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Nomos – Ethos – Oikonomia

In Memory of
Professor Remigiusz Sobański

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Da questa parte onde 'l fiore è maturo
di tutte le sue foglie, sono assisi
quei che credettero in Cristo venturo

Dante Alighieri
Divina Commedia/Paradiso/Canto XXXII, 22–24

Dedicating the next two volumes to the memory of Professors Rev. Józef Tischner and Rev. Remigiusz Sobański, the Editorial Board of *Philosophy and Canon Law* would like to express their gratitude in the form of a symbolic "rose." The contemplation on the legacy and contribution to culture of these outstanding Thinkers, Teachers of the ethos of a scientist in limitless devotion to truth and its search—after all, makes us recall the mystical "rose" from Dante Alighieri's world monument to literature. But also the one from Antoine de Saint-Exupéry's masterpiece. As Stanisław Grygier inspiringly deduces—the presence of the "rose" gives the Little Prince's life meaning and value, makes him free. In the bonds of his responsible love, the nation and society are born – the space for the spiritual development of man (*ethos*). Little Prince's home (*oikos*), in which law (*nómos*) stems from love of the land, cultivated for the "rose"—that is, the common good—constitutes what is called *oikonomia*.

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Part One

Canon Law

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Dignity of the Human Person

Abstract: The Vatican II fundamentally changed the ecclesiastical view towards the human person. Especially in *Nostra aetate*, *Gaudium et spes*, and *Dignitatis humanae* it strengthens the dignity of the human person and personal freedom as base for a world with equal rights for all mankind. Therefore, the council qualified discrimination of all kind as against God's will. These statements have a huge impact on the necessary further development of theology and canon law.

Keywords: Roman Catholic Church, Second Vatican Council, Vatican II, human person, freedom, human dignity, human rights.

The Vatican II emphasized the dignity of the human person (*Dignitatis humanae* 1). This shows the human rights hermeneutic of the council in a new light, which will be demonstrated in this article. Of course, it will take a long time until the pre-conciliar Church, "whom God donated a Second Vatican Council, will be the Church according to the ideas of the council."[1]

[1] Original text: Karl Rahner, *Das Konzil – ein neuer Beginn*, ed. Andreas R. Batlogg and Albert Raffelt (Freiburg i. B.: Herder, 2012), 49: "Es wird lange dauern, bis die vorkonziliare Kirche, der ein II. Vatikanisches Konzil von Gott geschenkt wurde, die Kirche des II. Vatikanischen Konzils sein wird" (German quotes in this article are translated by the author).

In 2015, a conference in Munich was inspired by Rahner's quotation, cf. Christoph Böttigheimer and René Dausner, eds., *Vaticanum 21. Die bleibenden Aufgaben des Zweiten Vatikanischen Konzils im 21. Jahrhundert* (Freiburg i. Br.: Herder, 2016), 16. Cf. Franz Xaver Bischof, Gerd Häfner, and Johanna Rahner, "4. Reform kirchlicher Strukturen. *Einführung*," in *Vaticanum 21. Die bleibenden Aufgaben des Zweiten Vatikanischen Konzils im 21. Jahrhundert*, ed. Christoph Böttigheimer and René Dausner (Freiburg i. Br.: Herder, 2016), 171, which starts quoting: Karl Rahner, *Strukturwandel der Kirche als Aufgabe und Chance* (Freiburg i. Br.: Herder, 1972).

When will it be possible to claim—even in court, if necessary—the following theological statements of Vatican II as legal texts? "No foundation therefore remains for any theory or practice that leads to discrimination between man and man or people and people, so far as their human dignity and the rights flowing from it are concerned" (*Nostra aetate* 5b). So "[t]here is, therefore, in Christ and in the Church no inequality on the basis of race or nationality, social condition or sex […]" (*Lumen gentium* 32).

Following this path, *Gaudium et spes* concludes "with respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, language or religion, is to be overcome and eradicated as contrary to God's intent" (29). The "basic principles of human coexistence, like, for example, the social doctrine of the Church, (analogously) also apply in the Church,"[2] because the Church "coalesces from a divine and a human element" (*Lumen gentium* 8). Therefore, the Church must follow a path of learning and change,[3] "without losing the basic structure that is instilled in it from Christ."[4]

Remigiusz Sobański mentioned that the texts of Vatican II lead to different approaches of the role that canon law should play in the Church, mainly if the Church is to be seen as a society or a communio. He is more in favor of the second option. According to him, canon law, rooted in the mystery of the Church, does not play a peripheral role (like the principle "ubi societas, ibi ius"), but is linked to the essence of the Church's mission.[5]

Nonetheless, the texts of Vatican II also state that "the secret character does not cancel the social character of the Church."[6] Pope Francis explicitly encouraged "not be afraid to re-examine them [meaning customs and ecclesiastical norms]. […] Saint Thomas Aquinas pointed out that the precepts which Christ and the apostles gave to the people of God 'are very few.'"[7]

[2] Reinhard Marx, "Die Leitungsaufgabe des Bischofs. Anmerkungen und Perspektiven," in *Geist – Kirche – Recht. Festschrift für Libero Gerosa zur Vollendung des 65. Lebensjahres*. Kanonistische Studien und Texte 62, ed. Ludger Müller and Wilhelm Rees (Berlin: Duncker & Humblot, 2014), 42–43.

[3] Cf. Remigiusz Sobański, "Rechtstheologische Vorüberlegungen zum neuen kirchlichen Gesetzbuch," *Theologische Quartalschrift* 163 (1983): 185: "Auch gibt es rechtlich relevante Aussagen des Konzils, die überhaupt keinen Widerhall hervorgerufen haben. Aufgabe der Kanonisten wird es sein, diesen Zustand nicht nur festzustellen oder gar zu beklagen, sondern seinen Ursachen nachzugehen."

[4] Marx, "Leitungsaufgabe," 43.

[5] Sobański, "Rechtstheologische Vorüberlegungen," 182.

[6] Marx, "Leitungsaufgabe," 43; original text: "[…] ohne dass die Grundstruktur, die ihr von Christus her eingestiftet ist, verloren gehen würde. Es gilt […]: Der Geheimnischarakter hebt den Sozialcharakter der Kirche nicht auf."

[7] Francis, "Apostolic Exhortation *Evangelii Gaudium* (November 24, 2013)," *AAS* 105 (2013): 1038, nr. 43, quoting Thomas Aquinas, *Summa theologiae*, trans. Andreas Speer (Berlin: Gruyter, 2005), I–II, q. 107, a. 4.

Which Concept of Freedom?

Karl Rahner stated that since Saint Paul, freedom had not been mentioned very often in the Catholic Church.[8] Thus, the concept of freedom had to be redeveloped in theological studies and ecclesiastical legal studies. But according to the Roman jurist Ulpian, justice is the constant and perpetual will to allot to every man his due. And what is justly due to the other? What is (objectively) due to him, of course. Does that not also include his (subjective) right?[9]

Freedom rights had a bad reputation in the Church for a long time, and one could not distinguish between two forms of freedom:

1. Freedom in a negative sense: For Thomas Hobbes, a free man is "he, that in those things, which by his strength and wit he is able to do, is not hindered to do what he has a will to."[10] All life goals, no matter how irresponsible, are considered to serve the purpose of realizing one's freedom as long as they do not violate other persons' rights.
2. Freedom in a positive sense is something different: "Hence man's dignity demands that he act according to a knowing and free choice […] not under blind internal impulse nor by mere external pressure. Man achieves such dignity when, emancipating himself from all captivity to passion, he pursues his goal in a spontaneous choice of what is good, […]" (*Gaudium et spes* 17). Positive freedom is a prerequisite for every moral or legal decision. This is also proven by the fact that coercion of a legal act makes it invalid.[11]

[8] Cf. Karl Rahner, "Die Freiheit in der Kirche," in *Schriften zur Theologie II*, ed. Karl Rahner (Einsiedeln: Benziger Verlag, 1958), 95.

[9] Cf. Ernst-Wolfgang Böckenförde, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter* (Tübingen: Mohr Siebeck, 2002), 242.

[10] Thomas Hobbes, *Leviathan or the Matter, form & Power of a Common-wealth Ecclesiastical and Civil* (London, 1651), chap. XXI of the liberty of subjects. What it is to be free, accessed July 13, 2022, https://www.gutenberg.org/files/3207/3207-h/3207-h.htm#link2H_4_0251; German translation: Thomas Hobbes, *Leviathan, oder Stoff, Form und Gewalt eines kirchlichen und bürgerlichen Staates*, ed. Iring Fetscher, trans. Walter Euchner (Frankfurt a. M.: Suhrkamp, 1984), 163.

[11] Cf. Ian Carter, "Positive and Negative Liberty," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Stanford University, 1997–). Article published February 27, 2003; last modified November 19, 2021, accessed July 14, 2022. Positive and Negative Liberty (Stanford Encyclopedia of Philosophy/Spring 2022 Edition). Cf. https://plato.stanford.edu/entries/liberty-positive-negative/. Isaiah Berlin, *Two Concepts of Liberty. An Inaugural Lecture Delivered before the University of Oxford on 31 October 1958* (Oxford: Clarendon Press, 1958). Berlin's notion of positive liberty is different from the one I discuss.

Personal dignity casts the Church's teaching in a whole new light. Aristotle and Thomas[12] assumed that women were incapable of rational action. Today, the equal dignity of men and women is emphasized as a fundamental truth of Christian anthropology (*Lumen gentium* 32), which has implications for the inclusion of women in ecclesial ministry (*Lumen gentium* 33, c. 228 CIC 1983).

Right as a Function of Freedom

In view of the Christian claim to truth and its authoritative mediation in the Church, is autonomous freedom and its establishment in Church institutions possible at all?[13] The human being is understood in all his or her social relations as a subject of responsible freedom. This constitutes his or her undetachable dignity as a human person, of which the Declaration on Religious Freedom speaks (*Dignitatis humanae* 1).[14] A Church that sees itself as a "great movement for the defense and protection of human dignity,"[15] as John Paul II put it, depends on Church personalities and Church institutions who stand up for human dignity and the rights of all people that flow from it. "At the same time, however, there is a growing awareness of the exalted dignity proper to the human person, since […] his rights and duties are universal and inviolable" (*Gaudium et spes* 26). That this is of course—in contrast to Thomas's thinking —also true for women and recognized by the fathers of the council: "Where they have not yet won it, women claim for themselves an equity with men before the law and in fact" (*Gaudium et spes* 9).

A good definition weather a law is just or unjust, gives the US Baptist pastor Martin Luther King. He fought against legal and social forms of disregard for Black people in the USA. For him, "an unjust law is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is

[12] Cf. Thomas Aquinas, *Summa theologiae*, I q. 92, a. 1 ad 2: "Et sic ex tali subiectione naturaliter femina subiecta est viro, quia naturaliter in homine magis abundat discretio rationis."

[13] Cf. Adrian Loretan, *Wahrheitsansprüche im Kontext der Freiheitsrechte* [Religionsrechtliche Studien 3] (Zürich: Edition NZN bei TVZ, 2017).

[14] Cf. Gerhard Luf, "Rechtsphilosophische Grundlagen des Kirchenrechts," in *Handbuch des katholischen Kirchenrechts*. 3rd ed., ed. Stephan Haering, Wilhelm Rees, and Heribert Schmitz (Regensburg: Pustet, 2015), 54: "Gemäß dieser Sicht soll der Mensch in all seinen sozialen Bezügen als Subjekt verantworteter Freiheit begriffen und wechselseitig anerkannt werden. Das macht seine unverfügbare Würde als menschliche Person aus, von der die Erklärung des II. Vatikanums über die Religionsfreiheit so eindringlich spricht."

[15] John Paul II., "Encyclical *Centesimus annus* (May 1, 1991)," *AAS* 83 (1991): 794–798, nr. 3–4.

a human law that is not rooted in eternity and natural law. Any law that uplifts human personality is just. Any law that degrades the human person is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality."[16] As soon as these theological propositions are legally enforceable, the Church will be able to speak more credibly of justice. For example, it will be able to take a stand against discrimination on the basis of sex (*Lumen gentium* 32; *Gaudium et spes* 29), and create instruments within its own ranks that would make discrimination impossible in the long term, "since it is contrary to God's plan" (*Gaudium et spes* 29).

Instrument for the Unity of Mankind

Human rights are universal, so religious communities cannot be human rights-free zones.[17] However, this is only possible if the concept of the person used in religious communities is compatible with the universal concept of person that underlies human rights.[18]

The universal concept of person is a prerequisite of every right and is thus relevant for the rights of religious communities. Every right that does not represent the universal concept of person is internally contradictory. Theology and ecclesiastical jurisprudence[19] could serve the substantive enforcement of the universal concept of person and thus of human rights. Then, the Church will become a "sign and instrument […] of the unity of the whole human race" (*Lumen gentium* 1). As a sacrament[20] of justice, the Church will be a "sign and

[16] Martin Luther King Jr., *Letter from Birmingham Jail*, accessed July 12, 2022, https://letterfromjail.com.

[17] Cf. Peter Kirchschläger, *Menschenrechte und Religionen. Nichtstaatliche Akteure und ihr Verhältnis zu den Menschenrechten.* Gesellschaft, Ethik, Religion 7 (Paderborn: Ferdinand Schöningh, 2016).

[18] Cf. Burkhard Josef Berkmann, *Nichtchristen im Recht der katholischen Kirche.* 2 vols. ReligionsRecht im Dialog 23 (Münster: LIT, 2017).

[19] There are different scientific approaches to relationship of the juristic and theological elements in canon law. Remigiusz Sobański strengthens a more important role of the theological aspects cf. Remigiusz Sobański, "Erwägungen zum Ort des Kirchenrechts in der Rechtskultur," *Archiv für katholisches Kirchenrecht* 155 (1986): 3–15; Remigiusz Sobański, *Grundlagenproblematik des katholischen Kirchenrechts* (Wien: Böhlau Verlag, 1987). Other authors like Gerhard Luf or Adrian Loretan rather represent a model that integrates both aspects, cf. Luf, "*Rechtsphilosophische Grundlagen des Kirchenrechts,*" 42–69.

[20] Cf. Peter Handke's understanding of the sacrament in relation to the sacrament of marriage: "Experience fragmentarily – dream completely." Peter Handke, *Mein Jahr in der Niemandsbucht. Ein Märchen aus den neuen Zeiten* (Frankfurt a. M.: Suhrkamp, 1994), 730.

instrument […] of a very closely knit union with God" (*Lumen gentium* 1), who, according to Jesaja (42, 1–7) and Matthew (25, 31–46), is a God of justice (Jer 30, 18).

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Adrian Loretan

La dignité de la personne humaine

Résumé

Le concile Vatican II a fondamentalement changé la vision ecclésiastique de la personne humaine. En particulier dans *Nostra Aetate*, *Gaudium et Spes* et *Dignitatis Humanae*, il renforce la dignité de la personne humaine et la liberté personnelle comme bases d'un monde où tous les êtres humains jouissent de droits égaux. Par conséquent, le Concile a qualifié toute forme de discrimination comme étant contraire à la volonté de Dieu. Ces déclarations ont un impact considérable sur le développement nécessaire de la théologie et du droit canonique.

Mots-clés : Église catholique romaine, Concile Vatican II, Vatican II, personne humaine, liberté, dignité humaine, droits de l'homme

Adrian Loretan

Dignità della persona umana

Sommario

Il Vaticano II ha cambiato radicalmente la visione ecclesiastica nei confronti della persona umana. Soprattutto in *Nostra Aetate*, *Gaudium et Spes* e *Dignitatis Humanae* rafforza la dignità della persona umana e la libertà personale come base per un mondo con uguali diritti per tutta

l'umanità. Pertanto, il concilio ha qualificato la discriminazione di ogni tipo come contraria alla volontà di Dio. Queste affermazioni hanno un enorme impatto sul necessario ulteriore sviluppo della teologia e del diritto canonico.

Parole chiave: Chiesa cattolica romana, Concilio Vaticano II, Vaticano II, persona umana, libertà, dignità umana, diritti umani

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Theology of Canon Law According to Professor Remigiusz Sobański

Abstract: Remigiusz Sobański (†2010) was highly appreciated in the world of post-Council canon law studies. His research was published in many languages. Most of his scientific achievements were presented in the Polish language. For this reason, I reach for studies unknown to a wider community of canonists in order to present Professor Sobański's views on theology of canon law, whose subject matter was a predominant topic of his scientific interests. I present the thematic scope of theology of canon law, its role in reference to fundamental issues of canon law, but also its inadequacy. Sobański thought that in order to fully illustrate the basic issues of canon law, theological approach should coexist with the legal one within one theory of canon law.

Keywords: Remigiusz Sobański, theology of canon law, theory of canon law, canon law studies

Introduction

Theology of canon law, as an official discipline existing at the faculties of canon law as part of canon law studies since 2002, has not concluded its hitherto discussion on its epistemological status and a clear definition of the subject of scientific study.[1] Undoubtedly, this fact contributed to the consolidation of the very definition of certain characteristic approach to the studies of canon law, which approximately since the mid-last century has had a permanent place

[1] Congregatio de Institutione Catholica, "Decretum quo ordo studiorum in Facultatibus Iuris canonici innovatur" (September 2, 2002), *Acta Apostolicae Sedis* 95 (2003): 281–285.

among significant ways of practicing canon law. However, the existence of the term does not mean clarity of the definition of referents. In terms of scientific studies it might result in both positive and negative influence on the verifiability of statements or scientific theories. The pros certainly include an expanding range of the undertaken research, which over time can lead to the separation of new scientific disciplines.

On the other hand, various ways of understanding the concept and fragmentation of the conducted research may contribute to the disappearance of the discipline itself due to the decreasing possibilities of verification of the achieved results having the same research subject at the starting point.

Giving a common name to a wide range of research is a long process. In case of theology of canon law, we dealt with to some extent spontaneous appearance of this term. It was provoked by the necessity of justification of canon law as a phenomenon applicable to the Church. The previous attempts of its justification in the context of the Catholic Church, in opposition to its negation in Protestant Churches, did not stand the test of time.

The defense of canon law on grounds relating to philosophical, social, political, or legal premises turned out to be not so much insufficient but rather inadequate to the accusations made against it and increasing ecclesial consciousness. The evidence of insufficiency of the hitherto arguments provided by the Catholic side based on *Ius Publicum Ecclesiasticum* theses were the attempts of polemical discussions with the thesis of Rudolph Sohm about the contradiction between the nature of the Church law and the nature of the Church. Juridical nature of the Church expressed in the *societas perfecta category* proved to be insufficient when confronted with Sohm's statements about the nature of the Church. The defense of canon law called for new argumentation. Theology, as well as ecclesiology as its part, became the area of in-depth studies on the Church law. The term theology of canon law started to be used very quickly to describe this area of studies on canon law, including a multitude of issues aiming to show the relationship between law and the Church in its efficient and final cause (ontological issues) and the possibility of discovering law adequately to its essence (epistemological issues).

Determined in this way, the task of harmonizing the "Church of law" with the "Church of love" and correcting the "unfortunate error," as Pius XII wrote, became the subject of interest of both canonists and ecclesiologists, whereby the canonist should remain the canonist and the theologian should remain the theologian. From this viewpoint, one can see the difficulty of providing an adequate definition of the theology of canon law and its objective. Arising on the spur of the moment, theology of canon law did not have to face these problems from the beginning. The concept was provoked by the aim, which was justification of the connection between the Church and law and by the choice of appropriate exploration area for verifiable argumentation. It was supposed to

be the Church itself as a divine-human community revealed in the Revelation. The way to discovering such Church is theology, therefore, the way to learning its law is determined also by theology, thereafter, described as theology of the Church law.

Over time, the attempts to appropriately define theology of canon law have been made. The issues connected with its identity, subject, determining its aim, method, relationship, and correlation with the studies on canon law are open to discussion. A big number of possible solutions, which were gathered and characterized by Paolo Gherri in his monograph dealing with this subject matter, have been formulated.[2] In accordance with the monograph's title, Gherri made a critical analysis of the presented solutions and, on the basis of his own research, presented a concept of theology of canon law. To a large extent, the reference point for the elaboration was the decree introducing theology of canon law as a lecture subject during canon law university course. The requirements of the Congregation are binding for the faculties and lectures of this subject. The range of discussed issues may vary in faculties of different universities, but the discipline within which they are covered should give an epistemological and methodological direction to the conducted research. Thus, it requires mostly methodological definition, since the subject such as canon law and its objective, which is showing its relationship with the Church, are unchanging. However, a particular method can lead to different solutions within the same discipline.[3] Understanding theology of law and its role within practicing canon law will take a different form in various approaches—legal-cultural, dogmatic-legal, pastoral or historico-redemptive one.[4]

The study of Gherri contributed to the presentation of the approach to theology of canon law by a canonist professor Remigiusz Sobański, whose scientific achievements and presence in the world of canon law studies are undeniable. The presentation of his thought can be a kind of supplement to the aforementioned deliberations and an inspiration for younger canonists to reach out for his solutions and publications. I have referred to and presented the problem of theology of canon law according to Sobański[5] multiple times and in different

[2] Paolo Gherri, *Introduzione critica alla Teologia del diritto canonico* (Torino: G. Giappichelli Editore, 2019).

[3] Zygmunt Hajduk, *Ogólna metodologia nauk* (Lublin: Wydawnictwo KUL, 2012), 146.

[4] Remigiusz Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego* (Warszawa: Wydawnictwo UKSW, 2001), 25–26.

[5] Tomasz Gałkowski, "Theology of Canon Law from the perspective of Remigiusz Sobański," *Annuarium Iuris Canonici* 1 (2014): 5–17, accessed April 17, 2021, https://annuarium.uksw.edu.pl/sites/default/files/Annuarium-1-2014%20popr%2006-2014.pdf; "Teologiczny wymiar prawa kościelnego w myśli ks. prof. Remigiusza Sobańskiego," in *Wkład Księdza Profesora Remigiusza Sobańskiego w rozwój kanonistyki*, ed. Tomasz Gałkowski (Warszawa–Kraków: Wydawnictwo Scriptum, 2014), 43–67; "Linie przewodnie kanonistyki w ujęciu Księdza Profesora Remigiusza Sobańskiego," in *Ars boni et aequi. Księga pamiątkowa dedykowana*

aspects. For this reason, I feel obliged to present his scientific achievements from yet another persepective. Hence the approach to the subject will focus on the context of gnoseological choices made by Sobański and their epistemological consequences. Other issues presented earlier will be reminded where necessary for the discourse.

Another reference to the issue of theology of canon law in Sobański's thought is associated with the conference dedicated to two great academics—canonist Remigiusz Sobański and philosopher Józef Tischner. It also corresponds to the ongoing discussion about understanding theology of canon law, which was presented and summarized by Gherri in his book. He mentions the person of Sobański only twice, but he does not present his ideas and studies.[6] A few of Sobański's publications have been translated into foreign languages.[7] The thought of Sobański has also been presented in a few studies.[8] For those who do not know Polish, I will present the ones which appeared in this language and give a broader view of Sobański's thought.

The beginnings of academic activity in the form of public presentation of Sobański's views date back to the year 1961, when he published his first article entitled "Modern Tendencies in Canon Law."[9] From the very beginning, his interests focus on the topic of canon law as an intra-ecclesial phenomenon. Here appears a gnoseological problem of choosing the right path of getting knowledge, that is, deciding whether previous solutions are sufficient or whether the new ones have to be found. The fundamental issue concerns the background and context of questions about law. He notices that the concept of law is characteristic of a religious language. However, this does not mean that every religion has its own law or that it results from the form of the religion.

Księdzu Profesorowi Remigiuszowi Sobańskiemu z okazji osiemdziesiątej rocznicy urodzin, ed. Józef Wroceński and Helena Pietrzak (Warszawa: Wydawnictwo UKSW, 2010), 65–82.

[6] Gherri, *Introduzione critica alla Teologia del diritto canonico*, 66, 177.

[7] A big number of deliberations on theology of canon law was published under the common title: *La Chiesa e il suo diritto. Realtà teologica e giuridica del diritto ecclesiale* (Torino: G. Giappichellli Editore, 1993).

[8] Hermann Kahler and Josef Schmitz-Wienke, "Le droit canonique en Pologne (Aspects essentiales de la théorie de R. Sobański)," *Praxis Juridique et Religion* 4 (1987) 1: 77–87; Ludger Müller, *Kirchenrecht-analoges Recht? Über den Rechtscharakter der kirchlichen Rechtsordnung* (St. Ottilien: EOS Verlag Erzabtei, 1991), 61–94; Carlo R. M. Redaelli, *Il concetto di diritto della Chiesa nella riflessione canonistica tra Concilio e Codice* (Milano: Glossa, 1991), 110–130.

[9] Remigiusz Sobański, "Współczesne tendencje w prawie kanonicznym," *Ateneum Kapłańskie* 53 (1961) 2: 175–192.

The Context of the Question about Canon Law

The beginnings of Sobański's academic work are lectures on canon law delivered for the clerics of his home diocese in Katowice in 1958. During classes, he noticed that students' interest in canon law decreased. It resulted from the dislike towards the way canon law was presented at the time, as it was based on analytical and methodical lectures on the code's norms together with historical introduction to the Church's institutions. A concurrent announcement of calling a common council and the reform of the current Code of Canon Law made by John XXIII in 1959 also had a significant influence on the negative approach to canon law in his way of lecturing. The announcement of changes and the actual changes of the existing norms which were made during the council and afterwards caused students' mistrust towards canon law. Canon law stopped enjoying authority among students. A large number of constantly changing regulations made the impression that canon law was not important. However, Sobański was not indifferent to his students' opinions. Therefore, Professor Sobański directed his academic research aiming to clarify not as much the discussed norms but to explain the Church law itself, its place and role in the Church, its sense and purpose.[10] Prospective clergymen were supposed not so much to know as to understand the Church law. In order to achieve this, Sobański dedicated his academic interests and research to fundamental issues of the Church law, which finally bore fruit in terms of original solutions and a considerable number of academic publications, as well as his recognition in the world of canon law studies.

A stimulus for Sobański's studies was the guideline of the council to bear in mind the mystery of the Church during the lecture on canon law, as it was presented by the Vatican Council II (*Optatam totius*, 16). What results from this statement is the fact that the appropriate reference point for canon law cannot be the achievements of legal sciences but taking into account the mystery of the Church. Such an approach at the same time gives a new direction to research and provides a broader dimension to the current lecture on canon law. Presented in the first place so far, a dogmatic lecture on norms must give way to the mystery of the Church. A canonist is interested not only in Church regulations but the Church itself. The subject matter of canon law studies is the Church in its mystery. In the lecture on canon law the mystery of the Church had to be connected with law. The effect of such a relationship is understanding canon law as a fragment of the Church reality. It is associated with the necessity to

[10] Remigiusz Sobański, "Prawo kościelne na tle trendów antyjurydycznych," *Collectanea Theologica* 43 (1973) 4: 37–46.

acknowledge the reasons which lie at the foundations of the Church norms and the factors which gave rise to them, and, on the other hand, appreciating the values which these norms serve. Canon norms are not independent regulations but are rooted in the tasks and life of the Church.[11] Therefore, the task of a canonist is to look at the Church from the perspective of a jurist. Sobański made the requirement expressed in the council decree *Optatam totius* the subject of his scientific explorations, looking for an appropriate approach to this guideline.

A gnoseological stimulus for Sobański's scientific inquiry was also the discussion which arose around the pattern of fundamental law (*lex Ecclesiae fundamentalis*), and specifically concerning divergent views on the character and purpose of this law.[12] The dispute concerned the way of taking into account the Church studies.[13] In the comments made by bishops, three distinctive points of view were revealed despite the fact that all of them emphasized that law should originate from theological beliefs of the Church. The first of them questioned the need of codification of fundamental law, expressing the opinion that the code should be preceded by a compendium of knowledge about the Church. The second point of view led one to believe that theological principles should be included in the fundamental law. The last opinion advocated that theological rules should underlie fundamental law but they should not be clearly expressed in it.[14] Finally, the willingness to codify fundamental law was not reflected in the new code. The discussion, however, gave a direction to Sobański's further research. He is of the opinion that law and theology should not be mixed. Theological rules provide foundations and inspire canon law. Fundamental law, as the name suggests, should be a law. Therefore, there was an urge to indicate its legal character, so that it could be a real legal basis, not a theological one. Ultimately, the idea to include fundamental law of the Church in the code was not put into practice. Sobański thought that the reason why it happened was lack of an appropriate method allowing to present the legal structures of the Church. It is not enough to say that theological assumptions inspire fundamental law, but, more importantly, they should be exposed and defined. It refers not only to the rules for fundamental law formulated similarly to the constitutional law, but the rules for the whole legal order of the Church. Uncovering these rules

[11] Remigiusz Sobański, "Wprowadzenie do zagadnień roli prawa w Kościele," *Prawo Kanoniczne* 18 (1975) 1–2: 8.

[12] Differences of opinion on this matter were revealed in bishops' comments, which were a response to the request to share their views on this subject made by the Commission for the revision of the Code of Canon Law dated 10 February 1971. Willy Onclin, "Relatio universas contrahens generales animadversiones ad Schema Legis Ecclesiae fundamentalis ab Episcopis propositas," *Communicationes* 4 (1972): 123–129.

[13] Remigiusz Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego (Uwagi na marginesie dekretu *Optatam totius* nr 16,4)," *Prawo Kanoniczne* 17 (1974) 1–2: 16.

[14] Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego," 17.

from the mystery which the Church represents is the first and fundamental step indicating a doctrinal foundation of the Church law binding it with the mystery of the Church.[15] From this perspective, an appropriate view of the structure of the Church is presented, which a canonist should always bear in mind. There remains a question how to do it and by means of what tools which remain in the methodological competences of a canonist. What is important is exposing the legal structure of the Church, that is, legal aspects of the Church and not deliberations about the Church in a legal context.

Theology of Canon Law as an Introduction to Canon Law Studies

Existing approximately from the mid-19th century, positive-empirical approach to legal studies combining philosophical foundations with theological aspects gave rise to the issues concerning justification of law in the Church. Referring to the Enlightenment trends, religion was presented as a cultural phenomenon and the Catholic Church as a true religion. In accordance with this approach, the Church law was justified by referring to the category of an ideal community and, at the same time, analogous to a state organization.[16] Italian secular canon law studies with a similar result justified the existence of canon law referring to the category of a fundamental legal order. Its representatives treated canon law as a legal phenomenon. Both attempts to justify law in the Church were not able to answer the question about the position of law in the Church. The response to this question was provoked by Sohm's theses. The polemic which arose as an attempt to provide an answer was not a suitable method of discussion and defense of canon law. Canonists realized there was a need to begin research concerning the basic issues of the Church and law which would go beyond the analogy of references or achievements of legal studies. A direct stimulus for these explorations was the statement of Pius XII expressed in the encyclical *Mistici corporis* (n. 53) about an unjustified juxtaposition of the Church of law and the Church

[15] Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego," 17–18.

[16] Remigiusz Sobański, "Teoria prawa kościelnego wśród nauk teologicznych i prawnych," in *Rozważania o państwie i prawie. Księga jubileuszowa ofiarowana Profesorowi Józefowi Nowackiemu*, ed. Elżbieta Giszter (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1993), 179. In 1842, the first manual of the methodology of canon law was published by Franz Joseph von Buß, *Die Methodologie des Kirchenrechts* (Freiburg–Basel 1842), and afterwards by Dominique Bouix, *Tractatus de principiis iuris canonici* (Parisiis 1852), and Thomas Marie Gousset, *Exposition des principes du droit canonique* (Paris 1859).

of love. The above factors had an impact on a new orientation of studies on the Church law. Canonists noticed that exposing the foundations of the Church law requires research on the Church itself. It was necessary to give up the previously dominant approaches originating from the area of philosophy or social and legal studies and turn towards theology. In this way, a new approach to canon law arose, which was referred to as theology of canon law. The name preceded a detailed definition, scope, and method of conducting research. Undoubtedly, an additional stimulus for this new approach to canon law was also the simultaneous development of Evangelical theology of law.[17]

The name theology of canon law was created in certain opposition to the environments—especially Italian secular canon law studies—whose research concerning justification of canon law were based mainly on the general theory of law. Thus, methodological orientation of the approach to fundamental subject matter of canon law contributed to the creation of the term theology of canon law. This path was also chosen by Sobański who gave the title "Zarys teologii prawa kościelnego" [The Outline of the Church Law Theory] to the manual on fundamental issues of canon law, which was written for use by students of the Faculty of Canon Law. It was the first study including theological issues of canon law in world literature.[18]

Both the first manual and later studies, which resulted in book publications and research papers, allow specification of different areas of interest of what the introduction to canon law studies, commonly known as theology of canon law, included. Historical background and a new methodological orientation indicated that the appropriate reference point for canon law is the Church, and the aim of research is revealing its theological sources. In this way, the term theology of canon law was created, which was described by Sobański in the 1970s as a science dealing with the Church law as a reality rooted in the mystery of the Church. Hence, the existence and role of canon law should be highlighted.[19] Fundamental issues concerning the Church law are included in the theological studies about the Church. For this reason, theology of canon law has become the science about its fundamental issues.[20] As such it should be treated as an introduction to canon law studies. The element which distinguishes developing theology of canon law from the previously existing introductions to canon law, both in the Church public law and in Italian secular canon law studies, is deriv-

[17] Remigiusz Sobański, *Zarys teologii prawa kościelnego* (Warszawa: Wydawnictwo Akademii Teologii Katolickiej, 1973), 19–25.

