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Table of contents

Part One

Ecumenical Juridical Thought

STANISLAV PŘIBYL	
Matrimony between Christians: Historical Dynamics and Canonical Perspective	7
NICOLAE DURĂ	
About the Religious Marriage. From the Marriage by <i>Confarreatio</i> to the Marriage as Sacrament (μυστήριον/ <i>sacramentum</i>)	29
TOMASZ ROBERT GAŁKOWSKI	
The Upbringing of Offspring in Mixed Marriages in a Historical Perspective	61
DAMIÁN NĚMEC	
Legal Regulation of Care for Mixed Marriages in Selected Central European Countries. Comparison and Proposals	81
JURIJ POPOVIČ	
Mixed Marriages with the Orthodox in the Metropolitan Church <i>sui iuris</i> in Slovakia — History and Present	103
PRZEMYŚLAŃ SAWA	
<i>Matrimonia mixta</i> — Doctrine, Law, and Spirituality. Reality and Challenges	121

Part Two

Reviews

Jakub Kříž: <i>Nepatřičné právo. Příspěvky ke studiu nespravedlivých zákonů</i> [Inappropriate Law: Contributions to the Study of Unjust Laws]. Prague: Leges, 2022 — STANISLAV PŘIBYL	153
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Róbert GYURI: <i>Zákon o slobode náboženskej viery a postavení cirkví a náboženských spoločností. Komentár</i> [Act on Freedom of Religious Belief and the Status of Churches and Religious Societies: Commentary]. Bratislava: Wolter Kluwer SR, 2021– DAMIÁN NĚMEC	157
Tomasz P. TERLIKOWSKI: <i>Rozdzieleni bracia. Szeptyccy, historia Polski i Ukrainy</i> [Separated Brothers: The Szeptyckis, history of Poland and Ukraine] Wydawnictwo WAM, Kraków: 2023 – JACEK ANDRZEJ SZCZOT	163
Notes on Contributors	169

Part One

Ecumenical
Juridical Thought



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Matrimony between Christians: Historical Dynamics and Canonical Perspective

Abstract: Firstly, the article provides basic information on the biblical teaching on marriage. While the Old Testament sees marriages with numerous offspring as a high value, the New Testament shows a tendency towards celibacy, be it on account of imitating Christ or for the expectation of imminent *parousia*. The most important author amongst the Fathers of the Church, St. Augustine, made a significant contribution towards forming the Catholic doctrine on marriage upon which drew even the medieval scholastics. In the modern age, the Church complained about the countries which forced their concept of marriage on the Catholic faithful. Even today, the Catholic Church is against the breakdown of marriage by means of divorce. Since the Second Vatican Council, however, there has been a development, for example, as regards contracting marriages between Christians of Catholic and non-Catholic confessions. Prior to the publication of the 1983 Code of Canon Law, this was expressed in the *motu proprio* of Paul VI *Matrimonia mixta*, whose regulation did not have to be changed substantially in the Code.

Keywords: marriage, celibacy, Christianity, Church, Gospels, epistles, offspring, Reformation, Eastern Orthodox Church, council, sacrament, contract, partner, Code of Canon Law

1. Matrimony in the perspective of the Old and New Testaments

“Marriage should be honoured by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexually immoral.”¹ In

¹ Heb 13:4.

this verse, the author of the Epistle to the Hebrews expresses the high respect that the institution of marriage has enjoyed in the Church since the beginning. Clearly, Christianity was not an ascetic spiritual movement which would oppose marriage or the procreation of offspring. However, unlike the Old Testament concept, marriage in the Christian perspective did not represent an indispensable value for achieving a genuinely fulfilled life and thus realizing God's intentions by procreating abundant offspring. This extraordinary value of offspring and the integration of family life into salvation history of the chosen people is aptly expressed in the promise found in one of the psalms: "Your wife will be like a fruitful vine within your house; your children will be like olive shoots around your table. Yes, this will be the blessing for the man who fears the Lord. May the Lord bless you from Zion; may you see the prosperity of Jerusalem all the days of your life. May you live to see your children's children — peace be on Israel."²

Marriage thus became a unique means to circumvent one's own death since a man goes on living in his — that is, especially male — descendants. With the emergence of the faith in the resurrection of the dead, values of earthly life are relativized, including those related to numerous offspring.³ This is testified by the martyrdom of the seven brothers and their mother in the second book of the Maccabees. The mother regrets neither the loss of her sons tortured to death, nor her own life. The sons are admonished with the following words: "I do not know how you came into being in my womb. It was not I who gave you life and breath, nor I who set in order the elements within each of you. Therefore the Creator of the world, who shaped the beginning of man and devised the origin of all things, will in his mercy give life and breath back to you again, since you now forget yourselves for the sake of his laws."⁴

The Evangelists testify that in his doctrine and practice Jesus himself disregards or even demands breaking natural bonds in the family. The disciples called in this way immediately leave their father: "And immediately he called them; and they left their father Zeb'edee in the boat with the hired servants, and followed him."⁵ Nevertheless, Jesus with his disciples also do not shun being present at a wedding: "On the third day

² Ps 128(127):3—6.

³ "The hope in afterlife existence slowly germinates in the post-exile period: it grows from the very faith in Yahwe, and is thus no heterogeneous complement to it. Explicitly, the idea of bodily resurrection, however, appears in apocalyptic literature (around 250 BC)." G. L. MÜLLER: *Katholische Dogmatik für Studium und Praxis der Theologie*. Freiburg im Breisgau 1996, p. 537.

⁴ 2 Macc 7:22—23.

⁵ Mk 1:20.

there was a marriage at Cana in Galilee, and the mother of Jesus was there, Jesus also was invited to the marriage, with his disciples.”⁶ Jesus teaches the indissolubility of marriage: the preserved *logion* “What therefore God has joined together, let not man put asunder”⁷ is an extraordinary testimony of his very radical and totally autonomous interpretation of the Torah.⁸ However, the absence of family bonding means a more radical discipleship linked to an imperishable reward: “And every one who has left houses or brothers or sisters or father or mother or children or lands, for my name’s sake, will receive a hundredfold, and inherit eternal life.”⁹

A free decision to live without a woman is the most radical choice: “For there are eunuchs who have been so from birth, and there are eunuchs who have been made eunuchs by men, and there are eunuchs who have made themselves eunuchs for the sake of the kingdom of heaven. He who is able to receive this, let him receive it.”¹⁰ On the one hand, we are surprised by the radicalism of Jesus’s interpretation of the Torah’s provision on the indissolubility of marriage, on the other hand, the same Jesus seems to have a profound appreciation for celibacy/wifelessness or eunuchism, which tended to be rather despised at that time.

Paul expands on this teaching of Jesus and calls wifelessness a spiritual gift, that is, a *charisma*. In the First Epistle to the Corinthians the apostle first presents the ideal¹¹: “Now concerning the matters about which you wrote. It is well for a man not to touch a woman.”¹² He himself follows this lifestyle and is grateful for it: “I wish that all were as I myself am. But each has his own special gift from God, one of one kind and one of another.”¹³ Especially, the expectation of the imminent *parousia* leads to relativising the need for marriage and offspring: “I mean, brethren, the appointed time has grown very short; from now on, let those who have wives live as though they had none, [...] for the form of this world is pass-

⁶ Jn 2:1b—2.

⁷ Mk 10:9; Mt 19:6.

⁸ “Thus he comes out as a unique teacher of Law, yes, as a companion and lawgiver articulating the intention of the law which is more than its written form. What matters is not just the prohibitions but, indeed, the very meaning of marriage as the fundamental element of humanity.” P. POKORNÝ: *Evangelium podle Marka*. Praha 2016, p. 179.

⁹ Mt 19:29; Lc 14:26.

¹⁰ Mt 19:12.

¹¹ “Jesus calls spiritual wifelessness a mystery which defies ordinary conceptualisation. In Cor 7:7, 1.7 Paul understands it as a charisma, a non-deserved gift, which — as a gift — should orient people towards heaven in a state of awe.” K. BERGER: *Kommentar zum Neuen Testament*. Gütersloh 2011, p. 96.

¹² 1 Cor 7:1b.

¹³ 1 Cor 7:7.

ing away.”¹⁴ Nevertheless, Paul makes clear the path of marriage is not just acceptable, it is desirable in relation to the natural need to satisfy the sexual urge¹⁵: “But because of the temptation to immorality, each man should have his own wife and each woman her own husband.”¹⁶

2. Testimony from the Patristic Period

In the beginning of the 2nd century, we find bishop and martyr Ignatius of Antiochia defending marriage which was still the form of life of numerous representatives of the Church at that time. He defends it against wifelessness which he holds dear, however, not at the expense of the unity of the Church: “If anyone can remain chaste in honour of the Saviour’s flesh, then let him do so without boasting. For if he boasts of it, he is lost; and if he thinks himself for this reason better than the bishop, he is lost.”¹⁷ Whenever marriage is contracted, the intervention of the bishop is sought for: “Those who marry should be united with the bishop’s approval, so that the marriage may follow God’s will and not merely the prompting of the flesh. Let everything be done for God’s honour.”¹⁸ However, Ignatius mentions no further details as to why the bishop had only expressed his approval for the marriage being contracted according to the then valid civil law, or whether such an approval took the form of a specifically Christian nuptial ceremony.

It is also evident that Ignatius writes his epistle at a time in which the life of Christian communities started to be endangered by the increasing propaganda of the docetic form of gnosis. The infiltration of the gnostic movements became apparent in both doctrine and practice. The denial of Jesus’s real bodily suffering led to rejecting the Eucharistic community and to despising all things corporal, including the institution of marriage. This had two, seemingly totally opposite consequences. Marriage was either rejected as a lifestyle oriented towards carnal intercourse, or despis-

¹⁴ 1 Cor 7:29b, 31b.

¹⁵ “Paul neither defines marriage as an economic unity, nor does he refer to the strategic link between family and the procreation of offspring. In fact, he focuses on the right placing of sexuality: in marriage, sexuality finds its direction, which — as a consequence — makes it possible to avoid fornication and prostitution.” H. LEPPIN: *Die frühen Christen. Von den Anfängen bis Konstantin*. München 2018, p. 265.

¹⁶ 1 Cor 7:2.

¹⁷ IgnPol 5,2a.

¹⁸ Ibidem.

ing corporeality resulted in a complete lack of restraint and led to orgies. The Epistle of Jude warns against this tendency¹⁹: “But you must remember, beloved, the predictions of the apostles of our Lord Jesus Christ; they said to you, ‘In the last time there will be scoffers, following their own ungodly passions. It is these who set up divisions, worldly people, devoid of the Spirit’.”²⁰

However, Paul’s First Epistle to the Thesallonians, apparently the oldest piece of Christian literature, presents a normative form of marriage amongst Christians: “For this is the will of God, your sanctification: that you abstain from immorality; that each one of you know how to control his own body in holiness and honour, not in the passion of lust like heathen who do not know God.”²¹ Succumbing to physical lust means relapsing into pagan animality, even when containing various speculative doctrines which seem compatible with Christianity, or, indeed, seem a higher form thereof.²² The apostle gives a clear warning against non-marital sexual intercourse, since it completely contradicts the faith Christians received: “Shun immorality. Every other sin which a man commits is outside the body but the immoral man sins against his own body. Do you not know that your body is a temple of the Holy Spirit within you, which you have from God? You are not your own; you were bought with a price. So glorify God in your body.”²³

Ignatius of Antioch insists that marriage must not be contracted without the consent of the bishop; in the beginning of the 3rd century, Tertullian — in a letter addressed to his wife — discusses the benefits of a marriage in which the spouses share the faith: “How shall we ever be able adequately to describe the happiness of that marriage which the Church arranges, the Sacrifice strengthens, upon which the blessing sets a seal, at which angels are present as witnesses, and to which the Father gives His consent? For not even on earth do children marry properly and legally without their fathers’ permission. How beautiful, then, the marriage of two Christians, two who are one in hope, one in desire, one in the way of life they follow, one in the religion they practice. They are as brother and sister, both servants of the same Master. Nothing divides them, either

¹⁹ “The theomaniacs are rebuked for three forms of destruction. They defile the body, disrespect the authority and despise supernatural powers.” P.-A. SEETHALER: *První a druhý list Petrušv. List Judův*. Kostelní Vydří 2001, p. 117.

²⁰ Jude 17—18.

²¹ 1 Thess 4:4—5.

²² “The founders of various gnostic sects wanted to raise Christianity from the level of faith to the level of science and thus managed to acquire an existential right for it in the Hellenistic world.” J. QUASTEN: *Patrologia. I primi due secoli (II-III)*. Casale Monferato 2000, p. 226.

²³ 1 Cor 6:18—20.

in flesh or in spirit. They are, in very truth, two in one flesh; and where there is but one flesh there is also but one spirit. They pray together, they worship together, they fast together; instructing one another, encouraging one another, strengthening one another. Side by side they visit God's church and partake of God's Banquet; side by side they face difficulties and persecution, share their consolations. They have no secrets from one another; they never shun each other's company; they never bring sorrow to each other's hearts. Unembarrassed they visit the sick and assist the needy. They give alms without anxiety; they attend the Sacrifice without difficulty; they perform their daily exercises of piety without hindrance. They need not be furtive about making the Sign of the Cross, nor timorous in greeting the brethren, nor silent in asking a blessing of God. Psalms and hymns they sing to one another, striving to see which one of them will chant more beautifully the praises of their Lord. Hearing and seeing this, Christ rejoices. To such as these He gives His peace. Where there are two together, there also He is present; and where He is, there evil is not."²⁴

While Paul in the First Epistle to the Corinthians seems to suggest that marriage for the "avoidance of fornication" serves primarily for satisfying bodily desire (*remedium concupiscentiae*), Tertullian provides an amazing account and a complex description of a real bodily and spiritual unity of the spouses. The ecclesiastical ceremony represents the beginning of marriage (*matrimonium in fieri*) and the prerequisite of their intimate and an all-round experience of the marriage bond (*matrimonium in facto esse*). Sharing the Christian faith finds its demonstration also in the mutual loving relationship of the spouses, that is, a man and a woman, who at that time still had an inferior position.

Although the position of the woman in patriarchal Roman family fell very short of the contemporary concept of the equality of the spouses, Christianity indisputably taught considerateness of men towards women: "As for the man for we can apply this example to him, also: lay aside the inordinate emotions of your heart and the rudeness of your manners when you meet your patient wife. Get rid of your obstinacy when your gentle consort offers you her love. You are not a master, but a husband. You have not acquired perchance a handmaid, but a wife. God designed you to be a guide to the weaker sex, not a dictator. Be a sharer in her activities. Be a sharer in her love."²⁵ Mutual equality in marriage was already aptly

²⁴ TERTULLIANUS: *Ad Uxorem* 7,84, http://www.tertullian.org/works/ad_uxorem.htm [accessed 4.10.2023].

²⁵ AMBROSIUS: *Hexameron* V,7,18—19, https://archive.org/stream/fathersofthechur027571mbp/fathersofthechur027571mbp_djvu.txt [accessed 4.10.2023].

expressed by Paul²⁶: “The husband should give to his wife her conjugal rights, and likewise the wife to her husband. For the wife does not rule over her own body, but the husband does; likewise the husband does not rule over his own body, but the wife does.”²⁷

An important contribution for further formation of the Christian doctrine on marriage came with Augustine: his work “Of the Good of Marriage” has had a profound impact on the Western church (*Wirkungsgeschichte*): “Therefore the good of marriage throughout all nations and all men stands in the occasion of begetting, and faith of chastity: but, so far as pertains unto the People of God, also in the sanctity of the Sacrament (*in sanctitate sacramenti*), by reason of which it is unlawful for one who leaves her husband, even when she has been put away, to be married to another, so long as her husband lives, no not even for the sake of bearing children: and, whereas this is the alone cause, wherefore marriage takes place, not even where that very thing, wherefore it takes place, follows not, is the marriage bond loosed, save by the death of the husband or wife.”²⁸

3. The Middle Ages and the Reformation

Augustine’s teachings on the three goods of marriage (*tria bona*), namely, the good of offspring (*bonum prolis*), the good of fidelity (*bonum fidei*) and the good of the sacrament (*bonum sacramenti*) was adopted by scholastic theology and in this way it became part of the official church doctrine in the High Middle Ages. In fact, it was especially important for defining the sacramentality of marriage. The key terminological incentive for this theological development was undoubtedly the term “mystery” (*mystérion*) in the Epistle to the Ephesians, which was rendered into biblical Latin with the word *sacramentum*, which was, indeed, the same word used for the sacraments: “This is a great mystery, and I mean in reference to Christ and the church.”²⁹ Moreover, Augustine himself evidently

²⁶ “Paul demands strict equality and justice in male-female relations (*iustitia distributiva*). [...] Even at the expense of repeating himself, Paul keeps emphasising that requirements for men and women are the same.” K. BERGER: *Kommentar zum Neuen Testament...*, p. 585.

²⁷ 1 Cor 7:3—4.

²⁸ AUGUSTINUS: *De bono coniugali* 24,32, <https://www.newadvent.org/fathers/1309.htm> [accessed: 4.10.2023].

²⁹ Eph 5:32.

used the term *sanctitas sacramenti* to express the indissolubility of the marriage bond.

In 1439, at the late medieval Council of Florence, whose goal was to re-establish the unity of the See of Peter with the oriental churches, the Armenian church was presented with an obligatory schema on the sacrament of marriage³⁰: “The seventh is the sacrament of matrimony, which is a sign of the union of Christ and the church according to the words of the apostle: This sacrament is a great one, but I speak in Christ and in the church. The efficient cause of matrimony is usually mutual consent expressed in words about the present. A threefold good is attributed to matrimony. The first is the procreation and bringing up of children for the worship of God. The second is the mutual faithfulness of the spouses towards each other. The third is the indissolubility of marriage, since it signifies the indivisible union of Christ and the church. Although separation of bed is lawful on account of fornication, it is not lawful to contract another marriage, since the bond of a legitimately contracted marriage is perpetual.”³¹

The Protestant Reformation was gaining ground at a time in which the Church had already been holding the doctrine on the seven sacraments of the New Testament. However, the Reformers kept essentially only two of them, namely baptism and the Lord’s Supper. Using the arguments from the Bible, they attacked the Church doctrine. For instance, Luther declared the following: “Because matrimony has existed since the beginning of the world and still exists also at the infidels, there is no reason to call matrimony a sacrament of the New Testament. Since the marriages of the forefathers were no less holy than ours, the marriages of the infidels are no less real than those concluded by the faithful, and yet the marriages of the infidels are not considered sacramental. Moreover, there are godless people amongst the faithful who are even more godless than the pagans.”³²

For the Council of Trent thus the denial of the sacramental nature of marriage accounts for disrespecting the doctrine of the Church: “If anyone says that matrimony is not truly and properly one of the seven sacraments of the evangelical law, instituted by Christ the Lord, but has been devised by men in the Church and does not confer grace, let him

³⁰ “Since this was just the work of the theologians, which — apart from other things — also lacked the psychological bond with the clergy, the monks and the Christian faithful of the East, this union failed.” K. SCHATZ: *Všeobecné koncily. Ohniska církevních dějin* [The Universal Councils: the Focal Points of Church History]. Brno 2014, p. 148.

³¹ G. ALBERIGO et al.: *Conciliarum oecumenicorum decreta*. Bologna 2013, p. 550.

³² M. LUTHER: “Die Ehe als Schöpfungswirklichkeit — weder Zeichen noch Verheißung.” In: G. KOCH: *Sakramentenlehre II*. Graz 1991, p. 278.

be anathema (*anathema sit*).”³³ While the Council of Trent has special importance for canon law because of the ground-breaking regulation on the compulsory canonical form of marriage, for the fathers of the council the prerequisite of all the introduced disciplinary regulations was doctrinal clarity. Although the churches emerging from the Reformation do not use the terminology of the sacraments or sacramentality, however, that does not mean that the supernatural character of the marital cohabitation blessed by God is dismissed.³⁴

The Reformers, however, did not just deny the sacramentality of marriage, they also attacked consecrated life: for them, it was just a “human invention.” The Augsburg Confession, for instance, declares the following: “That is what true perfection and true worship consists of, not in begging or in a black or gray cowl, etc. But the common people get many pernicious ideas from the false praise of the monastic life, when they hear people praising the single life without any restraint. For it follows that one cannot get married without a burdened conscience. When the common man hears that only mendicants can be perfect, how is he supposed to know that he may have property and do business without sin? When the people hear that it is only a ‘counsel’ not to take revenge, it follows that some will mistakenly imagine it is not sin to exercise vengeance outside of its exercise by officials [...] A person can also read plenty of examples where some have abandoned wife and children and their administrative office and hidden themselves away in a cloister. They did it, they said, to flee from the world and to seek the kind of life that would please God more than other kinds of lives. They were not even able to recognize that one should serve God in the commands that he has given and not in the commands that are of human invention.”³⁵ Nevertheless, the Council of Trent confirmed the paradox that those who follow evangelical counsels aim for higher goals, although the actual consecration — unlike marriage —

³³ CONCILIIUM TRIDENTINUM: *Matrimonii perpetuum*, Canon 1. In: I. A. HRDINA: *Dokumenty Tridentského koncilu. Latinský text a překlad do češtiny* [The Documents of the Council of Trent: Latin text and Czech Translation]. Praha 2015, p. 204.

³⁴ “Marriage is a God-given cohabitation of a man and a woman [...] An evangelical marriage is part of the church: it belongs to the community of the saints and is called to build up spiritual home and strengthen the faith via the Word of God, the sacraments and prayers.” V. VOLNÝ: “Obřady uzavírání manželství v evangelických-luterských církvích.” In: W. BUGEL et al.: *Obřady manželství v různých liturgických tradicích* [The Rites of Marriage in Various Liturgical Traditions]. Olomouc 2013, pp. 151—156.

³⁵ “Augsburské vyznání.” In: *Čtyři vyznání. Vyznání augsburské, bratrské, helvetské a české se čtyřmi vyznáními staré církve a se čtyřmi články pražskými* [Four Confessions: the Augsburg Confession, the Confession of the Brethern, the Helvetian Confession and the Czech Confession, including the Four Articles of Prague]. Ed. R. ŘÍČAN. Praha 1951, p. 110.

does not constitute a sacrament: “If anyone says that the married state excels the state of virginity or celibacy, and that it is better and happier to be united in matrimony than to remain in virginity or celibacy, let him be anathema.”³⁶ It may be suitable here to point out that Catholicism shares this high esteem for consecrated life with the Eastern Orthodox Church.³⁷

For the Eastern Orthodox Church, the concept of the seven sacraments elaborated by scholastic philosophy is alien; however, its liturgical books show they understand the sacramentality of all the seven sacraments taught in the Catholic Church. Thus the Eastern Orthodox Church is ready to accept the sacramentality of marriage as well as other six sacraments (or holy *mysteria*); however, it also recognizes the fact that this doctrine was not dogmatized in the first millennium of the undivided Church.³⁸ Clearly, the scholastic doctrine needed to come to terms with numerous objections to the sacramentality of marriage. In his *Summa Theologiae*, St. Thomas Aquinas deals with the objection of the external natural element — as it is the case with other sacraments in relation to bread, wine, water or oil: “The sacrament of Matrimony, like that of Penance, is perfected (*perficitur*) by the act of the recipient. Wherefore just as Penance has no other matter than the sensible acts themselves, which take the place of the material element, so it is in Matrimony.”³⁹

³⁶ CONCILIIUM TRIDENTINUM: *Matrimonii perpetuum*, Canon 10. In: I. A. HRDINA: *Dokumenty Tridentského koncilu...*, p. 206.

³⁷ “Monastic life has always been and still is a crucial force in the spiritual life of the Church and the society. There have always been centres of education where great personalities were raised; centres of culture and the arts, centres of charity and social assistance. Many authors claim monastic life bloomed in times of civilization crises and deteriorated thereafter. In fact, one may claim such a life was a means of protest against the decline of the spiritual civilisation of the given age.” P. I. BOUMIS: *Kanonické právo Pravoslávnej Cirkvi* [The Canon Law of the Eastern Orthodox Church]. Prešov 1997, p. 137.

³⁸ “In the Eastern Orthodox Church, there is a tradition to talk about seven mysteries: baptism, chrismation, holy communion (Eucharist), repentance (confession), marriage, holy orders and unction (anointing the sick). This tradition is not original and cannot be traced back to the early Christian tradition. In fact, it was adopted from the Catholic Church in the 13th century.” P. KORMANÍK: *Základné sväté tajiny pravoslávnej Cirkvi* [The Fundamental Holy Mysteries of the Eastern Orthodox Church]. Prešov 1996, pp. 7—8.

³⁹ THOMAS AQUINAS: *Summa Theologica*, Supplement, q. 42a, 1c; ad I; ad II, <https://www.newadvent.org/summa/5042.htm> [accessed 4.10.2023].

4. The development in the modern age

Another major question is the relation between the sacrament of marriage and the rite used to conclude the marriage contract. The effort to sever these two things and to grant the state the sole competence in relation to concluding the contract; or to see the Church as just providing supernatural grace was most succinctly expressed by Pope Leo XIII. This problem area became topical at a time in which a great number of countries had already introduced civil marriage, either obligatory or facultative. The encyclical *Arcanum* of Leo XIII (1880) teaches the reason to conclude the marriage contract (*ratio contractus*) is the same as the reason to accept the sacrament (*ratio sacramenti*): “Christ, therefore, having renewed marriage to such and so great excellence, commended and entrusted *all the discipline bearing upon these matters* to His Church. The Church, always and everywhere, has so used her power with reference to the marriages of Christians that men have seen clearly how it belongs to her as of native right; not being made hers by any human grant, but given divinely to her by the will of her Founder. [...] Let no one, then, be deceived by the distinction which some civil jurists have so strongly insisted upon — the distinction, namely, by virtue of which they sever the matrimonial contract from the sacrament, with intent to hand over the contract to the power and will of the rulers of the State, while reserving questions concerning the sacrament of the Church. A distinction, or rather severance, of this kind cannot be approved; for certain it is that in Christian marriage the *contract is inseparable from the sacrament*, and that, for this reason, the contract cannot be true and legitimate without being a sacrament as well. For Christ our Lord added to marriage the dignity of a sacrament; but marriage is the contract itself, whenever that contract is lawfully concluded.”⁴⁰ Although this concept was disputed in the Catholic Church in the modern age, the valid Code of Canon Law keeps it: “For this reason, a valid matrimonial contract cannot exist between the baptized without it being by that fact a sacrament.”⁴¹

In the 19th century, various countries gradually started to tolerate divorces. Paul himself concedes that some marriages can be separated, while still emphasizing that it is a mere concession which does not come from the mouth of the Lord of the Church: “To the rest I say, not the Lord, that if any brother has a wife who is an unbeliever, and she consents to live with him, he should not divorce her. If any woman has a hus-

⁴⁰ LEO XIII: “*Arcanum divinae sapientiae.*” *Acta Sanctae Sedis* 12 (1879), p. 394.

⁴¹ CIC/1983, Canon 1055 § 2.

band who is an unbeliever, and he consents to live with her, she should not divorce him. For the unbelieving husband is consecrated through his wife, and the unbelieving wife is consecrated through her husband. Otherwise, your children would be unclean, but as it is they are holy. But if the unbelieving partner desires to separate, let it be so; in such a case the brother or sister is not bound. For God has called us to peace. Wife, how do you know whether you will save your husband? Husband, how do you know whether you will save your wife?”⁴² The historical impact of this text has direct bearing on the valid canon law.⁴³ For instance, the canonical requirement of the interrogations fully corresponds to the meaning of Paul’s text: “For the baptized party to contract a new marriage validly, the non-baptized party must always be interrogated whether: 1) he or she also wishes to receive baptism; 2) he or she at least wishes to cohabit peacefully with the baptized party without affront to the Creator (*sine contumelia Creatoris*).”⁴⁴ In the Catholic Church, the absolute indissolubility of sacramental and consummated marriage of two baptized faithful⁴⁵ is not just an ideal, it is also a legal norm. Its content is reflected in the canonical impediment of an existing marriage bond (*impedimentum vinculi*): “A person bound by the bond of a prior marriage, even if it was not consummated, invalidly attempts marriage.”⁴⁶

While the Eastern Orthodox Church tolerates divorce and allows a remarriage under stricter rules, the Eastern churches united with the Catholic Church accept the Catholic doctrine on indissolubility. The Catholic Church insists on the indissolubility, however, it respects the liturgical or theological concept of the sacrament of matrimony as it exists in the united Eastern churches. The comparison of the Code of Canon Law of the Latin Church and the Code of Canons of Oriental Churches shows that there co-exist two quite different concepts of the sacrament of matrimony. In the Latin Church, the sacrament is administered by the baptized prospective spouses, while the one assistant is understood as someone who is “present, asks for the manifestation of the consent of the contract-

⁴² 1 Cor 7:12—16.

⁴³ “Here Paul shows great tolerance and a big heart: he respects the freedom of the pagan partner. It is his or her decision whether to continue the marriage or not. In the latter case, the Christian partner has the right to contract another marriage. In today’s ecclesiastical law, this regulation still exists (*privilegium paulinum*). The Christian partner should not be pressing on the continuation of marriage, especially with the false hope that the other one may be converted or even saved.” F.-J. ORTKEMPER: *První list Korintánům* [The First Epistle to the Corinthians]. Kostelní Vydří 1999, p. 69.

⁴⁴ CIC/1983, Canon 1144 § 1, 1° and 2°.

⁴⁵ Cf. CIC/1983, Canon 1061.

⁴⁶ CIC/1983, Canon 1085 § 1.

ing parties, and receives it in the name of the Church.”⁴⁷ The assisting person does not necessarily have to be a priest, it may also be a deacon or a lay person.⁴⁸ The oriental churches, however, understand the role of the assisting person as someone blessing the marriage through epiclesis, that is, by invoking the Holy Spirit. Epiclesis is, however, an act reserved for priests.⁴⁹ Thus the officiating person is indisputably also the real administrator of marriage. Therefore, such a blessing can only be performed by a cleric with priestly ordination: “Only those marriages are valid which are celebrated with a sacred rite, in the presence of the local hierarch, local pastor, or a priest who has been given the faculty of blessing the marriage by either of them, and at least two witnesses.”⁵⁰

The Catholic canon law went as far as to refer to the canon law of the non-Catholic party: “Even if only one party is Catholic, the marriage of Catholics is regulated not only by divine law but also by canon law with due regard for the competence of civil authority concerning the merely civil effects of such a marriage. 2. In addition to divine law, marriage between a Catholic and a baptized non-Catholic is also regulated by: (1) the law proper to the Church or ecclesial community to which the non-Catholic belongs, if that community has its own matrimonial law; (2) the law that binds the non-Catholic, if it is an ecclesial community, if proper matrimonial law is lacking.”⁵¹ The reference to the divine right, represented especially by the indissolubility of marriage is the crucial one, since such a strict legal norm is applied only in the Catholic Church. Other legal requirements may be applied flexibly: “If the Church must judge the validity of a marriage between baptized non-Catholics [...] with regard to the form of the celebration, the Church recognizes any form prescribed or admitted by the law to which the parties were subject at the time of the celebration of the marriage, provided that the consent be expressed in a public form and, when at least one of the parties is a baptized member of an Eastern non-Catholic Church, the marriage celebrated with a sacred rite.”⁵² Ecumenical openness and theological integrity are

⁴⁷ Cf. CIC/1983, Canon 1108 § 2.

⁴⁸ Cf. CIC/1983, Canon 1108 § 1, Canon 1112.

⁴⁹ “The expression of this concept of marriage we may call pneumatological is the necessity of the presence of a priest or a bishop who not only assist during the sacramental rite of marriage (by taking the matrimonial consent), but also invoke the Holy Spirit on the married couple. On the contrary, the valid Latin code sees the priest as a *qualified witness* who takes the matrimonial consent administered by the spouses themselves.” J. DVOŘÁČEK: *Východní kanonické právo* [The Canon Law in the Oriental Churches]. Praha 2014, pp. 104–105.

⁵⁰ Cf. CCEO, Canon 828 § 1.

⁵¹ CCEO, Canon 780 § 2, 1° and 2°.

⁵² CCEO, Canon 781 2°.

thus intertwined. If the Eastern churches, both Catholic and non-Catholic, to which this regulation may be applied, know no other form of contracting marriage than the one with a priestly blessing; the Catholic Church, however, respects the necessity of the sacred rite and requires it.

The churches emerging from the Reformation have no obligatory canonical form of marriage and some of them do not even have their own legal regulations as regards solemnizing marriages; thus, they presuppose their faithful to contract only civil marriages. In these cases, the Catholic Church respects the internal regulations or traditions of these churches when making judgements about such marriages. However, since the adoption of the decree *Tametsi* of the Council of Trent, the Church has required their faithful to keep the solemn form of contracting their marriages: “Those who shall attempt to contract marriage otherwise than in the presence of the parish priest or of another priest authorized by the parish priest or by the ordinary and in the presence of two or three witnesses, the holy council renders absolutely incapable of thus contracting marriage and declares such contracts invalid and null, as by the present decree it invalidates and annuls them.”⁵³ The valid Code transforms this obligation of Catholic Christians into a canonical formulation: “Only those marriages are valid which are contracted before the local ordinary, pastor, or a priest or deacon delegated by either of them, who assist, and before two witnesses according to the rules expressed in the following canons and without prejudice to the exceptions mentioned [...].”⁵⁴

When contracting a marriage of a Catholic party with a non-Catholic party of an Eastern rite, the Catholic Church requires a priestly blessing, which would not be necessary for a Catholic party of the Western rite: “The prescripts of can. 1108 are to be observed for the form to be used in a mixed marriage. Nevertheless, if a Catholic party contracts marriage with a non-Catholic party of an Eastern rite, the canonical form of the celebration must be observed for liceity only; for validity, however, the presence of a sacred minister is required and the other requirements of law are to be observed.”⁵⁵ In the case of a marriage between a Catholic party and a party from one of the reformation churches, there can also be issues based on the church affiliation of one of the prospective spouses to some of the reformation churches, which allow to apply dispensation in the case of grave difficulties⁵⁶: “If grave difficulties hinder the observance

⁵³ CONCILIIUM TRIDENTINUM: *Tametsi*, caput 1. In: I. A. HRDINA: *Dokumenty Tridentinského koncilu...*, p. 208.

⁵⁴ CIC/1983, Canon 1108 § 1.

⁵⁵ CIC/1983, Canon 1127 § 1.

