christianity and allows full implementation of justice, which is of specific character.

On the basis of his reflections, Carlo Fantappiè shows a new, possible form of the source of canon law, contrary to the applicable code. He suggests *Novum Corpus Iuris Canonici* harmonizing the law of the Latin and Eastern Church, containing general principles of law allowing their integration with the solutions of particular Churches and elimination of problems caused by the current code. Such a *Corpus* should be integrated with *Corpus Concilii* indicating close connection of synodal principles and the principles of canon order. The study by Fantappiè opens the door not only to scientific discussions giving rise to changes taking place in the Church. It is a specific suggestion concerning the possibility of prospective normative solutions, which are not limited by a short-term necessity. The law of the Church is first of all a theological phenomenon, whose source is in the structure of ecclesial community and which expresses it. As a theological experience it is a legal phenomenon. Carlo Fantappiè's conclusions only confirm this belief.

Tomasz Gałkowski
University of Cardinal Stefan Wyszyński, Warsaw
https://orcid.org/0000-0001-9166-9516

Notes on Contributors

Robert Benne, Jordan-Trexler Professor of Religion, *Emeritus* and Research Associate in the Religion and Philosophy Department of Roanoke College in Salem, Virginia. He teaches Christian Ethics for the online Lutheran Institute for Theology. In 1982, he founded the Roanoke College Center for Religion and Society, which the College named in his honor in 2013. He was Jordan-Trexler Professor of Religion and Chair of the Religion and Philosophy Department at Roanoke College for 18 years. Before that he was Professor of Church and Society at the Lutheran School of Theology at Chicago for 17 years. A native of Nebraska and a graduate of Midland University, his graduate degrees are from the University of Chicago. He has lectured and written widely on the relation of Christianity and culture.

Pavol Dancák, Professor, Ph.D., is a priest of the Greek-Catholic Archeparchy of Prešov. He holds degree from the Philosophical Faculty of Pontifical University of John Paul II in Cracow. On April 27, 2005, he attained habilitation in history of philosophy with a book *Historical and Philosophical Reflections of Paideia in the Works of Karol Wojtyła*, at the Faculty of Arts, University of Prešov in Prešov, and on January 29, 2011, he was appointed Professor of History of Philosophy. Currently, he is Head of Department of Philosophy and Religious Studies.

Tomasz Gałkowski, CP (born 1967) graduated from the Pontifical Faculty of Theology, the Collegium Bobolanum: SJ in Warsaw. In 1991–1995 he studied Canon Law at the Pontifical Gregorian University in Rome, where on the basis of the dissertation *Il quid ius nellà realta umana e nella Chiesa* received his doctoral degree. He was awarded of the Bellarmin's Prize for his publication (*Analecta Gregoriana* 269, Roma 1996). In 2007, he received a postdoctoral

degree at the Faculty of Canon Law of the University of Card. St. Wyszyński in Warsaw. His monograph *Right—Duty. Priority and Interdependence in the Law Orders: Canonical and the Secular Society* was awarded the Prize of the Rector of the University. He is author of about 100 scientific publications. His scientific interests include issues related to the *ratio legis* of the canonical norms and issues of common law and canon law. Currently, he is a professor and chair of the Theory of Canon Law at this University.

Piotr Kroczek, Catholic priest, professor of law, doctor of ecumenical theology, judge in Tribunal of Archdiocese of Cracow, chairman of the General Norms and Legal Theory Department at the Faculty of Canon Law at the Pontifical University of John Paul II in Cracow; he majored in legal theory and denominational law.

Andrzej Pastwa, Dr. iur. can. habil., head of Department of Canon Law and Ecumenical Theology of the Faculty of Theology at the University of Silesia; judge at the Metropolitan Ecclesiastical Court in Katowice. Member of Consociatio Internationalis Studio Iuris Canonici Promovendo, Consociatio Iuris Canonici Polonorum, as well as Commission for Polish-Czech and Polish-Slovak Relations of the Polish Academy of Sciences. He has published numerous papers on canon law, especially marriage law, most recently: *Il bene dei coniugi. L'identificazione dell'elemento ad validitatem nella giurisprudenza della Rota Romana*, [Biblioteca Teologica, Sezione Canonistica, 7], Eupress FTL—Edizioni Cantagalli, Lugano—Siena 2018. Editor-in-chief of the English-language academic journals: *Ecumeny and Law* and *Philosophy and Canon Law.*

Stanislav Přibyl, Associate professor JUDr. Stanislav Přibyl, Ph.D., Th.D., JC.D., is a priest from the Catholic Archdiocese of Prague. He studied at the School of Law of Charles University in Prague and the School of Canon Law of the Institutum Utriusque Iuris of the Pontifical Lateran University in Rome. He received the degree of associate professor following a successful defence of his dissertation, *Tschechisches Staatskirchenrecht nach 1989* (*Czech Religion Law after 1989*), from the School of Law of University in Trnava (Slovakia). He is a judge and a promoter of justice of the Metropolitan Tribunal in Prague; he teaches church law and secular law at the School of Theology of the University of South Bohemia in České Budějovice, and is a scientific co-worker at the Institute for Legal Aspects of Religious Freedom of the University in Trnava, as well as serves as a spiritual administrator at the St. Mary of the Assumption and Charlemagne Church in Prague-Karlov.

Lucjan Świto, Rev. doctor habilitatus of Legal Sciences; professor at the University of Warmia and Mazury in Olsztyn; chair of Canon Law and Philosophy

of the Faculty of Theology at the UWM in Olsztyn; judge and Officialis of the Metropolitan Court of the Archdiocese of Warmia in Olsztyn; consultor of the Legal Council of the Polish Bishops' Conference.

The publication is indexed in the following databases:

BazHum

Central and Eastern European Online Library (CEEOL)

Index Copernicus

Worldcat

Erih Plus

Copy-editing and proofreading Gabriela Marszołek
Cover design Emilia Dajnowicz
Typesetting Alicja Załęcka

Electronic version is the original one. The journal was previously published in printed form with the ISSN 2450-4955.
The journal is distributed free of charge ISSN 2451-2141.

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: 7.75. Publishing sheets: 9.0.

ISSN 2451-2141
05
9 772451 214008

Free copy

About this book