[18] Honorata Typańska, "Pola aktywności Księdza Oficjała Remigiusza Sobańskiego," in *Sędzia i Pasterz. Księga pamiątkowa w 50-lecie pracy ks. Remigiusza Sobańskiego w Sądzie Metropolitalnym w Katowicach (1957–2007)*, ed. Honorata Typańska (Katowice: Księgarnia św. Jacka, 2007), 13.

[19] Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego," 27.

[20] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 16.

ing this law from the essence of the Church. However, it requires moving away from certain image of both law and the Church treated selectively and suitably for conclusions planned in advance.

The Council decree *Optatam totius* implies that the mystery of the Church, which should be borne in mind while delivering lectures on canon law, is, above all, the Church useful to law, which in its mystery is revealed as a point of departure justifying the existence of law in it. The approach to the Church cannot be selective and limited to one specific image which reflects a chosen truth about it. A canonist is interested in legal aspects of the Church (legally tangible truths about the Church), which still include the whole ecclesial reality revealed in the current consciousness of the Church.[21] An appropriate approach to it is understanding the Church as a sacrament. The idea of sacramentality exposes the source of the legal structure of the Church and allows to notice its ontological foundations.[22] It explains the existence of law in the Church reaching its essence, since it refers to the most profound reasons of the visible dimension of the Church, which is a community and has a sacramental role for the world. It explains the existence of law in the Church reaching to its essence, because it refers to the most profound reasons of the visible dimension of the Church, which is a community and performs a sacramental function to the world. Hence, basing the justification of the existence of law in the Church on the idea of sacramentality is the first task of the introduction to the Church law. Further, specific ones include the issue of law as a structure of Church community, law as one of the constitutive elements of the Church and showing its full, ecclesial dimension. These three aspects, according to Sobański, should be the content of the introduction to the Church law. He is of the opinion that only on their basis one can draw conclusions for interpretation and application of law, as well as its continuity and variability.[23]

The second issue, which should be the lecture subject of thus understood introduction to the Church law studies, is the concept of law directly connected with the concept of the Church. A canonist uses the concept of law in the same way as it functions in law studies. However, it does not concern a specific term or definition of law, but a judicial quality of the subject. Canon law is a real law and the Church law studies use methods specific to legal sciences.[24] The research whose aim is to justify the Church law with all its consequences cannot be based on an a priori accepted concept of law or refer to its particular criteria. The starting point is the reality, in which the phenomenon of law and the way of thinking about it arise and exist. Christians' legal awareness is the source of

[21] Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego," 20.

[22] Remigiusz Sobański, "Teologia prawa kanonicznego jako nauka o ontologicznych podstawach prawa kościelnego," *Śląskie Studia Historyczno-Teologiczne* 5 (1972): 63–67.

[23] Sobański, "Zagadnienia wstępu do nauki prawa," 22–23.

[24] Sobański, "Wprowadzenie do zagadnień roli prawa w Kościele," 8.

knowledge of the Church law.[25] In case of the Church, it relates not to some law in the Church, but its law. It is the law deriving from the nature of the Church being the subject of faith. Thus, scientific explorations concern the fact of the existence of law in the Church. It is considered that the reality of the Church includes the elements which are called law therein. Therefore, the subject of interest of theology of canon law is the foundations of such a law, regardless of the fact whether this term is explicit, analogical, or ambiguous.[26]

Another issue with regard to the introduction to legal sciences is, according to Sobański, the problem of the canonical norm. He points out that understanding law as an element of the Church structure, Church regulations should reflect the reasons which gave rise to them and led to their existence, as well as demonstrate the values which they serve. These are the values of Church community, its common good and thereby the good of its specific recipients.[27] It refers to constitutional regulations and norms, as well as disciplinary ones. There is a strong relationship between them, since they belong to social order, social relations within Church community based on the union with God and binding the faithful with one another. The Church law is above all the demonstration of these human relations constituting the Church, which stem from the saving will of Christ and which are realized in everyday life of Christians.[28] Continuously present in the Church community, its saving structure is enriched by constitutional acts whose occurrence is dependent on the theological consciousness of the Church at a certain historical moment and on the development of social life forms. Hence, the concern of the Church legislator is creating optimal conditions for the pursuit of the Church mission, the meeting of man with God in His saving will. Here appears the role of the community, whose task is to facilitate this meeting and to create favorable conditions conducive to its realization. This function is fulfilled by disciplinary acts, which point out what one should do to become a participant of Christ's humanity in the Church community, building and renewing it. Orders and prohibitions of disciplinary norms refer to the behavior of the faithful in the Church community. They do not refer to the personal devotion of believers, but—on the basis of bonds constituting an ecclesial community—they regulate the activity of the community, which is the unity of the word and sacrament. The actions of believers resulting from these two elements, controlled by regulations which may sometimes seem far from Church reality, always remain the sign of and reason for the supernatural life in the Church. Thus, they contribute to the fulfilment of its fundamental mission. The Church law defines proper ways of behavior, calls for its

[25] Remigiusz Sobański, *Kościół – prawo – zbawienie* (Katowice: Księgarnia św. Jacka, 1979), 15–30.

[26] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 32–35.

[27] Sobański, "Wprowadzenie do zagadnień roli prawa w Kościele," 8.

[28] Sobański, "Wprowadzenie do zagadnień roli prawa w Kościele," 8–15.

realization, which finally is supposed to lead to the development of the ecclesial community.[29]

Three scopes of research with regard to the introduction to canon law studies indicate the connection between theology and law, but also distinct roles of a theologian and a canonist when it comes to theological interests. The development of canon law occurs on the basis of more and more profound knowledge of the Divine constitution of the Church together with reflection on its historical structures adequate for realization of the mission of the Church.

A Canonist versus a Theologian

A canonist, both in his practical activity and scientific explorations, deals with the law of the Church. Thus, he keeps before his eyes a social community, whose relations stem from the endowment and require an appropriate approach, including a legal one within the same unity of the word and sacrament. The point of reference for justifying and understanding a legal phenomenon in the social dimension of faith is in the first place the Church itself, and specifically its legal aspects. There is a difference in approach to the Church between a theologian, ecclesiologist, and a canonist. However, the law of the Church does not use a different concept of the Church than theology does. The same Church is the matter of interest for a theologian and a canonist. Nevertheless, a theologian is supposed to be a theologian and a canonist should be a canonist. On the other hand, a canonist is not a lawyer either, since his research area is determined by the law rooted in the mystery of the Church.

The approach to legal aspects of the Church distinguishes the subject of study of a canonist and a theologian. It highlights the specificity of the canonist's view of the Church. The formal subject matter in accordance with which the canonist deals with the Church is its communal, that is, social character, which results from the social character of the Christian faith. Social bonds which create the Church community have a supernatural character and are a result of the gift of grace and uniting the believers presence of Christ in each of them. Looking at the Church, the canonist notices an active community of faith connected with the system of social relations. The foundation of these typical relations manifesting in activity is a lively presence of the word and sacrament. Thus, social relationships express the relation of the faithful to God. This social reality, whose foundations were laid by Christ, becomes the matter of interest of a canonist who learns and expresses it. He draws conclusions from it, thanks

[29] Sobański, "Wprowadzenie do zagadnień roli prawa w Kościele," 17–20.

to which social bonds of faith are embodied in their historical shape. Defining them requires an appropriate legal apparatus available to a canonist.[30]

A theologian's ecclesiology in a canonist's activity becomes legal ecclesiology. However, Sobański goes further in his statements about the role of a canonist and specificity of his scientific approach to law. He points out that the issue of highlighting the basics of law in the Church should be the matter of interest of ecclesiology, not necessarily the legal one. In this case, theology of canon law would not be necessary, and the role of a canonist would be reduced to dealing only with the positive side of law. Legal ecclesiology can, as a matter fact, take advantage of the achievements of theologians, but should remain aware of the differences in justification, which result from the specificity of formal aspects of the subject of research, which is the Church. A canonist should consolidate knowledge about the Church and always keep in mind its whole mystery. The point of reference for a canonist are legal aspects of the Church, that is, the law which is a part of its reality. He strives to answer the fundamental questions which go beyond highlighting its foundations and thus exceeds a theologian's capacity. These questions concern ontological issues of canon law, such as the law of the Church as an "entity," and study its efficient and final cause, its essence and relation to other entities within one Church community.[31] The law of the Church is not a supplementary value, external or useful for ensuring law and order, avoiding disputes or eliminating conflicts in the Church community. Being a part of the structure of the Church, it participates in its mission. It is one of the elements through which the Church fulfils its objective of a "sign and instrument of salvation." In this perspective, the task of a canonist with regard to basic issues of canon law goes beyond its justification. He should show canon law in the way that it participates in the mystery of salvation realized by the Church.[32]

Together with the questions of ontological character, there appears an epistemological issue of learning about canon law adequately to its essence. This problem goes beyond the range of interest of theologians since it concerns the legal experience itself within the Church community. This area of research can be explored only by a canonist having knowledge of legal sciences, combining it with the ability to recognize legal consequences of faith in the ecclesial community. The task of a canonist is synchronizing legal thought with the ecclesial view of law. However, he should do it by first referring to the starting point and shedding light on the ecclesial law. His knowledge of legal sciences is not useless, after all canon law developed in continuous contact with the European legal culture. What is more, its communicative value results from the fact that canon

[30] Sobański, "Wprowadzenie do zagadnień roli prawa w Kościele," 13–14.

[31] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 12.

[32] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 30.

law is one of the signs and instruments of salvation. Communicating with the world, it must use the language understood by it. The achievements of the legal thought are not worthless for a canonist's activity.[33]

The formal subject distinguishes a canonist and a theologian in their approach to the same reality of the Church. Nevertheless, a theologian can also explore a legal experience within an ecclesial community and its effects in the form of existing legal institutions. However, he will limit himself to the analysis of theological elements present in law or its norms and institutions. His approach leads to demonstrate only legal aspects of particular institutions or, if appropriate, existing norms. However, he leaves aside law itself. A canonist is interested in the law originating from the essence of the Church, and not theological elements having a legal aspect due to the fact they belong to the structure of the Church. The objective of such an approach to law in the Church would only be displaying theological dimensions present in ecclesial law. In other words, such a theology of canon law would be reduced to exposing legal-canonical elements assigned to the Church by Christ. In consequence, it would not be a theology of law since it does not make law its matter of interest or even does not reach law. It deals with theological objectives included in the legal system. The task of a canonist who deals with theology of canon law does not limit itself to drawing theological conclusions from theological structures of the Church, but should aim to display the theological aspect of legal structures.[34]

Theology versus Canon Law Studies

In his last manual dedicated to theology of canon law, Sobański explains in what way he understands and describes this scientific discipline, theology of canon law. It is a discipline which strives to answer basic questions asked of the law of the Church, particularly its ontological and epistemological issues.[35] This general formulation of ontological and epistemological problems includes the issues discussed by the Author in the introduction to canon law studies, which as he himself noticed, was called theology of canon law due to *locus teologicus* of the discussed ideas. What is examined is ecclesial law, and if the Church is the subject matter of theology, then its law should also share the dimension of theological deliberations with it. Undoubtedly, this name signifies not only

[33] Remigiusz Sobański, "Epistemologiczne problemy pojęcia prawa kanonicznego," *Prawo Kanoniczne* 33 (1990): 57–58.

[34] Sobański, *Zarys teologii prawa kościelnego*, 16–17.

[35] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 12.

an appropriate approach to the issues of canon law, but also treating research achievements in this field as an introduction to canon law. What is important is drawing attention to the fact that we deal with canon law, which in the first place is the Church phenomenon, and then as such it becomes a legal phenomenon. For this reason, the study of canon law should not begin with a lecture on the existing norms but with getting to know the basis for their existence and the purposes for which they were formulated. It is not only about interim objectives. The aim which permeates them is building the Church in which and through which the faithful anticipate their salvation. Without this fundamental context, the same norms, even supported by theological references, may remain in the sphere of pure legal solutions functioning in opposition to internal structural bonds constituting an ecclesial community. Hence, theology in this meaning is the introduction to canon law studies as knowledge of its basic issues. Theology of canon law, dealing with the basics and salvific function of canon law, clearly goes beyond previously existing issues treated as the introduction to canon law studies.[36]

The area of research determined in this way does not remain indifferent to the question about its attitude to canon law studies, which name is used to refer to the whole knowledge of canon law. Sobański points out that raising the issue in this way may lead to understanding theology of canon law as a discipline existing outside canon law studies. This view can be strengthened by treating the study of canon law as a legal discipline, if the method of legal sciences will determine its legal character. Theology of canon law would have, in this situation, the status of a discipline independent of canon law studies. As every reality, also canon law could be examined in the light of the revelation. Thus, theology of canon law would exist similarly to theology of law, and even could constitute, in the Catholic interpretation, a kind of introduction to it. An analysis of the structures of the Church law could offer law certain new categories, which would make it possible to discover a saving role of law in general.[37]

However, theology of canon law has a common matter of interest with the study of canon law, namely, the law of the Church. This fact places it within the canon law science. Learning about canon law is inseparably associated with getting to know the Church. Theology of canon law falls into the scope of theological knowledge. It is not outside canon law study, since sharing with it one subject of knowledge it indicates its foundations, which make it possible to draw conclusions with the remaining research areas. All other aspects of discovering canon law remain secondary to the theological approach.[38]

[36] Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego," 27.

[37] Sobański, *Zarys teologii prawa kościelnego*, 14.

[38] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 16–17.

Within one study of canon law one can distinguish many specific scientific disciplines. The multitude of research points of reference and methodological differences make it possible to look at the study of canon law as a theological science, which does not cancel out its affiliation with other sciences, also the legal ones.[39] The classification of canon law as a theological science, according to Sobański, determines its subject of reference, which is ecclesial law as a religious phenomenon in the first place and then a legal one.

Theology versus Theory of Canon Law

Since the very beginning of his interest in canon law, Sobański has used the term theology of canon law to determine fundamental issues of canon law indicating its theological foundations.[40] It resulted from methodological preferences in terms of the right gnoseological choices. To develop the introduction to canon law science, one should refer to theology pointing to the ecclesial base of the law of the Church, which results from its essence. Sobański delivered lectures on such a subject for almost twenty years at the Faculty of Canon Law of the Academy of Catholic Theology in Warsaw. The name was supposed to emphasize methodological orientation not only of the lecture content, but also canon law study itself. It could suggest, however, that within ecclesial sciences, there may be two sciences of canon law—a legal one (canon law science) and a theological one (theology of canon law). Therefore, in the next manuals as well as lectures, Sobański applied the term theory of canon law.[41] The change of the name was caused by the fact that with regard to basic issues theological approach to canon law did not have to be emphasized so much. The foundations of canon law were included in theological deliberations on a permanent basis. There was also no need to underline theological approach in opposition to the theory of law in its positivist origin. Apart from that, as he stated earlier, as a new discipline, it was not clearly defined and its subject matter was being discussed. What connected those approaches within theology of law were the issues of ecclesial law's existence, emphasizing its theological dimension and

[39] Remigiusz Sobański, *Nauki podstawowe prawa kanonicznego. I. Teoria prawa kanonicznego* (Warszawa: Wydawnictwo UKSW, 2001), 18.

[40] This is confirmed by the article published in 1972 entitled "Teologia prawa kanonicznego jako nauka o ontologicznych podstawach prawa kanonicznego," as well as in the book under the title *Zarys teologii prawa kościelnego* published by Sobański in 1973.

[41] Remigiusz Sobański, *Teoria prawa kościelnego* (Warszawa: Wydawnictwo ATK, 1991).

pointing to its purpose.[42] On the other hand, using the term theology of canon law could have suggested breaking the connection between canon law and legal sciences. Due to this fact, making further research explorations Sobański created a holistic approach to canon law by comprising its fundamental issues, which were not limited to the ones indicated earlier. Apart from the issues traditionally included in theology of canon law, such as its foundations, justification, concept, sources (the law of God), binding nature, and purpose, he added new issues discussed in the theory of law, namely, an ecclesial act, customary law, canon norm (concept, application), the dynamism of law (legal entities, application, compliance with the law, application of law, specification of a legal norm). He examined all these issues by taking advantage of the achievements of legal sciences with their appropriate reference to canon law, stressing its autonomy as a Church phenomenon.

Favoring the term theory of canon law by Sobański resulted also from the need to develop a theory which would integrate and classify research results, whose aim was to make what is called law in the Church more accessible. The law of the Church is understood as ecclesial law and as such it is present in the world and legal culture.[43] Similarly to law, also ecclesial law is a complex phenomenon, which is reflected in the form of organizational system, a collection of norms as a cultural phenomenon and social fact. For this reason, the approach to research on canon law can be taken on many research grounds and by means of different scientific methods. However, all these possibilities of exploration refer to ecclesial law, which in the first place is a religious phenomenon and as such becomes a cultural, social or even political occurrence.[44] The difference between the approach of theology and theory of ecclesial law concerns only the aspect-oriented interpretation of the subject, which is ecclesial law. In theology, canon law is perceived as the Church phenomenon, whereas in theory as a legal reality. The theological aspect determines the question about the law and its reference to salvation if it is an element of the Church structure and shares with it its aim as a sign and the instruments of salvation. The legal aspect is the point of view of lawyers.[45]

The knowledge concerning basic issues of canon law should integrate the findings made from the theological and legal point of view. In this way, a common theory of canon law can be made. At the same time, the theory integrating basic knowledge of canon law sets aside useless discussion about the affiliation of the same canon studies with theological or legal sciences. Its place among theological studies is ensured by the subject matter, which is the law of the Church, since canonistic findings finally concern the Church. On the other hand,

[42] Sobański, "Zagadnienia wstępu do nauki prawa kanonicznego," 26–27.

[43] Sobański, "Teoria prawa kościelnego wśród nauk teologicznych i prawnych," 181.

[44] Sobański, *Nauki podstawowe prawa kanonicznego. II. Teologia prawa kościelnego*, 16.

[45] Sobański, *Nauki podstawowe prawa kanonicznego. I. Teoria prawa kanonicznego*, 16–17.

one cannot deny that canon law studies belong to legal sciences. It concerns one of the areas of law which exists in a particular community.[46]

* * *

The decree issued by the Congregation for Catholic Education reforming canon law studies at the Faculties of Canon Law did not change Sobański's views on theology of canon law.[47] He did not join the discussion on formulating a clearer definition of what this new discipline prevailing in the lecture of canon law is. *Ius sequitur vitam*, but knowing Sobański's scientific activity it could be said that law still falls behind. From current discussion it is difficult to draw explicit conclusions about what this discipline is from the point of view of the Congregation. In terms of all the subjects taught at the faculties of canon law I get the impression that law got misplaced somewhere in the ecclesial law. Let us hope it will not do harm to ecclesial law due to its dejuridization tendency. In order to be the law of the Church, canon law must be first of all juridical. This is what Sobański continuously cared for and emphasized in his research.

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[46] Sobański, "Teoria prawa kościelnego wśród nauk teologicznych i prawnych," 184–185.

[47] Remigiusz Sobański, "Uwagi o studiach prawa kanonicznego (na marginesie Dekretu Kongregacji Wychowania Katolickiego z 2.9.2002)," in *Semel Deo dedicatum non est ad usum humanos ulterius transferendum. Księga pamiątkowa dedykowana ks. prof. dr. hab. Julianowi Kałowskiemu MIC z okazji siedemdziesiątej rocznicy urodzin*, ed. Józef Wroceński, Bożena Szewczul, and Andrzej Orczykowski (Warszawa: Wydawnictwo ATK, 2004): 21–31.

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Tomasz Gałkowski

Théologie du droit selon le Professeur Remigiusz Sobański

Résumé

Remigiusz Sobanski (†2010) a bénéficié d'une reconnaissance dans le monde de la canonistique postconciliaire. Ses recherches scientifiques ont été publiées dans de nombreuses langues. Cependant, la plupart de ses travaux scientifiques ont été présentés en polonais. Voilà pourquoi l'Auteur du présent article s'intéresse à des études inconnues de la communauté des canonistes pour présenter les points de vue de Sobański sur la théologie du droit canonique, dont le sujet était l'objet principal de son intérêt scientifique. Il présente le champ thématique de la théologie du droit canonique, son rôle par rapport aux questions fondamentales du droit canonique, mais aussi son insuffisance. Sobański pensait que pour illustrer pleinement les questions fondamentales du droit canonique, l'approche théologique devait coexister avec l'approche juridique au sein d'une seule et même théorie du droit canonique.

Mots-clés: Remigiusz Sobański, théologie du droit canonique, théorie du droit canonique, canonistique

Tomasz Gałkowski

La teologia del diritto secondo il professor Remigiusz Sobański

Sommario

Remigiusz Sobański (†2010) ha goduto di riconoscimenti nel mondo degli studi canonici postconciliari. La sua ricerca scientifica è stata pubblicata in molte lingue. Tuttavia, la maggior parte dei risultati scientifici sono stati presentati in polacco. Per questo motivo, l'Autore del presente lavoro si rivolge a studi sconosciuti alla maggior parte della comunità dei canonisti per presentare le opinioni di R. Sobański sulla teologia del diritto canonico, il cui argomento era l'oggetto principale dei suoi interessi scientifici. Il testo presenta la portata tematica della teologia del diritto canonico, il suo ruolo in relazione alle questioni fondamentali del diritto canonico, ma anche la sua insufficienza. R. Sobański riteneva che per illustrare pienamente le questioni fondamentali del diritto canonico, l'approccio teologico dovesse coesistere con l'approccio giuridico all'interno di una teoria del diritto canonico.

Parole chiave: Remigiusz Sobański, teologia del diritto canonico, teoria del diritto canonico, studi canonici

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The Research Activity of Rev. Prof. Remigiusz Sobański in the Field of Substantive Canon Law

Abstract: Remigiusz Sobański (1930–2010), a long-time professor at the Faculty of Canon Law of the Academy of Catholic Theology in Warsaw, and then at Cardinal Stefan Wyszyński University in Warsaw. Although his research focused mainly on the theory of canon law, he also published several dozen works in the field of canonical matrimonial law. These works cover four main research areas: marriage law (general rules), marriage consent, form of marriage, mixed marriages. Moreover, as a judicial vicar, he prepared and published several dozen sentences in the cases of *nullitatis matrimonii*.

Keywords: Remigiusz Sobański, marriage, matrimonial law, article, sentence

Rev. Remigiusz Sobański (1930–2010), a long-time professor at the Faculty of Canon Law at the Academy of Catholic Theology in Warsaw, and then at Cardinal Stefan Wyszyński University in Warsaw, was one of the most prominent canonists of the last decades. Even though the main area of his research interests was theory of the canon law, laying the foundations, after all, for the establishment of this discipline on the grounds of the science of canon law, together with other authors, he was also familiar with the dogmatics of the canon law, including the field of substantive matrimonial law. In his bibliography of almost 600 works, it is possible to trace in this area twenty dissertations and articles, as well as sixty-two court sentences delivered in cases of marriage nullity, in which he was a ponens.[1]

[1] Wojciech Góralski, "Remigiusz Sobański (1930–2010)," *Państwo i Prawo*, vol. 66, no. 3 (2011): 103–107; Wojciech Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki

Dissertations and Articles

The subject matter of Rev. Sobanski's dissertations and articles generally boils down to four thematic threads: matrimonial law *in genere*, marital consent, the form of entering into matrimony, and mixed marriages.

Within the general issues, the original study "Wyznaczniki kanonicznego prawa małżeńskiego" [Determinants of Matrimonial Canon Law] should be given special importance.[2] Bearing in mind the historical reasons concerning the institution of matrimony in Christian Europe, governed by *ius utrumqe*, when matrimony was governed exclusively by the canon law, and the subsequent rupture of this unity in the age of the Reformation, perpetuated by the entry into force of the great nineteenth-century codifications, the Author points out the peculiarities of the matrimonial canonical system. He considers the unity, indissolubility, and sacramentality of matrimony as its basic determinants, with special emphasis on the latter one. He states that the sacramentality of matrimony means that "a canonical marriage is concluded not by a declaration of will to enter into matrimony, but by an internal act of will expressed externally (in accordance with the law)."[3] He underlines that while in Polish law defects in the said declaration do not constitute grounds for marriage annulment (the article was written before the July 24, 1998, amendment to the Family and Guardianship Code),[4] under canon law many of them result in the invalidity of the marriage, which is primarily due to the indissolubility of the matrimonial bond. It is because the fact that marriage is created by the consent of the parties (as an internal act of will) and that it is indissoluble made the Church legislature "fortify" this act with a series of dispositions defining its shortcomings. "Without having the possibility of divorce," notes the canonist,

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prawa kanonicznego (szkic do badań szczegółowych)," in *Wkład Księdza Profesora Remigiusza Sobańskiego w rozwój kanonistyki. W dowód wdzięcznej pamięci o zasługach dla rozwoju kanonistyki. Materiały z konferencji naukowej zorganizowanej na Wydziale Prawa Kanonicznego UKSW w dniu 11 grudnia 2013 roku*, ed. Tomasz Gałkowski (Warszawa–Kraków: Scriptum, 2014), 87–88; Zbigniew Janczewski, "Sylwetka Księdza Profesora doktora habilitowanego Remigiusza Sobańskiego," in *Ksiądz Rektor Remigiusz Sobański – uczony, nauczyciel, sędzia*, ed. Wojciech Góralski (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2005), 29–32.

[2] Remigiusz Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," in *Małżeństwo w prawie świeckim i w prawie kanonicznym*, ed. Bronisław Czech (Katowice: Instytut Wymiary Sprawiedliwości. Ośrodek Terenowy przy Sądzie Wojewódzkim w Katowicach, 1996), 183–193.

[3] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 185.

[4] See *Ustawa z dnia 24 lipca 1998 r. o zmianie ustaw – Kodeks rodzinny i opiekuńczy, Kodeks postępowania cywilnego, Prawo o aktach stanu cywilnego, Ustawy o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej oraz niektórych innych ustaw* (Dz. U. 1998 Nr 117, poz. 757).

> canon law must focus on the moment of entering into matrimony and tie the legal effects to perversions of the will and to what is destructive to the marriage in its very essence. It would be at odds with Christian anthropology and would be downright inhumane for a law to condemn people to remain in a forced or extortionate marriage or with a person unfit for married life.[5]

According to Sobański, in the field of canon law, it is necessary to harmonize legal provisions regarding two principles derived from natural law: consensus as the causal reason of marriage and *ius connubii*, that is, the right of every person to marry. The norms set by the Church legislator constitute the product of these two principles and draw the line between a sufficient and insufficient will for marriage, a task that is by no means easy. To help in its execution come centuries of experience and the achievements of anthropology, psychology, and psychiatry.[6]

Somewhat related topic was taken up by Rev. Sobański in an article entitled. "Od nierozerwalności do nieważności. 'Rozwód' i 'orzeczenie nieważności małżeństwa'" [From Indissolubility to Nullity. 'Divorce' and 'Declaration of Nullity of Marriage'].[7] In the article, he explains what *indissolubilitas matrimonii* is; he focuses his attention on the declaratory (rather than constitutive) nature of the Church court judgment declaring the marriage nullity.[8]

In the work entitled "Adnotationes de competentia Ecclesiae in matrimonium,"[9] Sobański briefly discusses the Church's authority over marriage, noting, among other things, the role of the Church legislator in establishing legal norms with regard to such a significant institution for the Church. On the other hand, the application of canon law in missionary activity is the subject of yet another work entitled. "Canon Law of Marriage Applied in Missionary Activities."[10]

The subject of attention of the eminent canonist in the area of matrimonial law were not only the fundamental issues, but also the completely secondary ones. However, his innate insight and investigative inquisitiveness urged him

[5] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 186.

[6] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 187; See Zbigniew Janczewski, "Kanoniczne prawo małżeńskie w publikacjach ks. prof. Remigiusza Sobańskiego," in *Ksiądz Rektor Remigiusz Sobański – uczony, nauczyciel, sędzia*, ed. Wojciech Góralski (Warszawa: Wydawnictwo Uniwersytetu Kardynał Stefana Wyszyńskiego, 2005), 88–89.

[7] Remigiusz Sobański, "Od nierozerwalności do nieważności. 'Rozwód' i 'orzeczenie nieważności małżeństwa,'" *Przegląd Powszechny*, no. 3 (2008): 11–18.

[8] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 89.

[9] Remigiusz Sobański, "Adnotationes de competentia Ecclesiae in matrimonium," *Monitor Ecclesiasticus*, vol. 105 (1980): 301–305.

[10] Remigiusz Sobański, "Kanoniczne prawo małżeńskie stosowane w działalności misyjnej," *Nurt SVD*, vol. 31, no. 3 (1997): 44–67; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 90.

to quickly clarify anything that might be questionable. In the statement entitled "Zaświadczenie o spowiedzi przedślubnej?" [A Certificate of Pre-Marriage Confession?],[11] Sobański critically elucidates—from the point of view of Polish local law, universal law, and the assumptions of the internal sacramental forum—the practice of handing the nupturients slips of paper by the priest for confession (twice), which then, after being signed by the confessor, they should return to the parish office before the marriage (such an obligation was imposed by diocesan synods of the interwar period and contemporary ones). As a result of the detailed argument, Sobański assumes that the facts made on the internal forum are not recorded, and, what is more, the nupturients' give their data on a piece of paper to the confessor involuntarily, which stands "in contradiction with the manner of action in the internal sacramental field."[12]

When it comes to matrimonial consent, the former rector of the Academy of Catholic Theology has devoted several significant studies to it. An interesting study titled "Wartości wyznaczające normy kan. 1095–1103 KPK" [Values Determining the Norms of Can. 1095–1103 CIC] can be considered as leading here.[13] Asking about the *ratio legis* of canonical norms regarding consensual incapacity and defects in matrimonial consent, he points out, as above, two fundamental principles regarding matrimonial consent and the indissolubility of marriage. He draws attention to the proper orientation of the will of the nupturients toward the formation of a lifelong community of life and love: one and indissoluble, oriented toward their good and offspring. "It is this community," the author stresses, "that is the value that determines the norms of can. 1095–1103,"[14] and it is a value of an institutional nature, thus having an objective and permanent shape, prior to the persons forming it *in concreto*. The marriage entered into by the nupturients is therefore precisely institutional in nature, determined by the Church's teachings and its laws. Defined in this way, marriage delineates an indispensable space of freedom, but at the same time secures it. It would be a misunderstanding to contrapose the social good and legal order to the individual good. After all, the marital bond is an experience of "going beyond oneself." The good that determines the norms of can. 1095–1103 is marriage seen not in opposition to the human person and his or her rights and freedoms, but as a form of existence, related to the complementarity of man

[11] Remigiusz Sobański, "Zaświadczenie o spowiedzi przedślubnej?," *Prawo Kanoniczne*, vol. 37, no. 3–4 (1994): 259–266.

[12] Sobański, "Zaświadczenie o spowiedzi przedślubnej?," 266; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 90.

[13] Remigiusz Sobański, "Wartości wyznaczające normy kan. 1095–1103 KPK," in *Podmiotowość osoby ludzkiej i konsens małżeński*, ed. Jan Krajczyński (Płock: Płocki Instytut Wydawniczy, 2005), 19–35.

[14] Sobański, "Wartości wyznaczające normy kan. 1095–1103 KPK," 33.

and woman, that occurs as a result of mutual devotion and acceptance of the counterparts.[15]

Another article, entitled "Dylematy przy stosowaniu kanonu 1095" [Dilemmas in the Application of Canon 1095][16] is a thoroughly original reflection on the tension between the priestly and judicial functions of a Church judge in deciding cases of marriage nullity under the titles contained in the said canon. This tension is noted between the two goals of Church law: on the one hand, "to protect the identity of the community, the integrity of the faith, and the authenticity of the word and sacrament; on the other hand, to support the believer in the realization of his Christian vocation and to assist him in solving his life situations in a manner as close as possible to the ideals of the faith."[17] Very often the faithful misunderstand the principle of the indissolubility of marriage, meanwhile, Rev. Sobański states: "The Church would put its credibility at stake if it abandoned the principle of matrimonial indissolubility out of pity for the lot of mankind."[18]

Can. 1095, no. 3 CIC has also become the subject of Sobański's work entitled "Transseksualizm a zdolność do zawarcia małżeństwa. *Quaestio disputanda*" [Transsexualism and the Capacity to Marry. *Quaestio disputanda*].[19] Recognizing this problem (the so-called change of sex) as a new one of great practical importance, the author notes that in assessing the transgender people's (as well as intersex people's) capacity to marry, the issue of impotence plays a key role (when it is certain, they cannot be allowed to marry). The impediment of impotence lies in the physical sphere, while the mental capacity of the affected person remains intact. In assessing transsexualism, Rev. Sobański recommends caution, as it is a phenomenon that has not yet been sufficiently studied (diagnoses are not always certain). In relation to people claiming to have "changed their sex" and providing documentation as a proof, it is not always clear that transsexualism is indeed involved (it is not certain that the psychological satisfaction achieved after "changing sex" is permanent).[20]

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[15] Sobański, "Wartości wyznaczające normy kan. 1095–1103 KPK," 34–35; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 91.