⁵⁶ “The legislator does not specify what these grave difficulties are; however, they must either concern situations in which the non-Catholic party or his/her family has

of canonical form, the local ordinary of the Catholic party has the right of dispensing from the form in individual cases, after having consulted the ordinary of the place in which the marriage is celebrated and with some public form of celebration for validity [...].”⁵⁷

5. The outcome of the legal regulations of mixed marriages

If the legislator admits the very canonical form prescribed by the Catholic Church may be a problem in contracting a marriage (*matrimonium in fieri*), it proves that confessionally mixed marriages also bring along various difficulties. Evidently, confessional differences may become a risk element for marital cohabitation (*matrimonium in facto esse*).⁵⁸ In the post-exile period of the People of God, the Israelites ran the risk of mixed marriages with women from different nations that do not respect the Lord God: “In those days also I saw the Jews who had married women of Ashdod, Ammon, and Moab; and half of their children spoke the language of Ashdod, and they could not speak the language of Judah, but the language of each people. And I contended with them and cursed them and beat some of them and pulled out their hair; and I made them take oath in the name of God, saying, ‘You shall not give your daughters to their sons, or take their daughters for your sons or for yourselves. Did not Solomon king of Israel sin on account of such women?’”⁵⁹

For the Catholic Church (unlike for Israel), ethnic identity has never been a decisive issue; the real issue was belonging to a concrete confession. The 1917 Code of Canon Law summed up the attitude of the Catholic Church towards the risk for the Catholic party in marriage as in a severe formulation of the matrimonial impediment of mixed religion (*mixta religio*): “The Church most severely forbids everywhere marriages

grave objection towards the form required by the Catholic Church, or one of the prospective spouses experiences a grave conflict in his/her conscience which cannot be solved otherwise.” L. SABBARESE: *Il matrimonio nell’ordine della natura e della grazia. Commento al Codice di Diritto Canonico Libro IV, Parte I, Titolo VII*. Città del Vaticano 2016, p. 345.

⁵⁷ CIC/1983, Canon 1127 § 2.

⁵⁸ “It should be openly admitted that the Church does not favour such marriages because the drama of division amongst Christians is thus transposed into the family founded on such a marriage. Practical experience shows such marriages suffer from frequent conflicts between the spouses on the issues of religion and faith which sometimes leads into expressions of lovelessness, or even religious indifference.” J. DUDA: *Katolícke manželské právo* [The Catholic Marriage Law]. Spišská Kapitula 1996, pp. 227—228.

⁵⁹ Neh 13:23—26a.

between two persons, one of whom is a Catholic and the other a member of a heretical or schismatic sect; if there is a danger of perversion for the Catholic party or the offspring, such a union is also forbidden by divine law.”⁶⁰ Evidently, this impediment was to be dispensed from only as long as there was a well-founded hope to keep the faith by the Catholic party.⁶¹ However, the guarantee for this was to be — paradoxically, the non-Catholic party: “the non-Catholic party guarantees to remove the danger of perversion from the Catholic party and both promise to baptize and educate their children in the Catholic faith.”⁶² The Code also imposed an automatic penal sanction (*latae sententiae*) on those who would dare to contract a mixed marriage without a prior dispensation: “Catholics who dare to contract a mixed marriage without ecclesiastical dispensation, are in fact barred from legal ecclesiastical acts and from the Sacraments, until they have obtained a dispensation from the Ordinary.”⁶³

A ground-breaking change in assessing confessionally different mixed marriages came only with the Second Vatican Council (1962—1965), which set the goal of restoring the unity of all Christians: “The restoration of unity among all Christians is one of the principal concerns of the Second Vatican Council. Christ the Lord founded one Church and one Church only. However, many Christian communions present themselves to men as the true inheritors of Jesus Christ; all indeed profess to be followers of the Lord but differ in mind and go their different ways, as if Christ Himself were divided. Such division openly contradicts the will of Christ, scandalizes the world, and damages the holy cause of preaching the Gospel to every creature.”⁶⁴

The post-conciliar legislation thus gradually derogated many of the norms of the earlier 1917 Code. In the field of confessionally mixed marriages, the process went from broadening the dispensational authority of

⁶⁰ CIC/1917, Canon 1060.

⁶¹ “The impediment *mixtae religionis* is *iuris humani*, if there is not the danger of perverting the Catholic party or their offspring from the Catholic faith. If such a danger exists, the *ban* on marriage is given by divine law (can. 1060; cf. can. 1038, § 1), however, this does not lead to invalidity of such a marriage. As regards the dispensation of the impediment, the following needs to be said: if there is certainty that such perversion does not take place, a dispensation is possible and such marriage is permissible; if no guarantees have been given, such a marriage is valid but not legitimate.” K. HENNER: *Základy práva kanonického. Část druhá. Právo platné* [The Foundations of Canon Law: Part Two — the Valid Law]. Praha 1921, p. 240.

⁶² CIC/1917, Canon 1061 § 1, 2°.

⁶³ CIC/1917, Canon 2375.

⁶⁴ CONCILIUM VATICANUM II: “Unitatis reintegratio,” 1,1. *Acta Apostolicae Sedis* [hereinafter: AAS] 57 (1965), p. 90.

the bishops towards the legislation of Paul VI, issued as a *motu proprio*.⁶⁵ In the introductory part, the pope expresses a balanced position of the Church between keeping faith on the side of their faithful and the right of every Catholic to choose the married state (*ius connubii*): “The Church is indeed aware that mixed marriages, precisely because they admit differences of religion and are a consequence of the division among Christians, do not, except in some cases, help in re-establishing unity among Christians. There are many difficulties inherent in a mixed marriage, since a certain division is introduced into the living cell of the Church, as the Christian family is rightly called. And in the family itself the fulfilment of the Gospel teachings is more difficult because of diversities in matters of religion, especially with regard to those matters which concern Christian worship and the education of the children. For these reasons the Church, conscious of her duty, discourages the contracting of mixed marriages, for she is the most desirous that Catholics be able in matrimony to attain to perfect union of mind and full communion of life. However, since man has the natural right to marry and beget children, the Church, by her laws, which clearly show her pastoral concern, makes such arrangements that on the one hand the principles of divine law be scrupulously observed and that on the other the said right to contract marriages be respected.”⁶⁶

The final and still valid regulation of mixed marriages came with the Code of Canon Law of 1983. As with Paul VI, John Paul II does not qualify mixed marriages as an impediment, but instead uses the construction of a ban, even though such a mild form can be a subject of criticism.⁶⁷

⁶⁵ PAULUS VI: “Matrimonia mixta.” AAS 62 (1970), pp. 257—263.

⁶⁶ Ibidem, p. 257.

⁶⁷ “If further difficulties and dangers in a marriage between partners of different confessions cannot be removed with a legal regulation, there are in principle two options to deal with such difficulties and dangers. For instance, if there is snow or ice which makes it dangerous to drive on the given road, one can ban the use of this road by putting in a prohibiting road sign. However, if the road is still being used, for example, because otherwise one would have to take a long and difficult bypass, one must look for other options. The prohibiting road sign may be replaced with a commanding one: this road may be used if further safety measures are taken, for example, by using anti-skid chains for driving in snow. However, instead of stressing special attention of those concerned, others should provide help by removing the snow or ice or alleviate the danger by using gritting substances for winter. Analogically, one may ask how to replace the ban on contracting marriage between a Catholic and a partner of a different confession with an appeal to those who are concerned to take preventive measures or — in conjunction with this — by imposing obligations to others, namely, the clerics and the ecclesiastical community to provide appropriate help to those concerned.” M. KAISER: “Ehe zwischen konfessionsverschiedenen Partnern.” In: *Ministerium iustitiae. Festschrift für Heribert Heinemann zur Vollendung des 60. Lebensjahres*. Eds. A. GABRIELS, H. J. F. REINHARDT. Essen 1985, pp. 316—317.

The obligation to keep the Catholic faith rest with the Catholic party (as in the *motu proprio*), the non-Catholic party does not need to provide any guarantees anymore: “the other party is to be informed at an appropriate time about the promises which the Catholic party is to make, in such a way that it is certain that he or she is truly aware of the promise and obligation of the Catholic party.”⁶⁸

6. Conclusions

While the indissolubility of the marital bond is still a firm constant of the Catholic canonical regulation of marriage, in many other aspects matrimonial law in the Church has been simplified and the disciplines loosened. Perhaps the most conspicuous example is the issue of mixed marriages. We only have to compare the code regulation on mixed marriages with the canonical regulation of the Trullan Council, “Fifth-Sixth Council” (*concilium quinisextum*): “An orthodox man is not permitted to marry a heretical woman, nor a orthodox woman to be joined to an heretical man. But if anything of this kind appear to have been done by any [we require them] to consider the marriage null and void, and that the marriage be dissolved. For it is not fitting to mingle together what should not be mingled, nor is it right that the sheep be joined with the wolf, nor the lot of sinners with the portion of Christ.”⁶⁹ Today, the legislator becomes progressively more aware of the fact that it is impossible to weigh down the consciences of the faithful with the burden of the ancient divisions in the Church for which they cannot be blamed.

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⁶⁸ CIC/1983, Canon 1125, 2°.

⁶⁹ “Pravidla šestého svatého všeobecného sněmu, cařihradského, jinak trullského, konaného ve sloupové síni císařského paláce,” rule 72. In: *Pravidla všeobecných a místních sněmů i sv. otců pravoslavné církve*. Praha 1955, p. 58.

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STANISLAV PŘIBYL

Mariage entre chrétiens: Dynamique historique et perspective canonique

Résumé

L'article présente des informations fondamentales sur l'enseignement biblique concernant le mariage. Alors que l'Ancien Testament considère les mariages avec une descendance nombreuse comme une grande valeur, le Nouveau Testament suggère davantage le célibat, que ce soit en raison de l'imitation du Christ ou de l'attente de la *parousie* imminente. Augustin, le plus important auteur parmi les Pères de l'Église, a apporté une contribution significative à la formation de la doctrine catholique sur le mariage, dont se sont inspirés les scolastiques médiévaux. À l'époque moderne, l'Église se plaignait des pays qui imposaient leur conception du mariage même aux fidèles catholiques.

Même aujourd'hui, l'Église catholique s'oppose à la dissolution du mariage par le divorce. Cependant, depuis le concile Vatican II, il y a eu des développements, par exemple en ce qui concerne les mariages entre chrétiens de confessions catholique et non-catholique. Avant la publication du Code de droit canonique de 1983, cela a été exprimé dans le *motu proprio* de Paul VI *Matrimonia mixta*, dont la réglementation n'a pas dû être significativement modifiée dans le Code.

Mots-clés: mariage, célibat, christianisme, Église, Évangiles, Épîtres, descendance, Réforme, Église orthodoxe orientale, concile, sacrement, contrat, partenaire, Code de droit canonique

STANISLAV PŘIBYL

Matrimonio tra cristiani: Dinamica storica e prospettiva canonica

Sommario

L'articolo presenta le informazioni di base sull'insegnamento biblico che riguarda il matrimonio. Mentre l'Antico Testamento considera i matrimoni con numerosa prole come un grande valore, il Nuovo Testamento suggerisce in misura maggiore il celibato, sia per l'imitazione di Cristo sia per l'attesa della prossima *parusia*. Sant'Agostino, il più importante autore tra i Padri della Chiesa, diede un contributo significativo alla formazione della dottrina cattolica sul matrimonio, da cui successivamente attinsero gli scolastici medievali. In epoca moderna, la Chiesa lamentò i paesi che imponevano la propria concezione del matrimonio anche ai fedeli cattolici.

Anche oggi la Chiesa cattolica si oppone alla dissoluzione del matrimonio tramite il divorzio. Tuttavia, a partire dal Concilio Vaticano II, c'è stato un progresso, ad esempio, nel campo dei matrimoni tra cristiani di confessione cattolica e non cattolica. Prima della pubblicazione del Codice di Diritto Canonico nel 1983, ciò è stato espresso nel *motu proprio* di Paolo VI *Matrimonia mixta*, la cui regolamentazione non ha dovuto essere significativamente modificata nel Codice.

Parole chiave: matrimonio, celibato, cristianesimo, Chiesa, Vangeli, Lettere, prole, riforma, Chiesa Ortodossa Orientale, concilio, sacramento, contratto, partner, Codice di Diritto Canonico



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About the Religious Marriage From the Marriage by *Confarreatio* to the Marriage as Sacrament (*μυστήριον/sacramentum*)

Abstract: The marriage, one of the ancient institutions of mankind, was initially regulated by divine law (both natural and positive), hence its religious character, that also can be found in the Roman marriage known as the *confarreatio* marriage.

According to the provisions of the *ius civile*, a man and a woman enter into a marriage through a contract. But, by an imperial constitution promulgated by the Emperor Justinian, only the civil marriage contracted by a written contract in a Church is a *iustas nuptias* ('legal marriage') (cf. Novel 74).

The marriage as institution — provided by *ius civile* — has evolved into the sacramental act of marriage when it was raised to the rank of a Holy Sacrament of the Church by our Savior, Jesus Christ, at Cana of Galilee (cf. John 2:1—11). And, from apostolic age, the Holy Sacrament (*Mysterion*) of Marriage has been accompanied by the administration and reception of the Holy Eucharist by the groom and the bride, that is, by the man and the woman. And, this sacramental act of marriage was regulated by church law, that is the canon law of the Eastern and Western Churches (cf. can. 3 Trullan Council).

From the year 893 the subjects of the Byzantine emperor had to receive the Sacrament of Marriage after they were contracted the civil marriage (cf. Novel 89 of Emperor Leo the Wise). Only in this way a marriage could be bearer of legal effects.

Keywords: religious and civil marriage, Roman law, Byzantine law, canon law, Christian theology of marriage

Introduction

In the Twelve Tables (written down around 450 BC), “the first codification of Roman law,”¹ we also find provisions regarding the religious marriage. In fact, the Twelve Tables were “the basis of the *ius civile* centuries after the law code had ceased to be of any practical use,”² as proves also *à l’évidence* the great Roman jurists from the 2nd and 3th centuries AD, such as Gaius and Pomponius, who considered the Twelve Tables as the basis of the *ius civile*, in which the institution of marriage found a special place.

About this reality, we find numerous testimonies both in the *Justiniani Institutiones*, that help us “to look back on over fourteen hundred years of legal history,”³ and in *Justiniani Digestae*, which “preserves the writings of the classical jurists.”⁴

Based on the writings of the famous jurists that lived between the late 1st century BC and the mid-3rd century AD, “only one book (in the modern sense) has come down to us which is an original work of the classical period and, moreover, has not been revised by the compilers of the *Corpus Juris Civilis*, and that book is the *Institutes of Gaius*,”⁵ “that lived from about AD 110 to at least 179.”⁶

In his book, Gaius underlined the juridical status of the *iustas nuptias*, that is, of the marriage contracted between Roman citizens, with a view to having “children [...] not only do they become Roman citizens [*cives Romani*] but are also subject to their father’s power [*potestatem parentum fiunt*].”⁷

The same famous Roman jurist also spoke about the prohibitions to the marriage, hence the assertion that the “marriage cannot be contracted between people in the relations of parent and child,”⁸ or in their relationship “as parent and child is based on adoption.”⁹

Until the epoch of the Emperor Constantine the Great, all the problems of the Christians, concerning the marriage, were discussed, and

¹ Z. CHITWOOD: *Byzantine Legal Culture and the Roman Legal Tradition*, 867—1056. Cambridge 2017, p. 16.

² *Ibidem*.

³ *Justinian’s Institutes*. Trans. P. BIRKS, G. MCLEOD. London 1987, p. 7.

⁴ *Ibidem*, p. 10.

⁵ *The Institutes of Gaius*. Trans. W. M. GORDON, O. F. ROBINSON. London 2001, p. 8.

⁶ *Ibidem*, p. 9.

⁷ *Ibidem*, p. 49.

⁸ *Ibidem*.

⁹ *Ibidem*.

resolved by the bishop (cf. Matt 18:18—17; 1 Cor 6:1—3). And then, this episcopal attribution was transformed into a legal mode of procedure and, consequently, all the cases concerning the marriage between Christians entered into the jurisdiction of the episcopal courts, about which we find references in the Theodosian Code.

Among others, in the Theodosian Code we find “two edicts by which Constantine gave the episcopal courts a place in the judicial system of the empire.”¹⁰ Moreover, by his imperial legislation, “the episcopal arbitration was transformed into a legal mode of procedure.”¹¹

Hence also the prohibition of the complaint of bishops, before civil courts, for matters which are within the competence of ecclesiastical courts (cf. can. 6 Sin. II ec.; 15 Carthage).

About the legal effects of the Christian religious marriage, we find special provisions in the legislation of the Emperor Justinian (527—565), who preserved the Roman law by his Code, Digest, *Institutiones*, and *Novels*.¹² All these works were inserted later on into a *Corpus Iuris Civilis*, that remains “the major source of our knowledge of Roman law,”¹³ including about the marriage law.

At the end of the 9th century, when the collection of laws entitled *Epanagoghi* (*Epanagoge*) was published and, more precisely, when the *Novels* of Emperor Leo the Wise (886—912) were enforced, in their texts we find special references to the legal effects of religious marriage as well as references regarding the legitimacy and validity of civil marriage only after the officiating the religious marriage when accompanied by the administration of the Sacrament of Marriage.

1. The religious character of the pre-Christian marriage

The religious character of marriage was stipulated expressly from “the dawn of human civilization” by *ius sacrum*,¹⁴ that is, by divine law, both

¹⁰ W. K. BOYD: *The ecclesiastical edicts of the Theodosian code*. New York 1905, p. 90.

¹¹ *Ibidem*, p. 91.

¹² See C. MITITELU: “Emperor Justinian’s *Constitutions* on the Legal Protection of the Mother and Children.” *Bulletin of the Georgian National Academy of Sciences* 4 (2019), pp. 165—175; C. MITITELU, B. CHIRILUȚĂ: “The Christian Family in the Light of the Nomocanonical Legislation Printed in Romanian Language in the 17th Century.” *Ecumeny and Law* 2 (2014), pp. 247—268.

¹³ *The Institutes of Gaius* ..., p. 7.

¹⁴ Cf. G. DANIELOPOLU: *Explicațiunea instituțiilor lui Justinian* [The explanation of Justinian’s institutions], vol. I, pt. 1. Bucharest 1899, p. 174.

natural and positive, and it was confirmed by the ceremonies performed in the temples of different peoples (e.g. Babylonians, Indians, Thracians, Greeks, Romans etc.).

For example, for the ancient Greeks — who made a clear distinction between ‘divine laws’ (αἱ ὅσια) and ‘human laws’ (τὰ δίκαια) (Plato, *Politics*, 301 AD) — sacred rites, including those concerning marriage, were regulated by ‘divine law’ (τὴν ὅσιαν) (Euripides, I T. 1461).¹⁵

That at the Romans,¹⁶ the religious marriage was a reality before the elaboration of the Twelve Tables,¹⁷ is proved both by the ancient Roman legal tradition, about which give us an indisputable testimony the Twelve Tables, and the Roman jurisprudence from its classical epoch (the late 1st century BC and the mid-3rd century AD).

Among other things, the text of the Twelve Tables, an exponential monument of ancient Roman law (*ius romanum antiquum*), was and still is a source of reference and inspiration not only for the European jurists and theologians, but also for those in China. One of them is Professor Xu Guodong from the Xiamen University (People’s Republic of China), who, among other things, in a conference held on February 7, 2005, spoke about “the permanence of the normative substance of Roman law.”¹⁸

Before the Twelve Tables, the Roman marriage had three modes or forms of manifestation, namely by *treditio*, *deductio in domum*, and *confarreatio*.¹⁹ Marriage “by tradition” was the marriage act concluded according to the *treditio*, that is, according to the ingrained legal custom. The second way of marriage, *deductio in domum*, consisted in taking the bride to her husband’s house in the wedding procession (cf. Tacitus, Cicero, etc.); and the third way of marriage was concluded by *confarreatio*,

¹⁵ Apud A. BAILLY: *Dictionnaire grec-français*. 26th edn. Paris 1963, p. 1411.

¹⁶ See C. MITITELU: “Matrimonium (Marriage) in Roman Law. The Impact of the Provisions of *Ius Romanum* on International and National Matrimonial Law.” *Bulletin of the Georgian National Academy of Sciences* 4 (2020), pp. 120—130; C. MITITELU: “Reglementări ale dreptului roman, privind instituția căsătoriei, exprimate și comentate în *Decretum Gratiani* [Regulations of Roman Law, on the Institution of Marriage, expressed and commented in *Decretum Gratiani*].” *Jurnalul juridic național: teorie și practică* 2 (2019), pp. 32—35.

¹⁷ According to the testimony of the Roman tradition, of legal origin, the Twelve Tables were drafted by several *decemviri*, i.e. by about ten Roman magistrates, between 451 and 450 BC. *Dreptul Roman 12 Tabele: O prezentare generală și istoricul* [Roman Law, Twelve Tables: An Overview and History], <https://ro.atomiyme.com/dreptul-roman-12-tabele-o-prezentare-general-a-si-istoricul/> [accessed 17.08.2022].

¹⁸ G. Xu: *Legea celor XII table în China* [The Law of the Twelve Tables in China], <https://drept.ucv.ro/RSJ/images/articole/2005/RSJ34/0101XuGoudong.pdf> [accessed 1.11.2022].

¹⁹ D. FUSTEL DE COULANGES: *La Cité antique*. Paris 1900, pp. 56ff.

that is, by the religious ritual of the marriage performed by the priests of the Temples (cf. Gaius, *Institutiones*, lb. I, 112).

According to the provisions of some imperial constitutions of Roman emperors, the temple priests had also the legal attribution to conclude the adoption (*adoptio/-onis*). For example, Emperor Antoninus Pius (86—161) was one of those who ordered that the adoption of an *impuber* was to be performed by the *pontifex*, namely by the temple servant, who was not only entrusted with overseeing and officiating public and private religious worship, but also with the conclusion of legal acts (cf. Cicero).

In ancient Rome, there was both *Collegium Pontificum*, presided over by the *Pontifex Maximus* ('high priest'), and *pontifices minores* ('ordinary priests'), who usually helped those who held the office of pontiff (*pontificium/-i*). This college of pontiffs exercised "authority, law, and power"²⁰ to legislate (cf. Aulus Gellius, 2nd century AD), hence the fact that these pontiffs were said to have been "the first law scholars."²¹

This reality is attested also by the philological testimonies: for instance, both the adjective *sanctus* ('holy', 'sacred', 'inviolable', 'revered', 'pure', 'honest') and the noun *sanctio/-onis* ('sanctification', 'holiness', 'sacredness', 'inviolability', 'moral purity') derive from the verb *sancio/-ire*, *sanxi*, *sanctum*²² ('to approve', 'to promulgate', 'to forbid', 'to punish').

It was these first scholars of *ius romanum*, that is, the *pontiffs* or the clerics of Roman temples, who made it possible to speak both of *sanctitas templi* ('the sanctity of temples') and of *sanctitas tribunatus* ('court inviolability') (Cicero), hence the notion of *sanctio* in the sense of 'sanction, punishment provided by law'.

The adjective *sanctum* is also used in phrases such as *sanctum ius* ('sacred law') and *sanctum templum* ('holy temple'), because these first scholars of Roman law, the pontiffs, were the ones who initially created *ius romanum antiquum* (Old Roman law) and held the status of *magistrates* in *sanctum templum* ('holy temple') and in *templum magistratum* ('temple or platform of magistrates') (cf. Tit Liviu). The fact that the law was born in the vestibule of temples is confirmed even by the clothing of both ancient and contemporary magistrates, that proves *à l'évidence* this reality.

In accordance with the provisions of the Code of Laws of the Twelve Tables, it was "a crime to neglect the rituals prescribed by religion."²³ And,

²⁰ G. GUȚU: *Dicționar latin-român* [Latin-Romanian dictionary]. Bucharest 1983, p. 931.

²¹ *Ibidem*.

²² *Ibidem*, pp. 1087—1088, p. 1211.

²³ *Dreptul Roman 12 Tabele: O prezentare generală și istoric...*

among the religious rituals prescribed by the religion of the Romans we also find those of the marriage.

At the same time, according to the rules set out in the Twelve Tables, as far as *pater familias* is concerned, it was mentioned that “a child born after ten months since the father’s death will not be admitted into a legal inheritance” (Table IV, 5).²⁴

In the Twelve Tables there was also provided that “marriages should not take place between plebeians and patricians” (Table XI, 1),²⁵ that “whatever the people had last ordained should be held as binding by law [*lex*]” (Table XII, 5)²⁶ and that it was forbidden “[...] to bury or burn a corpse in the city” (Table X, 1).²⁷

In accordance with the provisions of the old Roman law, and more specifically with the provisions of *ius sacrum romanum*, religious marriage — concluded by *confarreatio cum manus* — could be abolished by *diffareatio*, that is, by the act of dissolution of such a marriage, which was also accompanied by a religious ritual. Therefore, both the institutional act of marriage and that of its dissolution were accompanied by a religious ritual performed by the ministers or the priests of temples (cf. Gaius, *Institutiones*, lb. I, 112).

Regarding the legal status of persons, including those who marry, Gaius, the famous Roman jurist of the 2nd century AD — recognized by the Law of Citations of Emperor Theodosius II in 426 AD “as an authoritative juristic source”²⁸ — wrote that “[...] some persons are their own masters, and some are subject to the authority of others” (Gaius, *Institutiones*, lb. I, 48),²⁹ hence his conclusion that there are “[...] persons who are subject to the authority of another, some are in his power, others are in his hand, and others are considered his property (*in mancipium*)” (Gaius, *Institutiones*, lb. I, 49).³⁰

At the Romans, *potestas pater familias*, that is, the power held by the head of the family, was exercised over children, and in general over his descendants, his wife (*manus*), his slaves (*dominica potestas*) and people *in mancipium*. The people *in mancipium* were in someone’s temporary property.

²⁴ *Law in Ancient Rome*, <https://www.crystalinks.com/romelaw.html> [accessed 6.10.2022].

²⁵ *Ibidem*.

²⁶ *Ibidem*.

²⁷ *Ibidem*.

²⁸ *The Institutes of Gaius...*, p. 10.

²⁹ *The Institutes of Gaius*, <https://thelatinlibrary.com/law/gaius1.html> [accessed 29.08.2022].

³⁰ *Ibidem*.

Women married by *usus* ('use'), by *confarreatio* (religious marriage with *manus*) and by *coemptio mulieris* (symbolic purchase of a woman), were all *mancipabile*, that is, owned by their husbands during their marriage.

2. The marriage as a great Sacrament under the New Law

Under the New Law, the Law of our Lord Jesus Christ, the marriage was elevated to the rank of *Sacrament* by the very presence of the Son of God at the Wedding in Cana of Galilee (cf. John 2:1—2), hence the term 'godfather' (ὁ ἀρχιτρίκλινος) found in verses 8 and 9 of the second chapter of the Gospel of John, which tells of the Wedding in Cana of Galilee,³¹ or the syntagms from the New Testament, such as "wedding garment" (Matt 22:11—12) and "honor of the wedding" (Heb 13:4). In addition, the New Testament — which speaks of "[...] the bridegroom from Cana of Galilee, at whose wedding the Mother of God and Jesus were invited together with the first six disciples," and where our Lord Jesus Christ "performed the first miracle,"³² turning water into wine (John 2:9) — mentions that the one who has a bride (νύμφη) is a bridegroom (νυμφίος) (John 2:9 and 3:29).

Therefore, in Christ's Church, marriage was conceived of and defined — from the beginning of its existence — as a "great Sacrament" (Eph 5:32), because the ancient institution of the mankind, the marriage — regulated by the divine law (both natural and positive) and Roman law — was raised to the rank of Sacrament by our Savior Jesus Christ himself when he participated in the Wedding at Cana of Galilee, where he also performed his first miracle, turning water into wine (John 2:1—11).

In the Christian Church, any benediction (ἐυλογία) given by a priest, according to the liturgical rite (cf. can. 27 St. Basile the Great), gives to it a sacramental character. Therefore, any religious marriage concluded without the observance of canonical impediments, it loses its sacred character (cf. can. 7 Neoc., 52 Laod., 66 the Trullan Council etc.).

The Emperor Justinian and his famous jurists (Tribonianus, Dorotheus, Theophilus etc.) also made some clarifications of legal doctrine regarding sacredness of things. Hence, their statements that only "those things are

³¹ I. MIRCEA: *Dicționar al Noului Testament* [New Testament Dictionary]. Bucharest 1995, p. 360.

³² *Ibidem*, p. 317.

sacred which have been duly consecrated to God by His ministers [*Deo consecrata sunt*], such as churches and votive offerings which have been properly dedicated to His service” (*Justiniani Institutiones*, lb. II, I, 8).³³

These sacred things, destined to the Church, are different from *res religiosae* (‘religious things’) and *res sanctae* (‘holy things’), since the latter (*res sacrae*) “belong to no one, for what is subject to divine law is no one’s property [*nullius in bonis est*]” (*Justiniani Institutiones*, lb. II, I, 7).³⁴ And, moreover, “if anyone attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred” (*Justiniani Institutiones*, lb. II, I, 8).³⁵

In the Ecumenical Orthodox Church from the first millennium, “[...] the issue of marriage sacralization was never raised,”³⁶ but what was developed was not only a biblical, dogmatical, canonical, and liturgical theology on the Sacrament of Marriage, but also a Christian Law on it.

Until the reign of the Emperor Justinian, the Roman law did not require from its citizens a written contract for the marriage, let alone for them to have their marriage witnessed and registered at the Church.³⁷ Therefore, the provisions of the *Ius Romanum Novum* that a marriage must be witnessed and registered at the Church remain an evident testimony that the dispositions of principle announced by the New Law were peremptory asserted by the Byzantine law (6th—14th centuries).

Indeed, in the year 538 Emperor Justinian decided in Novel 74 of his imperial Constitution that the Roman citizens, including “the men of Illustrious rank, at the level of our senators and Most Magnificent illustres,”³⁸ that they could not “enter into legal marriage without making marriage contracts”³⁹ and to present themselves “[...] at a house of worship and inform the defender of the most holy church. He, in turn, is to assemble three or four of the church’s most revered clergy, and make out a certificate to the effect that on this date in this month of this indiction, in such a regnal year and such a consulship, in his presence in this house of worship, the man N. and the woman N. were joined together in matrimony. If either or both of the couple wish to take the said certificate away

³³ *The Institutes of Justinian*, https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0011 [accessed 18.10.2022].

³⁴ *Ibidem*.

³⁵ *Ibidem*.

³⁶ A. KALLIGERIS: *Căsătorie de la Taină la Instituție* [Marriage from Sacrament to Institution]. Trans. I. ȚĂRLESCU. Bucharest 2016, p. 106.

³⁷ See the Novel 74 of Justinian, in: *The Novels of Justinian. A Complete Annotated English Translation*, vol. I. Eds. D. J. D. MILLER, P. SARRIS. Cambridge 2018, p. 523, no. 1.

³⁸ *Ibidem*, p. 528.

³⁹ *Ibidem*.

with them, they are to do that as well, and the defender of the most holy church, and the other three — or however many he may have decided, but no fewer than three — are to sign it, to that effect.”⁴⁰

In accordance with the provisions of the Novel 74 (chap. 4, 1, 2, a) of the Emperor Justinian,⁴¹ the respective written testimony, “was delivered to the parties and to the clerics.”⁴² A copy remained, however, in the Archive of the Church, as a proof that the respective Marriage was witnessed and registered at the Church. And a such marriage “[...] had the same importance as if it had taken place in front of the civil authority.”⁴³ In other words, a marriage concluded in the Church by a written contract had the same legal effect as a marriage that had been taken place in front of the civil authority, hence, therefore, the recognition of religious marriage as bearer of legal effects.

Moreover, according to the provisions of Justinian’s legislation, “those who concluded an interdicted marriage [*prohibitae nuptias*] had to suffer other sanctions [*alias poenas*], contained in the imperial constitutions [*sacris constitutionibus*]” (*Justiniani Institutiones*, lb. I, 12).

In their collection of laws entitled *Ecloga* (Ἐκλογή τῶν Νομῶν),⁴⁴ which was in fact the result of a selection of texts from the Roman-Byzantine law adapted to the realities of those times, the Emperor Leo III Isaurus (716—740) and, later on, his son, the Emperor Constantine V, also provided some legal norms concerning the contraction of betrothal.

According to the provisions of *Ecloga*, “betrothal of Christian can be contracted for minors from the age of seven upwards based on the desire of the betrothed and the consent of their parents and kin, if the parties enter into the contract legally — and they do not fall into the category of those prevented from marrying — that is through a betrothal gift, that is to say a *hypobolon* [ὑπόβολον], or through a written contract” (*Ecloga*, I, 1,1).⁴⁵

Concerning the dissolution of the contraction of betrothal, *Ecloga* provided that “if a man makes a written agreement and wishes to renege, then he shall compensate the girl according to the contract. However, if it is on the part of the girl that the agreement to the contract. However,

⁴⁰ Ibidem.

⁴¹ C. MITITELU: “Emperor Justinian’s Novel 74 and its Importance for European Marriage Law.” *Teologia* 4 (2019), pp. 26—37.

⁴² N. MILAȘ: *Dreptul bisericesc oriental* [Eastern Ecclesiastical Law]. Trans. D. N. CORNILESCU, V. RADU, I. MIHĂLCESCU. Bucharest 1915, p. 475.

⁴³ Ibidem, p. 476.

⁴⁴ See K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graeco-romani ineditorum: Ecloga Leonis et Constantini, Epanagoge Basilii Leonis et Alexandri*. Lipsiae, 1852, pp. 1—52.

⁴⁵ *The Ecloga and Its Appendices*. Trans. M. HUMPHREYS. Liverpool 2017, p. 45.

if it is on the part of the girl that the agreement is broken, without known accepted legal grounds, then the same sum which the man promised in the contract shall be given to him, along with anything else undertaken by him in the contract, and he shall be released from it” (*Ecloga*, I, 1,1).⁴⁶

About the provisions of *Ecloga* regarding the contraction of betrothal and its dissolution, we could say that its authors are more explicit than Justinian’s jurists, but they followed the principles asserted in the legislation of Justinian, as prove *à l’évidence* even the text of the *Ecloga*’s appendices,⁴⁷ where we find texts reproduced from *Codex*, *Digestae*, *Institutions* and *Constitutiones* (Novels) of Justinian.