[16] Remigiusz Sobański, "Dylematy przy stosowaniu kanonu 1095," *Prawo Kanoniczne*, vol. 48, no. 1–2 (2005): 49–55. See Wojciech Góralski, "Problematyka małżeństwa i rodziny w kwartalniku *Prawo Kanoniczne*," *Prawo Kanoniczne*, vol. 51, no. 1–2 (2008): 46.

[17] Sobański, "Dylematy przy stosowaniu kanonu 1095," 55.

[18] Sobański, "Dylematy przy stosowaniu kanonu 1095," 54–55; Góralski, "Problematyka małżeństwa i rodziny," 46–47.

[19] Remigiusz Sobański, "Transseksualizm a zdolność do zawarcia małżeństwa. *Quaestio disputanda*," in *Plenitudo legis – dilectio. Księga pamiątkowa dedykowana prof. dr. hab. Bronisławowi W. Zubertowi z okazji 65. rocznicy urodzin*, ed. Antoni Dębiński and Elżbieta Szczot (Lublin: Redakcja Wydawnictw KUL, 2000), 653–664.

[20] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 92.

Two works were dedicated by Professor Sobański to the simulation of matrimonial consent. In the first one, "Symulacja częściowa w ujęciu kan. 1086 § 2 a nauka o małżeństwie konstytucji *Gaudium et spes*" [Partial Simulation as Defined by Canon 1086 § 2 and the Doctrine of Marriage of the *Gaudium et spes* Constitution][21] asks what conclusions from the Council's doctrine on marriage come to the Church jurisprudence in relation to the mentioned title of nullity of marriage. In this study, the reader witnesses an attempt of "translating" the content of nn. 48–49 of the aforementioned Council's document into the applicable, code (CIC of 1917) norm on simulation in the exclusion of *omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem*. He formulates especially interesting comments regarding this first form of exclusion. He recognizes that the constitution *Gaudium et spes* tells us to view marriage in a social and ecclesiological context, which was impossible to notice in can. 1081 § 2 of the 1917 CIC, in which the social dimension was limited only to the tasks of bearing and raising offspring.[22]

On the other hand, in a text entitled "Wpływ mentalności wolnych związków na ważność zgody małżeńskiej" [The Influence of the Mentality of Free Relationships on the Validity of Matrimonial Consent][23] Rev. Sobański identifies the need for a thorough evaluation of cases brought to the judicial forum and concerning the exclusion of *bonum sacramenti.* This is because the growing pro-divorce mentality and the practice of the so-called free relationships can affect the formulation of a counterparty's intentions regarding the indissolubility of marriage. However, it is necessary to distinguish between a nupturient's views and the actual direction of his or her will.[24]

As many as six articles penned by Sobański raise the question of the form of marriage. The study entitled "*Velut Ecclesia domestica* a cywilna forma zawarcia małżeństwa" [*Velut Ecclesia domestica* and the Civil Form of Entering into Marriage],[25] in which the author addresses the issue of jurisdiction over the marriage of Church and state and the role of the family as a "domestic church" in the life of the universal Church, should be considered particularly original. He recalls that mandatory civil marriages, introduced in France in 1792, in

[21] Remigiusz Sobański, "Symulacja częściowa w ujęciu k. 1086 § 2 a nauka o małżeństwie konstytucji *Gaudium et spes*," *Śląskie Studia Historyczno-Teologiczne*, vol. 2 (1969): 31–49.

[22] See Janczewski, "Kanoniczne prawo małżeńskie," 36–37; Honorata Typańska, "Pola aktywności księdza oficjała Remigiusza Sobańskiego," In *Sędzia i Pasterz. Księga pamiątkowa w 50-lecie pracy ks. Remigiusza Sobańskiego w Sądzie Metropolitalnym w Katowicach (1957–2007)*, ed. Honorata Typańska (Katowice: Księgarnia Św. Jacka, 2007), 11–12.

[23] Remigiusz Sobański, "Wpływ mentalności wolnych związków na ważność zgody małżeńskiej," *Annales Canonici*, vol. 4 (2008): 5–20.

[24] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 93.

[25] Remigiusz Sobański, "*Velut Ecclesia domestica* a cywilna forma zawarcia małżeństwa," *Roczniki Teologiczno-Kanoniczne*, vol. 30, no. 5 (1983): 27–40.

some German states in the mid-19th century, in Italy in 1865 (until 1929), in Switzerland in 1874, in reunited Germany in 1875, and in the Polish People's Republic in 1945, were perceived by the Church as a serious threat to the sanctity of marriage and a violation of its own and inalienable rights with regard to this institution. Although initially strongly in opposition to the idea of civil marriage, over time the Church had to adapt her laws to the new situation and recognize the civil form of marriage of her believers (this was done by Benedict XIV in 1746). Sobański explains that the state cannot be required to give up its own matrimonial law, nor can it be denied competence in this area, after all, marriage is one of the so-called mixed issues. Characterizing the two legal orders in the sphere of marriage, he analyzes the institution of civil marriage of Catholics. He goes on to state that "marriage, being the sacramental sign of Christ's love for people, the image of the union of Christ and the Church, is the historical place of the Church's fulfillment,"[26] and that is why "it is called the home Church,"[27] through which the Church's presence in the world is realized. He adds that an obligation arises for Christians to take care "that their marriage is noticed and recognized as such in the secular community."[28] The civil form of marriage opposes neither faith nor Christian morality.[29]

In a statement entitled "Opinia o asystowaniu przy małżeństwach emigrantów" [Opinion on Assisting with Emigrant Marriages],[30] the reader is introduced to a problem that arose in Silesia in the 1980s: mass migration to Germany triggered a number of questions about emigrants marrying in their former dioceses in the country. Rev. Sobański argues that—in the light of CIC norms—such persons have lost residence in their parishes and dioceses, and thus their former parish priest no longer has the right to assist in their marriages (as emigrants). In addition, he puts forward solutions to yet other issues related to emigrants' marriages concluded in Poland.[31]

The establishment of the Military Ordinariate in Poland has led to disagreements here and there about the authority of military chaplains to assist at marriages. They gave Professor Sobański an inducement to speak twice on the subject. In an article entitled "Czy proboszcz parafii wojskowej może delegować upoważnienie do asystowania przy zawieraniu małżeństwa?" [Can the Military

[26] Sobański, "*Velut Ecclesia domestica*," 35.

[27] Sobański, "*Velut Ecclesia domestica*," 35.

[28] Sobański, "*Velut Ecclesia domestica*," 37.

[29] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 94.

[30] Remigiusz Sobański, "Opinia o asystowaniu przy małżeństwach emigrantów," *Wiadomości Diecezjalne*, vol. 58, no. 8 (1990): 481–482.

[31] See Janczewski, "Kanoniczne prawo małżeńskie," 38–39; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 96.

Parish Priest Delegate the Authority to Assist at Marriages?],[32] he took the position that since the military parish priest is by virtue of his office authorized to assist at the marriage of nupturients, at least one of whom belongs to the territory he represents (within the boundaries of his district), he is not competent to assist at the marriage of persons who do not belong to such a territory. The military parish priest, like any personal parish priest, requires in such a situation an authorization delegated to him by the Ordinary of the place or the parish priest where the marriage is being contracted (even when it takes place in a garrison church). Another important statement in the publication reads:

> A personal parish priest, including a military parish priest, cannot validly delegate the authority to assist. If he himself is prevented from assisting in his own church to those under his jurisdiction, another priest (or deacon) needs a delegation from the local ordinariate or parish priest, in accordance with can. 1111 (unless a territorial parish priest would assist in accordance with can. 1109).[33]

Sobański returned to the issue of a military parish priest's delegation of authority to assist at marriages of persons under his jurisdiction two years later in an article titled "Ponownie o proboszczach wojskowych i delegacji upoważnienia do asystencji małżeńskiej" [Once Again on Military Pastors and the Delegation of Authority to Assist at Marriages].[34] The author firmly maintains that assisting at marriages is not an act of executive power, which means that can. 137 (on delegation and subdelegation of executive power) does not apply here. Consequently, he accepts that—taking into consideration can. 1111 § 1 of the CIC (special act), in which there is no norm that would authorize an ordinariate and a personal pastor to delegate the authority in question)—an ordinariate and a military parish priest cannot validly delegate the authority to assist at marriages.[35]

Two studies by the long-time judicial vicar of the Katowice archdiocese on the form of marriage relate to the so-called concordat marriage, as defined in Article 10 of the Polish Concordat of July 28, 1993.[36]

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[32] Remigiusz Sobański, "Czy proboszcz parafii wojskowej może delegować upoważnienie do asystowania przy zawieraniu małżeństwa?," *Prawo Kanoniczne*, vol. 44, no. 1–2 (2001): 13–20.

[33] Sobański, "Czy proboszcz parafii wojskowej może delegować upoważnienie do asystowania przy zawieraniu małżeństwa?," 20; see Janczewski, "Kanoniczne prawo małżeńskie," 39–40; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 97.

[34] Remigiusz Sobański, "Ponownie o proboszczach wojskowych i delegacji upoważnienia do asystencji małżeńskiej," *Prawo Kanoniczne*, vol. 46, no. 1–2 (2003): 31–37.

[35] See Janczewski, "Kanoniczne prawo małżeńskie," 40–41; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 99.

[36] *Konkordat między Stolicą Apostolską i Rzecząpospolitą Polską z 28 lipca 1993 r.* (1998, Dz. U. nr 51, poz. 318).

"Uwagi o zmianach w polskim prawie postulowanych w art. 10 Konkordatu z 28 lipca 1993 roku" [Remarks on Changes in Polish Law Postulated in Article 10 of the Concordat of July 28, 1993][37] is a study that addresses the problem of the relationship of the form of canonical marriage to the form of civil marriage. The author stresses that it is something important for Catholics "to be able to marry in a form that suits their beliefs, and that their marriage enjoys recognition in the state forum."[38] If the civil form of marriage is obligatory for everyone, the views of Catholics, who are thus treated as if getting married is not a religious act for them (they feel discriminated against compared to non-believers), will not be respected. Moreover, the compulsory secular form of marriage leads to the sanctioning of an important inequality. Hence, the form of concordat marriage, that is, canonical marriage, which—after certain conditions are met—acquires effects in the state forum, is fully appropriate.[39]

The second text (statement) entitled "Zaświadczenie urzędu stanu cywilnego a przesłanki małżeństwa 'konkordatowego'" [Certificate of the Registry Office and the Premises of a "Concordat" Marriage][40] touches upon the topic of the conditions for recognizing a canonical marriage as validly concluded also in the light of the Polish law (as defined in normative acts of the Republic of Poland),[41] and in particular the certificate issued by the head of the Registry Office stating the absence of circumstances excluding the possibility to contract marriage.[42]

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[37] Remigiusz Sobański, "Uwagi o zmianach w polskim prawie postulowanych w art. 10 Konkordatu z 28 lipca 1993 roku," in *Czy potrzebna jest w Polsce zmiana prawa rodzinnego i opiekuńczego? Materiały z Ogólnopolskiej Konferencji Naukowej zorganizowanej w dniach 21 i 22 września 1995 roku w Katowicach*, ed. Bronisław Czech (Katowice: Instytut Wymiaru Sprawiedliwości. Ośrodek Terenowy przy Sądzie Wojewódzkim w Katowicach, 1997), 281–290.

[38] Sobański, "Uwagi o zmianach w polskim prawie postulowanych w art. 10 Konkordatu z 28 lipca 1993 roku," 283.

[39] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 100.

[40] Remigiusz Sobański, "Zaświadczenie urzędu stanu cywilnego a przesłanki małżeństwa 'konkordatowego,'" *Państwo i Prawo*, vol. 58, no. 5 (2003): 30–33.

[41] See *Ustawa z dnia 24 lipca 1998 r. o zmianie ustaw – Kodeks rodzinny i opiekuńczy, Kodeks postępowania cywilnego, Prawo o aktach stanu cywilnego, Ustawy o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej oraz niektórych innych ustaw* (Dz. U. 1998 Nr 117, poz. 757); *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 26 października 1998 r. w sprawie szczegółowych zasad sporządzania aktów stanu cywilnego, sposobu prowadzenia ksiąg stanu cywilnego, ich kontroli, przechowywania i zabezpieczenia oraz wzorów aktów stanu cywilnego, ich odpisów, zaświadczeń i protokołów* (Dz. U. 1998, Nr 136, poz. 884); *Obwieszczenie Ministra Spraw Wewnętrznych i Administracji z dnia 4 listopada 1998 r. w sprawie ogłoszenia wykazu stanowisk, których zajmowanie upoważnienia do sporządzenia zaświadczenia stanowiącego podstawę sporządzenia aktu małżeństwa zawartego w sposób określony w art. 1 § 2 i 3 Kodeksu rodzinnego i opiekuńczego* (M.P. 1998, Nr 40, poz. 554).

[42] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 101–102.

When it comes to the topic of mixed marriages, Rev. Sobański's oeuvre includes two works—both date back to the early years of his scholarly activity.

In a statement entitled "Instrukcja o małżeństwach mieszanych" [Guidance on Mixed Marriages],[43] the reader is introduced to a commentary on the Instruction *Matrimonii sacramentum* issued on March 18, 1966, by the Congregation for the Doctrine of the Faith.[44] Presenting and commenting on the various provisions of this ecumenical document, Sobański explains their origin and emphasizes that the Church, with a concern for preserving the revealed doctrine on marriage, revised the previous regulations on mixed marriages in the spirit of Vatican II's decree *Unitatis redintegratio*.[45] On the other hand, in an article titled "Nowe przepisy o małżeństwach mieszanych" [New Regulations on Mixed Marriages],[46] he discusses the dispositions of Paul VI's motu proprio *Matrimonia mixta* of March 31, 1970,[47] a document that significantly changed the discipline of mixed marriages. In his commentary, Sobański emphasizes the norm defining the conditions for obtaining a dispensation from the obstacle of *disparitas cultus*, also notes that the far-reaching changes introduced motu proprio from the field of mixed marriages testify that the legislator perceives it in the perspective of Christian unity and raising the dignity of Christian marriage.[48]

Published Sentences *coram* Sobański

As a long-time official of the Metropolitan Court in Katowice, Rev. Sobański served as a ponens in terms of adjudicating cases of marriage invalidity and thus prepared numerous sentences—as a rule, in the first and second instances, and exceptionally also in the third (under the authority of the Supreme Tribunal of the Apostolic Signatura). Of several hundred sentences, 60 have been published (mostly in the yearbook *Ius Matrimoniale*). The in-depth theoretical knowledge

[43] Remigiusz Sobański, "Instrukcja o małżeństwach mieszanych," *Wiadomości Diecezjalne*, vol. 34 (1966): 99–102.

[44] Congregatio pro Doctrina Fidei, "Instructio Matrimonii sacramentum" (18.03.1966), *Acta Apostolicae Sedis*, vol. 58 (1966): 235–239.

[45] See Janczewski, "Kanoniczne prawo małżeńskie," 33–34.

[46] Remigiusz Sobański, "Nowe przepisy o małżeństwach mieszanych," *Ateneum Kapłańskie*, vol. 75 (1970): 449–459.

[47] Paulus VI, "Motu proprio *Matrimonia mixta*" (31.03.1970), *Acta Apostolicae Sedis*, vol. 62 (1970): 257–263.

[48] See Janczewski, "Kanoniczne prawo małżeńskie," 35; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 102.

in the field of canon matrimonial law allowed the experienced Church judge to apply it in the sphere of judicial practice. In the sentences he prepared, their *in iure* (legal recitals) sections are particularly noteworthy. In general, it can be said that they are often true scientific deductions of the relevant titles of marriage invalidity. Their author generally refers to the jurisprudence of the Tribunal of the Roman Rota, but also reveals his own inventiveness. The vast majority of the *coram* Sobański sentences relate to cases of *nullitatis matrimonii* recognized from titles of nullity within the matrimonial consent.

When it comes to the titles of nullity pertaining to the marriage consensus, the following should be mentioned: incapacity to undertake the essential duties of marriage (can. 1095, no. 3 CIC)—34 sentences[49]; error due to malice (can. 1098 CIC—six sentences[50]; error as to the quality of the person (can. 1097 § 2 CIC)—four sentences[51]; simulation of full matrimonial consent (can. 1101 § 2 CIC)—two sentences[52]; exclusion of offspring (can. 1101 § 2 CIC)—two sentences[53]; grave fear (can. 1103 CIC)—two sentences[54]; exclusion of indissolubility of marriage (can. 1101 § 2 CIC)—two sentences[55]; grave defect of discretion of judgement (can. 1095, no. 2 CIC)—two sentences[56]; coercion and fear (can. 1103 CIC)—one sentence[57]; exclusion of matrimonial life

[49] See *Wiadomości Diecezjalne*, vol. 59 (1991): 93–95; *Wiadomości Diecezjalne*, vol. 61 (1993): 300–302; *Wiadomości Diecezjalne*, vol. 62 (1994): 211–215; *Ius Matrimoniale*, vol. 5 (1994): 103–109; *Ius Matrimoniale*, vol. 1/6–7 (1996): 221–242; *Ius Matrimoniale*, vol. 2/8 (1997): 233–241; *Ius Matrimoniale*, vol. 3/9 (1998): 207–216, 217–227; *Ius Matrimoniale*, vol. 4/10 (1999): 273–283, 257–264, 265–271; *Ius Matrimoniale*, vol. 8/14 (2003): 221–230; *Ius Matrimoniale*, vol. 9/15 (2004): 211–221, 223–240; *Ius Matrimoniale*, vol. 10/16 (2005): 221–226; 227–230, 231–234, in *Podmiotowość osoby ludzkiej i konsens małżeński*, ed. Jan Krajczyński (Płock: Płocki Instytut Wydawniczy, 2005), 103–105, 107–112; *Ius Matrimoniale*, vol. 11/17 (2006): 163–169, 171–177, 179–184, 12/18 (2007): 161–166; *Ius Matrimoniale*, vol. 13/19 (2008): 193–199,201–208, 209–218, 215–219, 221–225; *Ius Matrimoniale*, vol. 14/20 (2009): 223–227, 217–221, 211–215, 205–210; *Ius Matrimoniale*, vol. 15/21 (2010): 199–211, 213–216.

[50] See *Wiadomości Diecezjalne*, vol. 59 (1991): 232–236; *Entscheidungen kirchlicher Gerichte. Leitsätze* (Bonn 1991), 8; *Entscheidungen kirchlicher Gerichte. Leitsätze* (Bonn 1992), 29; *Ius Matrimoniale*, vol. 5/11 (2000): 241–250; *Ius Matrimoniale*, vol. 7/13 (2002): 213–225, 233–237.

[51] See *Ius Matrimoniale*, vol. 4 (1993): 92–97; *Ius Matrimoniale*, vol. 7/13 (2002): 213–225, 227–231; *Ius Matrimoniale*, vol. 11/17 (2006): 185–190.

[52] See *Ius Matrimoniale*, vol. 7/13 (2002): 207–212; cf. in *Podmiotowość osoby ludzkiej*, 113–117;

[53] See *Ius Matrimoniale*, vol. 4 (1993): 98–106; *Ius Matrimoniale*, vol. 4/10 (1999): 285–289.

[54] See *Ius Matrimoniale*, vol. 10/16 (2005): 235–238; *Ius Matrimoniale*, vol. 13/19 (2008): 221–225.

[55] See *Ius Matrimoniale*, vol. 4/10 (1999): 291–297; *Ius Matrimoniale*, vol. 9/15 (2004): 231–240.

[56] See *Ius Matrimoniale*, vol. 3/9 (1998): 207–216; *Ius Matrimoniale*, vol. 4/10 (1999): 257–264.

[57] See *Ius Matrimoniale*, vol. 9/15 (2004): 231–240;

(can. 1101 § 2 CIC)—one sentence[58]; mental illness (can. 1095, no. 1 CIC)—one sentence.[59]

In addition, one sentence for lack of canonical form (can 1108 CIC)[60] and one for new filing (can. 1644 CIC).[61] One decree of nullity of sentence has also been published (can. 1629 CIC).[62]

Limiting ourselves only to the sentences *coram* Sobański delivered due to incapacity to undertake the essential duties of marriage for mental reasons (can. 1095, no. 3 CIC), it is fair to say that the Ponens draws attention to the proper understanding of matrimonial consent (can. 1057 § 2 CIC) as an internal act of will (and not just a mere declaration). It is significant to frequently invoke—in the context of the disposition of the law with regard to the shortcomings of this act—the two principles already mentioned: the formation of marriage by an act of will and the human right to marry, which are closely linked.[63]

Inherent in Rev. Sobański's argument is an analysis of the aforementioned can. 1095, no. 3 of the CIC. He explains that this disposition of the Church legislature is based on the elementary assumption (derived from natural law) that no one can legally commit him/herself to what he or she cannot perform. He sees the essential duties of marriage in the light of can. 1055 § 1 of the CIC: the creation of matrimonial life, which presupposes the ability to give and receive each other's counterparties, requires full love, that is, "that special form of friendship through which spouses generously share everything between them, without unjust exceptions or selfish calculations" (Paul VI, Encyclical *Humanae vitae*). Such love requires the fulfillment of certain duties related to the welfare of the spouses, the bearing and raising of offspring, and the unity (fidelity) and indissolubility of the marriage. He points out that the inability to undertake (and fulfill) these duties must come from mental causes, which, however, should not be equated with mental illness, although it too may fall among them.

The Ponens very often states that true matrimonial love, which requires the fulfillment of essential matrimonial duties, is 'at odds' with egoism, self-seeking, tendencies to rule and govern, selfishness or intolerance. Meanwhile, marriage requires the ability to give oneself to another person, both physically and spiritually, while maintaining the autonomy and dignity of the persons. In addition, it requires overcoming one's own selfishness and recognizing one's own shortcomings, the ability to accept another person and understand his or her characteristics and one's own preferences, the ability to respect a separate

[58] See *Ius Matrimoniale*, vol. 4 (1993): 98–106.

[59] See *Ius Matrimoniale*, vol. 4/10 (1999): 249–255.

[60] See *Ius Matrimoniale*, vol. 6/12 (2001): 203–205.

[61] See *Ius Matrimoniale*, vol. 9/15 (2004): 241–244.

[62] See *Ius Matrimoniale*, vol. 15 (2010): 217–220.

[63] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 103–104.

opinion and to make concessions in conflict situations, and therefore the ability to go beyond one's own world. Analyzing individual cases, the Ponens repeatedly points out that the resolution of a particular case is not about the will to transfer the rights constituting the matrimonial community, but about the ability to do such an act. When such capacity is lacking, the marriage commitment—even with the best will—cannot be fulfilled and remains 'empty.'

The *coram* Sobański sentences are characterized by a strong distinction between an unsuccessful marriage and an invalid marriage. In his January 17, 1994, sentence Sobański states: "Thus, if the marriage turned out to be 'unsuccessful' (such is challenged in the Church court), the court must obtain an answer to the question of whether the 'lack of success' was due to insurmountable matrimonial difficulties, a lack of will to overcome them, or whether it occurred because the marriage with the partner in question exceeded the mental capacity of the person entering into it."[64] At the same time, he adds: "It is not a question of the ability to meet exorbitant, idealized requirements, but such as, according to Christian doctrine and practice, belong integrally to marriage, the lack of which makes it impossible to lead a married life."[65] At the same time, he points out that although this kind of impossibility in practice reveals itself after entering into marriage, the reasons causing it should already exist at the time of the marriage, as it is the actual state of affairs at that very moment that decides. The Judge-Professor emphatically repeats in his judgments after Pope John Paul II[66] that the mere assertion that a marriage has broken down in no way proves the inability of the counterparty to undertake the essential duties of marriage.[67]

Rev. Sobański points out the proper role of the expert in the cases in question. He recognizes that the court would be exceeding its competence if it were to assess the validity of the analyses conducted by the expert as to the personality of the contracting party in question. Instead, it is up to the court to assess the logical consistency of the deductions and verify the premises from which the expert drew his conclusions. He believes that the judge should ask himself: "Do the case files clearly show and are acceptable to the Court the grounds on which the experts based their opinions?"[68] The expert's task, he points out, is to identify the causes of, for example, the immature or disturbed personality of the person under examination, and whether it existed at the time of the marriage.

[64] "Wyrok c. Sobański of 17.01.1994 r.," *Ius Matrimoniale*, vol. 1/6–7 (1996): 225.

[65] "Wyrok c. Sobański of 17.01.1994 r.," *Ius Matrimoniale*, vol. 1/6–7 (1996): 225.

[66] John Paul II, "Address to the Roman Rota" (25.02.1987), *L'Osservatore Romano (Polish edition)*, 1987, no. 2, 32.

[67] See i.a. "Wyrok c. Sobański of 12.12.2006 r.," *Ius Matrimoniale*, vol. 13/19 (2008): 202; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 107.

[68] "Wyrok c. Sobański of 12.1996 r.," *Ius Matrimoniale*, vol. 2/8 (1997): 226.

The Ponens's critical approach to expert opinions is noteworthy. Thus, for example, in one of the sentences, he does not accept as convincing the opinion of an expert who merely admits that the mental illness revealed at a later stage [after the marriage—W. G.], through its various symptoms, may have prevented the respondent from functioning properly and thus may have had a negative impact on his acceptance of matrimonial obligations. This kind of a statement the Ponens considers hypothetical ("the respondent, as the expert formulates it, in a significant degree of probability may not have been able to […]").[69] More than once, the Author of the sentence even expresses amazement at the professional opinions of the experts.[70] Interesting are the assessments of expert opinions made in the *coram* Sobański sentences, especially in the sentences delivered by the Katowice Court in its third instance.[71]

Since the *ob incapacitatem assumendi* cases often involve personality pathology, among other things, immature personality, reflections on this very topic can be found in the sentence under discussion. Thus, asking about the mature personality, the Ponens defines it through such characteristics as: "the ability to subordinate drives and impulses to reason and direct one's own will, to accept various difficulties in life with the hope of dealing with them, to critically evaluate situations and life events, to establish interpersonal relationships and function in social groups, especially those to which one belongs as a result of one's free choice."[72] In turn, when it comes to the criteria of immature personality, he points out: "the inability to make decisions about daily life without seeking excessive advice and hedging, ceding most major decisions to others, reluctance to take initiative, agreeing with others also being convinced that they are wrong, a tendency to do things that are unpleasant or humiliating to oneself in order to be welcomed, feeling painfully hurt by criticism and disapproval, feeling vulnerable when alone."[73]

The Official of the Metropolitan Court of Katowice takes the correct position on the issue of the permanence of *incapacitas*, holding that such a requirement is unnecessary. He expresses the belief that the improvement (*nunc*) of the mental state of a given contracting party for the better after the reason causing incapacity at the time of marriage ceases to exist (*tunc*) may have diagnostic significance and needs to be taken into account in assessing the condition oc-

[69] "Wyrok c. Sobański of 14.12.2006 r.," *Ius Matrimoniale*, vol. 13/19 (2008): 195. See also "Wyrok c. Sobański z 21.12.2007 r.," *Ius Matrimoniale*, vol. 13/19 (2008): 212; "Wyrok c. Sobański z 21.12.2007 r.," *Ius Matrimoniale*, vol. 13/19 (2008): 217–218.

[70] See i.a. "Wyrok c. Sobański of 30.09.2008 r.," *Ius Matrimoniale*, vol. 14/20 (2009): 214.

[71] See i.a. "Wyrok c. Sobański of 30.09.2008 r.," *Ius Matrimoniale*, vol. 14/20 (2009): 218–219; "Wyrok c. Sobański z 06.07.2009 r.," *Ius Matrimoniale*, vol. 15/21 (2010): 215–216.

[72] "Wyrok c. Sobański z 12.12.2006 r.," *Ius Matrimoniale*, vol. 13/19 (2008): 203.

[73] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 108.

curring at the time of marriage, but of itself, does not make it attentive. "This means," he adds, "that a sentence declaring a marriage invalid for incapacity to undertake the essential duties of marriage does not preclude the possibility of possible future capacity"; this may be the case, in particular, with immature personalities.[74]

It is noteworthy that the Ponens repeatedly poses the question of the relation of the title of invalidity covered by can. 1095 no. 3 to the title specified in no. 2 of the same canon. In his opinion, a serious lack of evaluative discernment can go hand in hand with an inability to undertake the essential duties of marriage, although the border between these two legal figures is not always clear (in a particular case). The following statement by Rev. Sobański, which is important for judicial practice, seems apt: "Both the incapacity to marry specified in can. 1095, no. 2 and that referred to in can. 1095 no. 3 are due to mental causes. Since in determining the subject matter of the dispute, it is not always clear which incapacity is justified by the indicated mental reasons, it is expedient to adopt both norms as the legal basis for procedural inquiry. This practice is also often followed by the Tribunal of the Roman Rota (e.g., sent. c. Colagiovanni 31.5.1995—MonEccl 122 /1997/ 378–390, and many others). Since a person constitutes a certain mental unity and wholeness, not only are the boundaries between the causes entering into the optics of the two norms not always drawn quite clearly, but there may be causes that deprive both sufficient discernment and the ability to undertake the essential duties of marriage."[75]

Sobański explicitly advocates that the inability to undertake the essential duties of marriage cannot be relative. In one of his sentences, Sobański poses the question: "Whether—especially in light of the opinion of the expert of the first instance— the state of said exhaustion [of the claimant—W. G.] resulted from a clash of personalities or was independent of the characteristics of the other party. To put it another way, whether the claimant's incapacity was 'absolute' or merely 'relative.'" "The question," he adds, "must be asked, especially since the claimant," he admits, "is functioning well in the new relationship. A literal interpretation of can. 1095 no. 3 leads to the conclusion that relative incapacity does not fall within the hypothesis of this standard. It is about the inability to undertake and fulfill the obligations arising from the nature of marriage, not a 'character mismatch.' This is the prevailing position in the Church jurisprudence and among interpreters of can. 1095 no. 3. A different view would bring the declaration of nullity closer to the dissolution of a failed marriage."[76] On the basis of this statement, it is worth quoting another one: "When considering the issue in relation to the parties' marriage, one must first recall that living with

[74] "Wyrok c. Sobański of 12.12.1996 r.," *Ius Matrimoniale*, vol. 2/8 (1997): 231; Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 108–109.

[75] "Wyrok c. Sobański of 05.12.1998 r.," *Ius Matrimoniale* 4/10 (1999): 259.

[76] "Wyrok c. Sobański of 29.12.2005 r.," *Ius Matrimoniale* 11/17 (2006): 183.

another person always presents a certain degree of difficulty. This includes the spouses as well."[77]

In his sentences, Rev. Sobański refers to the papal magisterium (especially John Paul II's addresses to the Roman Rota), rotal jurisprudence, canonist literature (both foreign and Polish), and writings on psychology and psychiatry.[78]

Closing Remarks

The writing output of Rev. Prof. Remigiusz Sobański in the field of substantive matrimonial law, presented most concisely, indicates that his contribution to the development of the mentioned branch of canon law is remarkably significant. In this assessment, it should be taken into account that substantive matrimonial canon law was not the leading stream of research interests of the longtime professor at the Academy of Catholic Theology and then at the Cardinal Stefan Wyszyński University in Warsaw. Although he was not a matrimonialist, the area of matrimonial law was close to his heart, which was undoubtedly related to his work in the Bishop's Court and then the Metropolitan Court in Katowice, which he began as early as 1957 (he served there as a judicial vicar since 1989).

In his scholarly achievements concerning matrimony, Rev. Sobański dedicated most attention to matrimonial consent, as this was the area of matrimonial law he encountered most often in his judicial work. This very broad, complex, and particularly difficult to apply during a marriage annulment trial issue, hiding numerous complexities, intrigued the Judge-Professor the most. Most valuable here are the publications in which he sought answers to questions leading to a proper understanding (and application in the process of *nullitatis matrimonii*) of can. 1095, no. 1–3 (consensual incapacity to marry), which was introduced into the CIC of 1983. In his inquiries in this regard, he raised a number of "sensitive" threads. Particularly significant here is the aforementioned paper from 2005: "Dilemmas in the Application of Canon 1095."

The sentences prepared by Rev. Sobański (in marriage invalidity cases), published between 1991 and 2010, should be highly appreciated. Here the numerous sentences delivered for inability to undertake the essential duties of marriage for mental reasons deserve special attention. They are characterized by a high degree of the Ponens' insight, legal erudition, and a sense of justice. Repeating

[77] "Wyrok c. Sobański of 29.12.2005 r.," *Ius Matrimoniale* 11/17 (2006): 183.

[78] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 109.

frequently that the marriage annulment process 'revolves' around the search for the truth about a particular relationship, the Katowice Official made this clear in every case he handled.

When a question was asked during an interview conducted by Rev. Adam Pawlaszczyk with Rev. Sobański, on the occasion of his golden jubilee of judicial service: "What truth did Reverend Sobański seek over the past 50 years" [in carrying out this service—W. G.], the latter said, among other things: "The sentence [in a marriage invalidity case—W. G.] concerns the marriage (the claimant's thesis that the marriage is invalid is the subject matter of the case), but it is based on the recognized truth about the man, and that in his matrimonial relationship […] This truth bears the hallmarks of objective truth, because it is impossible to adjudicate the truth other than by means of the verb 'is' […]. The trial is conducted (only) when there is a clash between two truths: the one about the marriage recorded in the metric books and the truth of the party (or parties) about the invalidity of the union […]. These mutually exclusive truths are already formulated, the judge does not have to identify them, he only has to (!) inquire which of them is true."[79]

Analyzing both Rev. Professor Remigiusz Sobański's scholarly works on marriage and his sentences in matrimonial cases, it can be said that in both spheres of his ministry—scholarly and judicial—he assiduously served the truth about both the institution of matrimony itself and its certain 'incarnations.'[80]

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[79] Adam Pawlaszczyk, "Mam do czynienia z człowiekiem [rozmowa z ks. R. Sobańskim]," in *Sędzia i Pasterz. Księga pamiątkowa w 50-lecie pracy ks. Remigiusza Sobańskiego w Sądzie Metropolitalnym w Katowicach (1957–2007)*, ed. Honorata Typańska (Katowice: Księgarnia Św. Jacka, 2007), 27–28.

[80] Góralski, "Wkład prof. Remigiusza Sobańskiego w rozwój nauki prawa kanonicznego," 110.

w dniu 11 grudnia 2013 roku, edited by Tomasz Gałkowski, 87–110. Warszawa–Kraków: Scriptum, 2014.

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Wojciech Góralski

Activité scientifique du Révérend Professeur Remigiusz Sobański dans le domaine du droit canonique du mariage

Résumé

Remigiusz Sobański (1930–2010), longtemps professeur à la faculté de droit canonique de l'Académie de Théologie Catholique de Varsovie, puis à l'université Cardinal Stefan Wyszyński de Varsovie ; bien que ses recherches aient porté principalement sur la théorie du droit canonique, il a également publié plusieurs dizaines d'ouvrages sur le droit canonique du mariage. Ces travaux couvrent quatre domaines de recherche principaux : le droit du mariage – principes généraux,

le consentement au mariage, la forme du mariage, les mariages mixtes. En outre, en tant que vicaire judiciaire, il a publié des dizaines de jugements dans des affaires de *nullitatis matrimonii*, qu'il avait rédigés.

Mots-clés: Remigiusz Sobański, mariage, droit matrimonial, article, jugement

Wojciech Góralski

L'attività di ricerca del sacerdote professor Remigiusz Sobański nel campo del diritto matrimoniale canonico

Sommario

Remigiusz Sobański (1930–2010), il professore di lunga data presso la Facoltà di diritto canonico dell'Accademia di Teologia Cattolica di Varsavia, e poi presso l'Università di Cardinal Stefan Wyszyński di Varsavia. Sebbene la sua ricerca si sia concentrata principalmente sulla teoria del diritto canonico, ha anche pubblicato diverse decine di opere nel campo del diritto matrimoniale canonico. Questi lavori coprono quattro aree di ricerca principali: diritto matrimoniale (norme generali), consenso matrimoniale, forma del matrimonio, matrimoni misti. Inoltre, come vicario giudiziale, ha pubblicato diverse decine di sentenze nei casi di *nullitatis matrimonii* che ha redatto.

Parole chiave: Remigiusz Sobański, matrimonio, diritto matrimoniale, articolo, sentenza

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Pillars of the System of *ius matrimoniale canonicum* According to Remigiusz Sobański

Abstract: "The *Gaudium et spes* Constitution does not approach [matrimony] a priori—as the *Casti connubii* Encyclical did—but, instead, it analyzes the reality of matrimony as it is reflected in the Christian consciousness shaped by the teaching of the Church." This characteristic sentence, derived from *Śląskie Studia Historyczno-Teologiczne* [Silesian Studies in History and Theology] (1968), which debuted at that time on the market of theological periodicals, shows in itself the epistemological sensitivity and sharp methodical sense of the Author and the Executive Editor of the periodical. This study adopts a hypothesis, which suggests that in this and similar lines of the famous article from 1969—perfectly set in the current of the conciliar *aggiornamento*—a key to understanding the phenomenon and scientific format of the work of Rev. Professor Remigiusz Sobański (1930–2010) appeared. Positive verification of this hypothesis is not in doubt: the experience of half a century of work as a scientist and person with real-life experience (a judge and officials in the Katowice Tribunal) and the related fact that he has become an undisputed authority in the field of canonical matrimonial law, resulted in the Author's exposition of the systemic principles of the codified *ius matrimoniale* (CIC 1983). This finding makes it necessary to reflect, with sharpened attention, on the title area "Pillars of the system of *ius matrimoniale canonicum* according to Remigiusz Sobański" in the following order: (1) "the principle of matrimonial indissolubility" (*irrevocabilis consensus personalis—vinculum indissolubile*), (2) "the principle [that] shapes from within all the canonical norms on marriage" (*favor matrimonii*), (3) "the principle of the right to marriage" (*ius connubii*), (4) "sacrament—one of the structural elements of the Church" (*sacramentum matrimoni*; principles: *eo ipso sacramentum* and *favor fidei*).

Keywords: Remigiusz Sobański, methodology of the canon law, matrimony, sacrament of matrimony, matrimonial consent, principle of matrimonial indissolubility, *favor matrimonii*, *ius connubii*, principle *eo ipso sacramentum*, *favor fidei*

Introductory Remarks

"The *Gaudium et spes* Constitution does not approach [matrimony] a priori—as the *Casti connubii* Encyclical did—but, instead, it analyzes the reality of matrimony as it is reflected in the Christian consciousness shaped by the teaching of the Church."[1] This characteristic sentence, derived from *Śląskie Studia Historyczno-Teologiczne* (1968) [Silesian Studies in History and Theology], which debuted at that time on the market of theological periodicals, shows in itself the epistemological sensitivity and sharp methodical sense of the author and the executive editor of the periodical in the years 1968–1975. We may risk a claim that in this and similar lines of the famous article from 1969—perfectly set in the current of the conciliar *aggiornamento*—there is a key to understanding the phenomenon and scientific format of the work of Rev. Professor Remigiusz Sobański (1930–2010). Similarly to the above-quoted text on matrimony, which appeared at the beginning of his writing activity,[2] his entire impressive output, with a considerable share of *de matrimonio* studies—is distinguished by a well-recognized trademark: faithfulness to the hermeneutics of Vaticanum II. After all, this valued expert in the field of interpretation and application of Church law—deservingly honored with a double title of "Iustus iudex et Pastor bonus"[3]—perfectly understood the importance of the paradigm of the reform of the Church (and its law) as a "renewal in the continuity"[4]; a paradigm, it should be added, which he himself, as an outstanding theo-

[1] Remigiusz Sobański, "Symulacja częściowa w ujęciu k. 1086 § 2 a nauka o małżeństwie konstytucji Gaudium et spes," *Śląskie Studia Historyczno-Teologiczne*, vol. 2 (1969): 40.

[2] More specifically, it is the second article by the Canonist dedicated to the problem of canonical marriage. See an earlier publication: Remigiusz Sobański, "Instrukcja o małżeństwach mieszanych," *Wiadomości Diecezjalne*, vol. 34 (1966): 99–102.

[3] See *Sędzia i pasterz. Księga pamiątkowa w 50-lecie pracy ks. Remigiusza Sobańskiego w Sądzie Metropolitalnym w Katowicach (1957–2007)*, ed. Honorata Typańska (Katowice: Księgarnia Św. Jacka, 2007); cf. Grzegorz Leszczyński, "Iustus iudex et Pastor bonus," in *Wkład Księdza Profesora Remigiusza Sobańskiego w rozwój kanonistyki. W dowód wdzięcznej pamięci o zasługach dla rozwoju kanonistyki. Materiały z konferencji naukowej zorganizowanej na Wydziale Prawa Kanonicznego UKSW w dniu 11 grudnia 2013 roku,* ed. Tomasz Gałkowski (Warszawa–Kraków: Scriptum, 2014), 120; Andrzej Pastwa, "Promotor idei *dispensatio gratiae*. Uwagi o wkładzie ks. prof. R. Sobańskiego w kulturę prawną (Archi)diecezji Katowickiej," in *Wkład Księdza Profesora Remigiusza Sobańskiego w rozwój kanonistyki*, 164–165.

[4] Benedict XVI, "Address to the Roman Curia Offering them his Christmas Greetings" (December 22, 2005), https://www.vatican.va/content/benedict-xvi/en/speeches/2005/december/documents/hf_ben_xvi_spe_20051222_roman-curia.html, accessed February 28, 2022; Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007), http://www.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070127_roman-rota.html, accessed February 28, 2022.

retician and at the same time a recognized Church practitioner-judge, fully affirmed/applied, among others, in reference to the doctrine and discipline of marriage.[5] Therefore, it is not surprising that in the latter area, following the thought of the post-Conciliar popes Paul VI, John Paul II, and Benedict XVI—having in mind the famous theological principle *sentire cum Ecclesia*[6] and the immanent connection of *canones* with the unity and mission of the Church[7] dictated by this principle—the Professor consistently follows the rule that the work of the interpreter cannot be deprived of a vital contact with ecclesial reality.[8]

This is how Remigiusz Sobański's decisive and somewhat prophetic words should be understood, as they accurately predict the direction of the reform of *ius matrimoniale*[9]: "The canonical interpretation of matrimony must not deplete its theological reality. Canon law must reflect the current consciousness of the Church. Deeper immersion of theology into the teaching on matrimony should consistently be reflected in the Church matrimonial law."[10] These words are voiced in a situation when the blatant insufficiency/incompatibility of the current code formulations (CIC 1917) is all too clearly demonstrated by the difficulty of interpreting certain canons of matrimony or even their uselessness in jurisprudence,[11] as in the case of the famous formula defining the object of marital consent: *tradit et acceptat ius in corpus*.[12]

[5] Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007), http://www.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070127_roman-rota.html, accessed February 28, 2022.

[6] Paulus VI, "Allocutio ad Praelatos Auditores, Officiales et Advocatos Tribunalis Sacrae Romanae Rotae, novo litibus iudicandis ineunte anno coram admissos" (23 ianuarii 1967), *Acta Apostolicae Sedis*, vol. 59 (1967): 143; cf. Antoni Stankiewicz, "*Sentire cum Ecclesia* e l'interpretazione della legge canonica," *Periodica de re canonica*, vol. 102 (2013): 398–402.

[7] Cf. John Paul II, "Address to Members of the Tribunal of the Roman Rota" (January 29, 2005), n. 6, http://www.vatican.va/content/john-paul-ii/en/speeches/2005/january/documents/hf_jp-ii_spe_20050129_roman-rota.html, accessed February 28, 2022.

[8] Cf. Benedict XVI, "Address for the Inauguration of the Judicial Year of the Tribunal of the Roman Rota (January 21, 2012), https://www.vatican.va/content/benedict-xvi/en/speeches/2012/january/documents/hf_ben-xvi_spe_20120121_rota-romana.html, accessed February 28, 2022.

[9] For the sake of completeness, the majority of the Canonist's deductions concerning the personalistic reinterpretation of the partial simulation of the title (and the conclusions *de lege ferenda*) is consistent with the position of the first reviewer of the achievements of the Commission preparing the reform of the matrimonial law Urbano Navarrete, considered quite commonly as the most outstanding canonist of the 20th century. See Urbano Navarrete, *Structura iuridica matrimonii secundum Concilium Vaticanum II. Momentum iuridicum amoris coniugalis* (Roma: Editrice Pontificia Università Gregoriana, 19942).

[10] Sobański, "Symulacja częściowa," 44.

[11] Sobański, "Symulacja częściowa," 45.

[12] *Code of Canon Law* (promulgated: May 27, 1917) [further: CIC 1917], can. 1086 § 1.

This methodological and hermeneutical inquisitiveness of the young researcher,[13] sharpened by the experience of half a century of work as a scientist and person with real-life experience (a judge and officialis in the Katowice tribunal), is well reflected in the retrospective statement of the 80-year-old Jubilarian at the scientific conference combined with a ceremony of presenting him a memorial book. "The art is to make laws (*ars leges ferendi*), the art is to apply them in such a way that the regulations produce *in concreto* good law—*ius esto, iudex ius dicit*."[14] Here an important circumstance cannot be overlooked: since the specificity of the aforementioned *ius* is measured by the presence of God's law (positive and natural) in the Church law,[15] the jubilee lecture (the last one, as it turned out, delivered by the Professor) could not fail to mention the pillars of the system[16] of *ius matrimoniale canonicum*. Indeed, this time leaving the principle of "irrevocable personal consent"[17] in the background, Remigiusz Sobański explicitly emphasizes the importance of the systematic principles of the codified matrimonial law (CIC 1983),[18] which—when put into practice (defined, interpreted, applied)—invariably demand "operational" concretization.[19] This rule should be applied to the following principles: (1) "the principle of matrimonial indissolubility"[20] (*irrevocabilis consensus personalis—vinculum indissolubile*), (2) "the principle [that] shapes from within all the canonical norms

[13] The author's stance presented before the codification work began attests to this: "Should we not break away from the scheme of the three goods? These goods fall undoubtedly within the doctrine of the Constitution *Gaudium et spes*, but probably do not exhaust it." Sobański, "Symulacja częściowa," 43; cf. Andrzej Pastwa, "*Sacramentalitas* czwartym dobrem małżeństwa?" in *"Ars boni et aequi." Księga pamiątkowa dedykowana Księdzu Profesorowi Remigiuszowi Sobańskiemu z okazji osiemdziesiątej rocznicy urodzin*, ed. Józef Wroceński and Helena Pietrzak (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2010), 391–409.

[14] Remigiusz Sobański, "Między rygoryzmem a laksyzmem. Kanoniczny proces o nieważność małżeństwa na tle kondycji małżeństw sakramentalnych w Polsce," *Prawo Kanoniczne*, vol. 53, no. 3–4 (2010): 162.

[15] See Remigiusz Sobański, "Niezmienność i historyczność prawa w Kościele: Prawo Boże i prawo ludzkie," *Prawo Kanoniczne*, vol. 40, no. 1–2 (1997): 23–44.

[16] "The God's law does not appear […] in the Church law in isolated sentences, but instead it 'belongs to the system,' forming a coherent whole with the sentences coming formally and materially from the Church legislator. In this 'system,' there are sentences of which the Church is convinced that […] faithfully and 'directly' express the will of the Lord, there are those which have been formulated as a necessary consequence of the former, and there are finally those which are considered necessary precisely because of fidelity to the law of God." Remigiusz Sobański, *Metodologia prawa kanonicznego* (Katowice: Gnome, 2004), 44.

[17] Remigiusz Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," *Śląskie Studia Historyczno-Teologiczne*, vol. 30 (1997): 116.

[18] *Code of Canon Law* (promulgated: January 25, 1983), cann. 1055–1165.

[19] Sobański, *Metodologia prawa*, 44.

[20] Sobański, "Między rygoryzmem a laksyzmem," 164, 166.

on marriage"[21] (*favor matrimonii*), (3) "the principle of the right to marriage"[22] (*ius connubii*), (4) "sacrament—one of the structural elements of the Church"[23] (*sacramentum matrimonii*).

Irrevocabilis consensus personalis / vinculum indissolubile— The Principle of the Indissolubility of Marriage

In the opinion of the valued experts in the area of matrimonial law—among them Remigiusz Sobański—indissolubility[24] is such a fundamental determinant of the Church marriage that without it *matrimonium canonicum* could not be understood at all.[25] It is connected, according to the Professor, with the simple fact that "the norms of canonical substantive and formal matrimonial law […] are 'ultimately' a concretization of the principle of matrimonial indissolubility, recognized by the Church as a principle of the God's law."[26] It is not difficult to see that the two statements above address the fundamental methodological issue of affirming the way in which the content of Revelation—deduced through theological inference, using the rule of the "order of truths"—is objectified in the Church law.[27] The fidelity to the process of *aggiornamento*, that is, making the Church "present,"[28] determines the only cor-

[21] 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. 3, http://www.vatican.va/content/john-paul-ii/en/speeches/2004/january/documents/hf_jp-ii_spe_20040129_roman-rota.html, accessed: February 28, 2022; Remigiusz Sobański, "Ochrona małżeństwa w kanonicznym prawie procesowym," *Prawo Kanoniczne*, vol. 52, no. 3–4 (2009): 161–162.

[22] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 117; Sobański, "Między rygoryzmem a laksyzmem," 163.

[23] Sobański, "Między rygoryzmem a laksyzmem," 162.

[24] *Code of Canon Law* (promulgated: January 25, 1983) [further: CIC 1983], can. 1056.

[25] "Die Unauflöslichkeit (® 1056) ist diejenige Eigenschaft der kirchlichen Ehe, ohne die das kanonische Eherecht nicht zu versehen ist." Klaus Lüdicke, "Kommentar vor c. 1059," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Dezember 2013), Einf. vor 1059/2.

[26] Sobański, *Metodologia prawa*, 45, note 82.

[27] "The principle of the 'order of truths' serves as an interpretive tool useful for differentiating between content that is binding because of Revelation and that which is 'merely' legitimate and right. This 'difference of proximity' applies not only to sentences referring to God's law, but to all provisions of Church law." Sobański, *Metodologia prawa*, 44.

[28] Sobański, "Niezmienność i historyczność prawa w Kościele," 44.

rect way to communicate the truth about the principle of the indissolubility of marriage, according to the classical triad: proclaim—announce—apply. This, at the level of canon law, means that the communication *in canones* of this truth (promulgation— interpretation—application), that is, the articulation (according to the measure of the anthropological paradigm[29]) of the "substance of the God's law" which neither the Church nor anyone else has the power to abolish or change[30]—invariably "seeks" the support of the current conciliar doctrine on marriage[31] and the authoritative interpretation of the latter in the Papal magisterium.

The Polish Scholar follows this path when in his commentary to the still fresh passages of the matrimonial constitution *Gaudium et spes* he highlights a new pattern of the methodical approach of the fathers of the Second Vatican Council to *essentialia in matrimonio*—a renewed optics that can be described in one word: "personalization."[32] In turn, the personalistic view of matrimonial consent[33] resulted in an important change: the Council document explicitly links matrimonial indissolubility to love. Understandably, such a key systemic turning point deserved a longer authorial comment: "Not without surprise, some commentators have drawn attention to this moment by recalling that previous Church documents have justified indissolubility with respect to offspring, and with respect to childless marriages with the good and necessity of the institution of matrimony. […] Indissolubility (and unity) arise from the nature of the marriage community, not from the law of offspring. For only irrevocable and exclusive devotion corresponds with human dignity. This natural indissolubility is strengthened […] by the sacramentality of marriage, since it is an image of Christ's unity with the Church."[34]

[29] Andrzej Pastwa, "Kanonické paradigma nerozlučitelnosti. O vztahu přirozenosti a kultury v katolickém chápání manželství," *Studia theologica*, vol. 22, no. 2 (2020): 85–98.

[30] Sobański, *Metodologia prawa*, 44.

[31] Vatican Council II, "Pastoral Constitution on the Church *Gaudium et spes*" (December 7, 1965) [further: GS], nn. 47–52; Vatican Council II, "Dogmatic Constitution on the Church *Lumen gentium*" (November 21, 1964), n. 11; Vatican Council II, "Decree on the Apostolate of the Laity *Apostolicam actuositatem*" (September 18, 1965), n. 11.

[32] Here it is worth quoting a characteristic explanatory note of a great ally of the reform from Poland: "The idea was […] to personalize the matrimonial consent by detaching it from merely biological or contractual elements." Sobański, "Symulacja częściowa," 45.

[33] Sobański, "Symulacja częściowa," 46.

[34] Sobański, "Symulacja częściowa," 42–43. Hence the detailed commentary on the relevant passage of the *Gaudium et spes* constitution is not trivial: "Quae intima unio, utpote mutua duarum personarum donatio, sicut et bonum liberorum, plenam coniugum fidem exigunt atque indissolubilem eorum unitatem urgent" (GS, n. 48,1). The canonist notes, "The fact that the constitution links the matrimonial indissolubility with love allows us to understand in what sense the verb *urgent* is used; […] in light of the drafting committee's explanation, it appears that it was chosen deliberately to emphasize that the very nature of love requires fidelity and indissolubility." Sobański, "Symulacja częściowa," 43.

The same epistemological and methodological approach distinguishes Sobański's deep analysis of the doctrinal foundations of the systemic principle in question in the Papal teaching, or more precisely in the special magisterium addressed to the employees of the Church justice system.[35] It is no coincidence that the choice fell on the excellent, probably the most important during the pontificate of Pope Benedict XVI, *Address to the Tribunal of the Roman Rota* in 2007, the motto of which are the words: "the legal truth presupposes the 'truth of the marriage' itself."[36] It was here that the world of matrimonialistics[37] saw precise indications—so close to Remigiusz Sobański's scientific *credo*—on the one hand, dictating the requirement to base law on a firm anthropological (and ecclesiological) foundation, and, on the other, unveiling the false logic of positivistic discourse.[38] The Pope's strongly articulated fidelity to the "hermeneutics of the Council" points—as a first step—towards the generally signaled set of principles of the God's law underlying the *ius matrimoniale*: "The Council certainly described marriage as *intima communitas vitae et amoris*, but this partnership is determined, in accordance with the tradition of the Church, by a whole set of principles of the divine law which establish its true and permanent anthropological meaning."[39] This makes it all the more valuable to focus—in the next step—on the characteristics of the internal bond of justice between the persons of man/husband and woman/wife, which in a way crowns the papal lecture. This apt logic reveals the truth of the importance of the fundamental and first principle of the system of the

[35] See Andrzej Pastwa, *Il bene dei coniugi. L'identificazione dell'elemento ad validitatem nella giurisprudenza della Rota Romana* [Biblioteca Teologica, Sezione Canonistica, 7] (Lugano–Siena: Eupress FTL–Edizioni Cantagalli, 2018), 75–85.

[36] Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007).

[37] Cf. Ombretta Fumagalli Carulli, "Verità e giustitia nella giurisprudenza ecclesiale," *Ius Ecclesiae*, vol. 20 (2008): 463–478; Carlos José Errázuriz Mackenna, "Riflessioni circa il 'bonum coniugum' e la nullità del matrimonio," in *"Iustitia et iudicium." Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*. Edited by Janusz Kowal, Joaquín Llobell, vol. 1 (Città del Vaticano: LEV, 2010), 169–182; Paolo Bianchi, "L'interpretazione positivistica del momento costitutivo del matrimonio," *Periodica de re canonica*, vol. 101 (2012): 463–476.

[38] Remigiusz Sobański quotes in extenso the teaching of Benedict XVI: "['Truth of the marriage'] loses its existential importance in a cultural context that is marked by relativism and juridical positivism" (Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota," January 27, 2007). He adds of his own accord: "[This affects] the way many of the faithful also think about marriage. They perceive matrimonial indissolubility as an ideal to which all 'normal' believers cannot be committed. Remigiusz Sobański, "Prawda jako entelechia procesu o nieważność małżeństwa w świetle przemówień Piusa XII do Roty Rzymskiej," *Ius Matrimoniale*, vol. 13 (2008): 40.

[39] Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007).

canonical matrimonial law. This is how Sobański reads the papal[40] proclamation: "The essential juridical character of marriage is inherent precisely in this [indissoluble—R.S.] bond."[41]

The active attitude of the Church towards the *ius divinum* is already connected, as indicated earlier, with the initial work of "concretization," namely, the activity of the Church legislator of promulgating the norms of God's positive law (the "living" law—inscribed in the current context of history, owing to the "dynamics" of the hierarchical and charismatic gifts of the Holy Spirit[42]) in the surroundings of the sentences of Church law.[43] In the case of the first and other systematic principles of matrimonial law—in addition—an important role at the legislative stage is played by the application of the mentioned rule of "order of truths," which determines the normative order of the Church. The post-conciliar reform of the *ius matrimoniale* system shows this well. The reintegration of its framework—invariably around the principle of matrimonial indissolubility—had to take into account the "equal" presence in the system of other principles ("from God's law"), and what is related to this—the existence of potential tensions[44] generated by this presence. Therefore, the process of positivization (in the norms of the Church law) of the said principle required the Church legislator to precisely determine the cases in which the norm in question "from God's law" find (absolutely![45]) application and in which it does not. The result of the implementation of these assumptions in the matrimonial normative order (CIC 1983) is presented by Remigiusz Sobański as follows: "In applying the principle of matrimonial indissolubility, the Church at the same time generally defines cases in which it does not apply this principle or sets conditions

[40] Benedict XVI formulates the nodal idea of his Address to the Rota by invoking the context of John Paul II's anthropological thought: "The indissolubility of marriage does not derive from the definitive commitment of those who contract it but is intrinsic in the nature of the 'powerful bond established by the Creator' (John Paul II, *Catechesis*, General Audience 21 November 1979, n. 2; *ORE,* 26 November 1979, p. 1)." Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007).

[41] Benedict XVI, "Address to the Members of the Tribunal of the Roman Rota" (January 27, 2007); Sobański, "Prawda jako entelechia," 40.

[42] Andrzej Pastwa, "*Sensus fidei fidelium*. Legal and Ecumenical Reflection," in *Remaining United in Diversity*, ed. Andrzej Pastwa, *Ecumeny and Law*, vol. 6 (2018): 231–236.

[43] Sobański, *Metodologia prawa*, 43.

[44] The axis of these tensions, as Remigiusz Sobański has repeatedly stated, is marked by ontically inscribed in the system guarantees of protection and promotion of two—allegedly competing—basic goods: on the one hand, the good of the individual (*bonum personae*), and on the other hand, the common good (*bonum commune*), which is the authenticity and identity of the community of faith, with its inherent matrimonial indissolubility. Sobański, "Ochrona małżeństwa," 168.

[45] "A marriage that is ratum et consummatum can be dissolved by no human power and by no cause, except death." CIC 1983, can. 1141.

of its application—dispensation of non-consummated marriage, dissolution of a marriage in favor of the faith."[46]

Obviously, the Church's task of making specific the principles "of God's law"—here, specifically, the principle of matrimonial indissolubility—goes beyond the domain of the legislature. At this point it suffices—following Sobański—to point to the sphere of the Church's responsibility, related to the activity of its official representatives in interpreting and applying the law. Here the role of judges-members of collegiate tribunals who declare the truth about marriage in a court judgment—involving the authority of the Church (*ex officio*)—is invaluable: *iudex dicit ius*.[47] It is worth asking what currently (in the era of "society's crisis of values […], crisis of knowledge enlightened by faith"[48]) can, or even should, be the determinant of the reliability of fulfilling the above mentioned task? The Professor's recommendation, supported by many years of judicial experience, is not surprising: "I believe that it would be just to expound the principle of indissolubility in the legal motivation of judgments in matrimonial cases, including when nullity is declared."[49]

Favor matrimonii—"Principle [that] Shapes from within all the Canonical Norms on Marriage"

The words of the title formula, taken from John Paul II's Address to the Roman Rota in 2004,[50] perfectly resonate with Remigiusz Sobański's expert com-

[46] Sobański, *Metodologia prawa*, 44, note 81.

[47] See CIC 1983, cann. 1611–1612; Pontificium Consilium de Legum Textibus, "Instructio 'Dignitas connubii' servanda a tribunalibus dioecesanis et interdioecesanis in pertractandis causis nullitatis matrimonii" (January 25, 2005), art. 247, 250–254; see Remigiusz Sobański, "Iudex veritatem de matrimonio dicit," *Ius Matrimoniale*, vol. 4 (1999): 181–196.

[48] Francis, Address to the Officials of the Tribunal of the Roman Rota for the Inauguration of the Judicial Year (January 23, 2015), https://www.vatican.va/content/francesco/en/speeches/2015/january/documents/papa-francesco_20150123_tribunale-rota-romana.html, accessed February 28, 2022.

[49] Sobański, "Prawda jako entelechia," 40. It is worth noting that this recommendation is a practical interpretation of John Paul II's appeal to the judges of Church tribunals: "Judicial activity must […] be inspired by a *'favor indissolubilitatis.*'" John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 7, http://www.vatican.va/content/john-paul-ii/en/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rota.html, accessed February 28, 2022.

[50] The broader context of the papal statement is as follows: "*To evaluate these new attitudes correctly, one should first of all identify the foundation and limitations of the favor* in ques-

mentary to can. 1060 (CIC 1983)[51] in a study under a title that carries a lot of meaning "The Protection of Marriage in the Procedural Canon Law." Here we can see the methodological mastery in approaching the nodal principle of *processus matrimonialis*. Indeed, from the point of view of a legal theorist, it was necessary to first emphasize the importance of the favor of the law (*favor iuris*) that marriage enjoys, and of the associated presumption of its validity in case of doubt.[52]

> The law [Church law—A.P.] —the Canonist remarks—must protect formally-performed legal actions, without this the certainty of legal transactions would be undermined. Hence the presumption of the validity of the marriage, in accordance with the general principle of law according to which legal acts lawfully performed—in their external elements—are considered valid as long as the contrary is not proven.[53]

In Professor Sobanski's opinion, for this reason alone we can speak of an important systemic principle governing the canonical trial for marriage nullity.[54]

Of course, the above diagnosis is only the starting point for exploring the relevance of another of the title's "Pillars of the System." Looking through the prism of the theology of law or following the directives of the supreme legislator of the Church,[55] the Polish canonists had to: first, reflect on the place of can. 1060 in the systematic arrangement of the Code of Canon Law on Matrimony;

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tion. Indeed, this principle easily transcends the presumption of validity since it shapes from within all the canonical norms on marriage, both substantial and procedural." 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. 3.

[51] "Marriage possesses the favor of law; therefore, in a case of doubt, the validity of a marriage must be upheld until the contrary is proven." CIC 1983, can. 1060.

[52] "Die Gültigkeitsvermutung spricht für die formal korrekte Ehe, eine solche also, die dem äußeren Rechtsschein nach ordnungsgemäß geschlossen wurde. Immer wenn eine Ehe in der für sie geltenden Rechtsform eingegangen wurde, wird sie in der Rechtssphäre so behandelt, als sei sie gültig. Das gilt gleicherweise für die Ehen der Getauften wie der Ungetauften. […] Anwendung des 1060 auf einzelne Fragestellungen finden sich in den 1084 § 2, 1085 § 2, 1101 § 1, 1107." Klaus Lüdicke, "Kommentar zum c. 1060," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Februar 2009), 1060/2–3. Cf. Juan Ignacio Bañares, "El 'favor matrimonii' y la presunción de validez del matrimonio contraído. Comentario al Discurso de Juan Pablo II al Tribunal de la Rota Romana de 29.I.2004," *Ius canonicum*, vol. 45, no. 89 (2005): 243–257.

[53] Sobański, "Ochrona małżeństwa," 161.

[54] Sobański, "Ochrona małżeństwa," 161.

[55] 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. 2; John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 7; see also Andrzej Pastwa, *"Przymierze miłości małżeńskiej." Jana Pawła II idea małżeństwa kanonicznego* (Katowice: Wydawnictwo Uniwersytetu Śląskiego, 2009), 265–274.

second, include the legal-pastoral perspective in order to show the real (full) meaning of *favor matrimonii* in the system of *ius matrimoniale.*

Going beyond the literal wording of the canon in question, which *de facto* remains with the old formula of the analogous norm of the Code of 1917,[56] the experienced commentator, author of *Methodology of the Canon Law* (2004), highlights the importance of a contextual reading of the place of can. 1060 among the preliminary canons, which underwent—it is worth recalling—a thorough reform in the course of the personalization of the matrimonial consensus.[57] The author's commentary reads:

> It should be noted that this provision is placed […] among the general, preliminary norms of matrimonial law. It is preceded by the following canons: the canon stating the sacramentality of marriage for the baptized (1055 § 1—with an indirect legal definition of matrimony), the canon enumerating the essential qualities of marriage (1056), the canon showing the efficient cause of marriage and defining it (can. 1057), the canon stating the right to marriage (can. 1058), and the canon on the legal authority for marriage (can. 1059)."[58]

It is this circumstance that authorizes the author to formulate a relevant conclusion: "This positioning of can. 1060 leads us to infer that its meaning goes beyond the canonical rules of establishing the facts in a nullity trial."[59]

The above statement, which *implicite* refers the principle of *favor matrimonii* to a coherent personal-ecclesial vision of the matrimonial covenant (*matrimonium in fieri*), is a prelude to an adequate outline of the teleology of the matrimonial process—in accordance with the aforementioned magisterial directive, which, for the sake of precision, must be reproduced in the Italian original: "Non dobbiamo però dimenticare che nelle cause di nullità matrimoniale la verità processuale presuppone la 'verità del matrimonio' stesso" (Benedict XVI).[60] This is where the quintessence of the service of the magisterial pastor,[61] which—

[56] CIC 1917, can. 1014.

[57] Sobański, "Symulacja częściowa," 46–47; José María Serrano Ruiz, "L'ispirazione conciliare nei principi generali del matrimonio canonico," in *Matrimonio canonico fra tradizione e rinnovamento* (Bologna: EDB, 19912), 45–48.

[58] Sobański, "Ochrona małżeństwa," 161.

[59] Sobański, "Ochrona małżeństwa," 161–162.