Regarding the marriage, from *Ecloga* we find out that “marriage of Christians, whether written or unwritten, can be contracted between man and woman of marriageable age, that is fifteen for a man, and thirteen for a woman, both desiring it, and with the consent of their parents” (*Ecloga*, II, 2,1).⁴⁸

The same collection of Byzantine legislation — published in 740 AC⁴⁹ — provided that “a written marriage is contracted through a written dowry contract, [...] and a nuptial gift from the man equal to the wife’s dowry shall neither be stipulated” (*Ecloga*, II, 2, 3).⁵⁰ In fact, in the Isaurian era, only this kind of a written marriage contract continued to be — from a legal point of view — a ‘lawfully marriage’ (νόμιμον γάμον), called by Roman law a *iusta nuptia*.

According to the provisions of *Ecloga*, the indissolubility of marriage was ordained by our “God the Maker and Creator of all things,”⁵¹ who “teaches that marriage is an indissoluble union of those living together in the Lord. For He who brought mankind from nothingness into being did not form man and woman in the same fashion, although able to, but created her from the man in order that He might wisely ordain the indissolubility of marriage” (*Ecloga*, II, 2, 9, 1).⁵²

But, although the Christian jurists who compiled this collection of Byzantine legislation underlined the indissoluble nature of religious marriage, however, they admitted a second marriage. Indeed, in accordance with the text of *Ecloga*, “a second marriage [δευτερογαμία] can be con-

⁴⁶ Ibidem.

⁴⁷ Ibidem, pp. 89—112.

⁴⁸ Ibidem, p. 46.

⁴⁹ K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graecoromani ineditorum...*, p. 3.

⁵⁰ *The Ecloga and Its Appendices...*, pp. 46—47.

⁵¹ Ibidem, p. 50.

⁵² Ibidem.

tracted, either in writing or orally, between people who are not prohibited from marriage” (*Ecloga*, II, 2, 8, 1).⁵³

In the text of *Ecloga*, it is also mentioned that its authors decide — in the name of their emperor — that “it is necessary to expressly place in the present legislation the grounds by which marriage can be dissolved” (*Ecloga*, II, 2, 9, 1).⁵⁴

Concerning those who contract the third or subsequent marriages, the Empress Irene asserted — in one of her imperial constitutions — that she confirmed, “what was previously said in the second title [of the *Ecloga*], following the divine Apostle Paul about those contracting lawful marriage, quoting him about doing so up to a second union and under no circumstance a subsequent one (as such are unlawful and bestial) [...] Wherefore we order that all third marriage and subsequent union shall not, take place, as they are alien to the commandment of the divine Apostle and foreign to Christian kinship” (Novel II).⁵⁵

By her decision, Empress Irene in fact reaffirmed the decision taken by the Eastern Fathers meeting at the Synod of Laodicea in 343/348, who, among other things, stated in the first canon that, “in accordance with the provision of the ecclesiastical canon [κατὰ τὸν ἐκκλησιαστικὸν κανόνα],”⁵⁶ that is, the apostolic canon 17th, they admitted the second marriage, but they did not allow those who married twice *after baptism*, or those who, although legally married, had concubines, to be promoted “to the hierarchical catalogue [τοῦ καταλόγου τοῦ ἱερατικοῦ]” (can. 1st of Laodicea).⁵⁷ But, despite this decision of the Church, the practice to have concubines continued in the Roman Empire “until the 5th and 6th centuries.”⁵⁸

From the text of the 1st canon of Laodicea, we can also see that the decision of the Fathers of this Synod was taken primarily based on the teaching of “the divine Apostle Paul,” according to which a second marriage was permitted, but only after the death of one of the spouses (cf. Rom. 7: 3; 1 Cor. 7: 39).

The neo-testamentary texts of the divine Apostle Paul, invoked as testimony both by the 1st canon of the Synod of Laodicea and by Empress

⁵³ Ibidem, p. 49.

⁵⁴ Ibidem, p. 51.

⁵⁵ Ibidem, p. 168.

⁵⁶ Canon 1 of the Council of Laodicea, in: G. A. RHALI, M. POTLI: *The Syntagma of the Holy and Divine Canons* [The Athenian Syntagma], vol. III. Athens 1853, p. 171.

⁵⁷ G. A. RHALI, M. POTLI: *The Syntagma...*, vol. III, p. 23.

⁵⁸ L. STAN: “Commentary on Apostolic Canon 17.” In: *Canoanele Bisericii Ortodoxe. Note și comentarii (Canons of the Orthodox Church. Notes and Commentaries)*. Ed. I. N. FLOCA. Sibiu 1991, p. 17, no. 7.

Irene in her Imperial Constitution (Novel 2), show us that the Church also allowed remarriage, that is, the second marriage.

In the 3rd century, two schismatic presbyters, the Novatus of Carthage and the Novatian of Rome, founded a sectarian group known as the Novatians or Cathars (Κάταρους), that is the ‘pure ones’. For reasons of excessive rigorism, the Cathars or Novatians also refused — among other things — any relationship with “those married a second time [διγάμοις]” (can. 8 Sin. I ec.).⁵⁹

For this reason, the Fathers of the First Ecumenical Council decided that members of this schismatic group who wished to return “to the Catholic and Apostolic Church [καθολικῆ καὶ ἀποστολικῆ ἐκκλησίᾳ], [...] should confess in writing that they will follow her teaching, and that they will also have communion with those who are married a second time” (can. 8 Sin. I ec.).⁶⁰

From the text of Canon 8 of the First Ecumenical Council it is clear, therefore, that, following the Apostolic teaching (cf. Rom. 7:3; I Cor. 7:39), the early Church admitted — by *oikonomia* second marriage, which was to be recognized not only by the Fathers of the Synod of Laodicea and the Byzantine legislation, but also by the Constantinopolitan Council of 920 and the Pan-Orthodox Council of Crete⁶¹ of 2016.

Known as “Holy and Great Council” (Ἁγίας καὶ Μεγάλης Συνόδου), this Pan-Orthodox Council decreed among other things that “a marriage that is not completely dissolved or annulled and a third marriage constitute absolute impediments to entering into marriage, according to Orthodox canonical tradition [Ὁρθόδοξον κανονικὴν παράδοσιν], which categorically condemns bigamy and a fourth marriage” (II, 2).⁶²

Thus, with regard to second and third marriages, the 2016 Pan-Orthodox Council in fact reaffirmed the decisions of the Constantinopolitan Council of 920, and it condemned only a *fourth marriage*, and as was only natural, it also specified that a *pre-existing third marriage* constitutes an absolute impediment to entering into another marriage.

We also have to underline the fact that, according to the text of the decisions of this Holy and Great Council, “a civil marriage between a man and a woman registered in accordance with the law lacks sacramental character, since it is a simple legalized cohabitation recognized

⁵⁹ G. A. RHALL, M. POTLI: *The Syntagma...*, vol. II. Athens 1852, p. 133.

⁶⁰ Ibidem.

⁶¹ About this Council and its decisions, see N. V. DURĂ: “Decisions of the ‘Holy and Great Council’, Held in Crete (Greece, June 16—26, 2016), on Marriage.” *Teologia* 3 (2019), pp. 39—55.

⁶² *Holy and Great Council Pentecost 2016, The Sacrament of Marriage and its Impediments*, <https://www.holycouncil.org/marriage> [accessed 14.01.2023].

by the State, different from a marriage blessed by God and the Church” (I, 9).⁶³ Hence the exhortation of the Synod of Crete (Greece) that “the members of the Church who contract a civil marriage ought to [...] understand the value of the sacrament of marriage and the blessings connected with it” (I, 9).⁶⁴

Until the epoch of Emperor Leo VI the Wise (866—912), the Roman civil marriage continued to take place in three ways, namely, by verbal consent, by written contract, and by religious marriage. But only a civil marriage contracted in a Church in front of the lawyer of the Church (*ekdikos*) and in the presence of witnesses (cf. Novel 74 of Emperor Justinian), was recognized both by the Church and by the Byzantine State as *iustas nuptias* (‘legal marriage’) (*Justiniani Institutiones*, lb. I, 10).

The procedure for concluding the marriage according to the provisions of the *ius civile romanum* continued until 893, when Emperor Leo VI the Macedonian ordered “the obligation to consecrate marriage for all citizens of the state,”⁶⁵ and imposed the obligation of receiving the Sacrament of Marriage with the Holy Eucharist,⁶⁶ without which the civil marriage was not valid.

It is also known that “until the ninth century, the Church did not know any rite of marriage separate from the eucharistic Liturgy.”⁶⁷ However, the Emperor Leo VI the Wise was the one who decreed that “a marriage is not valid without the holy blessing (ἄνευ τῆς ἱερᾶς Εὐλογίας)” (Novel 89).⁶⁸ And, in the Church, his decision has still the force of a *ius cogens*.

In the same imperial constitution, the Emperor Leo VI the Wise (ὁ σοφός) mentioned that, over the centuries, “[...] marriage was per-

⁶³ Ibidem.

⁶⁴ Ibidem.

⁶⁵ A. KALLIGERIS: *Căsătoria de la Taină...*, p. 116.

⁶⁶ For more information, see N. V. DURĂ: “Rânduiești și norme canonice privind administrarea Sfintei Euharistii [Canonical ordinances and norms regarding the administration of the Holy Eucharist].” *Ortodoxia* 1 (1981), pp. 73—94; N. V. DURĂ: “Dispoziții și norme canonice privind săvârșirea Sfintei Liturghii [Provisions and canonical norms regarding the celebration of the Holy Mass].” *Ortodoxia* 1 (1981), pp. 73—94; C. MITITELU: “Rânduiești și norme canonice privind Sfânta Euharistie. Considerații de doctrină canonică [Canonical rules and regulations regarding the Holy Eucharist. Considerations of canonical doctrine].” In: *Dimensiunea penitențială și euharistică a vieții creștine* [The penitential and eucharistic dimension of Christian life]. Ed. G. PETRARU, L. PETCU. Iași 2014, pp. 271—293; C. MITITELU: “The celebrant of the Holy Sacrament of the Eucharist. Rules and canonical norms of the Orthodox Church.” *Annales Canonici* 10 (2014), pp. 135—148.

⁶⁷ J. MEYENDORFF: *Marriage an Orthodox Perspective*. 3rd edn. New York 2000, p. 24.

⁶⁸ C. A. SPULBER: *Les Nouvelles de Léon le Sage: Traduction — Histoire*. Cernăuți 1934, p. 279.

formed without prayers and Holy Gifts,”⁶⁹ that is, without the administration of the Holy Sacrament of the Eucharist, hence his order that any civil marriage “had to be confirmed by the intervention of the holy blessing,”⁷⁰ because, “where to the marriage candidates this institution seemed inappropriate,”⁷¹ that is without the administration of the Holy Sacrament of Marriage, “their marriage is not valid...” (Novel 89).⁷²

Therefore, according to this provision of the Imperial Constitution of Leo the Wise, *alias* Novel 89, a civil marriage would not be valid unless it was followed by a religious marriage, accompanied by the Holy Sacrament of Marriage.

In another imperial constitution the said emperor provided that “those who marry for the third time [τούς εις τριγαμίαν] are liable to the punishment provided by the holy canon [τοῦ ἱεροῦ κανόνος]” (Novel 90).⁷³

The prohibition of the third marriage had also been provided by the Empress Irene (797—802) in one of her imperial constitutions, namely Novel 28.⁷⁴ But, as it is known, even Empress Irene, “the first female ruler of the Byzantine Empire,”⁷⁵ had to accept the second marriage of his son, Constantine VI. But, in the eyes of the Byzantines, this second marriage was an “adulterous marriage,”⁷⁶ that determined the people to proclaim him “illegitimate.”⁷⁷

In Byzantium, this rigorist attitude towards second and third marriages, cultivated by the monastic milieu of the time, prevailed during the pontificate of the Patriarch Nikephoros the Confessor (ca. 758—828), whose canons — made up of the decisions of the Constantinopolitan Synods presided over by him — stipulated that “he who marries a second time [ὁ δίγαμος] is not crowned, but is also given the *epitimia* of not receiving the Holy Eucharist for two years; and he who marries a third time, five years” (can. 2 St. Nikephoros the Confessor).⁷⁸

Therefore, according to the decision of a synod presided over by Patriarch Nikephoros of Constantinople, second and third marriages were allowed only by *oikonomia*, since those who entered into them

⁶⁹ Ibidem, p. 280.

⁷⁰ Ibidem.

⁷¹ Ibidem.

⁷² Ibidem.

⁷³ Ibidem, p. 281.

⁷⁴ See P. ZEPOS, J. ZEPH: *Ius graecoromanum*, vol. I. Athenis 1931, p. 49.

⁷⁵ *Empress Irene of Athens — The first female ruler of the Byzantine Empire*, <https://www.historyofroyalwomen.com/byzantine-empire/empress-irene-athens-first-female-ruler-byzantine-empire> [accessed 4.12.2022].

⁷⁶ Ibidem.

⁷⁷ Ibidem.

⁷⁸ G. A. RHALI, M. POTLI: *The Syntagma...*, vol. IV. Athens 1854, p. 427.

were subject to the *epitimia* of not receiving the Holy Eucharist for a period of time.

This rigorous synodal decision was reaffirmed in 996 by Patriarch Sisinnius II of Constantinople (996—998),⁷⁹ although a synod/council held in Constantinople in 920 had allowed both second and third marriages under the well-known *Tomos of Union* (Ο Τομος τῆς Εηώσεως),⁸⁰ but categorically forbade the fourth marriage.

Concerning the remarriage, the Emperor Leo the Wise stated that he “did not want to agree with the canon law, because he did not punish the one who concluded the second marriage,”⁸¹ but “those who get married for the third time must undergo the punishment of the holy canon” (Novel 90),⁸² or, according to the statement in the Latin manuscripts of this Novel (90), *qui testium matrimonium contrahunt, sacri canonis poenae obnoxii sunt*,⁸³ that is, those who get married for the third time will be punished by the holy canons.

Undoubtedly, this express reference to the canonical legislation of the Ecumenical Church of the first millennium, by the Emperor Leo the Wise, confirms the fact that, *in illo tempore*, the “holy canons” were “another source of law that Emperor Leo VI used in order to draft his legislation.”⁸⁴

One of the Holy Canons which provided for the punishment of one who entered into a second marriage was Canon 7 of the Synod of Neocaesarea, which assembled in 315. Indeed, according to the provisions of this canon, “a second marriage requires repentance [μετάνοιαν]”⁸⁵ (can. 7 Neocaesarea), or in the terms of the Byzantine canonists, “bigamy entails punishment [ἐπιτίμιον].”⁸⁶

In the spirit of the provision of principle enunciated by this Synod in 315, other Fathers of the Church also provided *epitimias* accompanied by acts of repentance for those who marry a second time (cf. can. 4 St. Basil the Great; can. 19 St. John the Faster, etc.).

The Emperor Leo VI declared also that he did not know the reason why “the civil law did not seek to agree with the judgment of the Holy

⁷⁹ “The Tomos of the Patriarch Sisinnius II (996).” In G. A. RHALI, M. POTLI: *The Syntagma...*, vol. V. Athens 1855, pp. 11—19.

⁸⁰ “Tomos of the Union.” In: G. A. RHALI, M. POTLI: *The Syntagma...*, vol. V, pp. 4—10.

⁸¹ C. A. SPULBER: *Les Nouvelles de Léon...*, p. 281.

⁸² Ibidem.

⁸³ Ibidem, p. 280, note 1.

⁸⁴ Ibidem, p. 78.

⁸⁵ G. A. RHALI, M. POTLI: *The Syntagma...*, vol. III, p. 80.

⁸⁶ J. ZONARA: “The comment to the canon 7 of the Neocaesarea Council.” In: G. A. RHALI, M. POTLI: *The Syntagma...*, vol. III, p. 80.

Ghost,”⁸⁷ that is with the canons enacted under the assistance of the Holy Ghost as regards the canonical impediments to marriage, and, therefore, he “gave up punishing those who were not satisfied with the second marriage,”⁸⁸ but he admitted that they “had to undergo the punishment provided by the holy canon [τοῦ ἱεροῦ κανόνος] in this regard.”⁸⁹

Although Leo the Wise condemned the third marriage, however, he admitted it by *oikonomia* (κὰτα οικονομίαν). Moreover, the emperor’s decision regarding the remarriage was reaffirmed by the famous *Tomos Unionis* of 920, and then by the novels on polygamy of Emperor Constantine VII Porphyrogenitus (913—959).

But, as it is known, just the Emperor Leo VI transgressed the provisions of the holy canons of the Church, since he himself married for the fourth time in order to legitimize his son and heir made with Zoe Karbonopsina. But, for this transgression of the Church laws (canons), he was *aposteriori* condemned by the Fathers of the Holy Synod held in Constantinople in the year 920, under the presidency of the ecumenical patriarch Nicholas. And, by the famous “Ὁ Τομος της Ἐνωσεων”⁹⁰ of this Synod, the second and the third marriage were admitted by the Church *κατα οικονομίαν* (by *oikonomia*,⁹¹ accompanied by the acts of repentance, but it was categorically interdicted the fourth marriage (tethragamy).

According to the text of this synodical edict of 920, that was considered “not only a Church canon, but also a law of the state regarding successive marriages,”⁹² all the penitential measures were taken in order to be observed “the Church tradition [τὴν ἐκκλησιαστικὴν παράδοσις] and the teaching of the Holy Fathers [τὴν διδασκαλίαν τῶν Ἁγίων Πατέρων].”⁹³

Also in the 10th century were held other Constantinopolitan synods, like the one held in the year 996 under the presidency of patriarch Sisinus II,⁹⁴ that took also important decisions regarding the second and third marriage.

A Byzantine monk of the 10th century — who placed his Collection of penitential canons under the name of the Constantinopolitan Patriarch John the Faster (582—595) — stated that, according to the ‘custom’ (συνήθειαν) held by the Church, those who “are married three times

⁸⁷ P. NOAILLES, A. DAIN: *Les Nouvelles de Léon VI le Sage*. Paris 1944, p. 298.

⁸⁸ Ibidem.

⁸⁹ Ibidem.

⁹⁰ G. A. RHALI, M. POTLI: *The Syntagma...*, vol. IV, pp. 4—10.

⁹¹ See C. MITITELU: “The Oikonomia and its application in the See of the Confession.” *Analecta Cracoviensia* 51 (2019), pp. 313—341.

⁹² K. NIKOLAOU: *The Byzantines between Civil and Sacramental Marriage*, <https://journals.openedition.org/bchmc/285> [accessed 14.09.2022].

⁹³ G. A. RHALI, M. POTLI: *The Syntagma...*, vol. V, pp. 9—10.

⁹⁴ Ibidem, pp. 11—19.

[τρίγαμων] must be excommunicated five years...,”⁹⁵ but the third marriage is not to be dissolved if the spouses “have not had children from the previous marriages [τῶν προτέρων γάμων]” (can. 19 St. John the Faster).⁹⁶

Therefore, even a monk of that epoch (10th century) considered that the third marriage did not have to be dissolved if the spouses have no children from the previous marriages, but the spouses have to incur spiritual punishment (excommunication) for five years.

Concerning the remarriage of the woman, Leo the Wise alluded — in his imperial constitution (Novel 90) — to a provision found in the Emperor Justinian’s law (cf. *Codex* lb. V, 9, 9), which had been repealed by the Emperor Basil the Macedonian in his *Prohiron* published in 870 (lb. IV, 25). It is in fact about the remarriage of the woman, and according to the Code of Justinian, which contains laws enacted by the Roman emperors between the years 117—553 AD, and that it had two editions (in 529 and 533), “[...] all the property which the woman has received from her husband as well as that which has acquired (in addition) or shall acquire, shall be placed under a lien to the children (of that marriage),”⁹⁷ and, in the case that this mother “[...] enter into any contract [*contractum aliquem*]”⁹⁸ of marriage, the “[...] said woman, who remarries,”⁹⁹ shall not claim her right for the party to the property “[...] as that of the children born [*liberis geniti*] from said marriage or that of the grandsons and granddaughters born of these children” (*Codex Justinian* lb. V, 9, 9).¹⁰⁰

Therefore, according to the text of the imperial constitution enacted at Constantinople in the year 439 by the Emperors Gratian, Valentinian, and Theodosius, a remarried woman had to a lesser extent the right to the property than the children born from the former marriage.

The Emperor Leo VI the Wise’s attitude regarding the compulsory nature of religious marriage was perceived by some Eastern theologians of our days as an approach “[...] to the secularization of the Sacrament of Marriage,”¹⁰¹ because the Church would have had to “create another sacralization of marriage, independent of the Sacrament of the Holy Eucharist, depending on the future spouses, if they were worthy to receive it. This was a real need — said an Orthodox theologian — because, before

⁹⁵ G. A. RHALI, M. POTLI: *The Syntagma...*, vol. IV, p. 438.

⁹⁶ *Ibidem*.

⁹⁷ *The Codex of Justinian, A New Annotated Translation, with Parallel Latin and Greek Text*, vol. II. Ed. B. W. FRIER. Trans. F. H. BLUME. Cambridge 2016, p. 1155.

⁹⁸ *Ibidem*.

⁹⁹ *Ibidem*.

¹⁰⁰ *Ibidem*.

¹⁰¹ A. KALLIGERIS: *Căsătorie de la Taină...*, p. 126.

Leo's decision, a citizen could marry the second or third time,"¹⁰² because although "these marriages were not acknowledged by the Church, they were legal."¹⁰³

According to the same theologians, the so-called secularization of the Sacrament of Marriage was the one that created "the need to break the Sacrament of Marriage from that of the Holy Eucharist, a situation that was consolidated in the 16th century."¹⁰⁴

But even though the Emperor Leo VI married four times, no one could say that the secularization of the Sacrament of Marriage was initiated or cultivated by this emperor. On the contrary, the emperor Leo VI proved to be a person who respected the priests of the Church, and "the prayers of the priest."¹⁰⁵

Moreover, we have also to take into consideration the fact that, among other things, both the famous Byzantine canonists, Theodore Balsamon (12th century) and Constantine Harmenopoulos (1320—circa 1385), have invoked the authority of the imperial Constitutions (Novels) promulgated by Leo VI the Wise.¹⁰⁶ And last but not least, we must bear in our minds that, even in the Occident, "some scholars did not hesitate to give force of law to the Novels of the Emperor Leo."¹⁰⁷

I would also like to mention the fact that the Byzantine Emperor Alexios I was the one who — by Imperial Decree no. 22 of 1084 AD — acknowledged the same legal status of the marriage for slaves, who had in *ius divinum*, both natural and positive, the legal basis for their liberty.¹⁰⁸

Certainly, this imperial decree was another clear acknowledgement not only about the right of the slaves to Christian marriage, but also about the 'gift of liberty' (*libertatis dationem*) determined by "the modern spirit of humanity [*nova humanitatis ratione*],"¹⁰⁹ which was

¹⁰² Ibidem, pp. 126—127.

¹⁰³ Ibidem, p. 127.

¹⁰⁴ Ibidem.

¹⁰⁵ *Roman law in the later Roman Empire: Byzantine guilds, professional and commercial; ordinances of Leo VI, c. 895 from the Book of the Eparch*. Ed. and trans. E. H. FRESHFIELD. Cambridge 1938, p. 4.

¹⁰⁶ J. A. B. MORTREUIL: *Histoire du droit byzantin ou du droit romain dans l'empire d'Orient, depuis la mort de Justinien jusqu'à la prise de Constantinople en 1453*, vol. II. Paris 1844, p. 324.

¹⁰⁷ Ibidem, p. 328.

¹⁰⁸ C. MITITELU: "Dreptul natural, ca temei al libertății sclavilor, în concepția lui Epifanie din Moirans (1644—1689) [Natural law, as legal basis for liberty of slaves, in the conception of Epiphanius of Moirans (1644—1689)]." *Revista de Teologie Sfântul Apostol Andrei* 1 (2012), pp. 282—293.

¹⁰⁹ *Justiniani Institutiones*, lb. I, VI, 2.

expressly referred to by the great Christian legislator, Emperor Justinian, in his legislation¹¹⁰ concerning the human rights and their universality.¹¹¹

Among other things, in one of his imperial Constitutions (cf. *Codex Justinianus*, 7, 7, 1) the Emperor Justinian asserted that “cheating the slave of his freedom [*libertate servum defraudari*]”¹¹² is “a shocking situation” (*Justiniani Institutiones*, lb. II, 7, 4).¹¹³ Therefore, he decided to remedy that situation by his “pronouncement [*Constitutionem*]” (*Justiniani Institutiones*, lb. II, 7, 4).¹¹⁴

3. Marriage as the Sacrament of the Church and its ontological relationship with the Holy Eucharist

It was said that “a sacrament is a *passage* to true life; it is man’s salvation. It is an open door into true, unadulterated humanity.”¹¹⁵ And one of these Holy Sacraments of the Church is the Holy Sacrament of Marriage, that, in our Lord Jesus Christ’s times, has been perceived only as a contract or as a legal commitment. But he was the One who elevated that kind of marriage to the status of Sacrament of the Church (cf. Eph 5:32), or — as stated by the Theology of the Orthodox Church — at the rank of Sacrament of the Kingdom of God, which the Gospel compares to “a wedding feast, which fulfills the Old Testament prophetic visions of a wedding between God and Israel, the elected people.”¹¹⁶

¹¹⁰ C. MITITELU: “The legislation of emperor Justinian (527—565) and its reception in the Carpathian-Danubian-Pontic space.” *Analecta Cracoviensia* 48 (2016), pp. 383—397.

¹¹¹ N. V. DURĂ, C. MITITELU: “Human rights and their universality. From the rights of the ‘individual’ and of the ‘citizen’ to ‘human’ rights.” In: *Exploration, Education and Progress in the third Millennium*, vol. I, no. 4. Galați 2012, pp. 103—127; N. V. DURĂ: “Drepturile și libertățile omului în gândirea juridică europeană. De la *Justiniani Institutiones* la *Tratatul instituind o Constituție pentru Europa* [Human rights and freedoms in European legal thinking. From *Justiniani Institutiones* to *The Treaty establishing a Constitution for Europe*].” *Analele Universității Ovidius*. Series: *Drept și Științe Administrative* 1 (2006), pp. 129—151.

¹¹² *Justinian’s Institutes*, pp. 64—65.

¹¹³ *Ibidem*, p. 65.

¹¹⁴ *Ibidem*, pp. 54—65.

¹¹⁵ J. MEYENDORFF: *Marriage...*, p. 20.

¹¹⁶ *Ibidem*, p. 19.

Over the centuries, in the theological literature there has been a debate on whether there is an ontological (existential) relationship between the Sacrament of Marriage and the Holy Eucharist, through which the bride and groom become “members of the Body of Christ.”¹¹⁷

If we go back to the testimonies left by the first Christian writers and by the Church Fathers, we notice that they stated that the Sacrament of Marriage, *ordained by the Church*, was “confirmed by the Eucharist” (*confirmat oblatio*),¹¹⁸ where all the Sacraments of the Church are fulfilled because — as St. Nicholas Cabasilas stated — only in this Sacrament “we become *flesh of His flesh and bones of His bones*” (Gen 2:23).¹¹⁹ Hence the justified assertion that “many confusions and misunderstandings concerning marriage in our contemporary Orthodox practice would be easily eliminated if the original connection between marriage and the Eucharist were restored.”¹²⁰

Nevertheless, in order to better understand wherefore the Byzantine law — prior to Leo the Wise — did not observe and apply the provisions of canon law on religious marriage, we have to go *ad fontes*, that is to the collections of Byzantine law. For example, in *Ecloga* — a collection of compilations of ‘summarily’ (ἐν σύντομοι) selected legislation from Emperor Justinian’s body of laws (*Code, Institutions, Digests, and Novels*) — its authors, namely Emperor Leo III Isaurus’s jurists, wanted to specify that “they have changed them in a more human sense [φιλανθρωπότερον],”¹²¹ that is, in the spirit of a humanism of Christian origin.

Indeed, in the *Proimion* (Introduction) of this Code of Byzantine Laws, called by Byzantines Ἐκλογή τῶν νομῶν (Collection of laws), hence its denomination of *Ecloga*, it is stated that “Our God [Θεός ἡμῶν], the Master and Creator of all things, created man and adorned him with absolute freedom [τῆ ἀυτεξουσίῳτητι] and gave him the law [νόμον] as a help,”¹²² which was seen also as an “instrument for our salvation [σωτηρίας].”¹²³ Therefore, according with the Byzantine approach, the laws (*nomoi*) enacted in the name of the Holy Trinity are instruments for the salvation of the man, and not only a sum of the legal norms which regulate —

¹¹⁷ Ibidem, p. 21.

¹¹⁸ TERTULLIAN: *Ad Uxorem Libri Duo* [To his wife], II, 8, 6 https://www.tertullian.org/latin/ad_uxorem_2.htm [accessed 24.03.2023].

¹¹⁹ N. CABASILAS: *Despre via a în Hristos* [On the Life in Christ]. Trans. T. BODOGAE. Bucharest 2001, pp. 117—118.

¹²⁰ J. MEYENDORFF: *Marriage...*, pp. 22—23.

¹²¹ This statement was included in the title of the Eclogue, see K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graeco-romani ineditorum...*, p. 10; C. A. SPULBER: *L’Éclogue des Isauriens: texte-traduction, histoire*. Cernăuți 1929, p. 1.

¹²² C. A. SPULBER: *L’Éclogue des Isauriens...*, p. 2.

¹²³ Ibidem.

among other things — different juridical institutions, as for example the institution of marriage, based on *aliena instituta*, and not on a Christian teaching.

As far as the engagement (*sponsalia*/μνηστεία) was concerned, in *Ecloga* it was stated that, in case of Christians, engagements were made from an early age, that is, after the age of seven, with the affianced consent and with their parents and the relatives' consents (*Ecloga*, I, 1).¹²⁴

According to *Ecloga*, “the betrothal of Christians is affected by the payment of earnest money or a bond for it, or in writing. And the contract can be made by children from seven years of age and older, by mutual consent of the betrothed and with the assent of their parents and guardians” (*Ecloga*, I, 1).¹²⁵

In the same *Ecloga*, there are express references to ‘dower’ (προίκα), to the ‘dower contract’ (τὴν ὑποχεσθεῖσαν ἀντὶ προίκα) (*Ecloga*, III, 1),¹²⁶ to “the second marriage” (*Ecloga* II, 11),¹²⁷ to “the legitimate marriage” from the point of view of *ius civile romanum* (*Ecloga* II, 9),¹²⁸ to the “indissoluble” nature of the marriage (*Ecloga*, II, 13)¹²⁹ etc.

This testimony of *Ecloga* also attests the fact that, in that time, that is in the years 738—741, when this collection of Byzantine laws was published, there were two kinds of marriages, that is, the marriage stipulated by contract — a legitimate marriage according to *ius civile* — and the religious marriage.

In one of his imperial constitution, Justinian asserted that “the greatest gift that God, in his celestial benevolence, has bestowed on mankind are priesthood and sovereignty,”¹³⁰ that these ones are the supreme authority of Byzantine state (the emperor and the patriarch), and that “the one serving on matters divine, and the other ruling over human affairs, and caring for them. Each proceeds — added the emperor Justinian — from one and the same authority, and regulates human life,”¹³¹ that is derived from a common divine source, hence the imperious necessity

¹²⁴ C. MITITELU: “About Engagement (*Sponsalia*). From *Ius Romanum* to *Ius Civile* of Romania.” *Technium Social Sciences Journal* 29 (2022), pp. 672—682; C. MITITELU: “Elemente de drept matrimonial în Pravilele românești, tipărite, din secolul al XVII-lea [Elements of matrimonial law in the Romanian Nomocanons printed in the 17th century].” *Dionysiana* 1 (2008), pp. 412—419.

¹²⁵ K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graecorumani ineditorum...*, p. 14; C. A. SPULBER: *L'Éclogue des Isauriens...*, p. 9.

¹²⁶ C. A. SPULBER: *L'Éclogue des Isauriens...*, pp. 13—14.

¹²⁷ *Ibidem*, pp. 15—17.

¹²⁸ *Ibidem*, p. 19.

¹²⁹ *Ibidem*, p. 21.

¹³⁰ *The Novels of Justinian...*, p. 97.

¹³¹ *Ibidem*.

that between two institutions, *recte* the imperial office (*imperium*) and the priesthood (*sacerdotium*), has to be “a satisfactory harmony” (Novel 6, *Preamble*).¹³²

With such an opinion about the two main institutions of the Roman Empire, that is, the priesthood and the sovereignty, it is therefore unsurprising that the Emperor Justinian was considered to be the first Roman emperor who showed his “strong concern for the state of matrimony,”¹³³ and the one who recognized that “[...] antiquity was not very much concerned to make a distinction between first and second marriages” (Novel 22).¹³⁴ In fact, by his Novel 22, Justinian has not only “effectively Christianized and codified Roman marriage law,”¹³⁵ but, among other things, he protected “the interests of children in divorce”¹³⁶ and penalized “those who dissolve their marriage by mutual consent.”¹³⁷

Justinian was also the first Roman emperor who obliged “the members of respectable society (above the level of the peasantry and military rank-and-file) to have their marriages witnessed and registered at Church”¹³⁸ (cf. Novel 74). In other words, we could say that a marriage stipulated by contract acquired the legal effects only after it was witnessed and registered at a church. And, by such measures, Justinian created in fact a *reformed law* that made even the “divorce much harder.”¹³⁹

St. Theodore Studites (9th century) composed or revised an older text of the Prayer of the crowning of the brides and grooms, and thus he completed and imposed this prayer in the service of the Holy Wedding, that is, in the liturgical ritual of the Eastern Church. And thus, the Sacrament of the Wedding continued to be celebrated at every Sunday Mass as in the Apostolic age, and at the *crowning* of the bride and groom the priest read a prayer “before the whole people”¹⁴⁰ present at the Holy Mass.

At the end of the 9th century, the marriage blessed by the Church became a bearer of legal effects, as the Emperor Leo VI the Wise expressly provided in one of his imperial constitutions, *alias* Novel 89, as it was in fact provided in the *Epanagoge*,¹⁴¹ or in accordance with its initial title,

¹³² Ibidem.

¹³³ Ibidem, p. 233.

¹³⁴ Ibidem.

¹³⁵ Ibidem, vol. II, p. 751, n. 1.

¹³⁶ Ibidem.

¹³⁷ Ibidem.

¹³⁸ Ibidem, vol. I, p. 523, n. 1.

¹³⁹ Ibidem, vol. II, p. 751, n. 1.