[60] Benedetto XVI, "Discorso al Tribunale della Rota Romana in occasione dell'inaugurazione dell'anno giudiziario (27 gennaio 2007).

[61] In his famous Address to the Tribunal of the Roman Rota in 1990, John Paul II outlined the ontic foundations of the office of ecclesiastical judge and the original profile of his activity: "L'attività giuridico-canonica è per sua natura pastorale. […] Ne consegue che ogni contrapposizione tra pastoralità e giuridicità è fuorviante." John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 18, 1990), n. 4, http://www.vatican.va/content/john-paul-ii/it/speeches/1990/january/documents/hf_jp-ii_spe_19900118_rota-romana.html, accessed February 28, 2022. Cf. Francis, "Address to the Officials of the Tribu-

in John Paul II's matchless analysis—is described as a true *diakonia* ("a precious service") on behalf of the Christian community is revealed.[62] Indeed, in such a delicate matter as judging whether or not a marriage exists—without losing sight of the individual well-being of those seeking to have a broken marriage declared null and void and to be able to enter into a new one[63]—just this pastoral perspective "calls for the constant effort to develop more fully the truth about marriage […] as a necessary condition for administering justice in this field."[64] Fidelity to the rule *veritas facit legem* presents the judge with a serious challenge of responsibly carrying out *in casu* the "operative concretization" mentioned above, which: on the one hand, will guarantee that the *favor veritatis* will determine the entire dynamics of the process of *de nullitate matrimonii*; on the other hand, will make it possible to resist the nowadays artificially created opposition between *favor matrimonii* and *favor personae* (*favor libertatis*).[65] In the end, this means consistently overcoming the apparent[66] conflict between the good of the society (*bonum communionis*) and the good of the individual (*bonum personae*).

Obviously, Professor Sobański notices and correctly defines various (!) types of tensions between an individual and a community that occur in the system of the matrimonial law (and globally—in the whole canon law). But does the ecclesial importance of the problem itself—highlighted by the papal diagnosis of the causes generating the mentioned conflict[67]—not explain enough why the Canonist so often and with such care interprets the systemic principle of *favor matrimonii*. To see this, it is enough to quote the key links in the chain of analysis provided in two of his articles. The excerpt from the first text prepares the aforementioned interpretation with exposition and a preliminary weighing of supposedly oppositional goods:

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nal of the Roman Rota for the Inauguration of the Judicial Year" (January 24, 2014), https://www.vatican.va/content/francesco/en/speeches/2014/january/documents/papa-francesco_20140124_rota-romana.html, accessed February 28, 2022; cf. also Zenon Grocholewski, "La función del juez en las causas matrimoniales," *Ius canonicum* vol. 45, no. 89 (2005): 25–26.

[62] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 1.

[63] Sobański, "Ochrona małżeństwa," 161.

[64] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 1.

[65] John Paul II, "Address to the Prelate Auditors," n. 7; Cf. Janusz Kowal, "Conflitto tra 'favor matrimonii' e 'favor libertatis?,'" *Periodica de re canonica*, vol. 94 (2005): 243–273.

[66] Sobański, "Między rygoryzmem a laksyzmem," 166.

[67] "At times, in recent years some have opposed the traditional '*favor matrimonii*' in the name of a '*favor libertatis' or 'favor personae.*' In this dialectic it is obvious that the basic theme is that of indissolubility, but *the antithesis is even more radical with regard to the truth about marriage itself*, more or less openly relativized." John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 28, 2002), n. 7.

> "[The existing—A.P.] tension between the individual and the community raises […] the question whether the law is made and applied to protect, guarantee, and realize the rights of the faithful in the Church by making possible and encouraging Church coexistence founded on responsible faith, or whether it is applied to protect the community of faith by safeguarding the authenticity of those elements in which salvation is realized, i.e., the word and the sacrament. The rationale of the first stance is that participation in a community presupposes its existence in a definite shape with not blurred contours: a community losing its distinctness would cease to be a sign. The rationale of the second stance is that community really does not exist except in the testimony of the faithful: The church is a community of believers responding by a free act of faith to God's call.[68]

In contrast, Sobański's argument in the next article already quoted is clearly conclusive: "The norm of canon 1060 obliges [the judge—A.P.] to presume the validity of the marriage, the libellus instructs him to determine whether at the time of contracting the marriage there were causes recognized by law that rendered it invalid. It is in the interest of the litigants, and it may look like a conflict between a social good (the identity of the community), protected by a legal presumption, and an individual good, but this is an apparent conflict, for the sacrament is not an individual good, but the good of the community, which is the same good of each of the faithful."[69] Finally, it is worth dotting the i's and crossing the t's—if it were otherwise, *favor matrimonii* would not deserve to be called a systemic principle, a pillar of the system of canonical matrimonial law.

Ius connubii—Principle of the Right to Marriage

The necessary broadening of the perspective in the epistemological and methodological reflection on the pillars of the system of *ius matrimoniale canonicum* is marked by the *ius connubii*—the fundamental right of the person and at the same time the fundamental rights of the Christian.[70] Indeed, the

[68] Sobański, "Iudex veritatem de matrimonio dicit," 190–191.

[69] Sobański, "Między rygoryzmem a laksyzmem," 166.

[70] "All persons who are not prohibited by law can contract marriage." CIC 1983, can. 1058; see Juan Ignacio Bañares: "Comentario al c. 1058," in *Comentario exegético al Código de Derecho canónico*, ed. Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña, vol. 3/2 (Pamplona: EUNSA, 20023), 1067–1075.

high profile[71] of everyone's right to marriage as a systemic principle is evidenced by the fact that the object of analysis thus far, namely the presumption of can. 1060 (*favor matrimonii*) is in fact another aspect of the statement of can. 1058, indeed, the objectively autonomous proclamation of natural law (*ius connubii*).[72] Professor Sobański did not fail to precisely illuminate this relationship in his legal and legal-pastoral analyses. It is safe to say that, although Sobański did not have time to get acquainted with the famous address of Benedict XVI to the Roman Rota in 2011, for a long time he he directed the attention of the audience to the *clou* of the papal teaching in the scientific discussion of the *favor matrimonii—ius connubii* relation:

> The right to contract marriage presupposes that the person can and intends to celebrate it truly, that is, in the truth of its essence as the Church teaches it. No one can claim the right to a nuptial ceremony. Indeed, the *ius connubii* refers to the right to celebrate an authentic marriage.[73]

The consequences of (mis)understanding are extremely serious, because both the parish priest in his pastoral ministry of preparation and admission to marriage, and the judge in the trial judgment of an unsuccessful relation due to its possible invalidity—only through an adequate evaluation of the two (!) mentioned fundamental principles can they gain a full insight into the nature of the matrimonial interpersonal relationship, which is so desirable in *pro futuro* estimation or ex-post verification of the veracity of the matrimonial consensus *in casu*. This is also the legal and pastoral "strategy," which requires that the *ius connubii* be harmonized with the natural requirements of the *consensus matrimonialis*, that John Paul II "programmed" in his Rotal Allocutions, as evidenced in a passage from the 2003 Allocution:

> The church does not refuse to celebrate a marriage for the person who is well disposed, even if he is imperfectly prepared from the supernatural point of view, provided the person has the right intention to marry according to the natural reality of marriage. In fact, alongside natural marriage, one can-

[71] See Andrzej Pastwa, "Ius connubii Today—Legal and Pastoral Perspective," in *Youth—Church—Evangelism*, ed. Andrzej Pastwa, *Ecumeny and Law*, vol. 5 (2017): 235–261.

[72] "Die Kirche ist nicht frei, die Gültigkeit eingegangener Ehen in Frage zu stellen. Denn das Recht auf die Ehe meint nicht nur das Eingehen, sondern auch die Achtung vor dem Bestand der eingegangenen Ehe. Die Vermutung des 1060 ist nur ein anderer Aspekt der Aussage des 1058." Klaus Lüdicke, "Kommentar zum c. 1058," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Dezember 2013), 1058/2.

[73] Benedict XVI, "Address on the Occasion of the Inauguration of the Judicial Year of the Tribunal of the Roman Rota" (January 22, 2011), http://www.vatican.va/content/benedict-xvi/en/speeches/2011/january/documents/hf_ben-xvi_spe_20110122_rota-romana.html, accessed February 28, 2022.

> not describe another model of Christian marriage with specific supernatural requisites.[74]

An expert elaboration of the papal thought is the identification of potential fields of tension,[75] which is related to the operative delineation of the boundary (first at the level of lawmaking[76] and then at the level of its application) between the natural law principles of *consensus matrimonialis* and *ius connubii*—in the authorial legal and pastoral discourse of Remigiusz Sobański. Pointing towards indissolubility as the basic determinant of marriage (and the first systemic principle of *ius matrimoniale*), the Canonist does not hesitate to categorically condition the adequate application of the canonical norms of marriage on having a minimum of knowledge that the mentioned principles of the law of nature, which constitute basis for these norms, need to be harmonized (!). Thus, the parish priest, who is responsible for preparing the nupturients for marriage, should be aware that, on the one hand, "a law would go against natural justice if it bound two people for life if each of them did not truly, consciously and voluntarily decide to enter into such a relationship."[77] But also, on the other hand, "it would be going against the natural right of man for a law to prevent a person capable and willing to enter into marriage from doing so."[78]

Contemplating on the truth of the principle of *ius connubii*, one of the pillars of the System of *ius matrimoniale*, leads Remigiusz Sobański to emphasize

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[74] John Paul II, "Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota" (January 30, 2003), n. 8, https://www.vatican.va/content/john-paul-ii/en/speeches/2003/january/documents/hf_jp-ii_spe_20030130_roman-rota.html, accessed February 28, 2022.

[75] For the record, two outstanding canonists Klaus Lüdicke (as the first) and Remigiusz Sobański anticipated the theses of the papal lecture and, in a sense, prepared the ground for the reception of the magisterium quoted here; Klaus Lüdicke, "Kommentar vor c. 1095," in *Münsterischer Kommentar zum Codex Iuris Canonici*, ed. Klaus Lüdicke (Essen: Ludgerus, Lfg. Oktober 1987), Einf. vor 1095/1–2; Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 116–117.

[76] "Die Grenzziehung zwischen beiden Polen gehört zu den schwierigsten und bedeutendsten Entscheidungen des kirchlichen Gesetzgebers." Lüdicke, Kommentar vor c. 1095, Einf. vor 1095/2.

[77] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 116. On the grounds of the principle of indissolubility, the Canonist explains: "It would be at odds with Christian anthropology and would be downright inhumane for a law to condemn people to remain in a forced or extorted marriage or with a person unfit for married life" (116).

[78] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 116. And here, on the part of Sobański, an important addition could not be missed: "Marriage—and this indissoluble marriage—is for human beings. We must assume that people are by their very nature capable of living in one indissoluble relationship. This assumption also belongs to the truth about marriage." Sobański, "Prawda jako entelechia," 40.

the importance of a well-conducted examination of spouses.[79] The parish priest conducting pre-marital investigations, while aware that he does not have the right to allow people whose wills are defective to marry, will nevertheless assume each time that everyone has the right to marriage unless there are legal impediments. Generalizing, according to Sobański, the harmonization of the above-mentioned principles of natural law is governed by the following regularity: the optics of the parish priest in the matter at hand is different from that of the Church judge. Just as in the first case the principle of *ius connubii* (right to marriage)[80] prevails, once the marriage has taken place the legal presumption[81] argues for its validity.[82]

Sacramentum matrimonii—"One of the Structural Elements of the Church"

"Canon matrimonial law is determined by the Catholic understanding of matrimony."[83] This truly programmatic statement of Professor Sobański, which may seem to be a truism only to a layman, announces an important sector of the *ordinatio fidei*—the Church's legal order.[84] The epistemological and methodological position manifested here—close to the concepts of perhaps the most eminent legal theologian of the twentieth century, Eugenio Corecco—is distinguished by a very characteristic approach to the sources of faith. According to the Polish Scholar, if we assume that the law is not the only regulator of the Church life, and that all the regulations ultimately stem from the same source, that is, from the faith preached by the Church, then this fact indeed determines the *modus procedendi* of the Canonist. Consequently, his methodical orientation towards the handling of the texts of Holy Scripture and Tradition together

[79] See CIC 1983, can. 1067.

[80] CIC 1983, can. 1058.

[81] CIC 1983, can. 1060.

[82] Sobański, "Wyznaczniki kanonicznego prawa małżeńskiego," 117.

[83] Remigiusz Sobański, "Kanoniczne prawo małżeńskie stosowane w działalności misyjnej," *Nurt SVD*, vol. 31, no. 3 (1997): 44.

[84] Remigiusz Sobański, "Ustawa kościelna—ordinatio rationis czy ordinatio fidei?," *Collectanea Theologica*, vol. 48, no. 1 (1978): 27–35; Eugenio Corecco, "'Ordinatio rationis' o 'ordinatio fidei'? Appunti sulla definizione della legge canonica," in *Ius et Communio. Scritti di Diritto Canonico*, ed. Graziano Borgonovo and Arturo Cattaneo, vol. 1 (Lugano–Casale Monferrato: Piemme, 1997), 135–156; cf. also Libero Gerosa, "La legge canonica quale 'ordninatio fidei.' La lezione di Eugenio Corecco sul metodo scientifico nella canonistica," *Il diritto ecclesiastico*, vol. 106 (1995): 140–159.

with their magisterial interpretation—admittedly with an awareness of the limits of own competence—must mean that he applies the principles of theological hermeneutics.[85] With one reservation, however—reaching to the sources of faith, the Canonist cannot remain a passive receptor of their message and their interpretation in the theological disciplines.[86]

The adoption of these assumptions strengthens the persuasive power of the discourse, especially when Sobański extends the "matrimonial" research horizon to a sacrament, for example, in a study the content of which is foreshadowed by a title with a famous conciliar formula:[87] "*Velut Ecclesia domestica*…" (1983).[88] The ideological message is clear: Christian marriage as a dynamic "mystery"[89] of reality immersed in the Church *Communio* makes present in human/salvation history (!) the fundamental structure of the love of Christ-Betrothed for the Church-Betrothed. In other words, marriage, being the sacramental sign of the said God's Caritas,[90] is the historical site of the Church's realization[91] and as such fully deserves to be defined: "Church in miniature"[92] or "a living image and historical representation of the mystery of the Church."[93]

Within this context, two subject areas attract the attention of the diligent Researcher of the foundations of the canonical matrimonial law system. The horizon of the first area—in Sobański's methodical approach—is revealed by the observation that the dynamic presence of the Church through the sacramental marriage has a special character (i.e., definitely different from all other forms of the mysterious presence): "This uniqueness comes from the fact that […] mar-

[85] Sobański, "Metodologia prawa," 57.

[86] Sobański, "Metodologia prawa," 58. "For among the tasks of the professional canonist is also the work of developing church law, including the improvement of its ecclesial quality" (58).

[87] GS, n. 11,2; cf. AA, n. 11,4.

[88] Remigiusz Sobański, "*Velut Ecclesia domestica* a cywilna forma zawarcia małżeństwa," *Roczniki Teologiczno-Kanoniczne*, vol. 30, no. 5 (1983): 27–40.

[89] Winfried Aymans, "Gleichsam häusliche Kirche. Ein kanonistischer Beitrag zum Grundverständnis der sakramentalen Ehe als Gottesbund und Vollzugsgestalt kirchlicher Existenz," *Archiv für katholisches Kirchenrecht*, vol. 147 (1978): 424–446.

[90] "Indeed, by means of baptism, man and woman are definitively placed within the new and eternal covenant, in the spousal covenant of Christ with the Church. And it is because of this indestructible insertion that the intimate community of conjugal life and love, founded by the Creator, is elevated and assumed into the spousal charity of Christ, sustained and enriched by His redeeming power. By virtue of the sacramentality of their marriage, spouses are bound to one another in the most profoundly indissoluble manner. Their belonging to each other is the real representation, by means of the sacramental sign, of the very relationship of Christ with the Church." John Paul II, Apostolic Exhortation *Familiaris consortio* (November 22, 1981), [further: FC], n. 13.

[91] Sobański, "*Velut Ecclesia* domestica," 35.

[92] FC, n. 49.

[93] FC, n. 49

riage, a reality already existing in the natural order, that is, the order of creation, takes on its full dimension in the order of salvation realized by the Church, that is, in the sacramental order."[94] Within this optics, the natural covenant of man and woman as the Old Testament mystery "sign" and the "event" of the sacrament—the participation of the baptized nupturients in the New Testament *mystērion*: the love of Christ-Betrothed for the Church-Betrothed—remain inseparable, since the plan of Redemption cannot be separated from the plan of Creation. Thus, in the economy of Redemption, there can be no other true covenant of matrimony than the covenant in the form of the "event" of the sacrament.[95] The logic of this argument, based on true premises, leads to a clear[96] conclusion: a valid marriage cannot exist between the baptized without it being a sacrament. *Ergo*, on the one hand, this circumstance, and on the other, the official testimony[97] of *doctrina catholica seu theologica certa*,[98] confirmed by the papal magisterium, constitute an affirmation of the principle of the systemic inseparability of sacrament and matrimonial contract; a principle traditionally[99]

[94] Sobański, "*Velut Ecclesia* domestica," 35.

[95] Eugenio Corecco, "Il sacramento del matrimonio: cardine della costituzione della Chiesa," in *Diritto, persona e vita sociale. Scritti in memoria di Orio Giacchi*, vol. 1 (Milano: Vita e pensiero, 1984), 401.

[96] The author is aware of, but does not agree with the contrary stance in the study of Canon Law regarding marriages of baptized non-Catholics belonging to communities that do not recognize the sacramentality of marriage—Winfried Aymans,"Die Sakramentalität christlicher Ehe in ekklesiologisch-kanonistischer Sicht. Thesenhafte Erwägungen zu einer Neubestimmung," *Trierer Theologische Zeitschrift* 83 (1974): 321–338; Remigiusz Sobański, "Procesy o nieważność małżeństwa w Polsce na przełomie tysiącleci ery chrześcijańskiej," *Prawo Kanoniczne*, vol. 49, no. 3–4 (2006): 30, note 39.

[97] The conclusions of the research conducted by the International Theological Commission have their own weight (which is not mentioned by Sobański). The recently formulated one (2020) reads as follows: "According to the theological doctrine and canonical practice currently in force, every valid marriage contract between baptized persons is 'by itself' sacrament." International Theological Commission, "The Reciprocity Between Faith and Sacraments in the Sacramental Economy" (2020), n. 143, https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20200303_reciprocita-fede-sacramenti_en.html, accessed February 28, 2022; cf. International Theological Commission, "Propositions on the Doctrine of Christian Marriage" (1977), n. 3.3; International Theological Commission, "Christological Theses on the Sacrament of Marriage" (1977), n. 9, http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_1977_sacramento-matrimonio_en.html, accessed February 28, 2022.

[98] Pontificia Commissio Codici Iuris Canonici Recognoscendo, *Relatio complectens synthesim animadversionum ab Em-mis Patribus Commissionis ad novissimum Schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et Consultoribus datis* (Città del Vaticano: LEV, Typis Polyglottis Vaticanis 1981), 245; cf. Wojciech Góralski, "Nierozdzielność ważnej umowy małżeńskiej zawartej między ochrzczonymi i sakramentu (kan. 1055 § 2 KPK i kan. 776 § 2 KKKW)," *Ius Matrimoniale*, vol. 12 (2007): 19.

[99] Cf. CIC 1917, can. 1012 § 2.

symbolized by the Latin formula of the first of the Code canons of matrimony: *eo ipso sacramentum*.[100]

Just as the personal and ecclesial implications declared by the above systemic principle (the "matrimonial" expression of the universal principle of *salus animarum suprema lex*[101]) definitely go beyond the "mere" sacramental effect of grace received for individual sanctification, the conclusions coming from the deep analysis of another (second) dimension of the integration of *sacramentum matrimonii* into the system of the Code matrimonial law—another fruit of the research of Sobański—emphasize and intensify the force of the Polish Scholar's *memento* to "not deplete the theological reality of marriage."[102] Here the Author's discourse is based on familiar premises: while *ex natura* only the irrevocable and exclusive personal devotion of the nupturients corresponds to human dignity,[103] in the marriage of the baptized this natural indissolubility is strengthened by the grace of the sacrament, so that the completed marriage of the baptized[104] becomes absolutely indissoluble[105] as "a complete—*una caro*—sign of the unity of Christ and the Church."[106] Leaving aside the details, it is this methodological approach that leads to an important finding: an in-depth analysis of the relationship between indissolubility and the sacrament of marriage[107] is the *sine qua non* for an adequate understanding of the systemic principle of *favor fidei*—at the interpretative and applied level. Indeed, generally speaking, the rule "in a doubtful matter the privilege of faith possesses the favor of the law"[108]

[100] CIC 1983, can. 1055 § 2; cf. Eugenio Corecco, "Die Lehre der Untrennbarkeit des Ehevertrags vom Sakrament im Lichte des scholastischen Prinzips Gratia perfecit, non destruit naturam," *Archiv für katholisches Kirchenrecht*, vol. 143 (1974): 379–442; Sobański, "Procesy o nieważność małżeństwa," 29–30.

[101] Cf. CIC 1983, can. 1752.

[102] Sobański, "Symulacja częściowa," 44.

[103] 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; Sobański, "Procesy o nieważność małżeństwa," 29.

[104] See FC, n. 20; John Paul II. "Address to the Tribunal of the Roman Rota" (January 21, 2000). http://www.vatican.va/content/john-paul-ii/en/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000121_rota-romana.html, accessed February 28, 2022.

[105] CIC 1983, can. 1141. It should be recalled that John Paul II officially affirmed the doctrine of absolute extrinsic indissolubility "as being peacefully held." John Paul II, "Address to the Tribunal of the Roman Rota" (January 21, 2000), n. 7. Cf. also Janusz Kowal, "L'indissolubilità del matrimonio rato e consumato. Status quaestionis," *Periodica de re canonica*, vol. 90 (2001): 273–304.

[106] Sobański, "Symulacja częściowa," 42–43.

[107] Andrzej Pastwa, "*Indissolubilitas… quae ratione sacramenti peculiarem obtinet firmitatem* (kan. 1056). Uwagi o relacji nierozerwalność – sakrament małżeństwa," *Śląskie Studia Historyczno-Teologiczne*, vol. 44 no. 2 (2011): 590–606.

[108] CIC 1983, can. 1150.

appears as "the governing principle of all canon law."[109] However, even if it is true that "the protection of faith precedes the principle of indissolubility, sets its limits,"[110] it must be remembered that the norms of can. 1143–1150 (CIC 1983) are only an exception to the rule. For the rule is the indissolubility of marriage, and the exceptions confirm it.[111]

* * *

"Understanding canonical matrimonial norms," as Remigiusz Sobański wrote in 2006, "requires seeing their ontological foundations, including a metaphysical vision of the human person. Without that, marriage is *sovrastruttura estrinseca*, a fruit of law and social conditions. Thus, the truth about marriage must be rediscovered again and again."[112] This last thought of the eminent Canonist is worth extending by recalling the source of inspiration he revealed, namely, the key passage of John Paul II's 2004 Address to the Tribunal of the Roman Rota:

> An authentically juridical consideration of marriage requires 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. It is necessary instead to rediscover the truth, goodness and beauty of the marriage institution. Since it is the work of God himself, through human nature and the freedom of consent of the engaged couple, marriage remains an indissoluble personal reality, a bond of justice and love, linked from eternity to the plan of salvation and raised in the fullness of time to the dignity of a Christian sacrament. It is this reality that the Church and the world must encourage! This is the true *favor matrimonii!*.[113]

[109] Sobański, "Kanoniczne prawo małżeńskie," 64. The Canonist argues: "The benefit of faith is the rationale for specific regulations which define exceptional situations and which constitute exceptions to the principle of marital indissolubility, an essential attribute of marriage. These exceptions are: 1) the Pauline privilege (can. 1143–1147), 2) the dispositions regarding polygamous unions (can. 1148), as well as 3) the impossibility of continuing the conjugal community (can. 1149), and 4) the Petrine privilege" (64).

[110] Sobański, "Kanoniczne prawo małżeńskie," 64.

[111] Sobański, "Kanoniczne prawo małżeńskie," 65; cf. Juan Fornés, "Comentario al c. 1150," in *Comentario exegético al Código de Derecho canónico*, ed. Ángel Marzoa, Jorge Miras, and Rafael Rodríguez-Ocaña, vol. 3/2 (Pamplona: EUNSA, 20023), 1579.

[112] Sobański, "Procesy o nieważność małżeństwa," 29.

[113] 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.

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Andrzej Pastwa

Piliers du système du *ius matrimoniale canonicum* vus par Remigiusz Sobański

Résumé

« La Constitution *Gaudium et Spes* n'aborde pas [le mariage] a priori – comme le faisait encore l'encyclique *Casti Connubii* – mais analyse la réalité du mariage telle qu'elle se présente dans la conscience chrétienne formée par l'enseignement de l'Église. » Cette phrase caractéristique, extraite de la revue théologique *Silesian Historical-Theological Studies* (1968), qui a fait en ce temps-là ses débuts sur le marché, trahit déjà à elle seule la sensibilité épistémologique et le sens méthodologique aigu du fondateur et rédacteur en chef de la revue. La présente étude adopte l'hypothèse que c'est dans cette phrase et dans les phrases similaires du célèbre article de 1969 – bien intégrées dans le courant de l'*aggiornamento* conciliaire – qu'a été révélée la clé de la compréhension du phénomène et du format scientifique de l'œuvre du Révérend Professeur Remigiusz Sobański (1930–2010). La vérification positive de cette hypothèse ne soulève aucun doute : un demi-siècle de travail académique, une riche pratique (juge et fonctionnaire au tribunal de Katowice) ainsi que le fait connexe qu'il est devenu une autorité incontestable dans le domaine du droit canonique du mariage, ont abouti à l'exposition par l'auteur des principes systémiques du *ius matrimoniale* codifié (CIC 1983). Cette constatation rend nécessaire une réflexion approfondie sur les titres des piliers du système du *ius matrimoniale canonicum* selon R. Sobanski, dans l'ordre suivant : (1) « le principe de l'indissolubilité conjugale » (*irrevocabilis consensus personalis – vinculum indissolubile*), (2) « le principe [qui] inspire toute la législation canonique sur le mariage » (*favor matrimonii*), (3) « le principe du droit au mariage » (ius connubii), (4) « le sacrement – un des éléments structuraux de l'Église » (*sacramentum matrimoni* ; principes : *eo ipso sacramentum* et *favor fidei*).

Mots-clés : Remigiusz Sobański, méthodologie du droit canonique, mariage, sacrement du mariage, consentement matrimonial, principe d'indissolubilité matrimoniale, *favor matrimonii, ius connubii*, principe *eo ipso sacramentum, favor fide*

Andrzej Pastwa

I pilastri dello *ius matrimoniale canonicum* secondo Remigiusz Sobański

Sommario

"La Costituzione *Gaudium et spes* non affronta [il matrimonio] a priori – come ha fatto l'enciclica *Casti connubii* – ma analizza la realtà del matrimonio così come si presenta nella coscienza cristiana formata dalla dottrina della Chiesa". Questa frase caratteristica, tratta dall'allora esordiente periodico teologico *Śląskie Studia Historyczno-Teologiczne* (1968), rivela già di per sé la sensibilità epistemologica e un acuto senso metodico del creatore e direttore della rivista. Nel presente lavoro è stata assunta l'ipotesi che in questo e simili versi del celebre articolo del 1969 – perfettamente inserito nella corrente dell'aggiornamento conciliare – si rilevasse la chiave per la comprensione del fenomeno e del formato scientifico dell'opera del sacerdote professor

Remigiusz Sobański (1930–2010). La verifica positiva di questa ipotesi non solleva dubbi: mezzo secolo di lavoro e di pratica dello studioso (giudice e funzionario del tribunale di Katowice), e il fatto che egli è diventato un'autorità indiscussa nel campo del diritto matrimoniale canonico, hanno portato a un'originale esposizione dei principi sistemici dello *jus matrimoniale* codificato (CIC 1983). Tale constatazione fa riflettere con viva attenzione sull'area del titolo dei pilastri del sistema ius matrimoniale canonicum secondo R. Sobański, nel seguente ordine: (1) "principio di indissolubilità coniugale" (*irrevocabilis consensus personalis – vinculum indissolubile*), (2) "principio [che] ispira tutte le disposizioni canoniche in materia di matrimonio" (*favor matrimonii*), (3) "principio del diritto al matrimonio" (*ius connubii*), (4) "sacramento – uno degli elementi strutturali della Chiesa" (*sacramentum matrimoni*; i principi: *eo ipso sacramentum* e *favor fidei*).

Parole chiave: Remigiusz Sobański, metodologia del diritto canonico, matrimonio, sacramento del matrimonio, consenso matrimoniale, principio di indissolubilità coniugale, *favor matrimonii*, *ius connubii*, principio *eo ipso sacramentum*, *favor fidei*

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Sobański's Critique of the (Particular) Legislation

Abstract: Legislation is an art. Fr. Professor Remigiusz Sobański, who analyzed the particular legislation of the (Arch)diocese of Katowice in his scientific activity, was very well aware of this. These academic analyses allowed him to draw up numerous observations and comments, as well as postulates with regard to this law. This article focuses on the formal aspects of law addressed by the great canonist.

Keywords: Sobański, legislation, statute, particular law, canon law

Introductory Remarks

The quality of legislation is very important for any entity that has its own endogenous law, including the Church. The canonists are familiar with this problem, however, it still has not been studied thoroughly in canonical literature.[1]

[1] See: Piotr Kroczek, *The Art of Legislation: The Principles of Lawgiving in the Church* (Kraków: Wydawnictwo UNUM, 2017); Geraldina Boni, *La recente attivita normativa ecclesiale: finis terrae per lo ius canonicum? Per una valorizzazione del ruolo del Pontificio Consiglio per i testi legislativi e della scienza giuridica nella Chiesa* (Mucchi/Modena: Mucchi Editore, 2021); Piotr Kroczek, "Kilka uwag do znowelizowanych Wytycznych Konferencji Episkopatu Polski w kontekście zasad techniki legislacyjne oraz znowelizowanego art. 240 § 1 kodeksu karnego," *Annales Canonici*, vol. 13 (2017): 91–107; Piotr Kroczek, "O niektórych uchybieniach legislacyjnych w nowym statucie Uniwersytetu Papieskiego Jana Pawła II w Krakowie," *Analecta Cracoviensia*, vol. 50 (2018): 269–280; Piotr Kroczek, "Ocena instrukcji *Dignitas connubii* z perspektywy sztuki legislacji," *Prawo Kanoniczne*, vol. 58, no. 1 (2015): 94–109.

This topic was also covered by Rev. Professor Remigiusz Sobański. His point of interest was mainly the area of particular legislation, mainly diocesan law. This scholar understood very well that through proper quality of particular law, autonomy of local churches can be promoted and centralization can be accomplished without any danger of harmful particularisms.[2] A good diocesan is essential for the community of the faithful to "vigeat, crescat, floreat."[3] As Sobański wrote: "The law gives—or is supposed to give—our actions a certain support, it is the branch on which we sit."[4]

This aim of the article is to present the views of the cited canonist on the particular legislation of the (arch)diocese of Katowice. Based on Professor Sobański's comments, it is possible to formulate specific postulates in the field of ecclesiastical legislation which are probably useful at any level of canon law-making, including the level of the Church's universal law.

Although, as Sobański noted, that "the characterization of the law can be done from the form or the content point of interests,"[5] the comments in this article mainly concern the form of the law, and in a lesser degree its content.[6] It is because the topic is hardly ever studied by the canonists; as Sobański wrote, "Formal aspects, however, should not be neglected. It is about the transparency of the legitimacy of church actions, decisions, orders."[7]

Form of Law in the Particular Legislation

Written law is "indeed a more developed form of law."[8] This is also due to the tendency of custom to yield to the written form and the passage of law into the hands of specialists.[9] Among the written law, the most prominent place should be given to the general decree. It should constitute the main source of canonical

[2] Józef Krukowski and Remigiusz Sobański, *Komentarz do Kodeksu Prawa Kanonicznego*, vol. 1. Księga I, *Normy ogólne* (Poznań: Pallotinum, 2003), 27.

[3] *Preafatio. Codex luris Canonici auctoritate loannis Pauli PP. II promulgatus, Roma 1983*: XXX.

[4] Remigiusz Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," *Prawo Kanoniczne*, vol. 38, no. 1–2 (1995): 161.

[5] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 168.

[6] This I leave to other Authors of the volume, who will address the issue of theology and legal theory in Sobański's scientific output.

[7] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 159.

[8] Krukowski and Sobański, *Komentarz do Kodeksu Prawa Kanonicznego.* vol. 1. Księga I, *Normy ogólne* (Poznań 2003): 78.

[9] Sobański, *Teoria prawa kościelnego* (Warszawa: Wydawnictwo UKSW, 1992), 91–101.

norms in the diocese, according to Sobański. The law should stand above any other form of law, especially the dispositions issued annually.[10]

According to Remigiusz Sobański, a law should contain an appropriately developed theological element, that is, a doctrinal one, preferably in the form of the first part of the law. This is because the point is that the legislator should indicate the motives that caused him to take same actions to enact the regulation and reasons for the content of the law. Unfortunately, "Diocesan laws rather rarely state the rationale for which they were passed. This is especially true of laws on clergy discipline," as the professor noted.[11]

The Subject of the Legislature

Referring to the subject of legislative authority, the people on which the law depends, it is necessary to notice, that for the correct exercise of legislative power, according to Sobański, is to be aware of the origin of authority in the Church,[12] and the basis of the binding force of Church law[13]. The professor cited the Constitution *Lumen gentium* indicating that diocesan bishops have a "sacred right and duty before the Lord of legislating."[14] This is a task the diocesan bishops should perform within the limits set by the law whether it is code (can. 38 § 1) or other laws. The bishop "may legally regulate everything that general regulation requires."[15] When he has a doubt about his competence, he can resolve it in his favor of legislative action. For in case of doubt, the presumption of law speaks for this solution.[16]

[10] Remigiusz Sobański, "Prawo partykularne diecezji katowickiej: 1922–1971," *Śląskie Studia Historyczno-Teologiczne*, vol. 7 (1974): 35.

[11] Remigiusz Sobański. "Cechy charakterystyczne katowickiego prawa diecezjalnego," *Śląskie Studia Historyczno-Teologiczne*, vol. 8 (1975): 170.

[12] Remigiusz Sobański, *Kościół jako podmiot prawa* (Warszawa: Wydawnictwo UKSW, 1983), 134–173.

[13] Sobański, *Teoria prawa kościelnego* (Warszawa: Wydawnictwo UKSW, 1992), 187–190.

[14] Vatican Council II, "Dogmatic Constitution on the Church *Lumen gentium*" (November 21, 1964), *Acta Apostolicae Sedis*, vol. 57, no. 27.1. (1965): 5–75.

[15] Remigiusz Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," *Prawo Kanoniczne*, vol. 38, no. 1–2 (1995): 141.

[16] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 141.

Acts of Particular Laws

Looking at the problem of the names of acts of particular law, Sobański postulated that generally "a law is a law, an instruction is an instruction, an order is an order […]."[17]

Profesor Sobański noted the difficulties in this field due to the ambiguity of the term "general decree." A decree of this type is either "law" (see can. 29) or "general executory decree" (see can. 32). It is not always easy to discern whether it is a decree in the nature of a law or an executive decree, to limit oneself to one. He explained that: "We are dealing with law when the act introduces new norms—either by entering areas not covered by the law or by amending or repealing norms previously in force. […] If, on the other hand, the general decree does not change the existing legal norms and does not go beyond the boundaries set by law (or universal law), we are dealing with executive decree."[18] For this reason, Sobański said that the legislator should limit himself to the term, namely law, not just general decree.[19] He wrote that "intending to promulgate a decree as law, the legislator should therefore make this clear."[20] However, he was aware that the absence of mention that the legislator is promulgating a decree as law does not thereby mean that it is not a law […].[21]

Authority to Publish Particular Law

Sobański stressed the importance of clearly and precisely identifying the sources of knowledge of the diocesan law. He was primarily concerned with the official promulgation organ (the official journal of the diocese) in which diocesan laws are promulgated. Other forms of promulgation, law, although permitted by canon law and which, according to the professor, demonstrate the operability and awareness of lawmakers, can cause some confusion. Promulgation by sending a letter to parish priests or to the vicar foranes (deans), as the professor wrote, "does not facilitate a comprehensive grasp of diocesan law, and may also create difficulties in determining the legal value of certain acts of the legislator."[22]

[17] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 161.

[18] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 144.

[19] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 143–144.

[20] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 143–144.

[21] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 143–144.

[22] Remigiusz Sobański, "Prawo partykularne diecezji katowickiej: 1922–1971," *Śląskie Studia Historyczno-Teologiczne*, vol. 7 (1974): 32–33.

Another point must be stressed here. According to can. 8 § 2, particular laws take effect one month after the date of promulgation. Sobański noted that official publishing organs in which particular laws are promulgated should provide daily date. For otherwise, it is impossible to calculate a month (that is 30 days, can. 202 § 1). Without daily date, the legislator should each time specify the day upon which a law takes an effect.[23] In light of can. 8 § 2, such practice should not be the rule. This is indicated by the Latin word "nisi." Sobański points out that initially *Wiadomości Diecezjalne* of the Archdiocese of Katowice carried the date, but now [it was 1995] only the month is shown. In this situation, every diocesan general decree (both of a statutory and executive nature) must [independently] indicate the effective date.[24] Sobański had the same critical comments on the official promulgation organ of the Polish Bishops' Conference [Akta Konferencji Episkopatu Polski; Norms of the Polish Bishops' Conference].[25]

Sobański postulated that the official promulgation organs should be published without any delay and should be provided with a publishing date on the title page, and that this date should coincide with the actual date of the issue's release. This punctuality is one of the features that distinguishes an official organ from non-official monthly magazines.[26]

In these places, it should be noted that Sobański prescribed to distinguish from the official promulgation organs some other official organs of the diocese of a pastoral nature, which serve to stimulate and coordinate pastoral work in the diocese, but are not intended to promulgate normative acts.[27] However, there is no obstacle to them being a venue for the popularization of laws.[28]

Regarding the editorial side of the official promulgation organ Fr. Sobański made several minor demands, which, when generalized, can be presented as follows. The first comment concerns the custom of using covers as a place for the table of contents. In the professor's opinion, this is a wrong practice. It is because, if the yearbook is bound, the magazine is deprived of its covers. "The table of contents is an integral component of each issue and goes with it into the bound yearbook."[29] The second point is the demand for arranging the table of contents of each yearbook of the official promulgation organ according to blocks in formal aspect (e.g., in the Holy See section should be divided into: encyclicals, messages, homilies, etc.), or at least arranging the table of contents

[23] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 148.

[24] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 148.

[25] Krukowski and Sobański, *Komentarz do Kodeksu Prawa Kanonicznego.* vol. 1. Księga I, *Normy ogólne*, 48.

[26] Sobański. "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 148.

[27] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 155.

[28] Piotr Kroczek, *The Art of Legislation: The Principles of Lawgiving in the Church* (Kraków: Wydawnictwo UNUM, 2017), 184.

[29] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 154.

of each yearbook according to alphabetical order. And the third postulate is the compilation of a detailed index of the yearbook.[30] It can be seen that Professor Sobański was concerned also about relatively minor things, which, however, would facilitate queries.

The Form of Expressing Canonical Norms

Sobański demanded that the will of the church legislator is to be properly communicated to the faithful and that canonical provisions must be properly formulated. He wrote that all injunctions, prohibitions, statements like "it is obligatory" are only informative, if they are not placed in laws. They exist only when they are actually established in a normative act.[31] A bon mot of Sobański can be cited here: "[…] it would be good if the word 'obligation' always really meant 'obligation.'"[32]

If any legally established obligation is reminded in any other form other than a law, then, as Sobański writes, it should clearly be indicated from which law it came.[33] Without this, it is difficult to establish the source of this obligation. The point, then, is that claims of the obligatory nature of a given behavior should not be unfounded. Providing a clear source of the norm causes that the addressees of the norms have a better understanding of what they are obligated to do and can more consciously, obey the law and the legislators' will. "Experience, in turn, instructs most emphatically that a factual appeal proves much more effective than an emphasis on duty."[34]

Sobański pointed out that there is a serious rationale and importance of "a clear distinction between propositional, encouraging, stimulating dispositions and normative dispositions. The latter must be clear not only in formulation, but also as to their legitimacy."[35] Moreover, in his view, more weight should be given to legislating laws that create opportunities for action than to regulations that prescribe action.[36]

Increasing the effectiveness of regulations, that is, a greater number of situations in which the law is obeyed can be built precisely by conveying to the ad-

[30] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 154.
[31] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 157.
[32] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 159.
[33] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 157.
[34] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 159.
[35] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 161.
[36] Remigiusz Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," *Śląskie Studia Historyczno-Teologiczne*, vol. 8 (1975): 171.

dressees of the norm *ratio* of the regulations that apply to them. Creative norms without explaining them to the faithful can achieve at most legalism. "And this very one is alien to church law."[37]

Another issue raised by Sobański was that legal norms should be built on the achievements of legal science. The idea is that the hypothesis and the disposition should be unambiguous, that is, they should clearly indicate whom the norm applies to and what behavior the legislator expects.[38]

When it comes to the articulation of norms, Sobański stressed that the specifics of canon law fully forgive the use of obtuse forms, that is, expressions such as "The reverend clergy will consider" instead of "It is ordered as follows." Such a soft and polite form does not harm the precision of the provision and is certainly more in line with the spirit of church law—Sobański wrote.[39]

Multiplicity of Norms

An important point Father Sobański made in the following sentence: canon law would never regulate or encompass all the Church activity. "The desire to include all life in legal norms would lead to its ossification and atrophy of initiative to stagnation.[40] That is why Sobański's scholarly works resound with an awareness of the danger of the inflation of norms. This is caused by an increasing number of very detailed norms. The outcome of this process negatively effects on the life of the faithful. This causes that those who are more active persons are perceiving the phenomenon in question as stifling their own dynamism, and a more passive persons become accustomed to being led by the hand, which in turn threatens the progressive dormancy of thinking and the disappearance of initiative.

Thus, the legislator should deduce to what extent it is necessary to legislate norms, and to what extent it is possible to leave matters to regulate themselves. Sobański wrote that the activity of the center of diocese [that is of the ecclesiastical authority—bishop] should be perceived not as a burden, but as a relief.[41] The aforementioned phenomenon also occurs when regulations are issued in matters already regulated.[42] By this process norms are unnecessarily duplicated.

[37] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 177.
[38] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 169.
[39] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 169.
[40] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 180.
[41] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 161.
[42] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 169.

Summarizing this point, it can be stated that "law is not good when it regulates life in the most detailed and complete way possible, but when it creates a proper trough for this life."[43]

The Salvific Function of the Law

Professor Sobański evaluated the canon law of the (Archi)Diocese of Katowice from a metacanonical point of view, that is, he emphasized that the ultimate meaning and purpose of this law lies in service to the salvation of man. As he himself wrote: "Such a viewpoint presupposes an understanding of the salvific function of Church law."[44] Hence the functions of law in the Church—although in many places analogous or even identical to the functions of secular law[45]—cannot be limited to providing discipline, order, but by regulating social relations, defining rights and duties to the community, thereby serving the supernatural life of that community.

As an example of the realization of this function of law, one can cite, following Sobański, the pastoral activities of the Church, such as a diocesan synod with a pastoral character. According to Sobański, in order to achieve its purpose, such a legal institution as a synod requires appropriate legal structures, namely, canonicality of regulation, since "the best initiatives will prove futile if they are not given the opportunity to flourish."[46] And the law "must not be an inhibiting factor, but is to serve the pastoral and supernatural purpose of the Church. Legal structures are to express the theological, pastoral content and secure its practical implementation."[47]

An element of the salvific function of the law is its *communio*. This element must be understood through the concept of *communio*, which is the formal principle of canon law.[48] Laws, therefore, are meant to build up the community, and can never break it up.

When the salvific function of canon law is considered, another feature of particular law is to be that the law, as "forming the historical setting of God's

[43] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 170–171.

[44] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 167.

[45] Piotr Kroczek, "Funkcja prawa" jako skutek wprowadzenia do systemu prawnego normy prawnej," *Annales Canonici*, vol. 4 (2008): 173–188.

[46] Remigiusz Sobański, "Prawo partykularne diecezji katowickiej: 1922–1971," *Śląskie Studia Historyczno-Teologiczne*, vol. 7 (1974): 33.

[47] Sobański, "Prawo partykularne diecezji katowickiej: 1922–1971," 33.

[48] Remigiusz Sobański, "W sprawie zasady formalnej prawa kanonicznego," *Prawo Kanoniczne*, vol., 30 no. 1–2 (1987): 3–30.

law," is not arbitrary, but "arises in listening to the word of God."[49] Sobański has repeatedly stressed that the principle of *Quod placuit principi, legis habet vigorem*[50] should not apply in canon law. This listening to God's word is to be seen and the content of the norm is also to be reflected in form, for example in the form of editorial units in canon law. These are *canons*.[51]

The salvific function of canon law is reflected in its content. According to Sobański, diocesan law is to deal with: (1) the structures of the local Church, (2) the activities of the local Church, and (3) its material base.[52] Regulations in these areas are supposed to cause the Church to be able to carry out its mission effectively.

Compatibility of Particular Law with Theology and Universal Law

An important postulated feature of law is its compatibility with theology. As Sobański writes: "Law does not precede theology, but puts theological postulates into practice."[53] Therefore, when enacting church laws, the first thing to think about is the logical rationale of the new norms in addition to the practical ones sent.[54]

Sobański enumerated deficiencies in the particular law he studied and pointed out the incompatibility of many norms of this law with the universal law. He wrote, for example, about the obligation under particular law to obtain permission from the ecclesiastical authority to celebrate Mass outside a holy place, but in the year of issuance of this norm, such an obligation could not be issued, because can. 932 of new Code of Canon Law 1983 was already in force.

Professor Sobański found many similar failures and references to the old legal regime. For example, the diocesan norm that mandated obtaining the permission and blessing of the diocesan bishop to establish religious communities, while can. 215 of the new Code granted the faithful the right to freely establish associations and manage them.

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[49] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," 142.
[50] Dig. 1. 4,1; Cf. Inst. 1.2.6.
[51] Sobański, *Teoria prawa kościelnego*, 190–193.
[52] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 170.
[53] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 175.
[54] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 176.

Other Features of the Particular Law

From Sobański's texts, the postulates of various features of particular law shines through. Here are some of them, which the legislator should keep before their eyes and take under consideration carrying out their work. A feature of the law is its ability to stimulate creative, full dynamism in the life of the Church as an institution and in the lives of the faithful. This can be done by creating opportunities for the faithful to take part in parish and diocesan events, such as retreats and synods. Law that inhibits initiatives, even if it has a venerable tradition behind it, if it no longer serves the realization of religious values, should be changed.[55]

Another feature of law is that a law causes uniformity of behavior, which in pastoral regulations is made evident in the effort to give the work of the clergy a uniform direction.[56] Such uniformity can be a creative process or a process that inhibits the Church.

One more feature of law can be mentioned, that is, its changeability. Professor Sobański believed that although the survival of the test of time by a law is in fact the highest praise for the law, the characteristic of changeability of law is very desirable.[57] The legislator must show readiness to change his work and openness to new factors flowing from the dynamism of the community. Sobański understood that the law is never a finite creation, but postulated that one should always see "the necessity of looking at the existing law and rethinking what can be used from it, what can be alluded to, what can be developed and finally what can be boldly changed."[58] He wrote that: "One should not be afraid of reforming the law, even if it goes to regulations to which we have become so accustomed that we are inclined to regard them as belonging to the Christian deposit."[59]

An important feature of the law is its realism. Fr. Sobański warned not to issue "unrealistic regulations, not suitable for application at all"[60] because such ordinances can bury the soundest case. "Rather, promulgating regulations that do not take into account social and personal realities results in disregard for the law and can form an inappropriate attitude toward the law in general."[61] Thus, legislators must control their laws from the viewpoint of realism.

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[55] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 176.
[56] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 173.
[57] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 177.
[58] Sobański, "Prawo partykularne diecezji katowickiej: 1922–1971," 33.
[59] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 176.
[60] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 177.
[61] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 178.

The last feature of canon law that Sobański dwells on is its effectiveness or efficiency. The law is then effective when it fulfills what it is the law to achieve.[62] Therefore, the legislator, when formulating a law, should pay attention to what law can achieve. In general, "law is where human relations take place. Therefore, legislation of the diocese is to include the relations of those called to the sacred ministries and other faithful, so mainly the activity of the clergy and other persons performing some function for the good of the public."[63]

Development of Particular Law

Sobański repeatedly stressed that "Church law is genuine law. This means that it must meet all the requirements for law from the point of view of legal theory."[64] Canon law cannot be backward. Therefore, Sobański also referred to the secular theory of law and took into account the achievements of jurists in his considerations. The canonists should not be lagging behind their colleagues.[65] These borrowings can be clearly seen in the fact that Sobański distinguished behind the secular theory of law between the canon law language and the canonical language, analogously behind the legal langusge.

Summary

Sobański believed that the law as a tool should not only be used, but it should be used wisely. The technical side of the law must not be neglected when legislating.[66] This necessitates a constant critical analysis of ecclesiological and pastoral canon law. This makes it possible to trace the picture of the Church

[62] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 179; see Piotr Kroczek, "Kiedy prawo kanoniczne jest efektywne?." *Annales Canonici*, vol. 2 (2006): 163–177.

[63] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 180.

[64] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego," 168.

[65] See Piotr Skonieczny, "La presunzione dell'imputabilita (can. 1321, § 3 CIC/83): commento ad un disposto da abrogare." *Angelicum* vol. XC (2013): 391; Geraldina Boni. *La recente attivita normativa ecclesiale: finis terrae per lo ins canonicum? Per una valorizzazione del ruolo del Pontificio Consiglio per i testi legislativi e della scienza giuridica nella Chiesa.* Mucchi/Modena 2021: 145, ft 200.

[66] Sobański, "Cechy charakterystyczne katowickiego prawa diecezjalnego,"169.

and its activities, its self-awareness and the focus of pastoral actions, but also the possible improvement by the legislator of his technical workshop. It is also a question of studying the fit of norms to social and ecclesial realities, as well as the influence of the law on the community, the impact of norms once other repercussions that the law causes.[67] From the analysis of the scientific works of Rev. Professor Remigiusz Sobański, it is possible to extract certain postulates, comments formulated towards the legislator and the law itself. Here are some of them:

1. Use the law as the main source of norms.
2. Explain the theological rationale behind the bill.
3. Be aware of your role in the community including the legislature and do your job.
4. Use proper nomenclature for the acts issued.
5. Promulgate normative acts in the body designated for this purpose.
6. Take care of the publishing and editorial quality of the publishing body.
7. If you want to prescribe something, communicate your will through statutes.
8. He praises canonical norms in an ecclesiastical way.
9. Do not multiply norms beyond the need.
10. Remember the principle and purpose of the law you are making.
11. Let the law build communio.
12. Let the salvific function of canon law be reflected in the content of the norms.
13. Take care of the theological correctness of the norms established by you.
14. Let the particular law be consistent with the higher law.
15. Be ready for changes in the law.
16. Take care of the dynamism of community life under the support of the law you make.
17. Realistically assess the reality of norm addressees.
18. Let the law be effective.
19. Use the achievements of the science of law.

Acting according to these guidelines, it is possible to make legislation also a particularistic true art, the art of legislation. It seems that contemporary canonists should learn from Sobański and implement his ideas and concepts, or at least take them into account in their work and critically develop them. This will make canon law an effective tool in the life of the Church.

[67] Sobański, "Uwagi o prawodawstwie (Archi)Diecezji Katowickiej 1983–1993," *Prawo Kanoniczne*, vol. 38 no. 1–2: (1995) 159–160.

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Piotr Kroczek

Critique de Sobański sur la législation particulière

Résumé

La législation est un art. Le Révérent Professeur Remigiusz Sobanski, qui a analysé la législation particulière du diocèse de Katowice dans ses travaux scientifiques, le savait très bien. Ces analyses savantes lui ont permis de formuler de nombreuses remarques et commentaires, ainsi que

des postulats concernant cette loi. Dans le présent article, l'attention est portée sur les aspects formels du droit légiféré abordés par le grand canoniste.

Mots-clés: Sobanski, législation, loi, droit particulier, droit canonique

Piotr Kroczek

La critica di Sobański alla legislazione particolare

Sommario

La legislazione è un'arte. Lo sapeva perfettamente il sacerdote professor Remigiusz Sobański, che nei suoi lavori scientifici ha analizzato la legislazione particolare della diocesi di Katowice. Queste analisi scientifiche gli hanno permesso di elaborare numerose osservazioni e commenti, nonché postulati in relazione a questa legge. Il presente articolo si focalizza sugli aspetti formali della legislazione sollevati dal grande canonista.

Parole chiave: Sobański, legislazione, statuto, diritto particolare, diritto canonico

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Aequitas canonica and Access to the Sacrament of Penance during the First Wave of COVID-19 in 2020 in the Light of the Principles of Canon Law

Abstract: Epidemiological measures during the first wave of the coronavirus epidemic in 2020 significantly affected the realization of religious freedom, including religious services and sacraments. This paper deals with one narrower topic in this area, namely, the regulation of access to the sacrament of penance in response to measures of secular law. It focuses mainly on the modalities of allowing access to this sacrament in the Catholic Church, both in terms of universal law and in terms of particular law and proposals for its formulation.

Keywords: Churches and religious societies, religious freedom, restriction of rights, Catholic Church, sacraments, Sacrament of Penance, canon law, analogy

Introduction

Epidemiological measures during the first wave of the 2020 COVID-19 epidemic significantly affected the exercise of religious freedom. This paper explores one narrower topic in this area, namely, the regulation of access to the sacrament of penance as part of spiritual ministry and care. In contrast to my first paper on

this topic, which was written in Czech and focused more descriptively,[1] I intend to focus this English-language paper on the fundamental theological issues related to the extraordinary manner of conferring the sacraments. This paper is largely inspired by the ideas of Professor Remigiusz Sobański, especially in his work *Nauki podstawowe prawa kanonicznego* [Basic Doctrines of Canon Law].[2]

The first section of the present article briefly delineates the situation created by the decrees of state authorities in the Czech Republic (which is very similar to the situation in other Central European countries). First, I will briefly summarize the basic data on the first wave of the COVID-19 epidemic, then I will present the measures leading to the restriction of access of clergymen to patients and clients of health, social and prison facilities and the measures leading to the restriction of the movement of the population.

Afterwards, I will discuss the regulations of the Catholic Church from a broader perspective. Assuming knowledge or easy traceability of the basic regulations regarding the ordinary and extraordinary modalities of the conferral of the sacrament of penance (individual absolution and collective absolution), I will focus on a special measure for the coronavirus epidemic: the note of the Apostolic Penitentiary of March 19, 2019, regarding the conferral of the sacrament of penance, especially the modalities of collective absolution, and its application in selected Catholic dioceses.

The third section synthesizes the findings of the two previous sections and shows the modalities of enabling access to the Sacrament of Penance actually implemented both in the Czech Republic and in other countries. On the basis of a critical evaluation, it presents some proposals for solutions to access to the sacrament of penance in this emergency situation, as well as examples of their implementation, including briefly the debate around them.

Sections four to seven represent the essential part of the work: a discussion of the various fundamental theological and canonical issues related to the proposals for extraordinary solutions to access to the Sacrament of Penance around Easter 2020.

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[1] Damián Němec, "Přístup ke svátosti pokání v katolické církvi během první vlny epidemie koronaviru v roce 2020" [Access to the Sacrament of Penance in the Catholic Church during the First Wave of the Coronavirus Epidemic in 2020]," in *Právna politika a legislatíva v oblasti konfesného práva: Zborník z medzinárodnej vedeckej konferencie v rámci online medzinárodného vedeckého kongresu Trnavské právnické dni, 24–25 septembra 2020* [Legal Policy and Legislation in the Field of Religion Law: Proceedings of the International Scientific Conference of the Online International Scientific Congress Trnava Law Days, 24–25 September 2020], ed. Michaela Moravčíková (Trnava: Právnická fakulta TU v Trnave, 2020), 33–51. Available on-line at http://publikacie.iuridica.truni.sk/too.

[2] Remigiusz Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, Teoria prawa kanonicznego (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2001); and Remigiusz Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 2, Teologia prawa kościelnego (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2001).

In the conclusion, I summarize the results achieved, bearing in mind that no generally accepted solution has yet been found, while the solution that I propose in this paper can be implemented.

1. Brief Summary of Actions during the First Wave of COVID-19 in the Czech Republic with a Focus on Access to the Sacrament of Penance

In this section, I will limit myself to a minimalist description of the most important legal measures in relation to the first wave of COVID-19 in the spring of 2020, with a narrowed perspective: focusing on access to the sacrament of penance, especially around Easter.[3] In 2020, Palm Sunday was April 5, and Easter Sunday itself was April 12.

Although the first air traffic measures were taken in early February 2020, the most important measure was the introduction of a national emergency (for the first time since the Czech Republic was formed in 1993!) on March 12, 2020, for a period of thirty days, which was repeatedly extended and only ended on May 17. Even after that, however, many restrictions continued, being relaxed in large part by early July 2020.

Even before the declaration of the state of emergency, the Ministry of Health decided on March 9, 2020, with effect from the following day, to ban visits to patients in inpatient health care facilities, residential social services facilities and residential respite social services facilities. Exceptions to this blanket ban were made: in the case of inpatient health care facilities, for visits to minors, patients with limited capacity, parturients, hospice patients and other patients in the terminal stage of terminal illness; in the case of social services facilities, for visits to minors, users with limited capacity and users in the terminal stage of terminal illness (the presence of fathers during childbirth was banned on March 18 and gradually relaxed).

As early as March 13, the Government issued a ban on visits to the accused, the convicted, and inmates in detention centres, prisons, and institutions for the execution of security detention for the duration of the state of emergency, effective March 14, from which individual exceptions could be granted by the Minister of Justice. It was only in connection with the end of the state of emergency that the the Ministry of Health issued a mandate to the Prison Service of

[3] Emergency measures in connection with the COVID-19 disease in the Czech Republic are systematically reported, including short comments, on the website www.fulsoft.cz/33/prehled-pravnich-predpisu-sbirky-zakonu-a-dalsich-zdroju-souvisejicich-s-prokazanim-vyskytu-koronaviru-oznacovaneho-jako-sars-cov-2-zpusobuje-onemocneni-covid-19-uniqueidgOkE4NvrWuMkmaNigtjQulrL-J1k5knUT6QOQea68B8/, accessed August 5, 2022.

the Czech Republic to decide on visits on May 15, 2020. Restrictions on visits were relaxed by further decrees of June 18 and June 30.

Only after the end of the state of emergency did the the Ministry of Health allow visits to inpatient medical facilities and residential social services facilities from May 25, usually for a maximum of two persons preferably in an outdoor area. These restrictions did not apply to visits to persons in the terminal stage of terminal illness. Following further modifications, these restrictions were lifted as of July 4.

From March 16 to March 24, the Government of the Czech Republic banned the free movement of persons, with the exceptions of travel to and from work and for the provision of essential needs and tasks; among these were also occupational tasks providing individual spiritual care and spiritual services. This prohibition was repeatedly extended from March 23 until the end of the state of emergency.

Also on March 16, a Government resolution banned persons in social care institutions (homes for people with disabilities, homes for the elderly, homes with special treatment) from going outside the premises or grounds of the institution for the duration of the state of emergency, and on the same day, a Government resolution recommended that seniors aged seventy and over should not go outside their homes for the duration of the state of emergency, except to visit a medical facility to receive urgent medical care.

The ban on the free movement of persons from March 16 effectively meant a complete ban on public worship, modified by allowing limited attendance at funerals from March 23. Further relaxations came after Easter. On April 15, the Minister of Health permitted weddings with attendance of up to ten people, effective April 20, and on April 17, effective April 27, public services with attendance of up to fifteen people, while maintaining strict sanitary measures, including a ban on singing. The Minister of Health, by decision of April 30, increased the number of participants in public services to 100 persons with effect from May 11. Following the end of the state of emergency, the Ministry of Health authorized 300 persons to attend on May 19, 2020, with effect from May 25, 500 persons to attend on June 2, with effect from June 8, and 1,000 persons to attend on June 18, with effect from Monday June 22. The requirement to wear facemasks was lifted on June 29 with effect from July 1. The Ministry of Health then lifted the restriction on holding services on July 3 with effect from July 4, but already in the middle of the summer holidays, on July 23, with effect from July 27, it again restricted the number of persons to 500.

The restrictions on the movement of people were eased by the Ministry of Health measures on June 12 with effect from June 15, 2020, then on June 18 with effect from June 19, and effectively lifted on July 3, 2020.

2. Church-wide Measures of the Catholic Church Regarding the Administration of the Sacrament of Penance

In the situation of a de facto sanitary crisis, especially in Italy and Spain, resulting from the coronavirus epidemic, the Apostolic Penitentiary issued on March 19, 2020, a Note on the Sacrament of Reconciliation in the situation of the current pandemic (hereinafter "the Note").[4] On the one hand, the Note recalls the traditional teaching and discipline of the Catholic Church that individual confession, coupled with individual absolution, is the only proper form of celebrating the Sacrament of Penance, and that perfect contrition for sins, available to all Catholics, remains the extraordinary way of achieving the forgiveness of sins. On the other hand, it elaborates on the possibility of granting general absolution to multiple penitents without personal confession of sins.

The Note recalls that in the current epidemic situation, the case of grave necessity foreseen in can. 961 § 2 CIC/1983[5] can (and need not) arise. The discernment of whether a case of such necessity has arisen belongs to the diocesan bishop in accordance with the principles agreed with the other members of the conference of bishops, and individual priests are to act accordingly. The bishop is to determine, according to the degree of pandemic contagion, the cases of grave necessity in which it is permissible to grant general absolution. Should a priest come to believe that a grave necessity so defined has occurred, he is to notify the diocesan bishop in advance or, in an urgent case, to inform him as soon as possible in retrospect of the granting of general absolution. In doing so, the penitents should be led to examine their conscience and repent. In all this, the Note repeats the existing teaching and practice of the Catholic Church.

The only more specific specification is as follows: "For example, the entrance to hospital wards where there are infected faithful who are in danger of death, using as much as possible and with the necessary precautions, means of vocal amplification so that the absolution may be heard."[6]

At the same time, the Note also encourages the appointment of extraordinary hospital chaplains (that is, priests appointed according to can. 564 of the CIC/1983), of course in collaboration with the receiving institution.

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[4] Apostolic Penitentiary, *Note on the Sacrament of Reconciliation in the Present Emergency of the Coronavirus* (19.03.2020), accessed August 5, 2022, https://www.vatican.va/roman_curia/tribunals/apost_penit/documents/rc_trib_appen_pro_20200319_decreto-speciali-indulgenze_en.html#NOTE.

[5] *Code of Canon Law: Latin-English edition* (Washington: Canon Law Society of America, 1983).

[6] Note of the Apostolic Penitentiary, specified in footnote nr. 4, unnumbered seventh paragraph.

3. Modalities of Access to the Sacrament of Penance in Central Europe

From the description of the measures against COVID-19 in section 1 of this paper, it is clear that the situation regarding access to the sacraments, especially the Sacrament of Penance, in the Czech Republic differs significantly from Italy and Spain. It must be stated that, although we will not give specific references for this statement, a similar situation to the Czech Republic applies to all the countries of Central Europe.

The fundamental difference lies in the fact that in Italy and Spain, there were more Catholics in one place (usually in a health care facility) without the possibility of normal access to a priest, whereas in Central Europe, Catholics were mostly confined or isolated in the places of their normal residence: in their homes, in social service facilities and partly in health care facilities, without forming groups there comparable to those in Italy or Spain. Thus, it is clear that the Note is overly charged with the Italian situation, which is unfortunately not an exceptional situation.

The restriction on the free movement in the Czech Republic did not concern the provision of individual spiritual care and service. It was therefore possible for clergymen to go out to individual recipients of spiritual care and service while maintaining strict regulations regarding sanitary protection. However, only a limited number of the faithful could be served in this way: often the elderly or their relatives were so afraid of contagion that they did not receive visitors at all; moreover, a significant number of Catholic priests fell into the category of the elderly. Another restriction was the prohibition of visits to patients and clients of health and social welfare institutions and prisons, which explicitly allowed clerical ministry (except for minors, of whom there are few in such institutions, and hospices) only in the terminal stage of irreversible illness.

In practical terms, it has proved easier in health care institutions to provide spiritual care by duly appointed healthcare chaplains, who are very often in the position of employees of the health care institution (either under an employment contract or under agreements for work outside the employment relationship), while observing hygiene measures. The situation in hospitals varied; in some, even hospital chaplains were not allowed to visit patients, let alone outside priests.

It was therefore necessary to look for solutions, in our case for the Czech Republic. I was personally involved in this search and thus was able to become acquainted with the proposals of other Czech canonists: Josef Jančář, Libor Botek, and Jiří Dvořáček (although in the last case the proposal was prepared for the diocese of Görlitz).

Josef Radim Jančář OCarm. drafted a proposal for a directive of the conference of bishops, which was based very faithfully on the Note, with the proviso that it was applicable only during the epidemic of COVID-19 and to persons affected by this disease. Since the Czech Bishops' Conference had not developed criteria for implementation, it offered as a provisional starting point the text of nos. 4–5 of the Apostolic Letter of John Paul II *Misericordia Dei* on some aspects of the celebration of the Sacrament of Reconciliation.

Jiří Dvořáček, in his proposal of principles and a concrete solution (which does not take the form of a legal document), stated that there was no adequate regulation for the situation, ergo a situation called lacuna legis had arisen. He did not see the appropriate solution in the use of general absolution for physically present persons, but proposed that it be granted by telephone or by means of secure electronic communication (e.g., Skype, WhatsApp, Viber), based on the use of the analogia legis principle in order to contribute to the salvation of souls.