¹⁴⁰ THEODORE STUDITES: *Letters*, I, 22. In: J. MEYENDORFF: *Marriage...*, p. 25.

¹⁴¹ P. ZEPOS, J. ZEPI: *Ius graecoromanum*. Athenis 1931, vol. 6.

*Ἐπαναγωγή τοῦ νομοῦ*¹⁴² (“The Restoration of the law”), that is, a collection of Byzantine laws published “between 884—886”¹⁴³ by the Emperors Leo and Alexander, sons of Basil I the Macedonian.

The two Byzantine emperors wanted — as the term *Epanagoge* tells us — to *restore* or re-enact laws that had been disregarded by the *Eclogue* of Emperor Leo II the Isaurian and his son Constantine V, who, by an imperial edict of 726, had declared persecution against icons.

In the *Epanagoge*, marriage is defined as “an alliance between a man [ἄνδρος] and a woman [γυναικὸς]”¹⁴⁴ and a “union [συνάφεια] for life” (lb. XVI, 1),¹⁴⁵ that is in the same terms used once by the famous Roman jurist Modestinus of the 2nd—3rd centuries AD. Indeed, for the Roman jurist, Modestinus, *Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communication* (Marriage is the union of a man and a woman, forming an association during their entire lives, and involving the common enjoyment of divine and human privileges) (Justinian, *Digesta*, lb. XXIII, 2, 1).¹⁴⁶

In the same collection of Byzantine legislation (*Epanagoge*), it is stated that a marriage is made by blessing, and by crowning, or by agreement (lb. XVI, 1). From this statement, it can be understood that at that time, namely at the end of the 9th century, there were two forms of marriage, that is, the civil marriage, which was of contractual origin, and the religious marriage, with the crowning ceremony, to which St. Theodore Studites († 826) had made express reference in one of his epistles.

As mentioned above, Emperor Leo VI the Wise was the one who — in Novel 89, published immediately after the collection *Epanagoghii* (*Epanagoge*) — provided that a civil marriage did not have a legal effect, and, in fact, it was not a legal one without “the blessing [ἐλογία],”¹⁴⁷ hence his order to observe “τοῦ γάμου τὰ πράγματα [marriage rules],”¹⁴⁸ and, as such, “marriages may be confirmed by the witness of a holy blessing”¹⁴⁹; thus, “if the future spouses did not wish to complete their union in this

¹⁴² K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graecoromani ineditorum...*, p. 53.

¹⁴³ I. N. FLOCA: *Drept canonic ortodox. Legislație și administrație bisericească* [Orthodox canon law. Legislation and church administration], vol. I. Bucharest 1990, p. 103.

¹⁴⁴ K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graecoromani ineditorum...*, p. 106.

¹⁴⁵ *Ibidem*.

¹⁴⁶ *Justinian’s Digest*, <http://legalhistorysources.com/Law508/Roman%20Law/JustinianDigest.htm> [accessed 22.01.2023].

¹⁴⁷ P. NOAILLES, A. DAIN: *Les Nouvelles de Léon VI le Sage...*, pp. 294—295.

¹⁴⁸ *Ibidem*.

¹⁴⁹ *Ibidem*.

way from the beginning,”¹⁵⁰ that is, with the help of holy prayers, “their marriage is not valid and such cohabitation will not produce the effects of marriage.”¹⁵¹ In other words, without these *prayers* of the Church, civil marriage would not have any legal effect.

The text of Novel 89 of the Emperor Leo VI the Wise also reveals that his predecessors had failed to “impose a rigorous formality in connection with marriage,”¹⁵² and that “they allowed them to be concluded without blessing [ἐλογίας].”¹⁵³ But, since “by God’s grace, we have reached a higher and holier level of social life” (Novel 89),¹⁵⁴ that is, to enjoy the privilege of living in a society with eminently spiritual-religious values, the emperor considered it appropriate to order those civil marriages be confirmed by the *holy blessing* of the Church. Ignorance or non-compliance with this law therefore meant that the respective civil marriage was not considered a valid marriage, and, in fact, did not bear legal effects.

The Emperor Leo VI the Wise concluded the text of his imperial constitution, *alias* Novel 89, by warning the bride and groom that if “the worries of marriage [τοῦ γάμου τὰ πράγματα]”¹⁵⁵ were not to their liking, all they had to do was choose “celibacy [ἀγαμία],”¹⁵⁶ and in this way they will not “violate the rules of marriage either.”¹⁵⁷ Therefore, Leo VI also recommended the celibacy as a moral style of life.

In his Novel 89, he acknowledged that the civil marriage, concluded in accordance with the provisions of *ius conubii* (Gaius, *Institutiones*, lb. I, 56), is a *iustae nuptiae* (‘legal marriage’) only through the liturgical service of the Holy Crowning performed by the priests of the Church of Christ, hence the conclusion that only in this way a civil marriage concluded by *contract* is legally enforceable.

By the said constitution Leo VI the Wise contributed both to the formalization of the sacralization of marriage, and to its preparatory part, that is the Christian engagement,¹⁵⁸ called by *Epanagoge*, μνηστεια, that signify ‘a remembrance’ and ‘a promise’ (ἐπαγγελία) for the wedding and

¹⁵⁰ Ibidem.

¹⁵¹ Ibidem, pp. 296—297.

¹⁵² Ibidem, pp. 294—295.

¹⁵³ Ibidem.

¹⁵⁴ Ibidem.

¹⁵⁵ Ibidem.

¹⁵⁶ Ibidem.

¹⁵⁷ Ibidem.

¹⁵⁸ C. MITITELU: “Logodna și Căsătoria în *Pravila* lui Andronachi Donici [Engagement and Marriage in Andronachi Donici’s *Nomocanon*].” *Revista Națională de Drept* 10—12 (2019), pp. 110—118; C. MITITELU: “On the ‘Concordat Marriage’ and its Legal Regime. Considerations and Assessments.” *Teologia* 1 (2022), pp. 59—60.

which could be concluded both ἐγγράφος and ἀγράφως,¹⁵⁹ that is, by a written act or orally (*Epanagoge*, XIV, 1).

By his constitution (Novel 89), the Emperor Leo IV the Wise contributed decisively to the acknowledgement of the practice of administering the Holy Sacrament of the Wedding during the Holy Eucharistic Service, and by this the communion with the Holy Sacraments, even if they were kept from a previous liturgy.

As a clear testimony about the initial connection of the Sacrament of the Wedding with the Holy Sacrament of the Eucharist remains the liturgical ritual, according to which the bride and groom who are not *worthy*, do not share the Holy Sacraments, but receive only “a common cup of wine blessed by the priest.”¹⁶⁰

Both the canonical tradition and the liturgical practice of the Eastern Church attest the fact that the Eucharist is a *seal* of marriage, which makes that “a non-Christian couple admitted into the Church through Baptism, Chrismation, and Communion”¹⁶¹ was not to be considered “remarried,” since “their joint reception of the Eucharist is the Christian fulfillment of a ‘natural’ marriage concluded outside the Church.”¹⁶²

The liturgical tradition of the Eastern Church of which St. Symeon, the Archbishop of Thessalonica,¹⁶³ gave testimony in the year 1420, confirms that the *priest* communed the bride and groom during the Holy Liturgy, when he says: “the Presanctified holy Things for the Holy. And all respond: One is Holy, One is Lord.”¹⁶⁴

The same Holy Father stated that “the priest then gives Communion to the bridal pair, if they are worthy. Indeed, they must be ready to receive Communion, so that their crowning be a worthy one and their marriage valid. For Holy Communion is the perfection of every sacrament and the seal of every mystery.”¹⁶⁵

It should also be mentioned that St. Symeon — as St. Theodore Studites (759—826) had previously done — that “those who get married must be worthy of Holy Communion; they must be united before God in a church, which is the house of God, [...] where He is being offered to us and where He is seen in the midst of us.”¹⁶⁶

¹⁵⁹ K. E. ZACHARIAE VON LINGENTHAL, K. EDUARD: *Collectio librorum iuris graecoromani ineditorum...*, p. 102.

¹⁶⁰ J. MEYENDORFF: *Marriage...*, p. 28.

¹⁶¹ *Ibidem*, p. 29.

¹⁶² *Ibidem*.

¹⁶³ SYMEON OF THESSALONICA: *Marriage and Holy Communion*. In: J. MEYENDORFF: *Marriage...*, p. 111.

¹⁶⁴ *Ibidem*.

¹⁶⁵ *Ibidem*.

¹⁶⁶ *Ibidem*, p. 112.

Finally, St. Symeon wrote that to “those who are not worthy of *Communio* [...] the Divine Gifts are not given, but only the common cup, as a partial sanctification, as a sign of good fellowship and unity with God’s blessing.”¹⁶⁷

Although this cup of communion is regarded as a *partial sanctification*, yet, in the perception and definition of Byzantine theology, it remained a clear sign of an accompaniment and union with God’s blessing, which it was imposed by Byzantine state legislation at the turn of the 9th and 10th centuries as a binding legal act for civil marriage.

In lieu of conclusions

The religious marriage was a reality in all religions of the world since antiquity, when *lex divina* and *proti philosophia*,¹⁶⁸ born in the tabernacle of temples, coexisted, and contributed to developing the process of human knowledge about God and his things.

That in the antiquity *matrimonium* (marriage) had a pronounced religious nature is attested by various sacred texts on religious ceremonies that accompanied the act of officiating religious marriage in the temples of those religions that enjoyed the freedom of religion.¹⁶⁹

Also, in order to highlight this reality from a legal point of view, in my study I made some references on the text of the Roman law (*iuris romanum*), that is studied even in China of our days, since Roman law confirms that the *pontiffs*, namely the servants of Roman temples, were not only those who performed the ritual of religious marriage by *confarreatio*, but also those who were entitled to dissolve it by *diffarreatio*, an

¹⁶⁷ SYMEON OF THESSALONICA: *Marriage...*, p. 112.

¹⁶⁸ N. V. DURĂ: “From ‘Proti Philosophia’ to Nietzsche’s thinking. Some considerations as philosophical knowledge is concerned.” *Philosophical-Theological Review* 5 (2015), pp. 9–25.

¹⁶⁹ N. V. DURĂ: “The Right to Freedom of Religion during of Emperors Cyrus ‘the Great’ (559—529 BC) and Alexander ‘the Great’ (336—323 BC).” *Studii filosofice* 2 (2015), pp. 231—242; N. V. DURĂ, C. MITITELU: “The Freedom of Religion and the Right to Religious Freedom.” In: *Conference on Political Sciences, Law, Finance, Economics & Tourism*. Vol. I. Albena 2014, pp. 831—838; C. MITITELU: “About the Right to the Freedom of Religion.” In: *Rethinking Social Action. Core Values*. Eds. A. SANDU et al. Bologna 2015, pp. 833—838; C. MITITELU: “Jurisprudența Curții Europene privind dreptul la religie. Considerații și evaluări [The jurisprudence of the European Court on the Right to Religion. Considerations and assessments].” *Jurnalul Libertății de Conștiință* 2 (2022), pp. 168—187.

act which was also accompanied by a religious ceremony officiated by temple servants.

The transition from the marriage by *confarreatio* to the marriage as Sacrament (*Mistyrion*) happened in Cana of Galilee, when Our Lord Jesus Christ performed his first miracle, turning water into wine (John 2:1—11), hence our duty to get better acquainted with the theology of the religious marriage established by the New Law of our Savior Jesus Christ, who raised it to the rank of Sacrament, whereby God's grace is shared with those who are accompanied through marriage, namely the groom and bride (male and female), by the blessing of the priests.

This sacramental act, which from the beginning of the Church was accompanied by the administration of the Holy Sacrament of the Eucharist, led to an increased *sacralization* of marriage. Therefore, it is noteworthy that the dissociation of the Sacrament of Marriage from the Sacrament of the Eucharist cannot be considered only as a result of the *secularization* of the theology of religious marriage, but also of the consequence of the impact of the secular values, including of some of the provisions of the laws of the Roman Empire (the West and the East), on Christians over the centuries.

In my study, special reference was also made to the initial ontological relationship between the Holy Sacrament (*Mistyrion*) of the Marriage and the Holy Eucharist, because only the true and authentic knowledge of this connection can help us eliminate some confusion and misunderstandings about the Sacrament of Marriage, that continues unfortunately to circulate even among some theologians of our days.

In order to bring better clarification in this regard, we referred the texts of some classical Byzantine theologians (e.g. St. Theodore Studites and St. Symeon of Thessalonica) and to the texts of some collections of Byzantine legislation, such as that of the Emperor Justinian, the *Eclogue*, the *Epanagoge*, and the Novels of Leo the Wise, which revealed that only through a return *ad fontes*, that is, to the sources, and through an interdisciplinary approach — theological, canonical, and legal — can one really bring a concrete contribution to the knowledge of the evolutionary process of the transition from marriage by *confarreatio* to marriage as Sacrament (Μυστήριον/*Sacramentum*), present both in the Eastern Orthodox Church (cf. can. 51 ap.), and in the Roman Catholic Church (cf. can. 1055 of *Codex Iuris Canonici*).

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NICOLAE DURĂ

Sur le mariage religieux
Du mariage par *confarreatio* au mariage en tant que sacrement
(μυστήριον/*sacramentum*)

Résumé

Le mariage, l'une des institutions les plus anciennes de l'humanité, était initialement réglementé par la loi divine (tant naturelle que positive), d'où son caractère religieux, que l'on retrouve également dans le mariage romain connu sous le nom de mariage par *confarreatio*.

Conformément aux dispositions du *ius civile*, un homme et une femme contractaient le mariage par le biais d'un accord. Cependant, en vertu d'une constitution impériale proclamée par l'empereur Justinien, seul le mariage civil conclu sous la forme d'un contrat écrit dans l'Église est considéré comme *iustae nuptiae* (mariage légal) (cf. Nouvelle 74).

Le mariage en tant qu'institution, assuré par le *ius civile*, a évolué en un acte sacramentel de mariage lorsqu'il a été élevé au rang de Saint Sacrement de l'Église par notre Sauveur Jésus-Christ à Cana en Galilée (cf. Jn 2: 1-11). Depuis l'époque apostolique, le sacrement du mariage (*mysterion*) était accompagné de la réception de la Très Sainte Eucharistie par le marié et la mariée, c'est-à-dire par l'homme et la femme. Cet acte sacramentel de mariage était réglementé par le droit ecclésiastique, c'est-à-dire le droit canonique des Églises orientales et occidentales (cf. canon 3 du Concile in Trullo).

À partir de 893, les sujets de l'empereur byzantin devaient recevoir le sacrement du mariage après avoir contracté le mariage civil (cf. Nouvelle 89 de l'empereur Léon le Sage). Ce n'est qu'ainsi que le mariage pouvait avoir des effets juridiques.

Mots-clés: mariage religieux et civil, droit romain, droit byzantin, droit canonique, théologie chrétienne du mariage

NICOLAE DURĂ

Sul matrimonio religioso
Dal matrimonio per *confarreatio* al matrimonio come Sacramento
(μυστήριον/*sacramentum*)

Sommarìo

Il matrimonio, una delle istituzioni più antiche dell'umanità, era inizialmente regolato dal diritto divino (sia naturale che positivo), da cui deriva il suo carattere religioso, che si può ritrovare anche nel matrimonio romano noto come matrimonio per *confarreatio*.

Secondo le disposizioni dello *ius civile*, l'uomo e la donna contrattavano il matrimonio attraverso un accordo. Tuttavia, in virtù della costituzione imperiale proclamata dall'imperatore Giustiniano, solo il matrimonio civile contratto in forma scritta nella Chiesa è considerato *iustas nuptias* (matrimonio legale) (cfr. Novella 74).

Il matrimonio come istituzione, garantito dallo *ius civile*, è evoluto in un atto sacramentale quando è stato elevato a rango di Santo Sacramento della Chiesa dal nostro Salvatore Gesù Cristo alle nozze di Cana di Galilea (cfr. Gv 2,1-11). Fin dai tempi apostolici, il sacramento del matrimonio (*mysterion*) è stato accompagnato dalla somministrazione e dalla ricezione della Santissima Eucaristia da parte dello sposo e della sposa, ossia dell'uomo e della donna. Questo atto sacramentale del matrimonio era regolato dal diritto ecclesiastico, ovvero dal diritto canonico delle Chiese orientali e occidentali (cfr. can. 3 del Concilio in Trullo).

Dal 893, i sudditi dell'imperatore bizantino dovevano ricevere il sacramento del matrimonio dopo aver contratto il matrimonio civile (cfr. novella 89 dell'imperatore Leone il Saggio). Solo in questo modo il matrimonio poteva avere effetti legali.

Parole chiave: matrimonio religioso e civile, diritto romano, diritto bizantino, diritto canonico, teologia cristiana del matrimonio



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The Upbringing of Offspring in Mixed Marriages in a Historical Perspective

Abstract: The concern for the upbringing of children in the marriages of Christians with followers of other religions or pagans, and then Catholics with non-Catholics, was from the very beginning a concern of the church community. This issue is discussed in the present article, in which the author focuses his attention on foundations of the regulations rather than on their legal aspect. The conducted analyses indicate that there has been a significant shift from the objective protection of faith to the subjective expression of the personal character of the marriage relationship and the related rights and obligations resulting from the free-given grace of belonging to Christ.

Keywords: mixed marriages, parents, offspring, upbringing, rights, obligations

1. Introduction

In the history of ecclesiastical legislation concerning mixed marriages and raising children, the most significant change is found in *motu proprio* of Paul VI *Matrimonia mixta*¹ and the earlier Instruction of the Congregation for the Doctrine of the Faith *Matrimonii sacramentum*.² Both documents are a legal consequence of the teaching of the Second Vatican

¹ PAUL VI: *Apostolic Letter in the Form of Motu Proprio “Matrimonia mixta”* [1.10.1970].

² CONGREGATION FOR THE DOCTRINE OF THE FAITH: *Instruction on Mixed Marriages “Matrimonii sacramentum”* [18.03.1966].

Council, translating conciliar ecclesiology into canonical language,³ especially in the approach to understanding the Church of Christ,⁴ to ecumenical issues⁵ and to the issue of religious freedom.⁶ From the three conciliar documents a triad emerges, in the light of which we can read the current legal solution concerning entering into mixed marriages, which still — according to Pope Francis — can be described as “complex situations.”⁷ The above-mentioned context of today’s theology concerning mixed marriages and consequently, existing legal solutions may be cursorily summarized in the following statements: 1) in the non-Catholic Christian denominations there are “many elements of sanctification and of truth”⁸; 2) “man’s response to God in faith must be free” and he is bound “to obey his conscience”¹⁰; 3) “anything wrought by the grace of the Holy Spirit in the hearts of our separated brethren can be a help to our own edification.”¹¹ Further papal documents, especially *Familiaris consortio*¹² i *Amoris laetitia*, confirm and reinforce the teaching of the Council, but are also symptoms of its development in detailed and difficult issues. Pope Francis points out that mixed marriages should be appreciated and developed for their intrinsic value as well as their contribution to the ecumenical movement.¹³

There has been a palpable advance in current theology and legal regulations concerning mixed marriages and bringing up children in them from the point of view of Catholic theology. As theological awareness and knowledge of Revelation develop, as well as through the ecumenical dialogue, in which the other side’s reasons are duly acknowledged, solutions to specific issues are sought by constructively taking into account the other side’s thoughts in one’s own theological argumentation, reception and shaping of consensus.¹⁴ Today’s solutions are not only a testimony to theological discrepancies, but also to the difficult way of arriving at

³ JOHN PAUL II: *Apostolic Constitution “Sacrae disciplinae leges”* [25.01.1983].

⁴ VATICAN COUNCIL II: *Dogmatic Constitution on the Church “Lumen gentium”* [21.11.1964].

⁵ VATICAN COUNCIL II: *Decree on Ecumenism “Unitatis redintegratio”* [21.11.1964].

⁶ VATICAN COUNCIL II: *Declaration on Religious Freedom “Dignitatis humane”* [7.12.1965].

⁷ FRANCIS: *Post-Synodal Apostolic Exhortation “Amoris laetitia”* [19.03.2016], n. 247.

⁸ *Lumen gentium*, n. 8.

⁹ *Dignitatis humane*, n. 9.

¹⁰ *Ibidem*, n. 11.

¹¹ *Unitatis redintegratio*, n. 4.

¹² JOHN PAUL II: *Apostolic Exhortation “Familiaris consortio”* [22.11.1981].

¹³ *Amoris laetitia*, n. 247.

¹⁴ W. KASPER: *Kościół katolicki. Istota, rzeczywistość, posłannictwo*. Kraków 2012, p. 541.

the recognition of the arguments of the other party. To a large extent, the environment for finding some solutions are joint initiatives undertaken by Christians of different denominations. These include their marriages. They are a privileged place for ecumenical dialogue, although this dialogue is not the reason for entering into them. The situation in which Christians of different faiths find themselves poses challenges regarding the Christian identity of the family and the upbringing of children.¹⁵ One should take into account the arguments of the other party and, at the same time, be in harmony with one's own faith response. A positive aspect and, at the same time, a stimulus mobilizing to common concern for the Christian upbringing of children is the rejection of the centuries-old practice of forbidding mixed marriages and punishing the Catholic side for failing to fulfill obligations resulting, for example, for not bringing up children in the Catholic faith. This historical argument will become the subject of this study, in particular the issue of raising offspring in mixed marriages. The history of marriages concluded by the followers of Christ, first with pagans and apostates from the faith, through their ties with Christians belonging to the Orthodox Church or Protestant denominations, had many faces. Diachronic, concise, but at the same time essential, presentation of mainly legal provisions shall allow us to understand their foundations and reasons, as well as their relations to those currently in force.

2. Antiquity

The oldest synods of the Church contain provisions in the formulated canons concerning the prohibition of Christians from entering into marriages with followers of other religions. We find dispositions in this matter in the canons of the first synod of the Spanish Church in the Council of Elvira,¹⁶ which dealt with matters of ecclesiastical discipline. The legal dispositions of this synod contained regulations concerning marriages between Christian women and pagans. In canon 15 this prohibition may have been drafted because of a certain practice that led to such marriages due to the number of Christian women significantly exceeding the number of Christian men at the time. So, the small number of Christian

¹⁵ *Amoris laetitia*, n. 248.

¹⁶ I use *concilium* in its original meaning as the Latin term introduced by Tertullian for the Greek term for the assembly of bishops *synodos*. E. SASTRE SANTOS: *Storia dei Sistemi di Diritto Canonico*. Roma 2012, p. 69.

men was supposed to justify marrying men who were pagans. We read in the said canon that it is forbidden to do so because it risks women falling into “spiritual adultery.” In common opinion, a normative provision is read as a ban on marrying pagans, which corresponded with the practice of the Church referring to the provisions of the Old and New Testament.¹⁷ However, there is no lack of opinion that the prohibition expressed in the canon should not be treated as absolute. Canon 15 confirms that Christian women could marry pagans when there were many more of them than Christian men.¹⁸ This was the situation of the Church in Spain at that time, similar to that of other Churches, where marriages between Christians and pagans were not uncommon.¹⁹ The correctness of this opinion can be confirmed by the fact that the prohibition concerns only the reason justifying the choice of marriage with pagans and the fact that there is less possibility of the loss of faith than in the case of marriages with heretics or Jews. No penalty was attached to such a ban. For this reason, the conciliar decision should be understood more as a recommendation than a prohibition.²⁰

In retrospect, reading the provisions of the canon without a historical context and without the underlying belief in Christian marriage may lead to ambiguous conclusions. Considerations can be made as to whether the prohibition relates to marriage (it could have been expressed unequivocally) or only to the justification of contracting a marriage, without taking into account other motives. The wording of the canon: *minime in matrimonium dandae sunt*²¹ speaks in favour of the latter solution, although there is no lack of opinion that the expression *minime* has more force than the prohibition itself due to the greater number of marriages between Christians and pagans than heretics or Jews, as discussed in the following canons.²² The next two canons of this synod (canons 16—17) leave no ambiguity. They clarify that Christian girls may not be married off to heretics who do not wish to enter the Catholic Church (can. 16). The reason for this provision is the lack of communion between the faithful and non-believers. The prohibition applies only to parents who marry

¹⁷ F. X. WERNZ, P. VIDAL: *Ius canonicum ad Codicis normam exactum*. Vol. 5: *Ius Matrimoniale*. Romae 1928, p. 301.

¹⁸ J. SYRYJCZYK: “Troska Kościoła o katolickie wychowanie dzieci w kanonicznym prawie karnym.” *Prawo Kanoniczne* 30/3—4 (1987), pp. 208—209.

¹⁹ *Ibidem*, pp. 208—209.

²⁰ L. ODROBINA: “Ancora sul divieto dei matrimoni misti a Concilio di Elwira.” In: *I concili della cristianità occidentale: secoli III-V*. Roma 2002, p. 583.

²¹ COUNCIL OF ELVIRA, can. 15. *Synody i kolekcje praw*. Vol. 1: *Dokumenty synodów od 50 do 381 roku*. Eds. A. BARON, H. PIETRAS. Kraków 2006, p. 52.

²² L. ODROBINA: “Ancora sul divieto dei matrimoni misti a Concilio di Elwira....” p. 584.

off their daughters, not to the marriage itself. For this reason, only the parents are punished with deprivation of communion for a period of five years. However, this punishment would have applied to their entire lives if they had given their daughters away as wives to pagan priests. The prohibitions against marrying non-Christians also lead to conclusions about the upbringing of children in such relationships. There was a danger of their upbringing outside the Christian faith.

At the subsequent local synods in Laodicea (the second half of the 4th century)²³ and in Agde (506), the ban on marrying Christians outside the Church community was maintained but no sanction was attached to the ban. The Council of Laodicea decided that it was possible to marry heretics on condition that they made a vow to convert to the Christian faith. The ban on entering into such marriages applied to all, irrespective of gender, and to parents giving away their children (sons and daughters) to marry. The Council of Agde in canon 67 confirmed the decree of canon 31 of Laodicea Council.²⁴

The issue of offspring born of relationships of Christians and pagans, heretics, or Jews, if the latter were formed despite the prohibitions, was first raised at the Council of Chalcedon IV (451). After affirming in canon 14 the ban on marriages of lectors and cantors with heretics, Jews and pagans, unless they promise to accept the true faith, the council decided that after marriage, children previously baptized by heretics should be admitted to the community of the Catholic Church. On the other hand, infants not yet baptized cannot be baptized by heretics.²⁵ The prohibitions expressed in this canon have been covered by indefinite canonical penalties. However, they do not apply to people who marry against the prohibitions expressed. They relate to baptism and the education of children in a non-Christian community. Thus, the order to raise a child in Christianity was imposed on Catholic parents by an express prohibitions. This order was further strengthened by a sanction for actions inconsistent with it. In the opinion of canonists, the upbringing of children in a non-Christian religion was qualified as complicity in the crime of heresy, because in this way heretical doctrines conducive to heresy were promoted.²⁶

²³ COUNCIL OF LAODICEA, can. 10, 31. *Synody i kolekcje praw*. Vol. 4: *Dokumenty synodów od 381 do 431 roku*. Eds. A. BARON, H. PIETRAS. Kraków 2010, pp. 112, 115.

²⁴ COUNCIL OF AGDE, can. 67. *Synody i kolekcje praw*. T. 8, *Dokumenty synodów od 506 do 553 roku*. Eds. A. BARON, H. PIETRAS. Kraków 2014, p. 21.

²⁵ COUNCIL OF CHALCEDON, can. 14. *Dokumenty Soborów Powszechnych*. T. 1 (325—787). Eds. A. BARON, H. PIETRAS. Kraków 2002, p. 239.

²⁶ M. CONTE A CORONATA: *Institutiones Iuris Canonici ad usum utriusque cleri et scholarum*. Vol. 4: *De Delictis et Poenis*. Romae 1955, n. 1878.

In her first centuries, the Church did not prohibit in an absolute way the marriage of Christians with followers of other religions or with heretics or pagans, but the prohibition was expressed by introducing various commands, it showed the value of the gift of faith and the obligation to transmit it through the Christian education of children. Already the synod in Elvira underlined the reasons behind these prohibitions: 1) danger of losing faith; 2) lack of community between believers and the unfaithful. It is worth noting that the prohibition of baptism of children born of such marriages by heretics is one of the conditions, apart from the conversion of a spouse to the Catholic faith, of concluding a marriage with a person from outside the Christian community. The two conditions constitute the beginning of the present-day warranties required before marriage between a Catholic and an non-Catholic or non-Christian.²⁷

3. Middle Ages

Formed in the first centuries, the constant practice of banning Christians from marrying non-believers, persons of other religions, schismatics or heretics was present in subsequent decisions of local synods in the Middle Ages (the Council of Orléan, 533 in can. 19; Orlean, 538 in can. 13; IV Council of Toledo, 633 in can. 63; the Council of Trullo, 692 in can. 72).²⁸ The conciliar decisions of the Middle Ages brought new normative solutions to the upbringing of children in mixed marriages between Christians and Jews or non-Catholics. The Synod of Toledo (633) decided in Chapter 63 (*Capitulum* 63) that children in such unions should be brought up in the Christian way (*christianam sequantur religionem*), regardless of whether the Christian side is male or female. At the same time, a failure to comply with this order was punishable by the sanction of separation if, after a prior warning by the bishop, the Christian side still does not want to comply with it.²⁹ This canon was fully incorporated into Gratian's Decree.³⁰

²⁷ U. NAVARETTE: "Matrimoni misti: conflitto fra diritto naturale e teologia?" *Quaderni di Diritto Ecclesiale* 5/3 (1992), p. 270.

²⁸ G. DZIERŻON: *Ewolucja doktryny oraz dyscypliny dotyczących przeszkody różności religii w kanonicznym porządku prawnym...*, pp. 43—50.

²⁹ IV COUNCIL OF TOLEDO, cap. 63. JOANNES DOMINICUS MANSI: *Sacrorum conciliorum nova et amplissima collectio*. Vol. 10. Florentiae 1764, p. 634.

³⁰ C.28 q.1 c.10.

In the formulation of the canon, one can see preferences relating to the upbringing of a child in the Christian faith, which is placed before the parents' obligation to pass on the faith. This is due to the decision that a child born of a Christian's relationship with a person of another faith should follow the mother's path, as long as she is a Christian. There is no such relationship in the case of a Christian father. When the mother is not a Christian, the child is to follow not the path of the father, but the path of Christian faith as if the role of the father was not to educate. Following the path of faith may mean that someone other than the father may take up Christian education. One can notice here a reference to canon 1 of the Synod of Hippo (393), which forbids the emancipation (release) of a son from his father's authority by a bishop or clergyman, adding that it is possible, however, when his way of life and customs are considered good. The reason for removing a son from his father's power is, on the one hand, his good life, which he can continue himself, but on the other hand, there is a fear of causing harm to the bishop or clergyman in the event of his indecent behaviour. In such situations, it is better to remove the son from the father's authority in order to protect his office in this way. The protection of the bishop and clergyman as a father cannot be damaged by the misbehaviour of their son.³¹

Apart from the formulation of the Fourth Council of Toledo, the issue concerning the Christian education of children is not discussed in other conciliar decisions. The main attention is focused on the issue of the possibility of contracting mixed marriages and the legal effects they cause. It was during this period, especially thanks to Hugh of Pisa, that marital obstacles in today's sense were distinguished as *disparitas cultus and mixta religio*.³² This distinction was intended to eliminate mixed marriages from church communities. Additionally, however, it was intended to punish Catholics who married non-Catholics. The provisions of the Council of Toledo gave rise to the claim that by the eliminating approach to such marriages, the non-Catholic upbringing of offspring born in non-Catholic marriages was also combated.³³ The Church's approach to raising children was based more on the child's direct relationship with faith than with the parents. In later centuries, such an attitude was transferred to the church practice (e.g. the evangelization of America, church schools with the upbringing of children of the indigenous people) of taking their

³¹ SYNOD OF HIPPO, can. 1, in: *Synody i kolekcje praw*. Vol. 4: *Dokumenty synodów od 381 do 431 roku*. Eds. A. BARON, H. PIETRAS. Kraków 2010, p. 61.

³² U. NOWICKA: "Przeszkoda różności religii." In: *Przeszkody małżeńskie w prawie kanonicznym*. Ed. W. GÓRALSKI. Warszawa 2016, pp. 209—210.

³³ J. SYRYJCZYK: "Troska Kościoła o katolickie wychowanie dzieci w kanonicznym prawie karnym..." pp. 210—211.

children away from their parents in order to bring them up properly in faith outside the family environment.

Medieval legal practice relating to the rearing of offspring, along with the penalties imposed on those abusing to do so, reflected earlier thinking about favouring or advocating heresy. Support for heresy was threatened by Pope Alexander IV with the penalty of deprivation of church funeral and excommunication. In addition, the accomplices (parents) and their offspring up to the second generation were punished with irregularities in receiving and having benefices in church and public offices.³⁴ The criminal responsibility for the upbringing of children in a non-Christian and thus heretical religion rested with the parents and children. The same applied to the situation of bringing up children in the pagan or Judaic religion, which was treated as complicity in the crime of apostasy from faith.³⁵ The practice of imposing penalties for complicity in heresy was confirmed by the Fourth Lateran Synod (1215). It concerned parents giving their children up for upbringing in a non-Catholic religion, for which they could be excommunicated *latae sententiae*.³⁶

4. Modern times

Undoubtedly, Protestantism, established at the beginning of the 16th century, had a great influence on the issue of mixed marriages and the upbringing of children. The emergence of a new religion in such a large part of Catholic realm contributed to marriages between Catholics and Protestants. The documents of the Council of Trent convened in response to the Reformation do not state that it dealt with the problem of mixed marriages. Also, the question of the obstacle of *disparitas cultus* was not elaborated on despite the achievements of earlier canon studies.³⁷

The new practice of mixed marriages prompted the provisions of provincial synods (France, Belgium, Germany, Poland) and those reminded by

³⁴ VI, V.2.2.

³⁵ VI, V.2.13.

³⁶ IV LATERAN COUNCIL, can. 3. *Dokumenty Soborów Powszechnych*. Vol. 2 (69—1312). Eds. A. BARON, H. PIETRAS. Kraków 2002, pp. 231—235.