Libor Botek drafted a directive to the individual diocesan bishop. In addition to the possibility of "classic" general absolution, it offers the possibility of using absolution without individual confession for physically present groups of penitents as well as for individual penitents, also by means of telephone or other forms of remote communication.

Similarly to Jiří Dvořáček, I brought forward a proposal of principles and a concrete solution without the form of a legal document. The starting point was also the use of the principle of analogia legis. In this proposal, I exclude the possibility of using means of remote communication for individual confession connected with individual confession of sins, because of the guarantee of the sacramental seal. Therefore, I propose as the only feasible solution a general absolution granted by means of remote transmission, as instructed by the diocesan bishop, either by the diocesan bishop himself, possibly on behalf of other diocesan bishops or the entire conference of bishops, for example, through Christian TV Noe and Radio Proglas, or by a priest or priests appointed by him, in conjunction with a penitential service preceded by proper catechesis in the media.

There was no consensus among the bishops in the Czech Republic, and therefore none of the proposals described above were finally implemented. On the contrary, the Czech Bishops' Conference website mentioned as a possible model the Slovak practice of emphasizing the extraordinary extra-penitential way of perfect contrition,[7] which corresponds to the statement of the Regent of the Apostolic Penitentiary, Mons. Krzysztof Nykiel in an interview with Vatican

[7] "Jak je to nyní se svátostí smíření? Inspirace ze Slovenska [How Is It Now with the Sacrament of Reconciliation? Inspiration from Slovakia] (18.03.2022)," accessed August 5, 2022, www.cirkev.cz/cs/aktuality/200318jak-je-to-nyni-se-svatosti-smireni-inspirace-ze-slovenska.

News on March 20, 2020, in which he does not mention any other options than those given in the note of March 19, 2020, without any mention of the analogy of the law.[8]

Different modalities have been used in other countries. In addition to the retention of the "classic" confession when church space was drastically altered to meet sanitary requirements, there was the practice of confession given to penitents sitting in their cars, with the confessor either sitting on a chair outside or in a garage, or inside the building and confessing through an open window, or the practice of "window confession" to "non-motorized" penitents, always observing prescribed distances and other sanitary precautions.[9]

In addition to these more or less classical ways, new proposals are emerging, albeit with question marks: is, for example, physical presence and contact the only type of truly personal presence and contact, or can it be supplemented in these times (and even more so in exceptional situations) by other ways of presence, as developed by the study group Lawyers for Pastoral Care led by Giorgio Giovanelli, professor of canon law (and before that, doctor of moral theology) at the Lateran University? Professor Giovanelli himself states that there remain open and unresolved questions.[10]

Perhaps the most radical solution (and, of course, the one affecting the largest number of penitents) was chosen by the Archbishop of Berlin, Heiner Koch: as announced in advance,[11] he granted general absolution to all prepared

[8] Krzysztof Nykiel. "Confessione e riconciliazione al tempo del coronavirus (20.03.2020)," accessed August 4, 2022, www.vaticannews.va/it/vaticano/news/2020-03/*confessione*-riconciliazione-coronavirus-24-ore-signore.html.

[9] Cf., for example, Marie-Danielle Smith, "Taking Confession In a Time of Coronavirus—One Driver at a Time (7.04.2020)," accessed August 5, 2022, www.macleans.ca/news/canada/taking-confession-in-a-time-of-coronavirus-one-driver-at-a-time/; Kacper Pempel, "Priest Takes 'Drive-in' Confessions as Coronavirus Spreads in Poland (7.04.2020)," accessed August 5, 2022, www.reuters.com/article/us-healthcare-coronavirus-poland-confess-idUSKBN21P325; Mark Armstrong, "Church in France Introduces Drive-in Confession during Coronavirus Lockdown (3.05.2020)," accessed August 5, 2022, www.euronews.com/2020/05/03/church-in-france-introduces-drive-in-confession-during-coronavirus-lockdown.

[10] "Giuristi per la pastorale: Intervista a Don Giorgio Giovanelli (4.02.2020)," accessed August 5, 2022, agenparl.eu/giuristi-per-la-pastorale-intervista-a-don-giorgio-giovanelli/; Lucio Brunelli, "Fedeli senza confessione? Una soluzione c'è (17.03.2020)," accessed August 5, 2022, www.vita.it/it/article/2020/03/17/fedeli-senza-confessione-una-soluzione-ce/154506/; Cindy Wooden, "Confession by Phone: Priest Says It Could Be Right in Some Situations (18.03.2020)," accessed August 5, 2022, cruxnow.com/church-in-europe/2020/03/confession-by-phone-priest-says-it-could-be-right-in-some-situations/.

[11] Cf. Kath. Kirchengemeinde Herz Jesu Zehlendorf, "Newsletter vom 02. April 2020. Mitteilung des Erzbischofs zur Generalabsolution (4.04.2020)," accessed August 5, 2022, www.herz-jesuberlin.de/unsere-newsletter/#Newsletter_vom_13_Maerz_2020.

penitents at the conclusion of the Good Friday liturgy, broadcast online (as a live-stream with a recording).[12]

4. The Question of the Goal of a Norm

Sobański gives a twofold approach to the goal of canonical norms. On the one hand, they are to guarantee the realization of subjective rights in the Church, since the Church does not exist in itself, but as a community of individual natural persons. On the other hand, the canonical norms are to protect the authenticity of the elements that contribute to salvation in the community, especially the Word of God and the sacraments—and these realities are given to the Church by their very nature, as they are not formed and shaped by the will of the faithful and according to their ideas. The fundamental goal of canon law is the salvation of souls,[13] as explicitly stated in the last text of CIC/1983, can. 1752: "Canonical equity is to be observed, and the salvation of souls, which must always be the supreme law in the Church, is to be kept before one's eyes."

The Note itself recalls (with explicit reference to can. 1752 CIC/1983) the salvation of souls as a guideline for the application of the provisions of the Note by diocesan or eparchial bishops, since the reception of the Sacrament of Penance significantly promotes the salvation of souls (subjective right). On the other hand, it places strong emphasis on the preservation of the very nature of the sacrament, the sacramental seal and the necessary discretion (authenticity of the God-given elements).

Very importantly, the Note leaves necessary room for the discretion of the bishops in the use of the extraordinary means of communal absolution. This is necessary for the fulfilment of the commitment to pastoral care which can. 383 CIC/1983 strongly recalls and which obliges the bishops to seek the necessary means of pastoral action. In this respect, the Note clearly corresponds to the fundamental requirements of the norms of canon law.

[12] The recording of the Good Friday liturgy was available on the website of the Archbishopric of Berlin at www.erzbistumberlin.de/wir-sind/veranstaltungskalender/event/event-title/liturgie-am-karfreitag-im-livestream-4376/ in September 2020 yet, unfortunately, it is no longer available. The general absolution itself on this recording began at 1h 16min.

[13] Sobański, *Nauki podstawowe prawa kanonicznego.* Vol. 2, 114–115.

5. The Question of Acceptance and Obligation of the Norm in a Situation Only Partially Identical to the Hypothesis of the Norm

The fundamental problem with the application of the Note in the Central European area is the fact that the real situation in this region coincides very little with the hypothesis of the norm (see section 2). In this situation, an important question arises: Can such a norm be realistically binding if it cannot be assumed to be widely accepted by the addressees of the norm?

The question of the binding nature of a norm is dealt with quite extensively by Sobański: he first presents different forms of autonomous justification for the binding nature of a norm, and then different forms of heteronomous justification. He points out that in the tradition of canon law, emphasis has always been placed on the adequacy of the norm (*aequum*) as the source of its binding force. At the same time, he points out that only such a norm can bind in conscience and achieve genuine acceptance by its addressees.[14] He also states that in St. Thomas Aquinas's conception (which I share), the law is the rule of practical reason, which participates in the knowledge of the eternal law that comes from the wisdom of God.[15]

The fundamental question is therefore to what extent the Note is a norm that is adequate (*aequa*) to the real situation in the Central European region. As can be seen from the description in section 3, the opinions of both canonists and bishops are far from unanimous on this matter. There are clear differences in the approach to the norm and to the interpretation of the law.

It is indisputable that general absolution is an exception to the rule, which is stated both by general sources, the Catechism of the Catholic Church[16] in no. 1484 and the CIC/1983 in can. 960, as well as the Note which seeks to specify the application of the exceptional circumstances generally referred to in can. 961 § 1, para. 2. It is therefore still an exceptional situation and so—legally speaking—the rule set out in can. 18 should apply: "Laws which establish a penalty, restrict the free exercise of rights, or contain an exception from the law are subject to strict interpretation." This interpretation is clearly preferred by the text of the Note itself, since it offers for the individual believer an individual path of perfect contrition, coupled with the desire to receive sacramental absolution (*votum confessionis*). This interpretation is also underlined by the semi-official interpretation of the Regent of the Apostolic Penitentiary, Mons. Krzysztof Józef Nykiel, in his interview published on Vatican News on the day of the publication of the Note, that is, on March 20, 2020, where he offers only and exclusively the

[14] Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, 69–114.

[15] Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1, 45–49.

[16] *Catechism of the Catholic Church* (New York: Doubleday, 1994).

path of personal, perfect contrition for the individual, referring to the words of Pope Francis's homily delivered the day before, on the Solemnity of St. Joseph on March 19, 2020.[17]

On the other hand, it is a fact that the situation caused by the COVID-19 disease and the associated limitations is different from the situations experienced so far. So the question necessarily arises: are the solutions offered so far really adequate to the goal of the norm, which is the salvation of souls? Therefore, in this new situation, are not new solutions or modified solutions to those used so far to be sought and should the bishops not use them? If we want to follow this path, we must use other legal instruments and leave the solid ground offered above all by legalism.

Since I am personally of the opinion that it is rather necessary to look for new ways, I will try to elaborate in the following section the considerations towards this solution.

6. The Question of the Application of Analogy and Epikeia

Sobański deals with analogy in his treatise on canonical equity (*aequitas canonica*), although not in detail. He reminds us that this approach to law is characteristic of canon law, especially as a tool against the harshness of law, even in cases where it is contrary to written law. Moreover, analogy, applied in the situation of the absence of a legal norm (*lacuna legis*), is a distinctive tool of canonical equity. In this way, canonical equity becomes a tool that allows for a correspondence between mercy and severity. A principle for canonical equity is the realization of the adequacy of law (*aequitas*), which is demonstrated over time by the acceptance or rejection of the norm by its addressees.[18]

Elsewhere, Sobański deals with epikeia, in the context of a treatise on observance. He reminds us of its fundamental nature: acting in an individual and concrete case in contradiction to a general and abstract norm. It is always linked to the realization of the common good (*bonum commune*), based on a proper judgment of conscience that considers not only the subjective good, but with full seriousness the norm itself and its goal. Since individual action in exceptional situations is at stake here, epikeia cannot be a source of law because law must be relatively general. It is therefore primarily the subject of moral theology because of its connection with the proper judgment of conscience (properly formed), and only secondarily is it discussed by law, in connection with the observance of law.[19]

[17] Cf. note no. 7.

[18] Sobański, *Nauki podstawowe prawa kanonicznego.* Vol. 1, 97–100.

[19] Sobański, *Nauki podstawowe prawa kanonicznego.* Vol. 1, 129–133.

Related to the notion of aequitas is a concept used in the Eastern tradition: *oikonomia* in contrast to *acribia*. Sobański recalls that the semi-Latin term *oeconomia* appeared in patristic literature and in the Latin Church[20]; but he does not pay any more attention to it. In the tradition of the Eastern Churches, the approach to the implementation of the law distinguishes between acrimony as the application of the law exactly in accordance with its wording and oikonomia as an application modified in relation to particular conditions, and as an expression of pastoral charity with regard to the goal of the norm, all the more so the greater the number of beneficiaries of such an action. In its content, then, oikonomia is more akin to epikeia.[21]

In the Latin Church, oikonomia and acribia are not spoken of, and therefore these terms do not appear in official Church documents. There is not a single mention of them in the CCEO.[22] Recently, however, they were explicitly mentioned in the motu proprio of Pope Francis *Mitis et misericors Iesus*,[23] amending the procedural norms in matrimonial matters in the CCEO (in a manner almost identical to the amendment to the CIC/1983 in the motu proprio of the same pope *Mitis iudex Dominus Iesus*[24]). The motu proprio addressed to the Eastern Catholic Churches explicitly states in the fifth unnumbered paragraph of its introductory text, with reference to Eastern traditions:

> For indeed the Bishop—having been constituted a model of Christ and standing in his place (*eis typon kai topon Christou*)—is above all a minister of divine mercy; therefore, the exercise of juridical power is a privileged place where, using the laws of *oeconomia* or *acribia*, he himself imparts the Lord's healing mercy to the Christian faithful in need of it (p. 2).

If we were to take the *analogy* route, what analogous texts could we draw on? In the first place, it is the Catechism of the Catholic Church, which states: "Individual, integral confession and absolution remain the only ordinary way for

[20] Sobański, *Nauki podstawowe prawa kanonicznego*. Vol. 1,, 98.

[21] Johannes Madey, *Quellen und Grundzüge des Codex Canonum Ecclesiarum Orientalium: Ausgewählte Themen*. (Essen: Ludgerus Verlag, 1999), 165–170; *Handbuch der Ostkirchenkunde, Band III* (Düsseldorf: Patmos Verlag, 1997), 155–158.

[22] *Code of Canons of the Eastern Churches: Latin-English Edition* (Washington: Canon Law Society of America, 2001).

[23] Francis, *Apostolic Letter Motu Proprio Mitis et misericors Iesus by which the canons of the code of canon law pertaining to cases regarding the nullity of marriage are reformed* (15.08.2015), accessed August 6, 2022, https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-et-misericors-iesus.html.

[24] Francis, *Apostolic Letter Motu Proprio Mitis Iudex Dominus Iesus by which the canons of the code of canon law pertaining to cases regarding the nullity of marriage are reformed* (15.08.2015), accessed August 6, 2022, https://www.vatican.va/content/francesco/en/motu_proprio/documents/papa-francesco-motu-proprio_20150815_mitis-iudex-dominus-iesus.html.

the faithful to reconcile themselves with God and the Church, unless physical or moral impossibility excuses from this kind of confession" (no. 1484). How can the restrictions due to COVID-19 be evaluated from this perspective? The individual believers who were not allowed to leave their homes were not, as a rule, in a situation of physical impossibility to go to a priest, nor were they prevented from doing so by moral considerations that applied primarily with respect to a particular confessor. Their situation had some features of both variants of impossibility, but did not coincide with either of them. Rather, in my view, one can speak here of "social impossibility" or "social necessity." If they were believers living in various social institutions, their situation would have been similar, with the difference that there was a larger number of persons in the location—then the question is to what extent these persons were of the Catholic faith and desired the conferral of the sacrament; especially in the conditions of the Czech Republic, this is usually only a small minority. In any case, it was forbidden for visitors to come to these establishments—and priests are not employed in these establishments, nor do they usually perform the ministry of chaplain. As a result, it is practically the same situation as for the faithful living in their homes.

CIC/1983 in can. 961 § 1, paragraph 2 states:

> There are not enough confessors available to hear the confessions of individuals properly within a suitable period of time in such a way that the penitents are forced to be deprived for a long while of sacramental grace or holy communion through no fault of their own.

Around Easter 2020, the problem was not usually the small number of confessors, but the measures radically restricting the faithful's access to the priests, the result of which was that they would, through no fault of their own, have to be without the Sacrament of Penance (and the Eucharist) for a prolonged period of time.

In the case of the use of the way of *epikeia*, this general and abstract norm is above all the Note, which in most of its text repeats the general norms previously laid down, giving a more specific application only for a situation which practically did not occur in Central Europe. However, it is difficult to make generalized judgements here, as this is an individual action.

The use of the means of general absolution seems to me to be justified on this basis, above all, with the use of analogy, not only from the point of view of the salvation of souls, but also from the point of view of the mitigation of the severity of the law and the realization of mercy, which Pope Francis himself constantly emphasizes.

7. The Question of Physical Presence in the Administration of the Sacraments

However, there is still the unanswered question of the necessity of the physical presence of the confessor and the penitent in the same place.

In section 3 I have mentioned the efforts to use means of remote communication for confession. This alternative is usually strictly rejected. This is also stated by Mons. Nykiel in the interview mentioned above: "Sacramental confession may not take place by telephone or email or other means of communication for reasons related to the protection of the sacramental seal." It can be argued that other means of remote communication are better secured against access by third parties, but this security is not so difficult to break for persons with above-average computer skills. The protection of sacramental secrecy, however, does not play a role in the case of general absolution, since these are not individual confessions of sins.

Mons. Nykiel continues:

> Above all, it requires the physical presence of the penitent. Through these means of communication, on the other hand, the priest can possibly provide useful spiritual advice to the faithful, console them or restore their hope, but not impart sacramental absolution.

I myself asked two teachers of dogmatic theology whether and to what extent this is a binding teaching of the Church, and they were unable to substantiate the binding nature of this teaching. Some objections may be raised against the necessity of physical presence. First of all, the physical presence of the bride and groom in the celebration of marriage is not strictly required in the Catholic Church; the possibility of a proxy is mentioned in can. 1104 CIC/1983 and can. 837 CCEO (albeit only on the basis of particular law). As summarized in no. 1623 of the Catechism of the Catholic Church, in the Western tradition the betrothed are considered to confer the sacrament on each other, while in the Eastern tradition it is by the blessing priest; in both conceptions, there is no presence of one recipient (and perhaps conferrer) of the sacrament in the case of proxy. In addition, there is also the question of the degree of physical presence: after all, at major celebrations, priests often concelebrate at a greater distance from the altar, and moreover, the Note itself allows for a very limited presence of the confessor in the case of a general absolution, requiring necessarily only that his voice be audible, even with the use of amplification equipment. Moreover, it is the COVID-19 situation that has led to the widespread use of the practice of various meetings, even remote voting, and yet this is understood as valid participation coupled with a different modality of presence.

Considering these facts, it cannot be said with certainty that a general absolution using means of remote communication is necessarily invalid; there is certainly no threat to the sacramental seal and discretion. However, the solution of this question does not fall within the realm of canonical science, but within the realm of dogmatic theology.

Conclusion

Already the first wave of the coronavirus epidemic has shown both the vulnerability of our civilization and existence, and has made us to pose— many serious questions.

In the area we are addressing, the main questions are: how to reconcile the necessary protection of the health of both clergy in the provision of spiritual ministry and care, and of the faithful in receiving it, considering critical aspects (especially the so-called critical populations)? How to try to ensure as much as possible the spiritual service in view of the implementation of the necessary state health measures, without falling into one of the extremes: recklessness or over-caution? To what extent and in what way to go the way of extraordinary canonical measures?

Especially in the matter of the Sacrament of Penance, these difficult questions present themselves: to what extent is the physical presence of the conferrer and the recipient of the sacrament necessary in general, and for this sacrament in particular? Are not modified modes of personal presence appropriate in view of the development of modes of communication? To what extent can the guidelines on general absolution be applied in a completely new situation which can be called "social impossibility" or "social emergency"? To what extent do we draw on a tradition that could not deal with some of the questions now raised? To what extent to apply canonical equity, especially analogy? How to consider the principle that the highest law is the salvation of souls? How would Christ and the apostles have acted in our present situation and in our place?

The solution proposed by the author of this paper consists in granting a general absolution by means of long-distance communication, after proper catechesis and adequate personal preparation of the recipients of the sacrament of penance (it was used in the Archdiocese of Berlin). The author identifies this solution as not only valid, but possible and appropriate on the basis of the use of canonical equity.

Obviously, the new situation will require further examination and decision. This paper seeks to stimulate and contribute to that search.

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Damián Němec

Aequitas canonica et accès au sacrement de pénitence lors de la première vague de COVID-19 en 2020 à la lumière des principes du droit canonique

Résumé

Les ordonnances épidémiologiques lors de la première vague de COVID-19 en 2020 ont affecté de manière significative l'exercice de la liberté religieuse, y compris le culte et les sacrements. La présente étude aborde un sujet plus restreint de ce domaine, à savoir la réglementation de l'accès au sacrement de pénitence. Elle se concentre en particulier sur la manière dont l'accès à ce sacrement a été rendu possible dans l'Église catholique, tant en termes de droit commun que de droit particulier, ainsi que sur les propositions visant à le formuler, et surtout, elle évalue ces propositions du point de vue des principes du droit canonique.

Mots-clés : églises et associations religieuses, liberté religieuse, limitation des droits, Église catholique, sacrements, sacrement de pénitence, droit canonique, analogie du droit

Damián Němec

Aequitas canonica e accesso al sacramento della penitenza durante la prima ondata di COVID-19 nel 2020 alla luce dei principi del diritto canonico

Sommario

Le normative epidemiologiche durante la prima ondata dell'epidemia di coronavirus nel 2020 hanno influenzato in modo significativo l'uso della libertà religiosa, compresi il culto e i sa-

cramenti. Il presente lavoro affronta un argomento più ristretto in questo campo, vale a dire la disciplina dell'accesso al sacramento della penitenza. In particolare, si focalizza sulle modalità per consentire l'accesso a questo sacramento nella Chiesa cattolica, sia in termini di diritto universale che di diritto particolare, e di proposte per la sua formulazione, e soprattutto valuta queste proposte in termini di principi del diritto canonico.

Parole chiave: Chiese e associazioni religiose, libertà religiosa, limitazione dei diritti, Chiesa cattolica, sacramenti, sacramento della penitenza, diritto canonico, analogia del diritto

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The Missing Concordat in the Czech Republic

Abstract: The present article discusses certain aspects of the Treaty between the Czech Republic and the Holy See. The text of the treaty was signed at the level of the government, however, it has not been ratified so far. Some provisions of the treaty are rather superfluous or lack sufficient normative basis. Nevertheless, as the example of Article 9 of the treaty on the recognition of civil effects of church marriages shows that the approval of the treaty by the Parliament of the Czech Republic would have been very beneficial. In fact, in the process of preparation for a new civil code an attempt was made to repeal church marriages recognized by the state. Such a project would have been made impossible by the concordat because church marriage would have been supported by an obligation of the state under international law. Fortunately, the civil code kept church marriages, and confessional law in the Czech Republic has to develop without a valid concordat.

Keywords: Concordat, treaty, ratification, parliament, Holy See, church marriage, church financing, civil code, religious law, legal person

Professor Sobański Puts Forward the Topic

On March 15, 1995, the Canon Law Society (*Společnost pro církevní právo*) residing in Prague had the rare opportunity to listen to the lecture delivered by Professor Sobański. The lecture took place within the cycle "The Effect of Law in the Society and in the Church" (*Působení práva ve společnosti a v církvi*), and was later published in the Church Law Review (*Revue církevního práva*), issued by the same Society under the title "Theoretical Basis and Practical

Realization of the Relationship between the State and the Church in Some European Countries" (*Teoretické základy a praktické uskutečňování vztahu státu a církve v některých evropských zemích*). It is no exaggeration to say that Professor Sobański opened our eyes to the world of the relations between church and state and thus provided basic orientation in comparative confessional law. At a time when I was studying the sources for my future doctoral thesis "The Legal Regulation of the Ecumenical Relations Amongst the Churches (*Právní zajištění ekumenických vztahů mezi církvemi*) in west German Münster, I noticed that Professor Sobański had published in various international academic journals already in the era of Communist totalitarian regimes in both Czechoslovakia and Poland, that is, in journals which the Czechoslovak canonists sadly could not access. Evidently, the Polish regime must have been much more tolerant to the Church, and, indeed, after 1989 Poland was better equipped to tackle the challenges of the new state–church relations between with more qualified specialists.

The abovementioned lecture expounded the meaning and the basis expressed by the Italian confessional-legal term *leggi rinforzate*:

> Keeping the worldview neutrality in a state is primarily realized by the means of treatises. They represent the foundation for legal regulations not based on the worldview idea or option of the state, but on the idea of respecting religious freedom and the identity of various religious communities. Various countries today conclude such treatises, and not only with the Apostolic See with its legal subjectivity based in international law, but also with other churches. This is how the state keeps its neutrality in terms of worldview; and the laws founded on such treatises and contracts have reinforced legal power (*leggi rinforzate*).[1]

Unsuccessful Ratification of the Concordat

It is a known fact that the Czech Republic is the one and only state of comparable size where a treatise of the concordat type has not been ratified yet.[2] By no means does this mean that contractual law in terms of treaties regarding some areas, such as pastoral care in the army and in prisons does not exist. However, the Treaty Between the Czech Republic and the Holy See on the

[1] Remigiusz Sobański, "Teoretické základy a praktické uskutečňování vztahu státu a církve v některých evropských zemích," *Revue církevního práva* 4 (1996): 87.

[2] "The Czech Republic is the only central European country which has not concluded a concordat." Hieronim Kaczmarek, *Czechy. Kościół i państwo* (Kraków: Wydawnictwo WAM, 2016), 311.

Regulation of Mutual Relations [*Accordo tra la Santa Sede a la Repubblica Ceca sul regolamento dei rapporti reciproci*][3] was signed in July 2002 only on inter-governmental level.[4] The vote taken in the Chamber of Deputies of the Parliament of the Czech Republic [*Poslanecká sněmovna Parlamentu České republiky*] resulted in non-ratification of the treaty.[5] The most likely reason for turning down the governmental proposal in the Chamber of Deputies was the promise of solving the restitution of the property confiscated by the Communist regime and the need to set out a new model of financing the Catholic Church, found in Article 17, par. 2 of the proposal:

> The economic security of the Catholic Church is guaranteed by the legal system of the Czech Republic. In the case of developing a new model of financing the Church, the state will guarantee that the process of adopting it will not cause economic problems in the Catholic Church. The new model would replace the current one.[6]

The then situation can be documented by the letter of the President of the Czech Republic to the Minister of Foreign Affairs:

> The first paragraph of Article 17 gives a completely unnecessary unilateral promise that "the Czech Republic will strive to solve the problems regarding the property of the Catholic Church as fast as it can in and a manner acceptable to both parties," although clearly this is a highly contentious political issue in this country at the moment. This promise is thus making an impossible pledge. The Czech Republic cannot make an obligation to another country how it is going to deal with its own internal issues.[7]

In the case of Article 17, it is evidently a program norm expressing a goal which the two contract parties aim to fulfil. It is thus one of the "final" norms

[3] Accordo tra la Santa Sede a la Repubblica Ceca sul regolamento dei rapporti reciproci, in *Revue církevního práva* 22 (2002): 163–175.

[4] The treaty was signed on July 25, 2002, by the then Minister of Foreign Affairs of the Czech Republic Cyril Svoboda and the Apostolic Nuncio of the Holy See Erwin Josef Ender.

[5] "The Chamber of Deputies of the Parliament of the Czech Republic started to discuss the treaty on the basis of a governmental proposal at its 16th session held on May 21, 2003. Ratification of the treaty was not to be accepted. The resolution No. 494 accepted it and the approval for the ratification was not given. It was turned down by 110 from 177 deputies present at the session, 39 voted in favour of the ratification. There were 28 abstentions. […]." Atonín Ignác Hrdina, *Náboženská svoboda v právu České republiky* (Praha: Eurolex Bohemia, 2004), 73.

[6] *Revue církevního práva* 2 (2002), 173.

[7] Václav Klaus, "Dopis prezidenta republiky ministru zahraničí ke smlouvě s Vatikánem," in *Vztah církví a státu. Sborník textů č. 31*, ed. Marek Loužek (Praha: Centrum pro ekonomiku a politiku, 2004), 117–120.

which demand the legislator to achieve a particular goal.[8] A similar form is used in the regulations of the European Union which envisage member states making their own decision on the form of achieving the given normative goal. When ratified, the promise of creating a new model of financing the Church expressed in Article 17 of the proposal would thus represent international obligation under the treaty with the Holy See, whose meaning would be to push the constitutional organs of the Czech Republic to fulfil the negotiated goal.

The Deficiencies of the Treaty Proposal

Some of the negotiated articles of the treaty would reinforce the guarantees of the individual and collective religious freedoms which the faithful in the Czech Republic enjoy.[9] Since the Czech Republic belongs to the countries respecting these freedoms, some legislators may have thought that the "usefulness" of the treaty seems exaggerated, as well as its "necessity" as articulated in the preamble. The preamble also contains proclamations which thematize the split public opinion in the Czech Republic on the issue: it tends to be very critical to the role of the Catholic Church "in the Czech state as well as in European and world history in the process of forming and defending the spiritual, cultural and human values and the potential of the Catholic Church to influence reconciliation processes in the world."[10].

The treaty proposal also states some indisputable facts, for example, regarding legal subjectivity of the Roman Catholic and the Greek Catholic Church in Article 3, par. 1, or anachronically opens up issues which had already been solved in the *Modus vivendi* during the so-called first Czechoslovak Republic

[8] "*Legislative processes* are initiated with *final* norms which may have different form: they can be based on the programming statement, government resolutions, resolutions of a club of the deputies in the Chamber, directives of the superiors, etc.; usually, these are not legal norms, however, the preparation of a regulatory decision is more or less obliged to follow these norms." Jiří Boguszak, Jiří Čapek, and Aleš Gerloch, *Teorie práva* (Praha: ASPI, 2004), 160.

[9] "Thank God a lay state was restored by Act 16/1990 Coll. and the Charter of Fundamental Freedoms published as an appendix to the Constitutional Act No 23/1991 Coll. The final step was Act No 308/1991 Sb. of the Czechoslovak Federative Republic, which represents the highest degree of the religious freedom of churches and church communities in the history of our state. It is a consequence of the new found freedom of the restored democracy and as a response to the attitudes of the church which stood on the side of the nation in its struggle for freedom, as it was stated by the late Cardinal František Tomášek in the November of 1989." Dominik Duka, *Přátelská odluka a kooperace jsou si blízké*, in: Marek Loužek, *Vztah církví a státu. Sborník textů* č. 31, (Praha: Centrum pro ekonomiku a politiku, 2004), 17–23, 18.

[10] *Revue církevního práva* 2 (2002), 163.

in 1928:[11] "The Holy See makes sure the borders of the Roman Catholic dioceses and that of the Greek Catholic eparchies and apostolic administrations existing in the Czech Republic correspond with the state borders of the Czech Republic."

The professionalization of the army in the Czech Republic started in the middle of the 1990s,[12] thus the issue of conscientious objectors, as themetized in Article 7 of the said treaty seemed irrelevant: "Both parties respect that nobody must be forced to serve in the army if it is contrary to his own conscience or religious belief."[13] In terms of the necessary normative obligatory contents, Article 8 dealing with the media was unfortunately completely omitted: "Both parties respect that mass media play an important role in the protection of the freedom of thought and conscience, as well as the freedom of religious belief and are willing to carry on supporting them in fulfilling this role."[14]

The Attempt to Abolish Church Marriages Acknowledged by the State

However, ratification of the concordat would be useful as regards Article 9 of the treaty dealing with church marriages and their effect for civil law: "The Catholic Church performs ceremonies in which marriages are contracted. If a marriage is so contracted and fulfils the norms given by the law of the Czech Republic has the same validity as a civil marriage."[15] Church nuptial ceremonies in the Czech lands used to be the only or at least a completely dominant form of contracting marriage. Since 1950, after the Communist regime came to power, citizens were forced to contract obligatory civil marriage. At that moment, new Family Code came into effect based on the Soviet model which set marriage aside from the complex regulation of civil law and established that only after contracting obligatory civil marriage citizens may also take part on "religious nuptial ceremonies."[16] If a priest blessed a couple prior to a civil ceremony, he was found guilty of committing a criminal offence.

[11] In Ignác Antonín Hrdina, *Texty ke studiu konfesního práva III – Československo* (Praha: Karolinum, 2006), 54–57.

[12] The Army of the Czech Republic operates on the basis on Act No. 219/1999 Coll., on the Armed Forces of the Czech Republic. It has been fully professionalised since 1 January 1, 2005.

[13] *Revue církevního práva* 2 (2002), 166.

[14] *Revue církevního práva* 2 (2002), 166.

[15] *Revue církevního práva* 2 (2002), 166.

[16] Act No. 265/1949 Coll., on Family Law, § 7.

Only after 1989 was it made possible to restore the practice of recognizing the validity of church marriages.[17] And indeed, the amendment of family law in 1992 restored the possibility of facultative church marriages. Citizens of Czechoslovakia and both its successor states, that is, the Czech Republic and the Slovak Republic, may contract their church marriage without a prior civil marriage. Symptomatically, after the division of Czechoslovakia, there were no efforts to reverse this legal status and from 2000 onwards this would have been impossible because Slovakia signed a first treaty of a concordat type with the Holy See. Article 10 of this Fundamental Treaty[18] establishes the following:

> A marriage contracted in accordance with the canon law and fulfilling the conditions of marriage given by the legal system of the Slovak Republic has the same legal status and effect as a marriage contracted in a civil form on the territory of the Slovak Republic. State evidence of marriages contracted in accordance with the canon law and their entry into the registry of the book of marriages is regulated by the law of the Slovak Republic. (par. 1)

Slovakia thus represents a model discussed by Sobański in his Prague lecture: namely, if states conclude concordats with the Holy See, similar treaties tend to be contracted also with non-Catholic churches.[19] The treaty between the Slovak Republic and registered churches and religious communities[20] represents an analogue of a basic concordat treaty with the Czech Republic, thus its Article 10 only adjusts the text to the legal systems of non-Catholic churches. Instead of the formulation "marriage contracted in accordance with the Canon Law," it

[17] "For a very long period of time (for 42 years), it was an obligation to contract marriage before state organs […]. This reality was considered burdensome for a number of the faithful, since their priority was to contract their marriage *coram Deo*." Damián Němec, "Pohled na otázku sekulárních účinků uzavření manželství před orgánem církve a náboženské společnosti především z hlediska katolické církve," in *Církev a stát: sborník příspěvků z konference – 1. ročník*, ed. Michal Lamparter (Brno: Právnická fakulta Masarykovy univerzity, 1996), 58.

[18] "Základná zmluva medzi Svätou stolicou a Slovenskou republikou," in *Revue církevního práva* 22 (2001): 55–63.

[19] "The attempt not to discriminate any of the existing churches and religious communities in Slovakia led the state to legal proclamation of equal law for all churches and religious communities to seal agreements with the state. Article 4, section 5 of Act No. 394/2000 Coll., which amends Act No. 308/1991 Coll. on freedom of religious faith and on the position of churches and religious societies, states that *the state may enter into co-operation agreements with churches and religious societies*." Margita Čeplíková, "Contribution of the Agreement Between the Slovak Republic and the Registered Churches and Religious Societies to the Progress of Freedom of Belief," in *Clara pacta – boni amici. Zmluvné vzťahy medzi štátom a cirkvami. Clara pacta – boni amici. Contractual Relations between State and Churches*, ed. Marek Šmid and Michaela Moravčíková (Bratislava: Ústav pre vzťahy štátu a cirkví, 2009), 54.

[20] Published under No. 250/2002 Coll.

uses the phrase "marriage contracted in accordance with the internal regulations of the registered Churches and Religious Communities."

However, the situation in the Czech Republic is different. The law on churches which comes from the time of the Czechoslovak federation and is still in force in Slovakia,[21] was replaced with a new law in 2002,[22] which introduced a concept of the so-called special rights of churches and religious communities. This covers the public activities permitted to the churches as a kind of extra in comparison with the secular civic association, societies, and other interest groups. These special rights also include the right to "perform ceremonies in which church marriages are contracted under a special regulation."[23]

In fact, the very term "special rights" has been a target of criticism, because when accepted, the state plays a role of a privilege distributor rather than that of a guardian of religious freedoms of the citizens.[24] The legislator thus also showed a tendency towards etatist dirigisme in abolishing contractual provisions which used to exist in the exercise of these specific rights and replace them with a unilateral act of the state: "Until special legal provisions are adopted […] specific rights may only be exercised in accordance with existing legal provisions. Contracts on the exercise of these rights of the registered churches concluded prior to the adoption of this law are still in force."[25]

Fortunately, no further laws have been passed to replace the existing and well-functioning contracts between organs of the state and the churches which were concluded at the time the law came into force.[26] However, the repeal of the law threatened the right to contract church marriages valid under civil law. This happened in relation to long-term preparation of the new Civil Code, that

[21] Act No. 308/1991 Coll., on freedom of religious faith and the status of Churches and Religious Societies (as amended).

[22] Act No. 3/2002 Coll. of 7 January 2002 on freedom of religious expression and the position of Churches and Religious Societies and amendments to some acts, as amended.

[23] Act No. 3/2002 Coll., § 7 par. 1, c) as last amended.

[24] "The main shortcoming of the system of special rights is a consequence of its philosophy. Special rights are understood as institutional authorisation of churches and religious communities. The legal regulation thus loses sight of the rights of persons in a concrete life situation (detention, people in custodial sentence, service in armed forces etc.). […] Since the right of religious expression belongs to the fundamental rights, it is disputable, to what degree one can in the case of churches and religious societies talk about "special rights," if some of these rights represent means of exercising elementary human rights." Jakub Kříž, *Zákon o církvích a náboženských společnostech. Komentář* (Praha: C. H. Beck, 2011), 94.

[25] Act No. 3/2002 Coll., § 28 par. 2.

[26] This regards the Contract on Prison Service between the Prison Service of the Czech Republic, the Ecumenical Council of Churches and the Czech Bishops' Conference, concluded on May 26, 1999, and the Contract on Cooperation between the Ministry of Defence of the Czech Republic, the Ecumenical Council of Churches and the Czech Bishops' Conference, concluded on June 3, 1998.

is, a complex codification of private law, whose goal was among other things to replace the present fragmentation of the regulation of private law matter into civil law, commercial law and marriage and family law. The original proposal found in the government draft bill used a clearly tendentious description for the fictitious historical trend which supposedly leads the legislator to repeal the facultative civil marriage:

> In the Middle Ages, all status issues appertained to the church, marriage was the last institution to be taken from the church by the state: in the evangelical Netherlands in the 17th century, in Catholic France in the 18th century, etc. A vast majority of European countries recognizes only civil marriage (Germany, Austria, etc.), in a minority of countries, there is the so-called state religion. In those countries civil marriage is facultative (Britain, Nordic countries) and in a few countries, church marriage can be celebrated only be explicitly recognized churches (Italy, Portugal, etc.).[27]

The claim that an "absolute majority" of European countries recognize only the obligatory civil marriage is patently false, because, for example, from the then twenty-seven members of the EU, only ten recognized civil effects of church marriages.[28] In fact, the trend in central and Eastern Europe was quite the contrary to the one provided by the explanatory memorandum, since the re-introduction of facultative church marriage was here understood as just one of the many manifestations of the interventions of the totalitarian power suppressing religion and pushing in into the private sphere of the citizens.[29] Against this backdrop, one should also mention the wording of the constituting elements of the criminal offence called "Violating family law":

> Whoever violates some of the provisions of family law while exercising spiritual assistance or similar religious function, even as a result of negligence, especially when officiating at a marriage between people who have not yet

[27] "Z návrhu občanského zákoníku k formě sňatku," in *Rvue církevního práva* 33 (2006): 65.

[28] "*Scientifically,* an acceptable basis for the adherents of the change would have been to publicly present topical statistics of the countries of the world with this or that form of marriage. Also, it would have been relevant to specify what kind of development was made in an important period (and what period it was), whether and what tendencies can be inferred and especially. o the basis of what prognostic methods they can be inferred. It is not enough to just sum up random data from various European countries." Ivo Telec, "Kritika přípravy odnětí svobody volby občanského nebo církevního sňatku," *Revue církevního práva* 33 (2006): 56.

[29] "We all remember the criminalisation of the clergy officiating at a religious ceremony before contracting a marriage. The socialist state demonstrated its power in all walks of life. It would be a pity to remember such a reality in relation to the preparation of the new civil code where only an obligatory civil marriage is to exist." Zdeňka Králíčková, "Glosa k návrhu obligatorního civilního sňatku," *Revue církevního práva* 33 (2006): 61–62.

> contracted [civil] marriage, will be punished with an imprisonment for a maximum of one year.[30]

Evidently, the original intention of the creators of the new Civil Code demonstrated its social unsustainability. Thus the final form of the code approved by the Parliament allowed the possibility of a facultative church marriage: "If the betrothed express the will to conclude a marriage personally before an organ of a church or a religious society approved by a special legal provision, it is a church marriage."[31] The explanatory memorandum puts forth the reasons for such a provision:

> Although the draft bill approved by the government presupposed only the provision for civil marriage because civil marriage should have the status and legal consequences at the level of private and public law, at the very end of the preparation of the draft of a new civil code a political decision was made that treating church marriages equally to civil marriages is a more appropriate decision if we consider the sensitivity of state intervention into private life of persons once church marriages with status effects were introduced into our legal system in 1992.[32]

The Development of Confessional Law without Concluding Concordat-Type Contracts

Evidently, had the treaty with the Holy See been ratified, Czech legislators would not have been submitted the draft with the abolition of church marriages. It is also clear that the era in which positive steps to the church were made, for example, when church marriages with civil effects were reintroduced, was the period shortly after the transition to democracy when the new state power understood many of the regulations as redressing the discrimination and oppression the churches and their faithful faced during the time of the Communist rule.[33] The attempt to get rid of church marriages was a clear sign of a trend change.

[30] Act No. 140/1961 Coll., penal law, § 211.

[31] Act No. 89/2012 Coll., Civil Code, § 657 par. 2.

[32] Jiří Švestka, Jan Dvořák, Josef Fiala, and Michaela Zuklínová, *Občanský zákoník. Komentář – Svazek II* (Praha: Wolters Kluwer, 2014), 8.

[33] "Evidently the relation between church and state in the Czech Republic has been changing since the end of the Communist era in 1989. The gratitude of the regime to the churches for their indisputable contribution to the destruction of the totalitarian regime found its normative expression in the Charter of the Fundamental Rights and Freedoms which stipulates that

Another example of this trend can be seen in the attempt to interpret the 2002 law on churches in such a way that solely those church institutions whose goal is practicing religious faith may be registered as legal persons by the Ministry of Culture. This led to the exclusion of especially church charity organization. The issue ended up at the Constitutional Court[34] and called for an unnecessarily confusing amendment of the law.[35] However, if a concordat had been in force, one can suppose that a number of problems would not have been raised, since Article 10 of the treaty draft establishes the following:

> In accordance with its own inner regulations, the Catholic church establishes its own legal persons for organizing and practicing the Catholic faith and for its activities especially in the field of education, health care, social institutions and charity. Legal persons so instituted become legal persons within the meaning of the Czech legislation after having fulfilled the conditions found within this legal system. (par. 1)

Some church activities would have already obtained its own legal framework if their concrete legal regulations had been missing or were still missing, as for example, the spiritual assistance of the clergy in institutional care buildings: "The Catholic church has the right to exercise spiritual and pastoral care and assistance in institutions providing social services for the persons confined in those institutions, if they so wish" (Article 13, par. 3 of the treaty draft).

It is true, however, that in other areas of the relations between the state and the church progress has been made even without the support of the obligations under international law which would be sanctioned by this treaty. This is, for example, in the area of health care which gradually allowed the adoption of legal, patient-friendly provisions as regards spiritual assistance,[36] and also establish the contractual basis for the activities of hospital chaplains.[37] In 2012, a law was adopted which brought the final solution to the restitution of church property and their financial security, which was—as mentioned above—the reason why the proposal of the treaty was not accepted.[38] It is thus evident that the bargain-

churches are, as has been stated before, completely independent on the state in terms of regulating its own matters; this gratitude has, however, quickly faded and I am not sure if the Parliament of the Czech Republic would pass such a norm today." Hrdonín Ignác Hrdina, *Náboženská svoboda v právu České republiky*, 254.

[34] The Ruling of the Constitutional Court of the Czech Republic (Plenary Session of the Constitutional Court). 2/06 publ. under No. 4/2003 Coll.

[35] Act No. 95/2005 Coll.

[36] Act No. 372/2011 Coll., on Health Services, § 28, par. 3 j).

[37] "Dohoda o duchovní péči ve zdravotnictví mezi Českou biskupskou konferencí a Ekumenickou radou církví v České republice," in*vue církevního práva* 60 (2015): 81–84.

[38] Act No. 428/2012, on the property settlement with Churches and Religious Societies, amending other acts.

ing power of the Catholic church and religious societies would have been different, had the legal obligations laid down in the concordat been in force. In fact, provisions in the form of the reinforced laws (*leggi rinforzate*) which Professor Sobański lectured upon in Prague would already have been on their way.

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Stanislav Přibyl

Le concordat manquant en République tchèque

Résumé

L'article aborde certains aspects du traité entre la République tchèque et le Saint-Siège. Le texte du traité a été signé au niveau gouvernemental mais il n'a pas encore été ratifié. Certaines dispositions du traité sont plutôt superflues ou n'ont pas de base normative suffisante. Néanmoins, comme le montre l'exemple de l'article 9 du traité sur la reconnaissance des effets civils des mariages religieux, l'approbation du traité par le Parlement de la République tchèque aurait été très bénéfique. En fait, lors de la préparation d'un nouveau code civil, on a tenté d'abroger les mariages religieux reconnus par l'État. Un tel projet aurait été rendu impossible par le concordat parce que le mariage religieux aurait été préservé par un engagement de l'État en vertu du droit international. Heureusement, le code civil a maintenu la validité des mariages religieux mais le droit confessionnel de la République tchèque a dû être élaboré sans concordat valide.

Mots-clés: concordat, traité, ratification, parlement, Saint-Siège, mariage religieux, financement de l'Eglise, code civil, droit religieux, personne morale

Stanislav Přibyl

Il concordato mancante nella Repubblica Ceca

Sommario

L'articolo discute alcuni aspetti del Trattato tra la Repubblica Ceca e la Santa Sede. Il testo del trattato è stato firmato a livello di governo, ma finora non è stato ratificato. Alcune disposizioni del trattato sono piuttosto superflue o mancano di una base normativa sufficiente. Tuttavia, come mostra l'esempio dell'articolo 9 del trattato sul riconoscimento degli effetti civili dei matrimoni religiosi, l'approvazione del trattato da parte del Parlamento della Repubblica Ceca sarebbe stata molto vantaggiosa. Infatti, nel processo di preparazione di un nuovo codice civile si è tentato di abolire i matrimoni religiosi riconosciuti dallo Stato. Tale progetto sarebbe stato reso impossibile dal concordato in quanto il matrimonio religioso sarebbe stato sostenuto dall'obbligo dello Stato ai sensi del diritto internazionale. Fortunatamente, il codice civile ha mantenuto i matrimoni religiosi e il diritto confessionale nella Repubblica Ceca è stato sviluppato senza un concordato valido.

Parole chiave: concordato, trattato, ratifica, parlamento, Santa Sede, matrimonio religioso, finanziamento della chiesa, codice civile, diritto religioso, persona giuridica

Part Two

Reviews

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Stanislav Přibyl, *Kanonické manželské právo* Nová Ves pod Pleší: Hesperion, 2021, 175 pp.

The issues of marriage and family are still an area of keen interest for professionals and the public, which is confirmed, among other things, by the experience in the teaching of Church law: matrimonial law enjoys the greatest interest in both faculties of theology and faculties of law. It is therefore necessary and useful to publish books on matrimonial law, with a different focus, scientific, practical or pedagogical.

The present monograph, *Kanonické manželské právo* [Canonical Matrimonial Law], meets these requirements, especially the last one mentioned, that is, the pedagogical one. It is a university textbook by its nature and is also advertised as such in electronic form (PDF) on the website of the Faculty of Law of the University of Trnava (http://publikacie.iuridica.truni.sk/ucebnice/) under the title *Vybrané problémy kanonického manželského práva* [Selected Questions of Canonical Matrimonial Law] with the same content and delivery. The character of the textbook is maintained by the absence of footnotes, but the monograph is based on a rich bibliography containing works in Czech, Slovak, Polish, German, and Italian.

Apart from the preface and conclusion, the monograph is divided into sixteen chapters: (1) The sacramentality of marriage, (2) The concept of marriage, (3) The goals of marriage, (4) The essential properties of marriage, (5) The marital consent, (6) The scope of application of the canonical matrimonial law, (7) Preparation for marriage and pastoral care of families, (8) Effects of marriage, (9) Prohibitions of marriage, (10) Marital impediments in general, (11) Marital impediments in particular, (12) The canonical form, (13) Marital consent and its defects, (14) Dissolution of marriage, (15) Separation during marriage, and (16) Convalidation and sanation of marriage. It is obvious that the author tries to cover the whole area of matrimonial law both theoretically (this applies especially to the first six chapters) and practically (the other ten chapters).

We can talk about the theoretical part and the practical part of this monograph in this way, although the author does not mention it anywhere.

Because this textbook is not intended for students of a complete course in Catholic theology, the first six chapters of its theoretical part, although they put it into theological and historical context, do not go into detail or deal with the subtle issues discussed. Thus, these chapters are relatively short, taking up a total of 29 pages. In contrast, the remaining ten chapters of the practical part form the more important and much more elaborate part of this monograph. This is also evident from the length of the text, which occupies a total of 130 pages. Not all the chapters are of a similar length: more than ten pages are devoted to questions of prohibitions of marriage, marital impediments, the canonical form of marriage, the annulment of marriage, and, above all, marital consent and its defects.

The longest and most thorough treatment concerns the issue of marital consent and of its defects (44 pages), in accordance with its doctrinal and legal significance. Marital consent is not only the efficient cause (*causa efficiens*) of the origin of marriage, in it the mutual personal, lifelong, and integral commitment of man and woman is realized. As a human act (*actus humanus*), it is most evidenced by moral theology, which is the starting point and corrective factor for canon law; moreover, most of the reasons for examining the validity of marriage concern precisely the area of marital consent, or rather the defects of marital consent.

In his explanation, as the author states in the preface, he follows the systematics of the 1983 Code of Canon Law, which, however, he sometimes abandons in favour of a more systematic treatment of the matter. The author's insight into the doctrinal and canonical tradition of the Catholic Church is an indisputable enrichment for the reader; he very often refers to the provisions of the Council of Trent (1545–1563), which for the first time comprehensively discussed the most important areas of the doctrine of marriage and the resulting legislation. The work is thus of considerable scientific value, without, however, abandoning the basic mission of the textbook: an intelligible introduction to the material treated. Here the author's practical experience as a judge of an ecclesiastical court comes to the fore, as he often gives examples from judicial practice, especially in the area of the defects of marital consent. This is an extremely valuable asset of this work, especially for lay lawyers, but not only for them, as it provides insight into the practice of the Church tribunals, which is often misunderstood and questioned, even by believers, also in the Catholic Church. Although it is not the author's stated intention, this publication can serve as a guide for persons whose church marriage has broken down, not only as a guide for seeking the truth about their own marriage through proceedings in the ecclesiastical tribunals, but also as a reference to practical criteria for discerning the severity of the difficulties that caused the breakdown of the marriage. In this way, this

monograph can also fulfil the goal of practical pastoral help in addition to its pedagogical goal.

The author applies an extensive knowledge of canon law: in addition to the 1983 Code of Canon Law, which is listed in the bibliography, he also draws on the legislation of the previous Code of Canon Law of 1917 and the Code of Canons of the Eastern Churches (1990), but without mentioning them in the bibliography, as well as on older and more recent Church documents, for example, *Casti connubii* of Pius XI (1930) and *Sacra virginitas* of Pius XII (1945) and from the document of the Pontifical Council for the Family, the Charter of the Rights of the Family of 1983, of which only the first encyclical is mentioned in the bibliography, as well as from the Catechism of the Catholic Church (Latin edition of 1997) and the relevant documents of Popes John Paul II and Francis, which are mentioned in the bibliography. As this is a textbook without notes, it is possible that some of the quotations are secondary quotations, which is permissible in publications with a pedagogical focus.

The author also considers secular family law, especially Czech family law, as well as the law of other larger Christian Churches, which are present in the Czech Republic. It thus leads to a more comprehensive view of marriage and related issues, not only from a purely Catholic ecclesial point of view, but also taking into account the reality of the life of faithful Catholics in civil society with its laws and rules to be respected, and from the point of view of the teaching and practice of other Christian churches. It thus responds to the insistent demands of practice, where church marriage between a Catholic man and a Catholic woman is already a minority phenomenon in the situation of the Czech Republic, while marriages between a Catholic and an unbaptized party clearly prevail, and there is no lack of mixed marriages, that is, between a person of the Catholic faith and a person of another Christian faith. Therefore, this monograph also has an ecumenical dimension.

The publication is definitely worth both scientific appreciation and careful reading, which is informative in many ways, despite the abovementioned shortcomings, especially in the bibliography, and therefore I have gladly read it myself and I can recommend it to a wide range of readers, both those dealing with secular or Church law and members of Christian churches. I would also like to recommend this book to people of other religious groups, as well as to those wishing to learn the Catholic understanding of marriage from the outside as it is developed in legal practice.

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Markus Graulich, Heribert Hallermann, *Das neue kirchliche Strafrecht. Einführung und Kommentar* Münster: Aschendorf Verlag, 2021, 278 pp.

Penal law is one of the sensitive areas of law, both by its delicate legal nature and by the sensitivity of its application for the addressees of penal norms, especially for the perpetrators of criminal offences. It is not surprising, therefore, that it has been subject to many changes, even complete revisions, throughout history, and this also applies to the penal law of the Catholic Church. These constant recasting of Church legislation had to respond not only to changes in Church life tied to changes in social development, but also to changes in secular law.

The present monograph *Das neue kirchliche Strafrecht* [The New Church Penal Law] focuses on the recent regulation of the penal law of the Catholic Latin Church sui iuris, usually known as the Roman Catholic Church. Although the overwhelming majority of Catholic Christians belong to this Church sui iuris, one cannot overlook the fact that this narrower definition for the Roman Catholic Church is absent from the title of the monograph.

The impetus for this publication is the promulgation of the new (or revised) text of Book VI of the 1983 Code of Canon Law, as implemented by Pope Francis by way of the Apostolic Constitution *Pascite gregem Dei* of May 23, 2021, while the new penal law itself came into force on December 8, 2021. The reason for such an extensive amendment was the considerable and obvious shortcomings of the original 1983 regulation, which Pope Francis clearly mentions in the aforementioned Apostolic Constitution:

> In the past, great damage was done by a failure to appreciate the close relationship existing in the Church between the exercise of charity and recourse—

> where circumstances and justice so require—to disciplinary sanctions. This manner of thinking—as we have learned from experience—risks leading to tolerating immoral conduct, for which mere exhortations or suggestions are insufficient remedies. This situation often brings with it the danger that over time such conduct may become entrenched, making correction more difficult and in many cases creating scandal and confusion among the faithful. For this reason, it becomes necessary for bishops and superiors to inflict penalties. […] Charity thus demands that the Church's pastors resort to the penal system whenever it is required, keeping in mind the three aims that make it necessary in the ecclesial community: the restoration of the demands of justice, the correction of the guilty party and the repair of scandals.

Thus, the pope himself does not conceal that the existing regulation was not suitable for proper application for the benefit of the community of the faithful, that is, the Church, and that it was based on the considerable questioning of the meaning of penalties and penal law in the Catholic Church after the Second Vatican Council (1962–1965).

The present publication does not set itself high goals, as is usual in the case of extensive and detailed commentaries (of which one cannot fail to mention the book published at the same time: Bruno Fabio Pighin, *Il nuovo sistema penale della Chiesa* (Venezia: Marcianum Press, 2021), 655 pp. ISBN 978-88-6512-816-9). As the authors themselves state in their preface on page 9, they want to contribute to the spread of knowledge of the new penal law of the Catholic Church in the German-speaking area quite quickly, thereby giving impetus to a more in-depth study of penal law and its application as it will occur in the future.

It is not surprising that such a work required the collaboration of two experienced authors. The first is Markus Graulich, a Salesian of Don Bosco, born in 1964, ordained a priest in 1994, who received his doctorate in canon law in Rome in 1999 and his habilitation in Mainz in 2004. He lectures on the basics of canon penal law at the Pontifical Salesian University in Rome, has been an attorney at the Apostolic Signatura since 2009, a judge of the Roman Rota since 2011, and since 2014—undersecretary of the Pontifical Council for Legal Texts, now the Dicastery for Legal Texts. The second is Heribert Hallermann, born in 1951, ordained a priest in 1976, who achieved his doctorate in theology in Trier in 1996 and his habilitation also in Mainz in 1998. From 2003 to 2016 he was professor of canon law at the Julius-Maximilians-Universität in Wüzburg; he is now professor emeritus.

The structure of the book itself follows from the intention of a short and clear presentation in the first place. First, on pages 12–17, the course of the five phases of the revision work is presented in detail by Mark Graulich: from the assignment given by Pope Benedict XVI in 2007, through the first scheme of 2011, distributed for observations, and the next two working schemes, to the definitive fourth scheme, that is, the draft submitted to Pope Francis at the be-

ginning of 2021. The author does not specify what changes were made to the text between the first and last drafts. Although this would not be uninteresting, such information is of more relevance to specialists than to the general public for whom the publication is intended.

The following longer section of the text written by Heribert Hallermann (pp. 19–51) is devoted to an introduction to the principles and main lines of the new legislation, without claiming the completeness of this introduction, which is clear from the title *Kontinuität und Reform. Ein erster Einblick in den textus recognitus des Liber VI* [Continuity and Reform. A first insight into the textus recognitus of Liber VI]. It comments on the structure of the new Book VI, then on the one hand on its continuity in content and ideas with the former text from 1983, but, on the other hand, also on the changes introduced: a more determined will of the Church to apply the penal law, a more specific definition of penal sanctions, a clearer definition of the mission of ecclesiastical punishments, amended penalties and penal measures, new substantive description of criminal offences, a wider application of penalties, among others a broader range of penalties, including for lay persons holding ecclesiastical offices and performing ecclesiastical services, and an explicit requirement of compensation for damages as a condition for remission of penalties. Only in this part of the text are footnotes referring to sources, that is, normative texts and case law, and to scholarly publications in German, which corresponds to the basic purpose of this book.

This introduction is followed on pages 52–59 by the text of the apostolic constitution *Pascite gregem Dei* and on pages 60–105 the text of the new Book VI of the Code of Canon Law, in both cases in the Latin original and in a German translation, clearly with the aim of making the new regulation familiar in a German-speaking environment.

The fundamental contribution of the authors is then embodied in the commentaries on the individual canons on pages 107–216: Heribert Hallermann deals with the first, general part of the new regulation (canons 1311 to 1353), Markus Graulich—with the second part containing the definition of the individual *actus reus* and the associated penal sanctions (canons 1354 to 1399). The individual canons are given in the original Latin text and in German translation, and are accompanied by a short commentary, usually emphasizing the comparison with the former regulation of 1983, but also with the regulation contained in the first Code of Canon Law of 1917, since the new legislation returns to or builds on this (for us already ancient) regulation in a number of points. The nature of the first introduction to the subject is emphasized by the fact that there is no annotated apparatus in this part of the book referring to other specialist publications.

The emphasis on the comparison of the new 2021 regulation with the previous 1983 regulation is very appropriately expressed by providing a synopsis of the two legal texts. First, on pages 217–244, a synopsis of the original Latin text is provided, which is essential and useful even for those with only a ba-

sic knowledge of the Latin language. Most readers of this book, however, will find the synopsis of the German translations given on pages 245–278 more accessible, which would be realistically weakened by a significant change in the German legal terminology used in translations nearly thirty years apart. This, however, has not occurred due to the long and distinctive tradition of German canon law terminology, and this again facilitates the aim of this publication: a quick and concise introduction to the topic.

This publication, their joint work of two experts, is therefore an initial and essential introduction to the new penal law of the Latin Catholic Church sui iuris, and it does so in a quality manner. Although it does not set itself high professional goals, it is certainly a desirable professional and, in a way, popularizing contribution to the knowledge of Catholic Church law, which is underlined by the fact that the publication of this book was logistically and financially supported by the German Bishops' Conference. It is thus an indisputable asset for the German language area—and no doubt also for all those who wish to familiarize themselves with the new penal law of the Roman Catholic Church, especially thanks to the synopsis of the original 1983 text and the new 2021 text (although similar synopses are available elsewhere, for example, on the website of the Pontifical Gregorian University, *Risorse canonistiche*—www.iuscangreg.it).

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Sebastián Frías, *Una Chiesa giusta Comprendere il diritto canonico* Tau Editrice, Todi 2022, pp. 307

The title of the study indicates two closely related issues that guide its Author. The first statement in the title of *Una Chiesa giusta* [A Just Church] does not clearly indicate that we are dealing with a study from the area of canon studies. Only the second part of the title *Comprendere il diritto canonico* [Understanding Canon Law] indicates that the Author raises an issue in the field of canon law. He sets himself the goal of bringing the understanding of canon law closer to the reader. On the one hand, it may arouse the interest of the reader who is looking for solutions on a very valid topic concerning the definition and foundations of canon law. On the other hand, it may raise some concerns about the novelty of the approach to this issue. The statement in the first part of the title indicates that the point of reference for considerations concerning canon law will be the category of things due and the definition of law dating back to antiquity as a right thing (*ius res iusta*), as an object of justice (*ius obiectum iustitiae*).

The juxtaposition of canon law with things owed in the ecclesial community is not a new idea in canon studies. It is known from the works of canonists originating from and sympathizing with the Spanish thought associated with the University of Navarre. The preferences and connections of the Author with this way of thinking and understanding canon law may have been influenced by the completed studies and the title of doctor of philosophy obtained at the Pontifical University della Santa Croce in Rome, where he had the opportunity to come across the approaches of canon law developed at the Faculty of Canon Law, derived from schools in Navarre. This influence was indicated by the Author himself, who expresses his thanks to Professor of the Faculty of Canon Law C. J. Erràzuriz for his assistance and valuable comments in the preparation of

the entire study. The fundamental theory of canon law from the point of view of Prof. Erràzuriz as the realization in the Church of the essence of what is right and just prevails in canonistic thought and literature. Frías is also inclined to this approach to the law. An insightful reader might expect that the Author will explain such preferences, especially since he defended his doctorate in canon law at the Pontifical Lateran University, where a different theory of canon law as a *norma missionis* has been present and developed for a long time. However, the Author does not follow this path. He remains faithful to the understanding of canon law as the presence of things due in the Church that are not determined by the positive statutes present in the church regulations. The concept of law dating back to antiquity and applied to the legal dimension of the church community allows for going beyond the positivist limitations and, at the same time, shows the dynamism of the life of this community determined by the things due to each of its members within the Christian communio. Thus, positive norms remain rules that define what is right in the ecclesial community.

The Author's scientific achievements, his education in philosophy and canon law meet on the basis of considerations concerning the definition of canon law. In such a situation it is always an open question to relate the philosophical, albeit realistic concept of law to the relations existing in the Church community. The second problem is related to the possibility of defining the law and its understanding regardless of the community that is aware of it and influences its understanding. Here a question arises relating to the origins of the Church's legal consciousness and the possibility of explaining and understanding it in terms of right and due things. These are issues that still engage contemporary canon studies.

The subject of the study, however, is not the concept of canon law, but its understanding and approximation in terms of a just thing. From this perspective, the second part of the title does not indicate considerations around the concept and justification of canon law, but is intended to lead the reader to understand it in the form and content in which it is currently presented in the perspective of the discussion initiated by Pope Francis on the synodal dimension of the Church and the first stage of the synod that began in dioceses. Thus, Frías combines in one study the issues of the practical nature of the everyday life of the ecclesial community with the theoretical justification of the normative solutions for which a realistic concept of law is the basis. Thus, it indicates that the law follows the life of the community (*ius sequitur vitam*), but also emphasizes that law is its inherent dimension, it is a reality that finds its raison d'être not in human statutes, but in the relational dimension of community members.

Practical arguments are the main motive of the study. The Author, for a proper understanding of the issue, presents their theoretical basis, in which he presents the understanding of law as a right thing. The first part of his study entitled "La giustizia nella Chiesa" is devoted to this issue. It deals with issues

common to people professionally involved in law and canon law. Thus, he indicates that he wants to go beyond the circle of experts on the subject and present individual issues in an accessible way to those interested in them and involved in the life of the Church in the perspective of their participation in the synodal process along with the issues raised and discussed. For this reason, in the next three chapters of this part, he synthetically presents the understanding of law as a right thing, and then indicates the reasons for the existence of law in the Church, referring to the missionary command of Christ to transmit the faith and build the church community, and characterizes the legal order of the Church, answering the question about the rightness of the canonistic order itself, which is a tool for the effective mission of the Church. It is not possible to draw attention to the individual theses and conclusions of the Author in a short review of the entire study. However, it is necessary to emphasize the reliability and synthetic nature of their formulations in accordance with the adopted assumptions, which direct more than the issues of the law itself in the Church towards its practical solutions undertaken in subsequent parts of the study. Along with reading its content, the reader recognizes the Author's assumptions expressed in the title of the monograph.

The subject of the next three parts are current issues related to the life of the Church classified into three categories of legal goods: the word of God, liturgy, and church authority. From their perspective, the Author takes up detailed issues, pointing to their legal dimension, thus emphasizing that it is not something added to the ecclesial community, but constitutes its integral and inviolable element. It should be emphasized that this dimension of the study determines its value. It allows the reader to see both the phenomenon of law going beyond the consequences of legislative activity, as well as to see in the Church a community in which law is a space for the development of gifts that determine its unity and contribute to its development.

When discussing individual issues in terms of legal goods, the Author remains faithful to his methodological assumptions. Before discussing them, he indicates the legal dimension of individual elements that build the Church. And so, in part II, the issues relating to the Church's Magisterium and catechesis are preceded by presenting the word of God in the category of what is right. He presents the issues relating to the issue of holy communion for divorced people living in a remarriage in the broader context of the liturgy as what is right. The issue of nullity of marriage and sexual abuse has been presented in the area of the Church's good, which is the holy authority existing in the Church by the will of Christ.

The study by Sebastián Frías fits in with the ideas related to current issues raised not only within the Christian community, but also perceived and lively discussed outside of it. It remains to be hoped that framing the law as a category of righteousness uniting Christians and non-believers will allow dialogue

between them. For believers, it can become a possible tool for understanding the legal reality of the Church and its normative solutions, which Frías presented in an understandable and accessible way.

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