³⁷ G. DZIERŻON: *Ewolucja doktryny oraz dyscypliny dotyczących przeszkody różności religii w kanonicznym porządku prawnym...*, pp. 81—82. The author adds that in the times of Counter-Reformation, views confirming the legal validity of this obstacle under the legal custom were dominant (p. 84).

the Holy See, which prohibited such marriages. The conclusion of mixed marriages was possible only after obtaining the papal dispensation, which popes issued rarely and only for very serious reasons, especially when it was related to the need to grant dispensation from a coexisting obstacle. Until the 18th century, the popes delegated such a possibility even less frequently than they gave dispensations themselves.³⁸ However, the condition for requesting a dispensation, as indicated by Benedict XIV in the Encyclical *Magne nobis* of 1748, was the requirement of conversion of the non-Catholic party, which, however, in Germany in the 18th and 19th centuries gave way to the widespread practice of concluding mixed marriages without fulfilling the condition of conversion. A characteristic feature of papal documents of that period in the matter of mixed marriages is the dependence of the dispensation for their conclusion on the submitted guarantees, including those relating to children. The Catholic side had to undertake a commitment to keep their faith and raise their children in the Catholic faith. A non-Catholic was required to make a commitment that he or she would allow his spouse to fulfill all religious practices and raise all children in the Catholic religion.³⁹

It was only Pope Pius IX who resumed the issues relating to mixed marriages and mitigating the requirements, but they did not meet with a response at the First Vatican Council.⁴⁰ The earlier legal solutions related to the obligation to impose penalties for complicity in the crime of apostasy of heresy remained in force. Such accomplices were parents who gave their children away to be brought up in the non-Catholic faith. Pius IX instituted the punishment of *latae sententiae* reserved to the pope *speciali modo*.⁴¹

Raising children in mixed marriages in the official documents of the Holy See of modern times appeared in the context of their baptism in the Catholic religion and the preservation of faith. The educational issue itself was not present. The child's faith was related to the faith of the Catholic parent and to the obligation imposed on him to raise the child in his own faith.

All papal exhortations addressed to the Catholic side apply only indirectly to children in mixed marriages. Characteristic for this period is also a clean criminal record for Catholics entering into a mixed marriage after

³⁸ F. X. WERNZ, P. VIDAL: *Ius canonicum ad Codicis normam exactum...*, p. 184.

³⁹ BENEDICT XIV: *Encyclical Letter "Magne nobis"* [29.06.1748]. In: *Codicis Iuris Canonici Fontes*. Vol. 2. Ed. P. GASPARI. Romae 1948, n. 387. BENEDICT XIV: *Apostolic Letter "Ad tuas manus"* [8.08.1748]. In: *Codicis Iuris Canonici Fontes*. Vol. 2...., n. 389.

⁴⁰ F. X. WERNZ, P. VIDAL: *Ius canonicum ad Codicis normam exactum...*, p. 185.

⁴¹ PIUS IX: *Apostolic Constitution "Apostolicae sedis"* [12.10.1869]. In: *Codicis Iuris Canonici Fontes*. Vol. 3. Ed. P. GASPARI. Romae 1933, n. 552.

obtaining a dispensation, if the children were baptized and brought up in the Catholic manner.

5. Contemporary times

The fall of ancien régime influenced the structural changes of European society as well as issues related to entering into marriage after the introduction of civil marriages to the state systems. Like Protestantism, the new possibilities of getting married, the practice of which were increasing, required a reaction from the Holy See. It is also the period when the first legal regulations protecting children's rights appear.⁴² The issue that required the Church's response concerned situations where state legislation stipulated that children in mixed marriages were to be brought up in the religion of the father or in the religion that the father would choose for his children. Pope Pius VIII responded to this problem in the Apostolic Letter *Litteris altero*.⁴³ He emphasized that the norms of state law are contrary to canon law. At the same time, he called on Catholics marrying non-Catholics to observe the norms of the Church. He recalled that the Church had never dispensed Catholics from the obligation to raise children in the Catholic faith and from the absolute obligation of the warranty on the Catholic side to raise all children in the Catholic faith. He also asked priests to remind the parties of their obligations regarding the Catholic upbringing of children before entering into marriage. He also added that priests are forbidden to celebrate such a relationship if the parties do not want to respect the requirements of church law, and the Catholic side should be censured in the event of a refusal to provide a warranty.

Another issue to which the pope responded with his intervention concerned the apparent consent to the Catholic upbringing of children by persons wishing to marry. This is because apparent consent was given in

⁴² The first attempts to protect children's rights in the forum of state legislation appeared in Great Britain in 1819. Robert Owen, an activist of the socialist movement and a pioneer of cooperatives, proposed a ban on the employment of young children in mines, factories and agriculture, which was passed in 1908 Children Act. Subsequent pieces of legislation to protect children appeared in Hungary (1901), France (1904), and Belgium (1912). In their content, they referred to social assistance for children, which was philanthropic in nature. T. GAŁKOWSKI: "The right of the child to life and to preserve his or her identity." *Ecumeny and Law* 3 (2015), pp. 229—230.

⁴³ Pius VIII: *Apostolic Letter "Litteris altero"* [25.03.1830]. In: *Codicis Iuris Canonici Fontes*. Vol. 2. Ed. P. GASPARI. Romae 1948, n. 482.

order to obtain a dispensation for marriage. In fact, however, the parents agreed among themselves that at least some, if not all, of their children would be raised outside the Catholic Church. Recognizing such marriages as validly yet indecently contracted, the Pope asked the priests again to admonish the Catholic side in such situations and persuade it to undertake an appropriate penance. The duties of priests also include reminding about the Catholic upbringing of children. The papal letter clearly shows that the guarantee of bringing up Catholic children in mixed marriages rested more on the priests, who were obliged to care for the preservation of the Catholic faith of children in mixed marriages, than on the parents themselves.⁴⁴ The commitment of the clergy and the threat of punishments was of greater value than the conscious testimony of the faith and rights of Catholic parents. It is hard not to get the impression that this situation resembles the rules of raising children under the penalty that could be imposed on the educator for failing to fulfill the obligation imposed on him.

6. The 1917 Code of Canon Law

In the pre-code legislation, the Church's concern for the Catholic upbringing of children in a mixed marriage, for which a dispensation was required, depending on the occurrence of serious reasons and providing a warranty, was expressed in imposing an obligation on the Catholic side to maintain their own faith and the children's faith. From the other side, which was considered heretical, commitments were required that would allow for the fulfillment of religious practices and the upbringing of all children in the Catholic religion. The centuries-old practice, constantly reminded in papal documents, was the basis for legal regulations in the 1917 Code of Canon Law. In the regulations of the Code, however, one can notice a significant change compared to the disposition of Pope Pius VIII. The guarantee of the Catholic upbringing of offspring was the pastoral influence on the Catholic side to induce them to fulfill the obligation assumed when concluding the sacrament. Marriages were forbidden if the parties did not want to provide a guarantee regarding the Catholic upbringing of their offspring, and the Catholic side was at risk of incurring censorship. In the Code of 1917, the emphasis of responsibility for

⁴⁴ J. SYRYJCZYK: "Troska Kościoła o katolickie wychowanie dzieci w kanonicznym prawie karnym...", p. 214.

the upbringing of children in the Catholic way was placed on the positive formulation of the obligation incumbent on parents (can. 1372 §2).⁴⁵

The first purpose of marriage, as expressed in canon 1113 § 1 was not only the birth, but also the rearing of offspring. The legislator explained that this upbringing is done by preparing a child for independent private and public life in the church and civil community. As a consequence, this obligation resulted in specific obligations, such as concern for the religious, moral, physical, and civic education of the offspring. The Code indicates the means by which the religious education of a child is carried out. These included: the baptism of a child (can. 770), teaching the principles of catechism (can. 1335) and education in Catholic or other schools with the consent of the local ordinary (can. 1372—1374). His prerogatives included the assessment of the circumstances of this choice of school and the provision of measures against deviation from the faith. The obligation of Catholic upbringing of children rested on Catholic parents, but it also applied to them in situations of entering into marriage with non-Catholics.

In the Code of 1917, the principle prohibiting mixed marriages (*severissime Ecclesia prohibet*) was maintained. The prohibition of entering into such marriages resulted from the fact that they could often lead to the loss of faith or religious indifference, and the offspring could be at risk of baptism and being brought up outside the Catholic Church (can. 1061 §1, 2^o). An additional motive was the possibility of illegal participation of a Catholic in sacred things (*communicatio in sacris*) in the non-Catholic religion or the admission of non-Catholics to sacraments in the Catholic Church. It was only possible to grant dispensation for such a marriage if the Church recognized that the obstacle did not arise from God's law.

The justification for granting the dispensation was to achieve moral certainty that the Catholic side and the offspring would not be in danger of losing their faith⁴⁶ from a mixed marriage. A surety measure in the form of warranty was required prior to entering into marriage. It concerned the non-Catholic side and was supposed to ensure that the Catholic spouse would not be in danger of losing his or her faith. Both parties were obliged to make a pledge regarding Catholic baptism and the upbringing of children (can. 1061 §1, 2^o). An additional measure securing the Catholic upbringing of offspring in mixed marriages were the penalties of *latae sententiae* excommunication provided for failure to comply

⁴⁵ Ibidem.

⁴⁶ F. BĄCZKOWICZ, J. BARON, W. STAWINOĞA: *Prawo kanoniczne. Podręcznik dla duchowieństwa*. Vol. 2. Opole 1958, p. 210.

with God's obligation resulting from the law. They were subordinate to Catholics who entered into marriage with an explicit or tacit agreement that all or some of the children would be brought up outside the Catholic Church (can. 2319 § 1.2⁰). The same punishment was also imposed on Catholics who knowingly gave their children to the clerical baptism of any non-Catholic religious association (can. 2319 § 1,3⁰) and those who consciously gave their children up for upbringing or education in the non-Catholic religion (can. 2319 § 1,4⁰).

Such Catholic parents were additionally suspected of heresy (can. 2319 § 2). In 1950, by the decree of the Holy Office, the penalty of excommunication *latea sententiae* was added to the penalties of the Code, reserved to the Holy See in a special way for Catholics who taught principles contrary to Christian faith and good Christian practice. On the other hand, the right to receive the sacraments was denied to those who gave their children up for education in associations that promoted the principles of materialism and rejected Christian faith and Christian manners. Children belonging to the above associations could not receive the holy sacraments.⁴⁷

The codex systematics indicated that offenses related to the failure to fulfill the obligation to educate children as Catholics caused or contributed to taking a stand against faith and unity of the Church. They applied not only to parents in Catholic marriages, but without any distinction also to Catholics contracting mixed marriages. However, non-Catholics did not commit the crime and were not punished, although as baptized persons they were subject to the obligation to observe purely ecclesiastical laws, and such are penal laws. The reason for such decisions should be sought in the conviction of the Church resulting from their already present irregular situation as subjects of the Catholic Church, referred to as heretics and schismatics. As heretics and schismatics, they were subject to criminal laws (can. 2314). The Church decisions formulated in this way reflect the long tradition of the Church, according to which the punishments for the lack of Catholic education of children only affected the Catholic side. From the point of view of a criminal sanction for non-Catholic upbringing of children, the Code maintained the discipline that had been established in decretal law.

⁴⁷ CONGREGATION OF THE HOLY OFFICE: *Monnium* [28.06.1950]. AAS 42 (1950), p. 553.

7. The period after the Second Vatican Council

The ecclesiology of the Second Vatican Council exerted a great influence on the new discipline in matters of mixed marriages and the issue of raising children in them. Christian communities are no longer considered unlawful, and those who belong to them are no longer heretics or schismatics, even in a material sense. They are also not subject to the rights and obligations arising from the law of the Catholic Church. Consequently, on the basis of the teaching on the unity of the Church of Christ and the elements of truth present in other Christian denominations, the distinction between members of the Church (*membra Ecclesiae*) and subjects of the Church (*subditi Ecclesiae*) has disappeared. The recognition of the salvific character of non-Christian communities⁴⁸ influenced the recognition of these communities' own law.

The issue of religious freedom raised at the same council had a significant impact on the legal regulation concerning mixed marriages. The intuition of the Council Fathers who took up the issue of religious freedom as part of their deliberations on ecumenism should be emphasized. It gradually gained independence, eventually resulting with an independent document devoted to this issue.⁴⁹ Looking at the history of the longest discussion and work on the final document on religious freedom, it is difficult to resist the statement that its value was first emphasized within ecclesiology, and then became the subject of anthropological considerations. Thus, it more broadly influenced the considerations concerning not only external regulations, but most of all the obligation to act in accordance with what dictates a person's conscience and to respect such choices. This also applies to the question of faith and religion both internally (choice and duration) and externally in its proper practice in various and religiously possible forms.

The upbringing of offspring in the faith that is professed is also connected with acting in accordance with one's conscience. This obligation does not arise from an external command, but results primarily from the gift received, which the faithful receive for the sake of building the community to which they belong. This closest community is the Christian family initiated by marriage. The gift becomes an obligation, and the law becomes the, directly connected thereto, obligation to convey what has been offered for free. This is reminded by the Code of Canon Law of

⁴⁸ *Unitatis redintegratio*, n. 4.

⁴⁹ L. WĄSIK: "Zasada wolności religijnej w Deklaracji o wolności religijnej *Dignitatis humanae* Soboru Watykańskiego II." *Analecta Cracoviensia* 47 (2015), p. 82.

1983, placing the concern for the Christian education of children among the duties and rights of the lay faithful (can. 226). This obligation of parents also corresponds to the right to receive the Christian education of their offspring as “new creatures through rebirth from water and the Holy Spirit.”⁵⁰ Children endowed with the grace of baptism therefore have the right to grow in the faith they have received, and the parents thus become responsible for the development of this gift. John Paul II explicitly expresses this truth in the *Catechesi tradendae* by writing: “[...] from the theological point of view, every baptized person, on the basis of baptism itself, has the undeniable right to receive from the Church education and education that will enable him to come to a truly Christian life,”⁵¹ therefore “he has the right to receive the word of faith, full and complete in its sharpness and strength; it cannot be mutilated, adulterated or impoverished.”⁵²

As in the previous code, the currently applicable one also includes penalties for crimes against religion and the unity of the Church in the form of censorship or other just penalties (can. 1366). However, a significant difference becomes apparent. The legislator resigned from the penalties of *latae sententiae* in favour of *ferendae sententiae*. It should be emphasized, however, that the dimension of punishments is justified as far as other remedial measures, such as fraternal admonition, discipline or pastoral influence, cannot contribute to the achievement of the goal (can. 1341). Deciding that the person committing the offense of having their offspring baptized or educated in a non-Catholic religion is guilty, the legislator indicates that censorship is not the basic punishment. Alternative punishments in the form of expiatory punishments mentioned in canon 1336 §1, 1—4^o can be used. Criminal discipline regarding the education of children in the non-Catholic religion has been relaxed compared to the previous code, although it follows the legal tradition of the Church established in the law of decrees.

Significant changes in mixed marriages and the upbringing of children were made under the influence of the conciliar teaching of Pope Paul VI in the documents mentioned at the beginning. The existing requirements on the non-Catholic side for children in mixed marriages to be brought up in the Catholic religion is contrary to the principle of religious freedom and forces non-Catholics to act against their own conscience. It is also incompatible with the spirit of ecumenism towards non-Catholic

⁵⁰ VATICAN COUNCIL II: *Declaration on Christian Education “Gravissimum educationis”* [28.10.1965], n. 2.

⁵¹ JOHN PAUL II: *Post-synodal Apostolic Exhortation “Catechesi tradendae”* [16.10.1979], n. 14.

⁵² *Catechesi tradendae*, n. 30.

Christians. The legislator had to react to the contradiction that arose between the doctrine and legal regulations. In the light of *Matrimonia mixta*, in mixed marriages, the Catholic and non-Catholic parties have the same rights and obligations and are equally obliged to cooperate in the upbringing of children. The Catholic side, however, is still obliged to do everything so that the offspring are baptized and brought up in the Catholic Church. The non-Catholic side is only supposed to acknowledge the commitments of the Catholic side. It is no longer required to consent to the Catholic upbringing of their children.

A novelty introduced by Paul VI is also the removal of the hitherto applicable penalties related to the rearing of offspring in mixed marriages.⁵³ The penalty for entering into a mixed marriage with an agreement to raise children outside the Catholic Church has been lifted. There is also no such penalty in the current Code of Canon Law. No legal liability for the contract of education of children outside the Catholic Church is an expression of the implementation of the principle of religious freedom and manifests the spirit of ecumenism in canon law.⁵⁴

A separate issue worth paying attention to in the light of *Matrimonia mixta* is the penalty for parents who have their children baptized or brought up in a non-Catholic religion. Doubts may arise regarding the definition of the parents: Are they Catholic parents or, as in the case of a mixed marriage, is the Catholic party also the subject of the crime in a mixed marriage? It cannot be the non-Catholic party that is not subject to purely ecclesiastical laws. When a child is baptized in a non-Catholic religion, the Catholic party does not commit a crime as long as it did everything that was possible to baptize the child in the Catholic faith. Therefore, failure to fulfill an obligation does not constitute a criminal offense. Such an interpretation is allowed by canon 6 § 2, which prescribes an interpretation taking into account the canonistic tradition, that is, in accordance with *motu proprio Matrimonia mixta*.⁵⁵ The same approach should be applied to the issue of putting children up for education in a non-Catholic religion. In the light of the canonist tradition, the normative solutions of *Matrimonia mixta* should be adopted, in which the penalties for the non-Catholic upbringing of children in mixed marriages were abolished. Therefore, in such marriages, the Catholic party does not commit a crime if, without doing everything in their power, gives the child up for education in a non-Catholic religion. The same interpretation

⁵³ *Matrimonia mixta*, n. 15.

⁵⁴ J. SYRYJCZYK: "Troska Kościoła o katolickie wychowanie dzieci w kanonicznym prawie karnym..." p. 217.

⁵⁵ J. SYRYJCZYK: *Kanoniczne prawo karne*. Vol. 2: *Część szczegółowa*. Warszawa 2003, pp. 40—41.

results from the commonly, though not fully accepted, conflict of laws principle that *lex posteriori generalis non derogat legi priori speciali*. The cessation of punishment for teaching children and adolescents contrary to the Christian faith and morals introduced by the Congregation of the Holy Office in 1950 is determined by canon 6 § 1,3^o, according to which all penal statutes issued by the Holy See are no longer in force, unless they have been incorporated into the Code of Canon Law.

8. Conclusions

1. Mixed marriages between Christians and pagans, and later between Catholics and non-Catholics, in the history of the Church were not subject to an absolute prohibition, although there were various ways of regulating them, especially after a clear difference between *disparitas cutus* and *mixta religio* appeared. The natural right to marry was noticed, and was regulated in the church community only because of the possibility of loss of the gift of faith.

2. An expression of the development of theological thought and its interpretation in the perspective of marriage between Christians was the transition from placing barriers to such marriages to their support and development in today's teaching of the Church. This path can be described as a transition from reluctance to perceiving their value.

3. The consequence of the developing ecclesiology are legal solutions which reflect the beliefs concerning the personal status of every human being and the specification of his rights and obligations also in the community of the Church

4. The obligation to raise children in Christian and Catholic way found its foundations in the obligation arising from endowing the faith, and not protecting it. This duty has a double source. It results from the rights of the baptized person (offspring) to receive what is needed for the growth of the Christian life as well as from the obligation to build the Christian community by transmitting the grace of free-given vocation to life with God.

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TOMASZ ROBERT GAŁKOWSKI

L'éducation des enfants dans les mariages mixtes dans une perspective historique

Résumé

L'éducation des enfants dans les mariages entre chrétiens et personnes d'autres religions, voire païens, ainsi que, plus tard, entre catholiques et non-catholiques, a toujours été une préoccupation de la communauté ecclésiale depuis ses débuts. Cette étude se concentre sur ce sujet en mettant l'accent non seulement sur les aspects juridiques mais surtout sur leurs fondements. Les analyses menées révèlent qu'il y a eu une évolution marquée de la protection de la foi objective vers l'expression subjective et personnelle de la nature relationnelle du mariage, ainsi que des droits et des obligations qui découlent de la grâce du don gratuit de l'appartenance au Christ.

Mots-clés : mariages mixtes, parents, enfants, éducation, droits, obligations

TOMASZ ROBERT GAŁKOWSKI

Educazione della prole nei matrimoni misti in prospettiva storica

Sommario

L'educazione della prole nei matrimoni di cristiani con aderenti di altre religioni o pagani, e successivamente di cattolici con non cattolici, è stata fin dall'inizio oggetto di preoccupazione della comunità ecclesiale. Questo studio è dedicato a tale questione, in cui l'Autore si concentra più sulle fondamenta delle regolazioni legali che sulle questioni legali stesse. Le analisi condotte indicano che si è verificato un significativo passaggio dalla protezione oggettiva della fede all'espressione soggettiva del carattere personale della relazione matrimoniale e dei diritti e doveri connessi derivanti dalla grazia gratuita dell'appartenenza a Cristo.

Parole chiave: matrimoni misti, genitori, figli, educazione, diritti, doveri



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Legal Regulation of Care for Mixed Marriages in Selected Central European Countries Comparison and Proposals

Abstract: This article presents the modalities of legal regulation regarding mixed marriages in the Catholic Church in selected countries of Central Europe: Poland, the Czech Republic, the Slovak Republic, Germany, and Austria. In the comparative part, it presents a comparison of the solutions in the following areas: announcement before marriage, declaration before requesting permission for a mixed marriage, mandate for permission for marriage, dispensation from the canonical form and possibilities of access to the sacrament of the Eucharist in mixed marriages. In the synthesizing part, it presents not only an evaluation of the solutions described and suggestions for their improvement, but also the way in which the relevant regulations and forms are issued and published from the point of view of pastoral care and the openness of the Church. In the appendix, it discusses the legal solution to similar situations (marriage of a Catholic party with an unbaptized person and with a Catholic party distant from Christian faith and practice) and presents in a framework the draft directive of the Bishops' Conference for mixed and similar marriages in the Czech Republic.

Keywords: Catholic Church, canon law, mixed marriages, preparation for marriage, conference of bishops

Introduction

Mixed marriages are a common reality and therefore a pastoral challenge. Pastoral care and its goal, the salvation of souls, is also to be served by legal regulation insofar as it benefits pastoral care.

The author of this article lives in the Czech Republic, so he has chosen for comparison the neighbouring countries of his homeland: Poland, Slovakia, Austria, and Germany. In this way, quite a lot of documents, which are sometimes very difficult to access, have had to be collected and compared.

The study uses the method of analysis, comparison, and then synthesis, which leads to concrete proposals, especially for the Czech Republic, where a new regulation of the Bishops' Conference is now being prepared.

In the first section it is necessary to mention the development of the understanding of the concept of mixed marriages after the Second Vatican Council and its impact in the current Church-wide legislation of the Catholic Church.

The next two sections deal with the conclusion of mixed marriages: the second section is devoted to the specific emphases of preparation for mixed marriages, and the third one to the special topic of dispensation from the canonical form of their conclusion.

The fourth section focuses on the care of persons living in mixed marriages, specifically on the legally addressed question of the access of the non-Catholic spouse to the sacrament of the Eucharist.

The fifth section contains not only a summary of the findings, but also a reminder of situations similar to mixed marriages, namely, the diversity of religions as well as permission for manifestly unbelieving Catholics, and makes suggestions *de lege ferenda*, thus also acting as a conclusion to the article.*

1. Terminological clarification and its impact in legal texts of the Church after Vatican II

Although Vatican II is often presented as a new beginning or even a turning point, that is, in a perspective of discontinuity, it is precisely in

* The article describes the legal situation at the end of 2022.

the question of mixed marriages that continuity is strongly manifested. The Council itself does not explicitly address mixed marriages in any of its documents, thus leaving in force the existing discipline established by the 1917 Code of Canon Law (hereinafter: CIC/1917).¹

The terminology of the CIC/1917 is not entirely uniform, but it is consistent. In several canons, it distinguishes between the diversity of religions (*disparitas cultus*), which is described as an impediment that causes both the invalidity and the illicitness of the marriage, and being mixed within the same religion — Christianity (*mixta religio* or *mixtae nuptiae*) — which is described as an impediment that causes “only” the illicitness of the marriage, however, it is expressed in canon 1060 in these words: the Church most strictly forbids (*severissime Ecclesia prohibet*).

On the other hand, in several respects, administratively, it treats the two impediments in the same or similar manner: both impediments are of a higher degree (*maioris gradus*), announcements are forbidden for both (can. 1026), the Holy See usually grants a dispensation for both (can. 1040), specifically by the Congregation of the Holy Office (can. 247 § 3), but except for the danger of death and the disclosure of an impediment just before the wedding (can. 1043 to 1045), the requirements (especially the promises) laid down in canons 1061 to 1064 for mixed marriages are also applied by the power of canon 1071 in the case of a disparity of cult; the marriage is to be without sacred rite, unless authorized by the Ordinary, but always without Mass (can. 1102 § 2).

This consistent terminology of the CIC/1917 is also taken up by the instruction of the Sacred Congregation for the Doctrine of the Faith, *De matrimoniis mixtis*, of 18 March 1966, which already slightly modified *ad experiendum* the previous discipline: a marriage may take place with a sacred rite with the permission of the Ordinary (no. IV), while local Ordinaries may, for serious reasons, ask the Holy See for a dispensation from the form (no. III); promises (declarations) may exceptionally, with the permission of the local Ordinary, be realized in a form other than writing (no. I, para. 4).²

However, what differed from this consistent distinction was the common practice of calling both mixed marriages (in German still distinguished by the terms *Konfessionsverschiedenheit* and *Religionsverschiedenheit*), which found its official expression in the *motu proprio* of Paul VI's

¹ *Codex iuris canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus praefatione Emmi Petri card. Gasparri et indice analytico-alphabetico auctus* (27.05.1917). Roma 1956.

² SACRA CONGREGATIO PRO DOCTRINA FIDEI: “Instructio de matrimoniis mixtis (18.03.1966).” *Acta Apostolicae Sedis* [hereinafter: AAS] 58 (1966), pp. 235—239.

Matrimonia mixta of 31 March 1970,³ where both situations are referred to as *matrimonium mixtum*. This *motu proprio* has largely relaxed the previous legal requirements: the dispensation from the impediment of denominational difference can be dispensed by the Ordinary (No. 3), both parties must be instructed in the Catholic understanding of marriage, the promise is now required only from the Catholic party, the other party is to be informed of it, with the details to be determined by the Bishops' Conference, the marriage is to take place in a canonical form in a sacred ceremony according to the recently published wedding rites, that is, as a rite without Mass (unless the Ordinary grants permission for Mass), whereas this form of celebration is required only for permissibility in the case of marriage to a non-Catholic Eastern Christian (nos. 4 to 8 and 11); in the event of difficulties in maintaining the canonical form of marriage, the Ordinary has the right to dispense with it according to the rules laid down by the Bishops' Conference (no. 9), marriages are to be duly registered in the registers, even in the case of a dispensation from the canonical form (no. 13), and Catholic clergy are to take care of mixed marriages (no. 14).

These modifications were subsequently transposed into the 1983 Code of Canon Law (hereafter: CIC/1983), especially in canons 1124 to 1129, entitled *De matrimoniis mixtis*, where mixed marriages are unambiguously defined in canon 1124 as marriages between two baptized persons, only one of whom is *de iure* Catholic.⁴

2. Legal elements in preparation for mixed marriages

In contrast to CIC/1917, mixed marriages are subject to the normal rules regarding the determination of the unmarried status of the spouses according to the regulations of the Bishops' Conference, as required by canons 1066 and 1067 of CIC/1983.⁵

³ PAULUS VI: "Litterae apostolicae motu proprio datae *Matrimonia mixta* quibus normae de matrimoniis mixtis statuuntur." AAS 62 (1970), pp. 257—263.

⁴ "Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus (25.01.1983)." AAS 75, Pars II (1983), pp. 1—320; corrections: *Appendix* from 22 September 1983, pp. 321—324.

⁵ In the following sections we will refer to CIC/1983 alone, therefore only the canon numbers will be given.

2.1 Pre-marriage announcements

The traditional part of the ascertainment of the unmarried state of the betrothed are the announcements; more detailed regulations for them according to canon 1067 are determined by the Bishops' Conference.

In Poland, announcements are to be made primarily by being posted in writing for at least eight days, including two Sundays or one Sunday and one ordered feast day. An exception may be granted by the local Ordinary.⁶ In Slovakia, in towns over 10,000 inhabitants, announcements are to be made on the parish notice board and on the parish website three weeks prior to the wedding, while in smaller towns and villages three Sundays before the wedding in the parish announcements, with no announcements if the couple has lived together for more than five years.⁷ In the Czech Republic, the resolution of the Czech Bishops' Conference of 1993 applies generally to announcements, whereby a dispensation from them may be granted quite broadly by the pastor conducting the pre-marriage proceedings.⁸ Only the Diocese of Brno issued in 2012 a clarifying particular law containing the exact wording of the announcements.⁹

In Austria, this is dealt with by a decree of the Bishops' Conference of 1984 which does not provide for any exceptions for mixed marriages; announcements are not made in the case of marriages with only ecclesiastical validity, marriages secretly celebrated, marriages of Catholics who have left the Church and in the case of simple convalidation.¹⁰

In Germany, this is newly addressed by the norms of the Bishops' Conference in force since 1 January 2005, which prescribe either an oral announcement or being posted in writing, in both cases for one Sunday liturgical celebration, with the proviso that the dispensation from announcements may be made by a person having general authority to

⁶ KONFERENCJA EPISKOPATU POLSKI: "Dekret ogólny o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego (18.11.2019)," n. 14—15. *Akta Konferencji Episkopatu Polski* 31 (2020), p. 31.

⁷ DIECÉZA BANSKÁ BYSTRICA: *Sviatosť manželstva, pastoračné inštrukcie*, <https://bbdieceza.sk/dokumenty/instrukcie-k-vysluhovaniu-sviatosti-sviatost-birmovania/> [accessed 24.08.2022], there is the norm of bishops' conference mentioned on p. 3.

⁸ ČESKÁ BISKUPSKÁ KONFERENCE: "Ohlášky před sňatkem (27.01.1993)." *Acta Curiae Olomucensis* 04 (1993), Prot. n. 1227-3/1993.

⁹ DIECÉZE BRNĚNSKÁ: "PZ 4.3 O ohláškách manželství." *Acta curiae episcopalis Brunensis* 9 (2012), Appendix 1, available also at <https://www.biskupstvi.cz/partikularni-zakon> [accessed 24.08.2022].

¹⁰ ÖSTERREICHISCHEN BISCHOFSKONFERENZ: "Dekret über Bekanntmachung der Trauung (can. 1067)." *Amtsblatt der Österreichischen Bischofskonferenz, Nr. 1 vom 25. Jänner 1984*, Document no. 3, p. 2.

assist in the celebration of a marriage, for instance, also by a deacon generally commissioned by his pastor; there are no exceptions for mixed marriages.¹¹

2.2 Declaration prior to the application for a mixed marriage, authorization of permission to marry

According to canon 1125, the condition for requesting permission for a mixed marriage is the declaration of the Catholic party and the notification to the other party (and instruction on the purpose and essential properties of the marriage); the modalities are to be determined by the Bishops' Conference according to canon 1126.

In Poland, this declaration and notification is made in three written copies: one remains with the Catholic party, one is attached to the marriage protocol and one to the application to the local Ordinary for permission for a mixed marriage; the refusal of this declaration by the Catholic party leads to the non-realization of the Catholic wedding, and the refusal of the notification by the non-Catholic party is to lead to an attempt to reach a joint decision of the spouses, according to the result of which the wedding is to be either abandoned or the Ordinary is to be asked for permission.¹² The text of the Catholic Party's promise reads: "I solemnly declare that I am prepared to push away the danger of losing my faith, to fulfil my religious duties and I sincerely promise to do everything in my power to ensure that all our offspring are baptised and brought up in the Catholic Church." The text of the other party's notification reads: "I acknowledge that I have been informed of the declaration and promise of my Catholic fiancé's (fiancée's) faith. I am indeed aware of the content of the promise and the conscientious duties of my fiancé (fiancée)."

In Slovakia, there is no uniform formula issued at the level of the Bishops' Conference, the forms are determined by the individual (arch)dioceses, and there is very poor access to the texts. The application form for dispensation or permission to marry of the Archdiocese of Košice contains

¹¹ DEUTSCHE BISCHOFSKONFERENZ: Ehe — 4.2.8 — 2, Partikularnorm zu c. 1067 CIC, https://recht.drs.de/fileadmin/user_files/117/Dokumente/Rechtsdokumentation/4/2/8/09_01_03a.pdf [accessed 25.08.2022].

¹² KONFERENCJA EPISKOPATU POLSKI: *Dekret ogólny o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego* (18.11.2019), n. 82—87.

this text of the promise of the Catholic party: “I declare that I believe in Jesus Christ and that, with God’s help, I want to continue to live according to the Catholic faith. I am ready to remove all dangers of my apostasy from the Catholic faith. At the same time, I will strive to respect the religious liberty and conscience of my fiancé/fiancée. I sincerely promise to do everything in my power to see that all children born of our marriage are baptized and raised in the Catholic Church. I will strive for the unity and permanence of marriage and for the preservation of the family community.” A declaration to this effect is also required from the other party: “By my signature I certify that I am aware of the above promise and of my partner’s obligations arising from his/her conscience.”¹³ The Formulary of the Diocese of Banská Bystrica contains the following texts: “I, the undersigned, born on [date of birth], of the religion of Roman Catholic, do declare that in my intended marriage I will endeavour to preserve and develop my Catholic faith and to live according to it. I sincerely promise to do all in my power to see that all my children are baptized and brought up in the Catholic Church.”; and “I, the undersigned, born on [date of birth], of the religion of [name of religion], by my signature, certify that I am acquainted with the commitment of my fiancé/fiancée, which arises from his/her conscience.”

In the Czech Republic, the details were prescribed by the Bishops’ Conference in 1999, permission is always given by the Ordinary, and the declaration and record of the notification are attached to the marriage protocol and are not sent to the Ordinary; if the non-Catholic party refuses to sign the notification, two witnesses, which may be the person leading the preparation for the marriage and the Catholic party, sign it as a substitute.¹⁴ The text of the Catholic Party’s promise reads: “I declare that in my intended marriage I will keep and develop my faith and live it. I will sincerely endeavour, as my faith requires of me, to have our children baptized and brought up in the Catholic Church. I will respect the religious liberty and conscience of my spouse and will be concerned about the unity and permanence of the marriage and the maintenance of the family community.” The text of the other party’s acknowledgement reads, “I am aware of the above written declaration of my Catholic spouse.”

¹³ KOŠICKÁ ARCIDIIECÉZA: Žiadosť o dišpenz / povolenie k sobášuv, <https://www.ke-arcidieceza.sk/sk/formulare> [accessed 25.08.2022].

¹⁴ ČESKÁ BISKUPSKÁ KONFERENCE: “Směrnice o smíšených manželstvích.” *Acta Curiae Archiepiscopalis Pragensis* 5 (1999), Annex no. 3, B.II. This directive has been published for internal use only in the Acts of the Curia of each (arch)diocese.

In Austria, two directives from 1984 apply: one generally for mixed marriages¹⁵ and the other specifically for marriages to Eastern Christians.¹⁶ In both documents there is a very broad authorization in chapter 1: permission for a mixed marriage can be granted by any person having a general authorization to assist in the celebration of marriage, for example, even a deacon generally authorized by his pastor, provided, however, that the couple who are engaged to be married have never been married ecclesiastically or civilly before. The text of the promise of the Catholic party reads¹⁷: “I wish to adhere to the Catholic faith in my marriage. I acknowledge that my faith requires me to commit myself to the baptism and education of our children in the Catholic Church. I will endeavour to comply with this with due regard for the conscience of my partner.” The text of the announcement to the other party is not prescribed; the announcement is confirmed in the wedding protocol.

In the case of Germany, this is dealt with in the norms of the Bishops’ Conference in force since 1 January 2005, with minor changes, mainly concerning the affiliation to the Church *sui iuris*, effective from 1 June 2022.¹⁸ Here, a general faculty is given to permit mixed marriages to all persons having a general authority to solemnize marriages, with an exhaustive list of situations in which it is necessary to apply to the Ordinary (note 23 to the marriage protocol). The text of the Catholic Party’s promise reads: “a) Do you want to live as a Catholic Christian in your marriage and bear witness to the faith? b) As a Catholic Christian you have the duty to have your children baptised in the Catholic Church and to bring them up in the Catholic faith. Do you promise to make every effort to fulfil this moral imperative as far as is possible in your marriage?” The text of the notification to the other party is not prescribed;

¹⁵ ÖSTERREICHISCHE BISCHOFSKONFERENZ: “Ausführungsbestimmungen der österreichischen Bischofskonferenz für konfessionsverschiedene Eheschließungen nach dem neuen kirchlichen Gesetzbuch (Can. 1124-1128).” *Amtsblatt der Österreichischen Bischofskonferenz*, Nr. 1 vom 25. Jänner 1984, Document no. 4, p. 2.

¹⁶ ÖSTERREICHISCHE BISCHOFSKONFERENZ: “Dekret über die rechtliche Ordnung konfessionsverschiedener Eheschließungen zwischen Katholiken und orientalischen Nichtkatholiken nach dem neuen kirchlichen Gesetzbuch (can. 1124—1128).” *Amtsblatt der Österreichischen Bischofskonferenz*, Nr. 2 vom 1. Juni 1984, Document no. 25, p. 13.

¹⁷ ÖSTERREICHISCHE BISCHOFSKONFERENZ: “Dekret über die Weise der Versprechen bei Mischehen, can. 1126.” *Amtsblatt der Österreichischen Bischofskonferenz*, Nr. 12 vom 3. August 1994, II. Gesetze und Verordnungen, Document no. 3, p. 3.

¹⁸ DEUTSCHE BISCHOFSKONFERENZ: Ehe — 4.2.8 — 2, Partikularnorm zu c. 1126 CIC: Erklärung und Versprechen bei konfessionsverschiedenen Ehen, https://recht.drs.de/fileadmin/user_files/117/Dokumente/Rechtsdokumentation/4/2/8/09_01_03a.pdf; BISTUM LIMBURG: “Änderungen im Ehevorbereitungsprotokoll.” *Amtsblatt des Bistums Limburg* 1 (14.01.2022), no. 357, p. 490.

the notification is confirmed by his/her signature at the end of the wedding protocol.

3. Dispensations from the canonical form

In this section, we deal with the dispensation from the canonical form in the situation of the marriage of a Catholic party and a baptized party belonging to the tradition of the Western Reformation, as specified in canon 1127 § 2. We do not, therefore, deal with the situation of the marriage of a Catholic party with a member of an Eastern Church not in the union with the Catholic Church, which is referred to in canon 1127 § 1, because there the canonical form is prescribed only for permissibility.

The Instruction of the Polish Bishops' Conference requires that the request for a dispensation from the canonical form be made by the Catholic party's own pastor, even if he differs from the pastor in charge of marriage preparation, and makes no exception to the requirement that the dispensation be granted by the Ordinary. It lists the following as the main reasons for the dispensation: the preservation of family harmony, obtaining parental consent to the marriage, or the recognition of a particular religious commitment of the non-Catholic party or his/her kinship bond with a minister of another Church or Ecclesial Community.¹⁹

In Slovakia, the Bishops' Conference does not cede this authority to persons other than ordinaries and in the norm on the granting of dispensations from the canonical form of 2009 is stated the following reasons in a demonstrative list: preservation of family harmony, obtaining parental consent to the celebration of marriage, recognition of the special family relationship of the non-Catholic party with a cleric of that party, greater involvement of the non-Catholic party in the life of the non-Catholic Church or religious society, and the possibility of the Catholic minister's participation in such a celebration of marriage with a dispensation from the canonical form, when he may take the opportunity to explain to those present such a celebration as a sacramental marriage with its objectives and essential properties (unity and indissolubility).²⁰

¹⁹ KONFERENCJA EPISKOPATU POLSKI: "Dekret ogólny o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego (18.11.2019)," n. 90.

²⁰ KONFERENCIA BISKUPOV SLOVENSKA: "Normy Konferencie biskupov Slovenska, podľa ktorých sa má na Slovensku udeľovať dišpenz od kánonickej formy jednotným

In the Czech Republic, the power to grant dispensations is also reserved to ordinaries, and a directive of the Bishops' Conference of 1999 also gives the following reasons in a demonstrative list: (a) if the non-Catholic party fundamentally refuses to marry in the canonical form and the Catholic party is firmly determined to marry, (b) if the canonical form is refused by the non-Catholic party who lives a significantly better Christian life than the Catholic party, c) if the observance of the canonical form could cause a very serious split in the family of one of the betrothed, d) if the non-Catholic party has a special position in his/her Church or religious community (clergy, member of the council, elders, etc.).²¹

In Austria, the competence to grant a dispensation from the canonical form according to the 1994 decree is also reserved to ordinaries and the following reasons are given demonstratively: family or friendly relations with the Catholic minister, resistance to the Catholic marriage on the part of the Catholic partner or his/her family members, the fact that the marriage is taking place in a non-Catholic environment, the danger that the partners will otherwise live together in an ecclesiastically invalid marriage.²²

In Germany, this dispensation is also reserved for ordinaries. The reasons are given demonstratively in the wedding protocol: serious conflict of conscience of the partners which cannot be resolved in any other way, insurmountable resistance of the non-Catholic partner to a canonical marriage, rejection of canonical marriage on the part of the relatives of one partner, or the danger that the partners will live together in an ecclesiastically invalid marriage.

4. Possibilities of access to the Sacrament of the Eucharist in mixed marriages

It is seldom that the regulations of the Bishops' Conferences of the countries under study regulate the modalities of access to the reception

spôsobom," no. 2.1.1-2.1.5, <https://www.kbs.sk/obsah/sekcia/h/dokumenty-a-vyhlasenia/p/dokumenty-kbs/c/dispENZ-od-kanonickej-formy-slavenia-manzelstva-50> [accessed 25.08.2022].

²¹ ČESKÁ BISKUPSKÁ KONFERENCE: "Směrnice o smíšených manželstvích," B.I.1. Moreover, it is expressly provided in B.I.7 that the Ordinary of the Catholic Party is authorized to grant a dispensation for any other grave reason.

²² ÖSTERREICHISCHE BISCHOFSKONFERENZ: *Dekret über die Dispens von der kan. Eheschließungsform*, can. 1127 § 2, *Amtsblatt der Österreichischen Bischofskonferenz*, Nr. 11 vom 28. April 1994, I. Gesetze und Verordnungen, Document no. 3, p. 4.

of the Eucharist by a partner belonging to ecclesial societies that emerged from the Western Reformation, as envisaged by canon 844. The Czech Bishops' Conference in its 2002 directive in Part B²³ give instructions with a dual mode of delegation. The minister of the sacrament himself is permitted to confer the Eucharist, among others, when there is danger of the death of the recipient, in impossibility caused by persecution, imprisonment, service in the army, stay in hospitals and social institutions, if a conferrer from his own Church is not reachable, and situations in the diaspora when a non-Catholic Christian feels a real need for sacramental assistance and cannot achieve it because a conferrer from his own Church is unavailable or only with great difficulty. With the permission of the local Ordinary, it is possible to confer the sacraments in these cases of serious spiritual need: the celebration of a mixed marriage, an extraordinary event in a marriage such as the baptism of children, the first Holy Communion of children, a significant wedding anniversary, a funeral Mass for a deceased family member, the strengthening of the life of grace and faith in confessionally mixed families (exceptionally, in cases of truly grave need), and if the petitioner is Catholic by faith and orientation but serious circumstances prevent him or her from making a formal conversion to the Catholic Church. In all cases, the applicant for the conferral of the sacrament must simultaneously meet the following four conditions: a) he cannot obtain this sacrament from the conferrer of his own church or ecclesial society, b) he himself requests it, c) he expresses his Catholic faith regarding the sacrament he desires to receive, d) he is duly prepared. It is clear, therefore, that the situation of mixed marriages is strongly reflected in these regulations.

There is also an emphasis on sharing the sacraments across denominations in Germany, where mixed marriages make up almost half of all marriages in the Catholic Church. Based on the work of the expert ecumenical commission Jäger-Stählin-Kreis, a comprehensive document *Gemeinsam am Tisch des Herrn* was produced in 2019 on the possibilities of sharing the sacrament of the Eucharist between Catholics and Protestants.²⁴ At the Spring 2020 meeting of the Bishops' Conference, the text was favourably discussed and sent to the Congregation for Bishops for recognition. On 20 May 2020, the latter forwarded it to the Congregation for the Doctrine of the Faith with a request for a statement, which

²³ ČESKÁ BISKUPSKÁ KONFERENCE: *Společenství ve svátostech s křesťany jiných církví*. Praha 2002, n. pag.

²⁴ Documents on this issue are published on the website of the DEUTSCHE BISCHOFSKONFERENZ: "Ökumene: Wichtige Dokumente, Auswahl ökumenischer Schriften von EKD und Deutscher Bischofskonferenz," <https://www.dbk.de/themen/oekumene/wichtige-dokumente> [accessed 26.08.2022].

sent its critical evaluation of the document to the president of German Bishops' Conference on 18 September 2020. The document does not deal with some fundamental topics of Catholic doctrine on the Church, the Eucharist and the priesthood with sufficient clarity and does not take due account of aspects related to the Eastern Churches' view of these issues; it can therefore serve as a starting point for further elaboration, but it cannot be a guide for individual decisions of conscience, for its application would lead to a deepening of the rift with the Eastern Churches. The letter is accompanied by a four-page appendix explaining the reasons leading the Congregation to this conclusion. It finds fault in the deficiencies in the biblical justification, the lack of consideration of the patristic tradition, the insufficient consideration of the role of the Church in the transmission of Christ's Eucharist, the minimized consideration of the Eucharistic ecclesiology of the Second Vatican Council, the lack of consideration of the Eucharistic ecclesiology of the Second Vatican Council, and the emphasis on the universal priesthood of the faithful as opposed to the ministerial priesthood, while accepting not the episcopal but the presbyterial succession characteristic of the theology of the evangelical churches, and disregard of the suggestions made by Pope Francis in his letter *Brief an das pilgernde Volk Gottes in Deutschland* of 29 June 2019. The next meeting of the Bishops' Conference at the end of September 2020 therefore did not vote on the document, but subsequently on 6 October 2020 a largely positive appreciation of the document was published by a working commission composed of representatives of the German Bishops' Conference and the Council of Evangelical Churches in Germany as a significant advance in mutual dialogue, while at the same time this appreciation does not obscure the differences of opinion between the Catholic and Evangelical traditions.²⁵ The question of the access of evangelical Christians to the Catholic Eucharist remains a burning issue in Germany, where in many cases there is a lack of agreement with the statement of the Congregation for the Doctrine of the Faith,²⁶ which has an impact

²⁵ DEUTSCHE BISCHOFKONFERENZ: *Pressemeldung Nr. 160 (06.10.2020)*, „Gemeinsam am Tisch des Herrn“ — Ein Votum des Ökumenischen Arbeitskreises evangelischer und katholischer Theologen, *Würdigung des Kontaktgesprächskreises*, <https://www.dbk.de/presse/aktuelles/meldung/gemeinsam-am-tisch-des-herrn-ein-votum-des-oekumenischen-arbeitskreises-evangelischer-und-katholi> [accessed 26.08.2022].

²⁶ In this context, it is significant that the WIR SIND KIRCHE IN DEUTSCHLAND movement also includes on its website, in the context of the document *Gemeinsam am Tisch des Herrn*, a strongly critical statement on the response of the Congregation for the Doctrine of the Faith from the President of the German Bishops' Conference, the Bishop of Limburg Georg Bätzing: “Bätzing: Nicht glücklich über Vatikan-Stellungnahme (16.03.2021),” https://www.wir-sind-kirche.de/?id=129&cid_entry=8669 [accessed 26.08.2022].

on the practice in individual parishes or dioceses, and decision making according to individuals' consciences takes place.²⁷

5. Evaluation and suggestions

5.1 Method of issuing and publishing regulations and forms

The regulations for mixed marriages are issued in significantly different ways in the countries studied.

In the case of Poland (2019) and Germany (2002), it is a generally binding decree (*decretum generale*) of the Bishops' Conference, to which the Congregation for Bishops has given its *recognitio*. In the case of Germany, they are published on the website of the Bishops' Conference (the Conference does not publish its acts), while in the case of Poland it is in the acts of the Bishops' Conference available on their website.

The Austrian Bishops' Conference has issued more regulations: in 1984 decrees for announcements before marriage, for mixed marriages with Eastern Christians and for mixed marriages with other Christians, and in 1994 another decree with the text of the promise of the Catholic party and the announcement to the other party. All of these decrees were published in the Acts of the Bishops' Conference, which are available on the web. Only the 1994 decree has the *recognitio* of the Apostolic See.

The Czech Bishops' Conference issued its norm for mixed marriages as a directive, not as a decree, and therefore without the *recognitio* of the Apostolic See. This directive has not been published on the website of the Bishops' Conference, but in the acts of the individual (arch)dioceses, so it remains more of an internal document. In contrast, the 2002 directive on *communicatio in sacramentis* and the 2017 directive on marriage preparation are both available on the Conference website. The latter directive, however, does not contain detailed guidelines for announcements before marriage; here the norm of the Bishops' Conference of 1993, published only in the Acts of the Curia of each (arch)diocese, must be applied.

The situation is even more difficult in Slovakia. On the website of the Bishops' Conference, only the norm on the granting of dispensations

²⁷ Cf., for example, the booklet for mixed marriages of the diocese of Münster: BISCHÖFLICHES GENERALVIKARIAT MÜNSTER: *Mit Christus gehen. Konfessionsverbindende Ehepaare und ihre gemeinsame Teilnahme an der Eucharistie*. Münster 2021, pp. 19–23.

from the canonical form of 2009 is published, without mentioning the date of its approval by the Bishops' Conference and without mentioning the *recognitio* of the Apostolic See; no other norms are traceable there. In the pastoral directives of the diocese of Banská Bystrica, the norm of the Bishops' Conference regarding the announcement of marriage is mentioned and its merits are given, and it is necessary to refer to the forms of the individual (arch)dioceses: rather rarely are the forms available on the web, in two dioceses they are in the internal part of the website, in the others they are completely absent from the website.

Personally, I believe that in such a serious matter, it should be a *decretum generale* of the Bishops' Conference, which has received the *recognitio* of the Apostolic See (now the Dicastery for Bishops). This is what follows from the diction of canon 455, since in cases of ascertaining the unmarried state of the betrothed (can. 1067), the manner of declarations and promises (can. 1126), and dispensations from the canonical form (can. 1127), the Bishops' Conference is expressly empowered to issue the norm in question. It may, of course, be argued *a contrario* that in the cases cited the "norm of the Bishops' Conference" is explicitly referred to without specifying its juridical nature, but the gravity of the matter, in my opinion, requires the form of a *decretum generale*.

And since this is a fact of general interest — marriage — where various forms of misinformation are easily spread out of ignorance, I consider it absolutely necessary to publish these regulations and forms online.²⁸

5.2 Announcements before marriage

The norms for announcements before marriage are usually set either in a separate norm (Austria, Czech Republic, and probably Slovakia as well) or in the regulations on preparation for marriage.

Depending on the extent of the possibility of dispensation, these norms are detailed: more detailed in the case of Slovakia, where dispensation from announcements is not foreseen, then Poland, where dispensation is granted on a case-by-case basis by the Ordinary, and Austria, where situations exempting from the obligation to announce are generally provided for.

²⁸ From the point of view of computerization of the administrative agenda, in my opinion, uniform forms published (among others) on the website of the Bishops' Conference should be established in individual countries, which is undoubtedly implemented in the case of Germany and Poland.

In the Czech Republic, the regulations are relatively precise and the right to dispense from announcements rests with the priest in charge of the pre-marriage proceedings. In Germany, there are framework norms, with the right to dispense being given to all persons with general authority to assist in a marriage, including, for example, parochial vicars and permanent deacons with general delegation.

Also, in this area there is a mandate for the Bishops' Conferences to determine whether or not to hold announcements and their modalities (can. 1067), so here too it should be a *decretum generale*, published on the website of the Bishops' Conference after receiving the *recognitio* of the Apostolic See.

5.3 Declaration prior to the application for a mixed marriage, authorization to permit the marriage

The declarations of the Catholic party required for the permission of a mixed marriage are very similar in substance to the provisions of canon 1125 CIC/1983. There is a great difference in the manner of notification of these declarations to the other party: from the signature in the context of the conclusion of the marriage protocol (Germany) to the separate written confirmation of the notification (Austria, Poland, Slovakia) to the separate signature of the other party, replaceable by the signature of the Catholic party and the person in charge of the pre-marriage preparation in case of refusal of the signature by the other party (Czech Republic).

Significant differences exist in the area of permission for mixed marriages: while in the Slavic countries (Poland, Slovakia, Czech Republic) permission is reserved for the Ordinary, in Austria and Germany, apparently because of a large number of mixed marriages, all those who are generally authorized to assist in the marriage are entitled to permit a mixed marriage.

This marked difference has its justification in the religious situation of the countries concerned.

5.4 Dispensation from the canonical form

The regulations for dispensation from the canonical form are quite similar in all the countries surveyed: in accordance with the provisions of canon 1127, they leave this competence only to the Ordinary, with the reasons for granting dispensation being formulated as a demonstrative list of facts when it is necessary or preferable to depart from the requirement of the Catholic canonical form. These reasons are very similar and are always aimed at ensuring common life in a proper marriage even at the cost of great concessions on the Catholic side.

It does not seem necessary to introduce any modifications in this area.

5.5 Access to the Eucharist in mixed marriages

The solutions regarding the possibilities of access to the sacraments, especially the Sacrament of the Eucharist, given by Catholic ministers in the case of the other party of a mixed marriage vary greatly.

While the available norms of the Bishops' Conferences of Poland, Slovakia, and Austria do not specifically address this, the norm of the Czech Bishops' Conference seeks a differentiated approach: it is always about individual persons, not general permission, and a distinction is made between the competence of the ministers of the sacraments themselves and that of the ordinaries.

The German approach clearly tends towards a very open access of evangelical Christians to the sacrament of the Eucharist administered in the Catholic Church, even to the extent that there is clear dissent from the statements of the Apostolic See.

In this context, I find the position of the Czech Bishops' Conference to be doctrinally and pastorally balanced and commendable.

5.6 Appendix

Legal solutions to similar situations

A factually analogous situation to a mixed marriage is a marriage between a Catholic party and an unbaptized party, which according to canon 1086 is an impediment to marriage. For such marriages, there are multiple references in the Code to mixed marriages: according to canon 1086, the dispensation is granted upon fulfilment of the requirements specified in canons 1125 and 1126 for mixed marriages: just and reasonable cause, a declaration by the Catholic party, and notification to the other party of the Catholic party's promises. In addition, canon 1129 provides that the provisions of canons 1127 and 1128 are to be applied to marriages with an unbaptized person: the canonical form of marriage, from which the local Ordinary of the Catholic Party may dispense, is to be observed, and the spouses are to be given the necessary pastoral care.

Other similar situations of prohibitions of marriage are specified in canon 1071, especially those Catholics who have publicly demonstrated their rejection of the Catholic faith, or even Catholics under canonical penalties (excommunication, interdict, suspension). Although these persons are *de iure canonico* still Catholics, in fact their life situation represents a burden on married life and a threat to the faith of the other party. This is also why canon 1071 § 2 requires that for a marriage with a Catholic who has publicly demonstrated their rejection of the Catholic faith, the declaration and notification prescribed in canon 1125 for mixed marriages with the necessary modifications (*congrua congruis referendo*) must be made.

These similarities find their application in different ways in the particular regulations. The 2019 regulation of the Polish Bishops' Conference for the preparation for marriage explicitly requires the application of the principles for mixed marriages in no. 73 for marriages with unbaptized persons and in no. 74 for marriages of Catholics who have formally separated from communion with the Catholic Church, baptized Catholics who have declared themselves unbelievers, Catholics in ecclesiastical censure, and those Catholics who persistently do not practise the faith. For the granting of a dispensation or permission, the appropriate forms are established as set forth in the appendix to this norm.

The German Bishops' Conference in its 2002 regulation also addresses diversity of religion and the marriage protocol clearly states that the

text of the Catholic party's declaration for mixed marriages is also binding in the case of diversity of religion or demonstrable rejection of the faith.

The Austrian Bishops' Conference has gone the route of more regulations. In addition to the two aforementioned regulations for mixed marriages of 1984 (for marriages with Eastern Christians and with other Christians), it issued in the same year a norm for marriages with an unbaptized person²⁹ and to deal with prohibitions on marriage.³⁰ In the case of a difference of religion, a dispensation from this marital impediment and possibly also from the canonical form of marriage is reserved to the local Ordinary according to the canonical residence of the baptized party. Similarly to mixed marriages, the prohibitions on marriage can be lifted by any person having general authority to assist in the celebration of marriage, for instance, even a deacon generally authorized by his pastor, provided, however, that the parties who are engaged to be married have never previously been married ecclesiastically or civilly.

In the Czech Republic and the Slovak Republic, no special norm has been issued for the marriage of a Catholic party to an unbaptized person, even in cases of the above-mentioned prohibitions, while the same declarations and notifications as for mixed marriages are already required by the Code of Canon Law, and the individual dioceses take this into account in their forms with regard to both the marriage protocol and requests for dispensation from obstruction or for permission to marry.

In the Czech Republic, therefore, a new regulation of the Bishops' Conference is currently being drafted to regulate, for practical reasons, not only the situation of mixed marriages ("inter-confessional marriages"), but the diversity of cult ("inter-religious marriages") and the marriage of Catholics of the Latin Church *sui iuris* with Catholics of other Churches *sui iuris* ("inter-ritual marriages"). Because of practical reasons, it is also to include rules for marriages between two Eastern Christians (usually Orthodox) before a Catholic minister, as is mentioned in the recently added § 3 of canon 1116, but not for marriages with Catholics who have formally separated from communion with the Catholic Church, baptized Catholics who have declared themselves unbelievers, Catholics in ecclesi-

²⁹ ÖSTERREICHISCHE BISCHOFSKONFERENZ: "Dekret über die rechtliche Ordnung religionsverschiedener Eheschließungen nach dem neuen kirchlichen Gesetzbuch (can. 1086 und can. 1129)." *Amtsblatt der Österreichischen Bischofskonferenz*, Nr. 2 vom 1. Juni 1984, Document no. 26, pp. 16—18.

³⁰ ÖSTERREICHISCHE BISCHOFSKONFERENZ: "Dekret zu den Trauungsverboten (can. 1071)." *Amtsblatt der Österreichischen Bischofskonferenz*, Nr. 2 vom 1. Juni 1984, Document no. 27, pp. 18—19.

astical penal servitude and those Catholics who persistently do not practise the faith.³¹ Since this is a text primarily intended for priests and other pastoral workers, it has been prepared as a clear, structured guide for practical use, with explanatory and source texts (excerpts from the translation of the two current codes and from the Ecumenical Directory), as well as the agreed nationwide forms — unfortunately this has been only one so far, being the text of the declaration of the Catholic party and the notification to the other party in appendices.

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DAMIÁN NĚMEC

Régulations légales concernant les mariages mixtes dans l’Église catholique dans certains pays d’Europe centrale Comparaison et propositions

Résumé

Cet article présente les régulations légales concernant les mariages mixtes dans l’Église catholique dans certains pays d’Europe centrale : République tchèque, Pologne, Slovaquie, Allemagne et Autriche. Dans la partie comparative, il examine les différences dans les domaines suivants : publication des bans avant le mariage, déclaration avant la demande de permission pour un mariage mixte, autorisation pour contracter le mariage, dispenses de la forme canonique et possibilités d’accès à l’Eucharistie dans les mariages mixtes. La partie synthétique propose non seulement une évaluation des solutions décrites et des suggestions d’amélioration, mais aussi une réflexion sur la manière de promulguer et de publier les règles et formulaires pertinents du point de vue du ministère pastoral et de l’ouverture de l’Église. En annexe, l’auteur discute des solutions juridiques pour des situations similaires (mariage avec une personne non baptisée ou avec une personne catholique éloignée de la foi chrétienne) et présente de manière succincte

un projet de directive de la Conférence épiscopale concernant les mariages mixtes et similaires en République tchèque.

Mots-clés: Église catholique, droit canonique, mariages mixtes, préparation au mariage, conférence épiscopale

DAMIÁN NĚMEC

Regolamentazioni legali riguardanti i matrimoni misti nella Chiesa cattolica in alcuni paesi dell'Europa centrale Confronto e proposte

Sommario

L'articolo presenta le modalità di regolamentazione legale riguardanti i matrimoni misti nella Chiesa cattolica in alcuni paesi dell'Europa centrale: Repubblica Ceca, Polonia, Repubblica Slovacca, Germania e Austria. Nella parte comparativa viene effettuato un confronto delle soluzioni riguardanti: le pubblicazioni prima del matrimonio, le dichiarazioni prima della richiesta di permesso per il matrimonio misto, l'autorizzazione a concedere il permesso per il matrimonio, la dispensa dalla forma canonica e la possibilità di accesso al sacramento dell'Eucaristia nei matrimoni misti. Nella parte sintetica vengono presentate non solo le valutazioni delle soluzioni descritte e le proposte per il loro miglioramento, ma anche il modo di emettere e pubblicare le normative e i moduli appropriati dal punto di vista della pastorale e dell'apertura della Chiesa.

Nell'appendice, l'Autore discute la soluzione legale di situazioni simili (matrimonio di una parte cattolica con una persona non battezzata e con una parte cattolica lontana dalla fede e dalla pratica cristiana) e presenta un progetto quadro di direttiva della Conferenza Episcopale riguardante i matrimoni misti e simili nella Repubblica Ceca.

Parole chiave: Chiesa cattolica, diritto canonico, matrimoni misti, preparazione al matrimonio, conferenza episcopale



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Mixed Marriages with the Orthodox in the Metropolitan Church *sui iuris* in Slovakia — History and Present

Abstract: The issue of intermarriage among believers is very topical nowadays because we have seen a lot of migration recently. The reasons are various, but the main ones are the opening of borders and migration for work. A frequent outcome of these processes is the celebration of mixed marriages. In the past, the Catholic Church has been negative about mixed marriages because it feared that in the future the Catholic side might lose its faith and the Catholic upbringing of children might be threatened. Even today, the Catholic Church is not very supportive of such marriages, but is tolerant of them in view of the progress of ecumenism. This welcoming does not mean, however, that the Church is indifferent to the fate of those who celebrate mixed marriages, since the celebration of such marriages is governed by the prescriptions of canon law, which have the task, from the very beginning, when such marriages are instituted, of being of help to those who celebrate them, so that they may live in them in peace and without offending the Creator, and so form a happy marriage despite their differences. The attitude of the Orthodox Church towards mixed marriages has been negative in the past and remains unchanged at the present time, and if a marriage is not celebrated in the Orthodox Church, it is not recognized as valid.

Keywords: Catholic Church, Orthodox Church, marriage, mixed marriage, canon

Introduction

The question of celebrating marriage in the Metropolitan Church *sui iuris* between the faithful of the Greek Catholic Church and the Orthodox Church in Slovakia causes various animosities even today.

Despite the fact that relations between the Greek Catholic Church and the Orthodox Church have been outwardly adjusted, as property matters have been settled with the help of the state, tensions and misunderstandings still arise on the question of the celebration of marriage. With this article we want to shed more light on this issue through recent historical developments up to the present time when the CCEO regulations have begun to be applied in this matter. It is important that the Church's view on this issue is known not only by pastors but also by the People of God.

1. Brief historical development of mixed marriage

The ancient canonical discipline had no precise terminology regarding the issue of mixed marriages. We can only speak of a kind of continuity on the question of celebrating marriages with the unbaptized and with the heterodox, that is, with persons baptized not in the true Church but in an already separated sect at that time. The canons of the first ecumenical councils and the synods of the various local churches forbid marriage between one baptized in the Church of Christ and the unbaptized or those baptized in the various heretic sects. Although at that time we can still speak of an undivided Church in the view of the later divisions, yet even in antiquity we find many separated communities, especially in the East, under the influence of the various heresies which had arisen in the Church from its beginnings.¹ The ancient canons which we shall present either lay down the basis of the obstacle of a distinct cult, or forbid the celebration of mixed marriages.² After the Second Vatican Council and the issuance of the two codices, there was a change in the canonical discipline in the Catholic Church regarding mixed marriages, but in the Orthodox Church the prescriptions of the ancient law are still applied to mixed marriages today.³

The canonical rules of the Synod of Laodicea (343—381) contain two canons concerning the prohibition of celebrating marriages with heretics. The prescription of canon 10 states: “Let not the members of the Church

¹ J. IVAN: *Miešané manželstvo v kánonickej normatíve východných katolíckych cirkví*. Michalovce 2008, p. 66.

² I. BELEJKANIČ: *Pravoslávne dogmatické bohoslovie II*. Prešov 1996, p. 137. Cf. P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi*. Prešov 1997, p. 119.

³ P. I. BOUMIS: *Kánonické právo pravoslávnej cirkvi...*, p. 119.

indifferently give their children in marriage to heretics.”⁴ Canon 31 of this synod prescribes: “They shall not marry any heretic, nor give them in marriage their own sons and daughters, unless they promise to become Christians.”⁵

Both of these canons are general and admit of no exception. The prohibition is absolute and applies to all heretics without distinction. Should such a case arise, however, the necessary condition is that the heretic must promise to convert to Christianity.⁶ A similar norm was necessary to defend the faith in the early centuries when various heresies were disrupting the Church.⁷

The Ecumenical Council of Chalcedon (451) in canon 14 contains the following prescription: “Since in some provinces it is lawful for lectors and cantors to marry, this holy council has decreed that it is not lawful for any of them to marry a woman of another faith (*heterodoxon*) [...] Nor may they give their children in marriage to a heretic (*hairetikó*), a Jew or a pagan, unless the person who associates with the orthodox party (*to orthodóxon*) declares conversion to the true faith (*eis tén orthódoxon pístin*). If anyone transgresses this prescription of the Holy Council, he will be subjected to ecclesiastical sanctions.”⁸

The marriages celebrated between Christians and heretics in antiquity did not have the non-applicable character of these marriages in the sense of contemporary normativity. Rather, they entailed canonical penalties to which those who solemnized such marriages were to be subjected, up to and including their excommunication from the ecclesial community. Furthermore, it should be noted that at that time, clear terminology regarding illicit and invalid marriages was not yet well defined. Only Trullan Council (691) brought clarification on this matter.⁹

The disciplinary rules of the Trullan Council (691) were accepted only in the East; the West did not accept its decisions.¹⁰ The prescription of canon 72 decrees: “It is not lawful for an orthodox man to marry a heret-

⁴ Н. СвЯТОГОРЕЦ: “Пидалион.” In: Правила православной церкви с толкованиями, том. 3: Правила Поместных Соборов. Екатеринбург 2019, p. 156.

⁵ Ibidem, p. 172.

⁶ Ibidem.

⁷ J. IVAN: *Miešané manželstvo...*, p. 67.

⁸ W. GÓRALSKI, E. GÓRECKI, J. KRUKOWSKI, J. KRZYWDA, P. MAJER, B. ZUBER: *Komentarz do Kodeksu Prawa Kanonicznego*. Vol. 3, Księga IV: *Uświęcająca zadanie kościoła*. Poznań 2011, p. 328. Н. СвЯТОГОРЕЦ: “Пидалион.” In: Правила православной церкви с толкованиями, том. 3..., pp. 153—154.

⁹ J. IVAN: *Miešané manželstvo...*, p. 68.

¹⁰ З. ХАНАТЬ: “О мшанных супружествах вообще, особенно же о мшанных супружествах связанных предъ схизматическимъ священникомъ.” In: Душпастырь, ч. 4, 1927. I, p. 29.

ical woman, nor for an orthodox woman to marry a heretical man. And if such a case should occur to anyone, the marriage is to be considered null and void (*ákuron*) and the illicit marriage contract (*áthesmon tó sunoikésion*) is to be dissolved, since one should not mix what is not to be mixed, nor unite the wolf with the sheep and the side belonging to Christ with the lot of sinners. If anyone transgresses what we have decided, he is to be excommunicated [...].”¹¹

The canon explicitly speaks of marriage between the orthodox and heretics. For the Byzantine commentator canonist Zonaras, “orthodox” means a believing Christian, while “heretic” is equated with a pagan, an unbeliever. The canon already explicitly establishes an inapplicable barrier to both intermarriage and different cults, without distinguishing heretics, schismatics, and pagans. Marriages with heretics and pagans are to be considered null and void (*ákuron*) and the illicit marriage contract (*áthesmon tó sunoikésion*) is to be dissolved, while the one who transgresses this norm is to be excommunicated.¹²

2. The attitude of the Greek Catholic Church towards mixed marriages

The attitude of the Greek Catholic Church towards mixed marriages between the faithful of the Eastern Catholic Church and the Orthodox Church has undergone a certain evolution, beginning with a complete prohibition and ending with the modern canonical discipline. Prior to the Second Vatican Council, the attitude toward mixed marriages between Greek Catholics and Orthodox was diametrically opposed to the current canonical prescriptions that are the fruit of the Second Vatican Council. When we look at the canonical legislation of the local Church *sui iuris*, it was governed by the 1917 CIC regulations. This legislation forbade marriage between two baptized persons, one of whom is Catholic and the other of whom belongs to a heretical and schismatic sect.¹³ A mixed marriage was considered to be a marriage contracted between two Christians, that is, validly baptized, one of whom is a Catholic and the other a non-Catholic. The Catholic party was considered to be such a person who had

¹¹ Н. СВЯТОГОРЕЦ: “Пидалион.” In: Правила православной церкви с толкованиями, том. 2: Правила Поместных Соборов. Екатеринбург 2019, pp. 312—313.

¹² J. IVAN: *Miešané manželstvo...*, p. 68.

¹³ З. ХАНАТЬ: “О мьшанных супружествах вообще...” In: Душпастьрь, ч. 4..., p. 28.

been baptized in and belonged to the Catholic Church. However, he or she could have been validly baptized outside the Catholic Church, with heretics or schismatics, returned to the Catholic Church after some time, and belonged to the Catholic Church at the time of the marriage. A non-Catholic baptized person was one who had been validly baptized with heretics or schismatics and continued to belong to them.¹⁴

The Greek Catholic Church forbade mixed marriages in the strictest possible manner and repeated this prohibition, although sometimes granting exemptions from this prohibition on the basis of sufficient reason and the provision of certain conditions.¹⁵ By this general stern prohibition she wished to show her condemnation of mixed marriages, which she considered in general to be a great evil. This prohibition applied everywhere,¹⁶ and therefore the faithful, whether their region was more or less religiously mixed, were to abstain from such marriages.¹⁷ The contrary custom was not only disapproved but condemned by the Church. Ordinaries, together with parish priests and other clergymen, were obliged to take care that such custom should be eradicated.¹⁸

The reason why the Church not only disapproved of intermarriage, but also condemned and forbade it, was that intermarriage opposed the second goal of marriage, namely, that spouses should help each other. Since there is no unity between the spouses on the major issues of life, which include the issue of religion, they can hardly, if ever, fully understand each other, they cannot be fully committed to each other and thus help each other. This understanding, however, could also be translated to mean that both spouses become lukewarm towards their religion.¹⁹ The prescription of canon 1062 of the 1917 CIC made it obligatory for the Catholic party to win the non-Catholic party to his or her religion.²⁰ The Catholic party in a mixed marriage was in danger of becoming lukewarm towards his or her own religion or falling away from his or her Catholic religion altogether and joining the religion of the other party. There was a similar danger in such a marriage for the children, who, seeing this religious difference of their parents, might become religiously indifferent

¹⁴ CIC 1917, canon 1060.

¹⁵ З. ХАНАТЬ: “О мѣшаныхъ супружествахъ вообще, особенно же о мѣшаныхъ супружествахъ связанныхъ предъ схизматическимъ священникомъ.” In: Душпастырь, ч. 2, 1927. II, pp. 75—76.

¹⁶ CIC 1917, canon 1060. Cf. З. ХАНАТЬ: “О мѣшаныхъ супружествахъ вообще...” pp. 74—75.

¹⁷ Ibidem, pp. 75—76.

¹⁸ J. IVAN: *Miešané manželstvo...*, p. 70.

¹⁹ Ibidem, pp. 70—71.

²⁰ З. ХАНАТЬ: “О мѣшаныхъ супружествахъ вообще...” In: Душпастырь, ч. 2..., p. 76; CIC 1917, canon 1062.

to the religion in general or follow the religion of the non-Catholic party. Since the Church could not allow, much less abet, the faith of the Catholic side to be compromised and the religious life of the children coming from such a marriage to be endangered, she had to strictly forbid such marriages.²¹

From this prohibition the Church only exceptionally granted exemption when it was sufficiently assured that the danger to the Catholic party and the children from the mixed marriage was removed or at least diminished, and, moreover, there was hope that the non-Catholic party would in time become Catholic.²²

In the case where in a mixed marriage the Catholic party and the future children were not only more likely but certainly in danger of apostasy from the faith, then such marriages were forbidden by God's law itself. For the law of God declares that no one may put himself in such danger of sin in which he will surely succumb, nor may anyone help another to fall into such danger. In such a case the Church had no power to dispense from the prohibition of mixed marriage, since she has the power to dispense from those marital impediments which she herself has instituted, but not from those which are determined by the law of God itself.²³

In the case where there was a celebration of the marriage of a Greek Catholic in the Orthodox Church, such a marriage was not valid within the meaning of the prescription of canon 1099 CIC 1917 due to the absence of the form of celebration of the marriage, since according to the prescription of canon 1094 CIC 1917 only those marriages are valid which are celebrated before the local parish priest, hierarch or delegated priest. In the event that children who come from such a marriage are baptized in the Greek Catholic Church, it should be noted in the remarks that the children are illegitimate. The marriage may be redeemed through the institution of *sanatio in radice*. At the same time, this believer was afflicted with the penalty of excommunication *latae sententiae*.²⁴

²¹ Ibidem, p. 75. CIC 1917, canon 1060 § 1.

²² J. IVAN: *Miešané manželstvo...*, p. 71; CIC 1917, canon 1061, 1062.

²³ J. IVAN: *Miešané manželstvo...*, p. 71.

²⁴ З. ХАНАТЬ: "О мѣшанных супружествахъ вообще..." In: Душпастырь, ч. 2..., pp. 137—138; CIC 1917, canons 1099, 1094. 2319. § 1, b. 1.

3. The current canonical discipline of the Greek Catholic Church on the issue of mixed marriage

The change of discipline was influenced by the ecumenical spirit of the Second Vatican Council and the change of the Church's attitude towards respect for the religious freedom of every person. Profound changes in the regulations concerning the celebration of mixed marriages were introduced gradually — first according to the instructions of the Congregation for the Doctrine of the Faith *Matrimonii sacramentum* of 18 March 1966, and then by the *motu proprio Matrimonia mixta* of Paul VI of 31 March 1970.²⁵

In his commentary, Remigiusz Sobański stresses that the norm defining the conditions for obtaining a dispensation and from the impediment of *disparitas cultus* also notes that the far-reaching changes introduced by Paul VI's *motu proprio Matrimonia mixta* in the area of mixed marriages show that the legislator viewed them in the perspective of Christian unity and the enhancement of the dignity of Christian marriage.²⁶

This change in the Catholic Church's attitude toward mixed marriages is reflected in the CCEO, in addition to the Code's abolition of prohibitive impediments, including the impediment of mixed marriages, it places the canonical arrangement regarding mixed marriages under a separate subtitle, clearly distinguishing these marriages from marriages with the unbaptized, for which the non-applicable impediment of a distinct cult is retained, while applying canon 814 CCEO regarding the conditions for the granting of the dispensation.²⁷

The prescription of canon 813 CCEO understands a mixed marriage as the one concluded between two baptized persons, one of whom is Catholic, the other non-Catholic. By "non-Catholic" (although this term is not the most appropriate) the canon understands Eastern non-Catholics (the Byzantine Orthodox and the pre-Chalcedonian) and Western Protestants (those belonging to churches and societies separated in the West after the Reformation started by Luther), who come into the world in these communions and are brought up in them in the faith in Christ, but they do not personally incur responsibility for the sin of schism, and the Catholic Church brings them together with fraternal love. Under the umbrella term of "non-Catholics" the canon does not directly include those Catholics

²⁵ W. GÓRALSKI et al.: *Komentarz do Kodeksu Prawa Kanonicznego...*, p. 328.

²⁶ W. GÓRALSKI: "The Research Activity of Rev. Prof. Remigiusz Sobański in the Field of Substantive Canon Law." *Philosophy and Canon Law* 8 (2022), pp. 1—20.

²⁷ J. IVAN: *Miešané manželstvo...*, p. 72.

who have publicly apostatized from the Catholic faith, that is, apostates, although they have not transferred to any non-Catholic Church or ecclesial community, for whom a special license is required from the hierarch of the place of celebration of marriage, which is not to be granted unless canon 814, regarding the conditions to be guaranteed in the celebration of mixed marriages with reasonable accommodation, is adhered to.²⁸

According to canon 813 of the CCEO, the permission of a competent authority is required for the celebration of a mixed marriage, without their permission the marriage is forbidden.²⁹ So there is no longer an obstacle to mixed marriages in the new legislation, even though it was previously entirely prohibited. What remained, however, was the prohibition against celebrating marriage without explicit license. Legally, however, this is a significant difference. For the barrier created a law that prevented the celebration of marriage. In its case, a dispensation was required from the barrier. Licensure, in turn, is prescribed in order to make the act permissible. The license is not a dispensation from the law, but a requirement for its fulfillment. It is within the power of the local hierarch to grant a license. It is required to be granted expressly; it cannot therefore be a mere implied licence. The hierarch of the place must have just and reasonable cause for granting it. Since it is not a dispensation, just and reasonable cause is not required for validity.³⁰

A local hierarch may grant, despite the legitimate prohibition against celebrating marriage with non-Catholic Christians, a license authorizing a mixed marriage, taking into account the conditions and circumstances of time, place, and persons enumerated in CCEO, canon 814, whenever just cause exists. In granting a license, the Church's continuing concern for the protection of the faith must be kept in mind. The fundamental principles from which the Catholic Church cannot retreat, and which have remained unchanged in the new legislation of the CCEO, relate essentially to the protection of the faith of the Catholic spouse and the education of children in the Catholic Church. The preservation of the faith is an absolute obligation under the law of God. Under the previous legislation, if in a particular case there was a grave danger of the Catholic spouse or the children born of the marriage falling away from the faith of the Catholic Church, the marriage would have been forbidden, since the law of God itself allows no dispensation or license in this matter.³¹

²⁸ D. SALACHAS: *Il sacramento del matrimonio nel Nuovo Diritto Canonico delle Chiese orientali*. Rome 1994, p. 138.

²⁹ G. NEDUNGATT, G. RUYSEN: *A Guide to the Eastern Code. A Commentary on the Code of Canons of the Eastern Churches*. Rome 2020, p. 657.

³⁰ J. IVAN: *Miešané manželstvo...*, p. 78.

³¹ *Ibidem*, p. 79.

In the light of the new CCEO legislation, which is based on the ecumenical spirit of the Second Vatican Council, as noted above, the faith of the non-Catholic side takes on a new value, and the Catholic Church thus does not require an absolute obligation on the Catholic side to have children baptized and brought up in the Catholic Church. The Catholic spouse promises to do everything in his or her power, and if the non-Catholic party does not agree, the license could be granted anyway, with the understanding that the Catholic party will do its best to pass on the Catholic faith to the children. Respecting the non-Catholic party's freedom of belief, the Church does not require any pledge from the non-Catholic spouse. However, it is clear that the license should be refused if the betrothed has already decided against any Catholic upbringing of the children. Nor should a license be granted if the party directly excludes having children, one of the goals of marriage.³² Also, before a mixed marriage license can be obtained by both parties, the candidates are required to accept its basic attributes, which are unity and indissolubility. As with marriage, problems can arise in practice because marriage is not always perceived as an indissoluble union between one woman and one man.³³

The wording of the norm regarding the solemn duty of the Catholic side in mixed marriages, especially on baptism and the education of children in the Catholic Church, is such that it does not ask for more than will be within its power. The truth is that in the East in mixed marriages between Catholics and Orthodox both the celebration of marriage and the baptism of children are, in practice, officiated in the husband's Church. It is therefore quite difficult for a Catholic wife to persuade an Orthodox husband to celebrate the marriage in the Catholic Church and to baptize the children in it as well. That is also why there is a limited circle within which she can do everything in her power to perpetuate her religion. However, a great opportunity remains regarding the possibility of a Catholic woman raising her children in the Catholic Church.³⁴

Finally, let us summarize the content of canon 814 of the CCEO. The granting of a license to celebrate a mixed marriage requires the fulfillment of conditions that cannot be equated with the guarantees or warranties of the previous legislation. Requirements to be met in order to obtain a license include:

³² Cf. D. SALACHAS: *Il sacramento del matrimonio...*, pp. 141—142.

³³ M. GWÓZDŹ: "Aktualność i znaczenie wymagań stawianych nupturientom o różnej przynależności wyznaniowej i religijnej w świetle kan. 1025 Kodeksu prawa kanonicznego 1983." In: *Miłość i odpowiedzialność — wyznaczniki kanonicznego przygotowania do małżeństwa*. Eds. A. PASTWA, M. GWÓZDŹ. Katowice 2013, pp. 160—161.

³⁴ D. SALACHAS: *Il sacramento del matrimonio...*, pp. 142—143.

1. The Catholic party's obligations under divine law ought to be protected. The preservation of the faith is an absolute obligation of the divine law. Thus, if in a particular case there was an imminent danger of losing the faith, the marriage of the Catholic party would be forbidden by divine law without the possibility of ecclesiastical permission. However, the duty to see that all children are baptized and brought up in the Catholic Church is limited by circumstances which do not depend solely on the will of the Catholic parent. He or she may be prevented from fulfilling this duty by law or by social custom. If these circumstances arise, the Catholic spouse has this obligation only to the extent that it is within his or her power to do so.

2. The second condition requires that the non-Catholic party be informed with the appropriate deference and be able to take into account what the other party is obliged in conscience to do. This notification will be made before the Catholic party makes the vows, and in a manner in which the information provided can be clearly established. The local hierarch can never require the same promises from a non-Catholic party.

3. Because the views of non-Catholics on the essential characteristics of marriage, especially its indissolubility, differ from Catholic doctrine, the third condition prescribes that both parties be instructed in the goals and essential characteristics of marriage.³⁵

All things considered, these new conditions represent a maximum softening of the previous legislation and should become a new stage on the path of reconciliation between the Catholic Church and the other Christian sister churches.

4. Mixed marriages in the Orthodox Church

The creation of man, marriage and the foundation of the Church are united in one creative act of God. This fact points to their connectedness. This also explains why the Bible uses marital terminology in those cases where the mystery of the relationship between God and man is explained. The biblical text says: "It is not good for man to be alone" (Gen 2:18). On the basis of this, St. Ambrose of Milan argues that the human race is "good" only in the union of what is masculine with what is feminine.

³⁵ G. NEDUNGATT, G. RUYSSSEN: *A Guide to the Eastern Code...*, p. 658. M. Gwóźdź: "Aktualność i znaczenie wymagań stawianych nupturientom..." pp. 150—165.

Only the human dyad, Adam and Eve, male and female, brings us to an understanding of the greatness of God, who alone speaks of himself as “we” (Gen 1:26). St. John Chrysostom, in turn, assures us that when man and woman unite in the holy mystery of marriage, they do not create the image of something earthly, but the image of God Himself.³⁶ By calling marriage a *mystery*, the Orthodox tradition also affirms the sacramentality of this institution. In Orthodox faith, the sacraments (*mysteria*) are not merely symbolic acts, but events that overcome fallen human nature and bring about the merciful forgiveness of sins. Through the presence and action of the Holy Trinity, they become salvation itself, that is, a theophany and an experience of deification for those who celebrate and receive them. In fact, the concept of *mysteria* has its literal origin in the verb that denotes the closing of the eyes as protection from a bright light; in the case of the sacraments, that light is God Himself.³⁷

The Orthodox Church has always, from the very beginning, had fundamental and unchangeable norms for Christian marriage. Only through the influence of “secular laws” was a special order of granting marriage, the act of *vinchaniya*, established. As a consequence of this influence, marriage was separated from the holy *mystery* of the Eucharist, which is a real union with Christ. By blessing marriage during the Eucharist, the Church clearly documented that marriage is a mystical union in the sense of the mysterious union of Christ with the Church. Likewise, the early Christians believed that marriage was the “domestic church” and that it was the basic unit of the local ecclesial community. As a result of the establishment of a special order for the conferral of the holy *mystery* of marriage, the act of *vincaniya*, which became binding throughout the empire, such awareness of the binding nature of marriage gradually disappeared. Therefore, only a return to the original Christian practice of conferring the holy *mystery* of marriage during the Eucharist will lead us to a correct view of the meaning and purpose of the holy *mystery* of marriage in the life of the Christian. Therefore, the next section will discuss the relationship of the Holy *Mystery* of Matrimony with the Eucharist.³⁸

It must be said, however, that there is a gradual separation of the holy *mystery* of marriage from the Eucharist. The special order for the conferral of marriage, which began to spread and be used in the Church from the 10th century onwards, has brought about this fact. It is therefore necessary to return to the practice of the early Church today that the Holy *Mystery* of Marriage be conferred during the Eucharist. Let the Eucharist

³⁶ I. BELEJKANIČ: *Pravoslávne dogmatické bohoslovie...*, p. 116.

³⁷ K. SCHEMBRI: *Oikonomia. Divorce and Remarriage in the Eastern Orthodox Tradition*. Rome 2017, p. 35.

³⁸ I. BELEJKANIČ: *Pravoslávne dogmatické bohoslovie...*, pp. 126—127.

be the seal that gives Christian marriage its proper meaning and proper understanding.³⁹

Unity of faith and a shared readiness to live together in the Orthodox Church is, according to canon law, a condition for an ecclesial marriage. The canons (Laodicean, Rules 10 and 31, Carthaginian, Rule 21, Chalcedonian, Rule 14, and *in Trullo*, Rule 72) prohibit Orthodox believers from marrying another Orthodox believer. Such marriages are to be an obstacle to receiving an ecclesiastical marriage. Of course, we cannot judge these rules formally either. It is clear that there will be understanding between two young people in all areas without being members of the same Church. But the question is whether two young people can transform human love into the joy of the Kingdom of God without a common faith, whether there is a sense of the reality of the kingdom even when they do not share a common faith. Whether it is possible to live as “one flesh” without receiving the body and blood of Christ together.⁴⁰ Therefore, one of the conditions of Christian marriage is that the man and the woman are not only united by their love for one another, but that they are also united by their life in Christ. For this reason, the early Church associated the holy *mystery* of marriage with the Eucharist, because there was a union with the new man, Christ. Therefore, the Eucharist was considered the seal of the holy *mystery* of marriage. Outside of union with Christ, there is no Christian marriage, no *mystery* of marriage.⁴¹

Despite the clear position of the Orthodox Church on mixed marriages, we still see a certain degree of flexibility on this issue. Examples of this flexibility are the decisions of the Russian Orthodox Church in 1721 (when it allowed the marriage of Orthodox brides to Swedish captives) and in 1803 and 1811 (when it dealt with mixed marriages in provinces annexed from Poland and Finland); the decision of the Church of Greece in 1869; and the decisions of the Church of Constantinople in 1782 (when it allowed Orthodox migrants in India to marry Armenians), in 1879 (when it reversed the strict 1869 decision), and in 1887 (when bishops were given the freedom to judge emerging cases and to bless such marriages in a non-scandalizing manner). In 1967, the Russian Church recognized the validity of a mixed marriage with a Catholic that is contracted before a Catholic priest and with the consent of the Orthodox bishop in question. More recently, the Russian Church has opened this up to Eastern Orthodox and Protestant Christians as well, and has made marriages between Orthodox and non-Christians legal.⁴²

³⁹ Ibidem, pp. 130—131.

⁴⁰ Ibidem, p. 137.

⁴¹ Ibidem, p. 135.

⁴² K. SCHEMBRI: *Oikonomia...*, p. 71.

Today, Protestant denominations allow and, more accurately, encourage the communion of separated Christians. At the same time, they do not require unity in faith as a condition for communion. The same is evident among Roman Catholics after the Second Vatican Council. They too began to practice *intercommunion*. Practically, this means that the Eucharist is no longer an expression of the fullness of truth. The Orthodox Church, which rejects intercommunion, in this way defends the Eucharist as an expression of unity in truth. On the other hand, it does not reject cooperation among all those who believe in Christ. This is precisely the position that the Orthodox Church takes in the case of the holy mystery of marriage. It sees to it that the unity between the newlyweds is also full unity in Christ. A mixed marriage cannot meet these criteria. Only a marriage in which a man and a woman are united by love, faith and the Eucharist can be a true mystery.⁴³

In recent decades, the topic of mixed marriages has been the subject of various official studies carried out in preparation for the Great and Holy Council of the Orthodox Church. These studies have revealed that there are different opinions on the subject among the various Orthodox Churches, mostly depending on the situation in which these churches lived. For example, the Russian Church (which conducts its ministry in a multi-denominational atmosphere) held that such a marriage could be blessed in the temple provided the non-Orthodox party recognizes the importance of the Orthodox blessing. The Greek Church (which lives in a mono-ethnic and mono-denominational environment) argued that it would be better to avoid mixed marriages regardless of churches and denominations and to permit them only in exceptional circumstances. The Polish Church (which lives in a non-Orthodox environment) suggested that a mixed marriage with any baptized person should be considered valid in the spirit of ecumenism and on the basis of local inter-faith relations.⁴⁴

On the other hand, with regard to the question of mixed marriages with non-Christians, the Russian Church considered that, in view of the new pastoral situations and the fact that there is no prohibition in the oldest canons concerning this question, the Orthodox discipline should return to the practice of the first three centuries of Christianity, namely, to follow Paul's teaching (cf. 1 Cor 7:12, 14, 16) and to treat mixed marriages with condescension. The Church of Cyprus simply reinforced and emphasized the prohibition of the 14th Canon of the Synod of Chalcedon (451). The Greek Church proposed the application of *oikonomia*.

⁴³ I. BELEJKANIČ: *Pravoslávne dogmatické bohoslovie...*, pp. 137—138.

⁴⁴ K. SCHEMBRI: *Oikonomia...*, p. 72.

The Polish Church called for a discussion on the possibility of blessing only one of the parties. The Czechoslovak Church reiterated its ban on blessing mixed marriages.⁴⁵

For this reason, the Inter-Orthodox Preparatory Commission in 1971 proposed that relative latitude be allowed in dealing with these issues on the basis of local conditions, and that the application of *oikonomia* be further explored in marriages with non-Orthodox Christians. In 1982, the Pan-Orthodox Preconciliar Conference endorsed this position and added two points. First, marriages to non-Orthodox Christians are to be rejected because of acrimony, but are to be blessed because of leniency and love for people, on the condition that the children of such marriages be baptized and raised as Orthodox; and secondly, marriages with non-Christians are to be absolutely forbidden for the sake of acrimony, but in certain cases and depending on specific pastoral needs, local autocephalous Orthodox Churches may exercise pastoral *oikonomia*.⁴⁶

Exceptions for marriages with non-Orthodox Christians are usually granted under three conditions: first, the mixed marriage must be contracted by an Orthodox priest and according to the Orthodox Rite of Marriage; second, the children born of the marriage must be baptized and raised in the Orthodox faith; and third, the marital problems must be resolved by the Orthodox Church. However, some authors urge the Orthodox Churches to be even more lenient with this rule, especially in light of the growing number of mixed marriages. According to Constantelos, “the Church should act and allow the blessing of such marriages, provided that the Orthodox member so desires and the non-Christian has no objection to such a blessing.” He adds that “the practice of the early Church, which believed that the unbeliever is sanctified through his union with the believer, should be restored to practice.”⁴⁷

According to Belejkaňič, many of the problematic issues associated with mixed marriages would be clarified if the Orthodox Church were to restore the union of the holy mystery of marriage with the Eucharist. The holy mystery of marriage between two members of the Orthodox Church would be confirmed by the Eucharist. Mixed marriages, second and third marriages would not be joined with the Eucharist, but would be blessed outside the Eucharist. This would express the relationship of the Orthodox Church to this issue.⁴⁸

⁴⁵ Ibidem, p. 72.

⁴⁶ Ibidem, p. 73.

⁴⁷ Ibidem.

⁴⁸ I. BELEJKANIČ: *Pravoslávne dogmatické bohoslovie...*, p. 139.

Conclusions

One motif that requires a deeper study of the Orthodox Discipline concerns the growing number of mixed marriages between Catholic and Orthodox believers. Official statistics show that during the last decades, especially after the fall of the Iron Curtain, the number of such marriages has increased drastically, even in regions with a Catholic majority.⁴⁹ Therefore, the growing number of mixed marriages reveals the need for fraternal cooperation between Christian churches, and therefore also at the local level between the Greek Catholic Church and the Orthodox Church in Slovakia, by a careful study of the doctrine of marriage in the canonical and pastoral situation and the ecumenical implications thereof. This issue is serious and important because both Churches require the same conditions with regard to their own faith. Even today, the legislation on mixed marriages of the Orthodox Church remains less flexible than that of the Catholic Church. Therefore, at present the competent authorities of the Orthodox Church face a great challenge to adapt the ancient discipline on mixed marriages to contemporary conditions. Otherwise, many families living in this way will forever be marked by the deficit of the validity of their own marriages celebrated elsewhere than in their own Church, or even by the loss of the integrity of ecclesial belonging to their own Church.

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⁴⁹ K. SCHEMBRI: *Oikonomia...*, p. 237.

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JURIJ POPOVIČ

Les mariages mixtes avec des orthodoxes dans l'Église métropolitaine *sui iuris* en Slovaquie Histoire et actualité

Résumé

La question des mariages mixtes parmi les croyants est très actuelle, en raison notamment de la grande migration observée récemment. Les raisons en sont diverses, mais parmi les principales figurent l'ouverture des frontières et la migration économique. Un effet fréquent de ces processus est la conclusion de mariages mixtes. Dans le passé, l'Église catholique était réticente à l'égard des mariages mixtes, craignant notamment que la partie catholique puisse perdre la foi et que l'éducation catholique des enfants puisse être compromise. Même aujourd'hui, l'Église catholique ne soutient pas ces mariages, mais elle y fait preuve de tolérance en raison du progrès de l'œcuménisme. Cette bienveillance ne signifie cependant pas que l'Église soit indifférente au sort de ceux qui contractent de tels mariages, car leur conclusion est réglementée par le droit canonique, qui vise dès le début de leur célébration à aider ceux qui les contractent à vivre en paix et sans offense envers le Créateur, et ainsi à construire un mariage heureux malgré les différences. La position de l'Église orthodoxe à l'égard des mariages mixtes était négative par le passé et demeure inchangée à ce jour, de sorte qu'un mariage non célébré dans l'Église orthodoxe n'est pas reconnu comme valide.

Mots-clés: Église catholique, Église orthodoxe, mariage, mariage mixte, canon

JURIJ POPOVIČ

Matrimoni misti con ortodossi
nella Chiesa metropolitana *sui iuris* in Slovacchia
La storia e il mondo presente

Sommario

La questione dei matrimoni misti tra credenti è molto attuale, poiché recentemente stiamo osservando una grande migrazione. Le ragioni sono varie, ma le principali sono l'apertura delle frontiere e la migrazione per lavoro. Un effetto frequente di questi processi è la celebrazione di matrimoni misti. In passato, la Chiesa cattolica era negativamente predisposta verso i matrimoni misti, poiché temeva che in futuro la parte cattolica potesse perdere la fede e l'educazione cattolica dei figli potesse essere messa a rischio. Anche oggi la Chiesa cattolica non sostiene tali matrimoni, ma li tollera per via del progresso dell'ecumenismo. Tuttavia, questa tolleranza non significa che alla Chiesa non importi il destino di coloro che contraggono matrimoni misti, poiché la celebrazione di tali matrimoni è regolata dalle norme del diritto canonico, che fin dall'inizio, quando tali matrimoni vengono contratti, hanno lo scopo di aiutare i coniugi a vivere in pace e senza offendere il Creatore, creando così un matrimonio felice nonostante le differenze. L'atteggiamento della Chiesa ortodossa verso i matrimoni misti era negativo in passato e rimane invariato al momento, e se il matrimonio non è celebrato nella Chiesa ortodossa, non è riconosciuto come valido.

Parole chiave: Chiesa cattolica, Chiesa ortodossa, matrimonio, matrimonio misto, canone



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Matrimonia mixta — Doctrine, Law, and Spirituality Reality and Challenges

Abstract: The fact that spouses profess different faiths is a major challenge for their life and for building a stable family. A closer examination of the reality of mixed marriages may be helpful in developing the pastoral care they need. The article shows what mixed marriages deal with in their spirituality, in the context of the existing doctrine, law and pastoral practice. It also discusses the shared values and expressions of Christian spirituality as well as areas where tensions or even crises may appear. The article is not only a recapitulation of the applicable laws and existing pastoral practice, but proposes some solutions, both pastoral and canonical.

Keywords: mixed marriages, ecumenism, intercommunion, child rearing, marital spirituality

Introduction

The development of interpersonal (interreligious, international, interfaith) relations and the growing number of interdenominational marriages or even unions where the spouses profess different religions give rise to the question of the Church's approach to such situations. For, on the one hand, the natural law guarantees the possibility of entering into marriage but, on the other hand, people who have been baptized must respect the order of their faith. All this shapes a multi-faceted spirituality, which should determine the way of living, thinking and acting and should set priority values. It is not surprising then that the Church (Churches) regulates the issue of

mixed marriages, keeping in mind the most important objective, which is the salvation of souls. The issue of mixed marriages brings together three areas which are important to Catholics, namely, the doctrine, the law, and the spirituality. A harmony between these three leads to a greater harmony in life and helps the spouses avoid additional difficulties. However, the first two must be there to serve the third, for it is spirituality that gives meaning to life and is a way to pursue the vocation arising from baptism.

In this context, it is worthwhile asking about the manifestations of the spirituality of a Christian marriage, especially a mixed marriage, and responding to the challenges facing spouses of different faiths. We should notice and recognize the status quo, but also, in a process of discernment and reading into the expectations of these marriages, identify solutions to be further discussed. Therefore, this article will first present the Catholic Church's teaching on mixed marriages. Then it will move on to the foundations of conjugal spirituality in the ecumenical context. Finally, the challenges facing mixed marriages and calling for in-depth examination and optimal solutions will be identified.

1. Doctrine and law on mixed marriages

First, the terms "Christian marriage" and "mixed marriage" need to be clarified and then the constitutive elements of marriage in the context of spirituality and the difficulties that mixed marriages have to deal with will be identified. Contemporary consensuses reached between churches on issues of key importance to marriages will also be discussed.

1.1. Christian marriage

In Christianity marriage is not merely a contract, but a covenant between a man and a woman forming a unity for life — "Marriage, understood as the relationship between husband and wife, is the most important of all human relationships. Its importance is greater than that of bonds with the family home, because marriage is the physical and spiritual union of two people."¹

¹ *Wprowadzenie do nauki o Biblii oraz doktryny i praktyki ruchu zielonoświątkowego*. Eds. E. BEDNARZ, R. TOMASZEWSKI. Warszawa 2010, p. 478.

The Catholic Church defines marriage as follows: “The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life and which is ordered by its nature to the good of the spouses and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.”²

The sacramentality of this relationship is recognized by the Roman Catholic, Old Catholic, Orthodox and Oriental Churches. Communities of the Protestant tradition do not consider marriage a sacrament, which however does not belittle the importance of the church’s blessing and spiritual dimension of marriage. Marriage is intended by God and demands to be respected. It is therefore not only a human institution, but it is — by its nature — subject to God’s law. What it means for Catholics is, among other things, its subordination to the canon law. And this does not preclude the effects arising from the civil law.³ It is therefore not surprising that before getting married people need to be instructed about the purposes and qualities of marriage.⁴

Linked to marriage are spirituality and manifold religious rituals. There are, of course, also marriages in which one of the partners does not practise his or her faith. In such a case, the spiritual dimension of life is limited but may be present to some extent. Marriages between Christians of different denominations or religions are not without tensions in key areas.

1.2. Mixed marriage⁵

The differences existing between individual branches of Christianity also result in different understanding of what marriage is and, conse-

² *Code of Canon Law* [further: CCL], canon 1055 § 1. The Pentecostal Church in Poland defines the marriage covenant as a lasting mutual responsibility and commitment featuring strong involvement, loyalty until death, and end of independence, which implies mutual self-sacrifice of the spouses. *Wprowadzenie do nauki o Biblii...*, p. 479.

³ CCL, canon 1059.

⁴ CCL, canon 1125, 30.

⁵ For information about the history of norms for interfaith marriages, see A. SOB-
CZAK: *Aktualna dyscyplina Kościoła wobec małżeństw mieszanych i im podobnych*, [http://
mateusz.pl/rodzina/as-mm.htm](http://mateusz.pl/rodzina/as-mm.htm) [accessed 20.10.2023]; P. M. GAJDA: *Prawo małżeńskie
Kościoła katolickiego*. Tarnów 2000, pp. 199—208; E. GAJDA: *Problem dopuszczalności
małżeństwa katolika z prawosławnym w prawie kanonicznym*. Toruń 2001, pp. 29—34.

quently, how it is celebrated. A marriage between Christians of different denominations is a mixed marriage.

Marriage between two baptized persons, one of whom was baptized in the Catholic Church or received into it after baptism, and the other a member of a Church or ecclesial community not in full communion with the Catholic Church, cannot be celebrated without the express permission of the competent authority.⁶

From the point of view of the Catholic theology, a distinction should be made between a marriage of a Catholic and a person from a Church that recognizes the sacramentality of marriage and a Catholic-Protestant marriage. Also, marriages between a Catholic and an unbaptized person⁷ or a person who has been baptized but notoriously abandoned practicing their faith⁸ should be taken into consideration.

In order to enter into a mixed marriage the couple must obtain the permission of the local ordinary,⁹ who demands that the Catholic partner declare himself or herself ready to remove any danger of the loss of his or her faith and promise sincerely to do everything he or she can to ensure that their children are baptized and brought up as Catholics, and the non-Catholic partner should be informed of the obligations of the Catholic spouse. The nupturients should be instructed about the purposes and essential properties of marriage, which is particularly important when they have different understandings of the theology of marriage. Since the social contexts may be different, the conferences of bishops establish the method in which these declarations and promises must be

For information about the adaptation of canon norms applying to interfaith marriages in Poland see L. ADAMOWICZ: "Prace Konferencji Episkopatu Polski nad nową regulacją przygotowania do zawarcia małżeństwa kanonicznego (cz. II)." *Stowarzyszenie Kano-nistów Polskich* 29 (2019), no. 32, pp. 11—19. Cf. P. MAJER: "Małżeństwa mieszane. Wybrane zagadnienia z praktyki kurialnej." *Studia Oecumenica* 11 (2011), pp. 199—217.

⁶ CCL, canon 1124 § 1.

⁷ "A marriage between two persons, one of whom was baptized in the Catholic Church or received into it, and the other of whom is not baptized, is invalid. A person is not to be dispensed from this impediment unless the conditions mentioned in canons 1125 and 1126 have been fulfilled" (CCL, canon 1086 § 1—2).

⁸ "Except in a case of necessity, a person is not to assist without the permission of the local ordinary at: [...] a marriage of a person who has notoriously rejected the Catholic faith [...]. The local ordinary is not to grant permission to assist at the marriage of a person who has notoriously rejected the Catholic faith unless the norms mentioned in canon 1125 have been observed with necessary adaptation" (CCL, canon 1071).

⁹ "[...] without the express permission of the competent authority. The local ordinary can grant a permission of this kind if there is a just and reasonable cause [...]" (CCL, canon 1124—1125).

made and externally confirmed.¹⁰ The form required by law must also be observed unless a dispensation was granted by the local ordinary; in Poland such dispensation may also be given by the ordinary of the non-Catholic partner's place of residence; the form should be public.¹¹ The non-canonical forms include celebration of marriage in a non-Catholic Christian community with the participation of a non-Catholic clergyman (minister), celebration of marriage in the Registry Office or celebration of marriage in the family circle in a religious form in the presence of witnesses.¹² The solemnity of marriage and its sacramentality (for the parties recognizing it) is also confirmed by the prohibition to repeat it in the other rite.¹³

1.3. The constitutive elements of Christian marriage and their spiritual significance

The canon law identifies two essential properties of marriage: unity and indissolubility (canon 1056). It is therefore obvious to see marriage as a permanent and legal union between one woman and one man, who together form a community of life. Marriage does not have the formal aspect only, but has a deeply vital dimension, where this lasting unity and communion is built day by day. This is why John Paul II said: “they are

¹⁰ CCL, canons 1125—1127. “The Catholic party is to declare in writing that he or she is prepared to remove dangers of defecting from the faith and is to make a sincere promise to do all in his or her power so that all offspring are baptized and brought up in the Catholic Church. [...] The other party is to be informed at an appropriate time about the promises which the Catholic party is to make [...] Both parties are to be instructed about the purposes and essential properties of marriage which neither of the contracting parties is to exclude.” KONFERENCJA EPISKOPATU POLSKI: *Instrukcja Episkopatu Polski o przygotowaniu do zawarcia małżeństwa w Kościele katolickim* [Instruction of the Polish Episcopal Conference on the preparation for marriage in the Catholic Church] [further: IM], no. 82.

¹¹ IM no. 79. “A marriage between two persons, one of whom was baptized in the Catholic Church or received into it, and the other of whom is not baptized, is invalid” (CCL, canon 1086 § 1).

¹² IM no. 92—93.

¹³ CCL, canon 1128. The same applies to sanation of marriage. See CCL, canon 1160—1163, canon 1165 § 2. For information about the forms of celebration of mixed marriages, see B. TROJANOWSKI: “Sposoby zawierania małżeństw mieszanych ze szczególnym uwzględnieniem miejsca ich celebrowania.” *Świdnickie Studia Teologiczne* 17 (2020), pp. 105—117.

called to grow continually in their communion through day-to-day fidelity to their marriage promise of total mutual self-giving.”¹⁴

This unity and indissolubility are rooted in love, where the spouses enjoy equal dignity.¹⁵ This is extremely important because conjugal love implies the totality of the life together encompassing the spiritual dimension, reason, feelings, senses, will, bodily impulses and instincts. They are the basis for the personal unity¹⁶ and inviolable faithfulness.¹⁷ No one can deny these essential properties of marriage, as this would result in the nullity of the wedding vows. A thorough examination must be done of the views and motives of the prospective spouses to ensure that their motives are not contrary to the Christian model.¹⁸ Should either partner deny the indissolubility, unity or sacramentality of the marriage, the priest should refuse to assist in its celebration.¹⁹

In addition, to some Christians,²⁰ marriage is a sacrament.²¹ Protestant communities do not recognize marriage as a sacrament, but do not regard it merely as a contract; they rather live it as a sacred covenant made by God’s will between a man and a woman. This unity leads to a wider fam-

¹⁴ JOHN PAUL II: *Apostolic Exhortation “Familiaris consortio”* [further: FC], no. 19.

¹⁵ See THE SECOND VATICAN COUNCIL: *Pastoral Constitution on the Church in the Modern World “Gaudium et spes”* [further: GS], no. 49.

¹⁶ See FC 13. Unity brings the fruit of children and fosters fullness, synergism, security, support, interdependence and mutual openness. *Wprowadzenie do nauki o Biblii...*, p. 480.

¹⁷ “As a mutual gift of two persons, this intimate union and the good of the children impose total fidelity on the spouses and argue for an unbreakable oneness between them” (GS 48). A biblical example of faithfulness is “Hosea (the archetype of God), whose wife (the archetype of Israel) repeatedly betrayed him, but he not only continued to love her, but forgave her and caused her to return to him.” *Wprowadzenie do nauki o Biblii...*, p. 481.

¹⁸ “During the investigation of candidates for marriage, the priest must ascertain whether any of the fiancés denies the indissolubility of marriage, its unity [...], its sacramental dignity or orientation at the well-being of the spouses and the bearing and rearing of offspring. He should therefore make sure that the fiancés really want to enter into an indissoluble union.” KONFERENCJA EPISKOPATU POLSKI: *Dekret ogólny o przeprowadzaniu rozmów kanoniczno-duszpasterskich z narzeczonymi przed zawarciem małżeństwa kanonicznego* [General Decree on Conducting Canonical and Pastoral Dialogue with the Parties Prior to Concluding Canonical Marriage], no. 65. “Questions about the essential properties and purposes of marriage should not be omitted even if one of the partners is not a Catholic or claims to be a non-believer and his or her understanding of marriage differs significantly from the Catholic doctrine, e.g. with respect to its indissolubility.” *Ibidem*, no. 67.

¹⁹ *Ibidem*, no. 77.

²⁰ Marriage is a sacrament not only in the Roman Catholic Church, but also in the Orthodox, Oriental, Assyrian or Old Catholic Churches.

²¹ CCL, canon 1056.

ily communion encompassing children, relatives, and other persons close to the family.

It is also necessary to see the purposes of marriage. Among them are the mutual good of the spouses and the procreation and raising of offspring.²² The first good is the communion of persons, which is the foundation for life embedded in the work of creation and God's plan for man. In the deepest sense, it is the communion of love that makes it possible for marriage and the family not only to live, but also to grow and develop. Marital love is centred around an indivisible and indissoluble unity, calling the spouses to live in an ever fuller relationship and bond.²³ This is the proper context of the life and spirituality of marriage — to remain at the service of life, which includes procreation (openness to new life) and the multidirectional upbringing of children. Finally, married people and families are to participate in the development of society (forming relationships and showing social responsibility) as well as in the life and mission of the Church (as a community of faith and evangelization, community of dialogue with God through prayer and liturgical life, community at the service of man and living the commandment of love towards God, man and God's creation).²⁴

The communion (unity) of the spouses is important in carrying out these tasks. United by the Holy Spirit, Christian spouses experience their communion in the Body of Christ together. As the Orthodox Church notes, “the Eucharist leads to communion, and so does marriage. [...] It is by receiving communion together every Sunday that the married couple realizes the purpose of marriage: to enter together into the mystery of Christ, or rather — to enter into this mystery as a whole future family.”²⁵

Unsurprisingly, the separate faiths and lack of intercommunion are impediments to moving towards unity on the Eucharistic path. However, every Christian couple is called to root their bond in spiritual life. For it is the love of God the Father and His faithfulness to man as well as the love of Jesus to the Church that are the strongest foundations for the faithfulness of the spouses. This stems from the grace of the accepted gift of marriage, through which the spouses grow in mutual love and in the love of God, gradually becoming witnesses to God's faithfulness and goodness to man.

²² CCL, canon 1055 § 1.

²³ “[God] wills and He communicates the indissolubility of marriage as a fruit, a sign and a requirement of the absolutely faithful love that God has for man and that the Lord Jesus has for the Church” (FC no. 20).

²⁴ *Ibidem*, no. 28—64.

²⁵ *Bóg żywy. Katechizm Kościoła Prawosławnego. Opracowany przez zespół wiernych prawosławnych*. Trans. A. KURYŚ et al. Kraków 2001, pp. 377—378.

1.4. Facing difficulties of mixed marriages

Since the ancient times, the Church has had to deal with the question of marriages between people professing different religions. In the beginning, marriages of Christians with pagans, Jews and heretics were banned (e.g. the Synod of Elvira). The reason for such a law was the concern that Christians might lose their professed faith or adopt foreign practices. Also, potential difficulties for marital unity, resulting from the existence of vital differences, were cited. However, the validity of such unions was not denied. Nevertheless, the need to make every effort to baptize the children in the Catholic faith and bring the spouse to the faith was clearly emphasised.²⁶

The 1917 Code of Canon Law imposed an obligation on the non-Catholic partner to promise that the children would be baptized and raised Catholic and that he or she would not put the Catholic spouse in danger of losing the faith.²⁷ After Vatican II, the Catholic Church relaxed its discipline on marriages between Catholics and members of non-Catholic Churches and communities.²⁸ The instruction *Matrimonii sacramentum* removed the obligation for non-Catholics to make the promises, *motu proprio De Episcoporum muneribus* allowed for a dispensation from the canonical form, which could be granted by the Holy See, and the decree *Crescens matrimoniorum* recognized that the canonical form of marriages between Roman Catholics and the faithful of the Eastern Churches is required for liceity. The right of dispensation from the form was finally granted to local ordinaries (*motu proprio Matrimonia mixta* of 31 March 1970).²⁹

²⁶ The Council of Chalcedon put forward the following rule in Canon 14: “Since in certain provinces it is permitted to the readers and singers to marry, the holy Synod has decreed that it shall not be lawful for any of them to take a wife that is heterodox. But those who have already begotten children of such a marriage, if they have already had their children baptized among the heretics, must bring them into the communion of the Catholic Church; but if they have not had them baptized, they may not hereafter baptize them among heretics, nor give them in marriage to a heretic, or a Jew, or a heathen, unless the person marrying the orthodox child shall promise to come over to the orthodox faith.” *Dokumenty soborów powszechnych. Tekst grecki, łaciński, polski*. Vol. I. Eds. A. BARON, H. PIETRAS. Kraków 2001, p. 239.

²⁷ CCL, canon 1061 § 1, 20.

²⁸ See M. SKŁADANOWSKI: “Małżeństwa mieszane wyznaniowo — ekumeniczna szansa i życiowe problemy. Perspektywa teologiczna i duszpasterska.” *Studia nad Rodziną UKSW* 15 (2011) 1—2 (28—29), pp. 47—55.

²⁹ SACRA CONGREGATIO PRO DOCTRINA FIDEI: “Instructio de matrimoniis mixtis.” *Acta Apostolicae Sedis* 58 (1966), pp. 235—239.

The concern for faith in marriage stems from baptism and derives from God's law. Thus, preservation of one's identity and raising children in the Catholic faith are, according to the canon law, requirements of conscience, although in fulfilling them the marital unity, family communion and the religious freedom of the non-Catholic spouse must be taken into account. Therefore, the partners must be properly instructed and the priest must become certain that the non-Catholic spouse has been effectively instructed on the obligations assumed by the Catholic partner.³⁰ Should the non-Catholic spouse expressly declare that he or she is not going to respect the obligations, it is necessary to discuss the potential source of conflict over the most important values and, where the non-Catholic partner's resistance persists, the pastor should refer the matter to the local ordinary. If the danger of faith loss is real, the local ordinary cannot grant permission or dispensation.³¹ It is also necessary to mention the decision of the Polish Bishops' Conference that in the case of a marriage between a Catholic and a person who has abandoned the Catholic faith, the latter is required to not only acknowledge the obligations assumed by his or her Catholic partner, but also to make a commitment not to disturb the practice of faith by the spouse or the baptism of children in the Catholic Church.³²

Certain specific difficulties that may arise in mixed marriages must be borne in mind, such as: "different understanding of marriage, threat of being unfaithful to one's own Church and the danger of religious indifference, disturbing the practice of faith, difficulty in the religious education of offspring."³³

Indeed, the religious aspect of life cannot be underestimated. Spouses' differing views on vital issues may generate various tensions and conflicts that affect not only the two people themselves, but also their children and the wider family. So before a marriage is celebrated it is necessary to make the couple aware of the difficulties they may encounter in their family life with regard to religious practices, professed truths of faith and the different moral evaluation of certain aspects of life. During meetings with the spouses-to-be the pastor should also indicate ways of resolving the difficulties.³⁴ It might also seem valuable to bring these people in contact with another mixed marriage.

³⁰ IM no. 83—84.

³¹ IM no. 85. In exceptional cases, the local ordinary may refer the matter to the Dicastery for Divine Worship and the Discipline of the Sacraments. See *ibidem*.

³² IM no. 77.

³³ KONFERENCJA EPISKOPATU POLSKI: *Dekret ogólny...*, no. 70.

³⁴ *Ibidem*, no. 75.

1.5. Attempt at ecumenical consensus in Poland

In 2011, the Polish Bishops' Conference and the Polish Ecumenical Council approved a document on mixed marriages entitled *Christian Marriage of People of Different Denominations. Declaration of the Churches in Poland at the beginning of the Third Millennium*. This is an epoch-making text demonstrating how developed the inter-church dialogue is. It needs to be read in the context of other joint declarations, including *The Sacrament of Baptism as a Sign of Unity. Declaration of Polish Churches on the threshold of the third millennium*.³⁵ Even though the document is only a draft, as it has been waiting, since 2011, to be evaluated by the Holy See, it is a valuable material to read.

The document starts with the statement that marriage is not only a human institution, but comes from the will of God and is an image of the covenant between God and the People (the Church). Such a union can only be entered into by one man and one woman. Such marriage features unity of life lived in respect, honesty, self-giving, forgiveness, submission to Christ, multifaceted fidelity, openness to life and the pursuit of the vocation of religious education of children. The Declaration also lists aspects which are different in individual churches' teaching on marriage — for example, Catholics and Orthodox consider marriage a sacrament, while Protestants do not, but they do situate marriage in God's order of creation; churches have different criteria for validity and liceity of marriage; they respect the indissolubility of marriage but have different approach to divorce and remarriage; they also differ in their views on contraception.³⁶ This does not undermine what is shared in the Christian understanding of mixed marriage, namely that they are celebrated "in the Lord," are rooted in baptism and faith in the Triune God, ensure preserving one's own denominational identity, and are an opportunity for ecumenical rapprochement and growth in faith.³⁷

Particularly valuable are the proposals concerning equal treatment of both partners in a mixed marriage: respect for the equal dignity of conscience, for the legal requirements of corresponding churches (e.g. the church's permission, if required), the partners and then spouses having the final say on how and where they want to be married and how they

³⁵ Other joint documents include: *The Appeal of Polish Churches for the Protection of Creation* (2013), *The Churches of Poland's Appeal to Respect and Keep Sundays Holy* (2015), *Message of the Churches in Poland on Refugees* (2016).

³⁶ *Christian Marriage of People of Different Denominations. Declaration of the Churches in Poland at the beginning of the Third Millennium (Declaration)*, I—II.

³⁷ *Ibidem*, III.

want to raise their children in the Christian faith, the joint obligation of religious upbringing of the offspring (with reference to Christ being the foundation), upbringing of the children in a specific confession but with ecumenical sensitivity, and pastoral cooperation.³⁸ In keeping with these principles is the following declaration proposed to be made by the future spouses:

*I declare that I will keep my faith and acknowledge the right of my spouse to keep his/her faith. I promise to do anything I can to ensure that all our children are baptized and brought up in the faith of my Church, taking into account that my spouse has the same right and obligation in his/her Church. I will therefore seek agreement with my spouse in making choices for the good of our community and the spiritual life of our children.*³⁹

The proposed solution is a breakthrough in the attitude to interfaith marriages, because, while respecting the legal arrangements of the individual churches and communities, it leaves the spouses the right to discern and decide on the religious upbringing of the children,⁴⁰ without causing remorse or a feeling of disloyalty towards their own church. On the one hand, it frees the spouses from external legal tensions. On the other hand, it respects their freedom and ability to make the right decisions. Before such a solution is implemented it must of course be revised by canonical legislative bodies.

The Italian *Vademecum* for marriages between Catholics and Eastern Christians offers similar solutions. Even though the Catholic spouse assumes the obligation to raise the children in the Catholic faith, it is ultimately the question of the spouses' shared decision and, if the children are baptized and brought up non-Catholic, the Catholic spouse does not receive a canonical sanction for it; however, even in such a situation he or she cannot avoid sharing their faith with the children.⁴¹ Respect for the conscience of the spouses regarding the decision on the religious upbringing of the children is also emphasized in the declaration signed between the Italian Bishops Conference and the Waldensian and Methodist Churches.⁴²

³⁸ Ibidem, IV.

³⁹ Ibidem, V. 2.

⁴⁰ Non-Catholic churches see the Catholic party's commitments to raise children in the Catholic faith as a manifestation of limiting the parents' right to choose religion for their children.

⁴¹ CONFERENZA EPISCOPALE ITALIANA: *Vademecum per la pastorale delle parrocchie cattoliche verso gli orientali non cattolici*, no. 14.

⁴² "Testo comune per un indirizzo pastorale dei matrimoni tra cattolici e valdesi o metodisti." In: *Notiziario della Conferenza Episcopale Italiana a cura della Segreteria*

2. Marital spirituality and how it is experienced by mixed couples

Spirituality is an important aspect of a Christian couple's life. In mixed marriages, it is particularly demanding for the spouses and their children. Nevertheless, it is good to focus on what is shared by both denominations and to develop the spouses' Christian identity without compromising on their respective faiths.

2.1. Christian spirituality and its constitutive elements

Spirituality is "a set of attitudes with intellectual, cognitive, emotional, evaluative and behavioural references."⁴³ This means that life is concentrated around objective and subjective values, which has an impact on all the constitutive elements of human life and shapes the attitude towards the entire reality. Thus, spirituality is not the same as piety (religious acts) or any cultural activity. However, Christian spirituality is also religious and related to faith.⁴⁴

Christian spirituality is founded on the truth about the Holy Trinity and the divine and human nature of Jesus Christ. On the one hand, it is a model for every human community, especially the Church, marriage and family. On the other hand, working in the incarnational model,⁴⁵ Christian spirituality presupposes harmony between the Divine and the human, the spiritual and the material (physical), the eternal and the temporal.⁴⁶

Generale 1997 no. 5, pp. 162—163. Similar solutions were proposed in Germany. See DEUTSCHEN BISCHOFSKONFERENZ: *Mit Christus gehen — Der Einheit auf der Spur. Konfessionsverbindende Ehen und gemeinsame Teilnahme an der Eucharistie*, no. 33.

⁴³ M. CHMIELEWSKI: "Duchowość." In: *Leksykon duchowości katolickiej*. Ed. M. CHMIELEWSKI. Lublin—Kraków 2002, p. 229.

⁴⁴ Faith is "a fundamental mode of behaviour toward being, toward existence, toward one's own sector of reality, and toward reality as a whole; [...] it is man's attitude to the entire reality and is incommensurable with knowledge; it is the bestowal of meaning without which the totality of man would remain homeless, on which man's calculations and actions are based." J. RATZINGER: *Wprowadzenie w chrześcijaństwo*. Trans. Z. WŁODKOWA. Kraków 1996, pp. 42—62.

⁴⁵ See P. SAWA: "Duchowość inkarnacyjna i jej chrystopologiczne podstawy." *Śląskie Studia Historyczno-Teologiczne* 44 (2011) no. 1, pp. 109—125.

⁴⁶ "The truth is that only in the mystery of the incarnate Word does the mystery of man take on light. [...] Since human nature as He assumed it was not annulled, by that very fact it has been raised up to a divine dignity in our respect too" (GS 22).

This helps build a positive attitude to the world. Its source is grace, God's free gift of favour and self-giving projected on life as a whole.

Christian spirituality also calls for specific religious practices. These include personal prayer, participation in the life of an ecclesial community (liturgy, worship), following the church year, especially the key holy days of the Nativity and Paschal celebrations, as well as observing the specific moral system. In addition to the religious aspect, these elements arouse strong emotions rooted in one's history and upbringing.

2.2. Marital spirituality

Christian spouses live out their religious identity in marital unity. The basis is the spiritual life growing out of their baptism and the fact that they form a community of persons bound by wedding vows.

2.2.1. Spiritual life — a life of baptism and faith

Marital spirituality is based on “the shared grace, faith, hope and love and other inner gifts of the Holy Spirit.”⁴⁷ It is a baptismal spirituality, started at the moment of receiving new life and oriented at growing in grace. It is about the dwelling of God in the hearts of people living by His grace, thanks to which “the Trinity is present in the temple of marital communion. Just as God dwells in the praises of his people (cf. Ps 22:3), so he dwells deep within the marital love that gives him glory.”⁴⁸

Thus, God is the strength of the family, surpassing any difficulties that may arise. This helps people grow in holiness in their ordinary lives immersed in God and in the saving work of Christ. Such life manifests itself in the focus on the Passover of Jesus, which implies union with the Saviour's cross and His resurrection. It does not have a devotional aspect only, but assumes that a man's day-to-day life is lived with the Lord. This creates a “God-enlightened space in which to experience the hidden

⁴⁷ KONFERENCJA EPISKOPATU POLSKI: *Dekret ogólny...*, no. 71.

⁴⁸ FRANCIS: *Post-Synodal Apostolic Exhortation “Amoris laetitia”* (further: AL), no. 314.

presence of the Risen Lord.”⁴⁹ Prayer, also in popular piety, is a way to strengthen this identity.⁵⁰

2.2.2. Christocentrism and sharing of life

The entire Christian spirituality is Christocentric, as the risen Christ is at the centre of the life of the baptized. He is not any vague idea or creator of a way of life, but a real Person the encounter with whom determines everything else. This was aptly expressed by Benedict XVI when he said: “Being Christian is not the result of an ethical choice or a lofty idea, but the encounter with an event, a person, which gives life a new horizon and a decisive direction.”⁵¹

Whatever one’s vocation and state of life is, every Christian is called to develop a personal relationship with Christ and to strengthen it through a life of prayer, sacraments, and morality. A married couple should go on this journey with Jesus together, which does not exclude professing faith individually. It is in Christ that the spouses can discover the inexhaustible source of their bond, love and unity. A relationship with Jesus entails living a lifestyle where one selflessly offers oneself as a gift to others. This has to do with sharing desires, aspirations, expectations, and hopes in different areas of life. However, it is the ability to sacrifice or even give up one’s wishes, because of love, that is the most profound expression of living out divine and human (marital) love. By living in this way, we follow Christ, who gave himself for the salvation of men. This humbleness, which leads to greater love and stronger bond, demands that people respect, listen, freely communicate with and are truly open to each other and accept each other’s feelings and emotions. Love lived in this way is fruitful, not only through procreation (as not all married couples can have children), but also through encouraging people to reach out and serve others.

The life and spirituality of Christians following Jesus should have an incarnational and paschal orientation. Firstly, it should show that the spiritual and the physical, the eternal and the temporal, the divine and the human co-exist. It would therefore be wrong to undermine or eliminate any of these, also in married life. In addition, this creates space for properly

⁴⁹ JOHN PAUL II: *Post-Synodal Apostolic Exhortation “Vita consecrata”*, no. 42.

⁵⁰ AL no. 318.

⁵¹ BENEDICT XVI: *Encyclical “Deus caritas est”*, no. 1.

understood sexuality. Secondly, life should have the paschal dimension, showing that by moving from the cross to the resurrection in every aspect of existence life gains an ultimate meaning and hope, which makes it possible to bear witness to the power of the Gospel to others.

2.2.3. Exclusive and unconditional love

Inner unity and harmony (coherence) are other important aspects of Christian life. The basis is “the experience of belonging completely to another person.”⁵² Relationship with God is the source of daily life lived in this way and the spouses can be “a sign and instrument of the closeness of the Lord” to each other.⁵³ A Christian marriage should therefore place God in the centre of life. In no way does this violate the marriage bond. On the contrary, living in union with God safeguards the love of the spouses who live with inner freedom and truth.

This translates into everyday life. First of all, marriage and family are the “nearest hospital” for the family members⁵⁴; thus, they go to Church like to a “field hospital.” This ideal is being actualized by being present, offering a word of comfort, looking at and hugging, caring, supporting and admiring a loved one, and reaching out together to those in need. This can only be done if we accept the work of the Holy Spirit.⁵⁵ In this respect, Francis points to the rooting of love in the Trinity: “Social love, as a reflection of the Trinity, is what truly unifies the spiritual meaning of the family and its mission to others, for it makes present the kerygma in all its communal imperatives. The family lives its spirituality precisely by being at one and the same time a domestic church and a vital cell for transforming the world.”⁵⁶

⁵² AL no. 319.

⁵³ Ibidem.

⁵⁴ FRANCIS: *General audience* (10.06.2015).

⁵⁵ See AL no. 321—324.

⁵⁶ AL no. 324.

2.3. Mixed marriages' shared values

Despite the differences resulting from the spouses' belonging to different communities of faith, the very fact that they are both Christian is a strong foundation of their spiritual unity. The Church's long experience with and the contemporary approach to mixed marriages bring out the importance of baptismal spirituality and the focus on common sources and expressions of religious life, without abandoning the requirements of a particular faith.

2.3.1. Respect for two-confessional identities

Confessional identity is of major importance in human life. Mixed marriages are not to undermine or exaggerate the differences between their faiths or to show any signs of indifferentism. The Church of one's spouse must be respected, including through respect for the truths of faith, forms of worship, and ethical sensitivity. Therefore, an adequate catechesis of both spouses in their own and the other party's denomination is essential.⁵⁷ It may also be helpful to take part in various meetings in their respective communities. An interesting example is the retreat for mixed couples, marriages and families that were held in Łódź on 8 and 9 May 2021 and that featured conferences and celebrations with homilies by the Metropolitan Bishop of the Diocese of Łódź Grzegorz Ryś and Bishop Jerzy Samiec, head of the Evangelical Church of the Augsburg Confession in Poland. The retreat showed that people in mixed marriages need to have their choices and identity confirmed by the clergy of their respective Churches, which in a way authorises their journey together.⁵⁸ Not only do such meetings serve the purposes of religious formation, but also offer a space for encounter, exchange of spiritual gifts and mutual inspiration for Christian life.

⁵⁷ "To contribute to greater mutual understanding and harmony, each of the fiancés should endeavour to learn more about the faith of the other party and get to know the religious teachings and practices of their own Church or ecclesial community." KONFERENCJA EPISKOPATU POLSKI: *Dekret ogólny...*, no. 72.

⁵⁸ "Building a Christian identity always requires being rooted in a particular tradition, but at the same time this should be accompanied by ecumenical sensitivity" (*Declaration IV. 5*). In this context it is important to mention the support to marriages that started as mono-religious but then one of the spouses converted to another faith, which may be a source of various new tensions.

2.3.2. The Word of God

The Word of God is a foundation of spiritual life for all Christians. And even though different Churches have different views on the relationship between the Bible and Tradition, it is the Scripture that unites Christians. For the Catholic Church, the Scripture and Tradition⁵⁹ are closely connected⁶⁰ through the action of the Holy Spirit. Therefore, Catholics take the Word of God in a communal context, which is linked to the personal dimension. The Scripture should therefore be read at liturgy, which provides a light for the public and individual interpretation of the Word of God. Another essential key for Catholics is the teaching of the Church's Magisterium: "[...] in things of faith and morals, belonging to the building up of Christian doctrine, that is to be considered the true sense of Holy Scripture which has been held and is held by our Holy Mother the Church, whose place it is to judge of the true sense and interpretation of the Scriptures; and therefore that it is permitted to no one to interpret Holy Scripture against such sense or also against the unanimous agreement of the Fathers."⁶¹

However, the Bible cannot be read as a source of doctrine only. For lots of Catholics, especially evangelical-oriented ones, the Word of God speaks about the redemptive event that touches particular persons.⁶² It is important to see not only *what the Spirit is saying to the Church*, but *what God is saying to me today through that particular Word*. This opens up a space for personal sharing of faith and one's experience, without debating dogmatic differences between denominations. In mixed marriages, this is particularly important for building spiritual understanding while respecting differences in ecclesiastical interpretations of the text.

⁵⁹ Not some customs or human traditions (although they matter too), but the whole heritage of faith and its understanding, which is a gift of the Holy Spirit leading to deeper truth.

⁶⁰ "[...] there exists a close connection and communication between sacred tradition and Sacred Scripture. For both of them, flowing from the same divine wellspring, in a certain way merge into a unity and tend toward the same end." THE SECOND VATICAN COUNCIL: *Dogmatic Constitution on Divine Revelation "Dei Verbum"*, no. 9.

⁶¹ LEO XIII: *Encyclical "Providentissimus Deus"*, no. 22. "God willed that Christ form the body where his words resound as words of life; it is then in Christ, within him, in the Church that we must read and listen. So, when a believer takes the Bible, they are *a priori* put within the Church..." P. EVDOKIMOV: *Prawosławie*. Trans. J. KLINGER. Warszawa 2003, p. 200.

⁶² See L. BORIELLO, G. DELLA CROCE, B. SECONDIN: *Historia duchowości*. Tom VI: *Duchowość chrześcijańska czasów współczesnych*. Trans. M. PIERZCHAŁA. Kraków 1998, pp. 328—330.

If received personally, “here and now for me,” the Word is not only God’s personal gift to man, but it also unites the spouses who support each other in faith. It does not prevent the Catholic partner from accepting the authority of the *Magisterium Ecclesiae*, and it does not compel the non-Catholic side to recognize it. The only source of Protestant communities’ spirituality is the Bible,⁶³ so the focus on the Word of God safeguards mixed marriages from deep conflicts arising from religious differences. It is of course important that the non-Catholic spouse also respects the theology of the Catholic partner.

At home it may be practical to place the Bible in a spot visible to anyone as a sign of unity. On the one hand, this may show that the family follows a common path relying on the Word of God, shared by all Christians. On the other hand, it may be a reference to the custom of placing the Bible on the Eucharistic table or another prominent place in the churches of Protestant communities, which is also being accepted by more and more Catholic churches, as Benedict XVI asked “that the book which contains the word of God should enjoy a visible place of honour inside the Christian temple, without prejudice to the central place proper to the tabernacle.”⁶⁴

2.3.3. Prayer and religious practices

Prayer is an important pillar of Christian spirituality and a way to build a personal and communal relationship with God. Obviously, prayer life takes place in an ecclesial and denominational contexts, which makes it complicated in a mixed marriage. Nevertheless, prayer that grows out of the Holy Scripture (e.g. meditation on the Word of God, recitation of psalms and biblical hymns) and the prayer of the heart do not arouse tensions or any opposition. One may maintain his or her tradition and does not have to renounce certain religious practices (e.g. in the case of Catholics, praying the rosary or praising Virgin Mary), but the marital and

⁶³ See T. J. ZIELIŃSKI: *Protestantyzm ewangelikalny. Studium specyfiki religijnej*. Warszawa 2013, pp. 171—213. “[...] the evangelical is one who is entirely subservient to the Bible. [...] He is a man of one book; he starts with it; he submits himself to it; this is his authority.” M. LLOYD-JONES: *Kim jest ewangelikalny chrześcijanin?* Trans. J. MURANTY. Włocławek 2008, p. 40. William Chillingworth said: “The Bible, I say, the Bible only is the religion of Protestants.” Z. PASEK: *Kultura religijna protestantyzmu*. Kraków 2014, p. 31.

⁶⁴ BENEDICT XVI: *Post-Synodal Apostolic Exhortation “Verbum Domini”*, no. 68.

family prayers must have universal forms. This requires that the spouses respect their practices and customs.

The prayer life, however, is not just about praying at home, but also about living the liturgical year, in which certain days have special significance (e.g. the observance of Ash Wednesday or the celebration of Corpus Christi by Catholics, or Good Friday by Protestants). An additional difficulty for Catholic-Orthodox or Protestant-Orthodox marriages is the calendar, where, for instance, Christmas or Easter are celebrated on different dates (in the case of Christmas the gap is thirteen days). Not only the celebration itself but also preparations are a challenge, especially for partly Orthodox families, as preparations involve specific fasts.

2.3.4. A sign of the journey towards Christian unity

A mixed marriage which has an inner unity is a sign of the journey towards unity of Christians and in some sense already achieves the unity by being a “domestic church.”⁶⁵ It brings about the unity with Jesus Christ, achieved also through sacraments and living in the ecclesial community. Couples celebrating the Eucharist together and practising intercommunion (in observance of the applicable canon laws) are an even clearer sign of unity. However, if one spouse does not share the Catholic Eucharistic faith, the couple’s life centred around the Word of God and the Eucharist celebrated in the spouses’ respective Churches shows that in fact God has the primacy and that the life is centred around a Christ.

3. Particular challenges facing mixed marriages

Certain specific challenges and tensions arise where the faith meets the life of mixed marriages. These challenges include the formal side of getting married, pastoral care, the Eucharist, decisions about the sacraments of the children, piety and various moral issues.

⁶⁵ DEUTSCHEN BISCHOFSKONFERENZ: *Mit Christus gehen...*, no. 52—53.

3.1. Celebration of marriage

An interfaith couple can marry in the ordinary canonical form, after obtaining the permission of the Catholic partner's local ordinary. It must be remembered though that marriage with a member of an Eastern Church requires the presence of a presbyter or bishop (it is an obligation of the canonical norm in the Eastern rites, which is why a Catholic deacon cannot be an official witness). A dispensation from the canonical form can also be obtained.⁶⁶ Such dispensation is necessary for validity of marriages with non-Catholics, with the exception of Orthodox Christians (where the dispensation is needed for liceity and legality).

The spouses' different religions, and the consequential lack of intercommunion, create a difficulty in the celebration of the wedding itself. In the Roman Catholic Church today, the sacrament of marriage is, as a rule, celebrated during the Eucharist, and the prayers of the Mass clearly show how marital unity is connected with Holy Communion, which is the source of communion for the spouses. Therefore, mixed marriages should be celebrated outside the Eucharistic liturgy, because of the presence of non-Catholics. Nevertheless, it is possible to admit the non-Catholic party to Holy Communion, in accordance with the general principles of Eucharistic sharing — professing of the Catholic doctrine of the Blessed Sacrament and the permission of the local ordinary are necessary in such a case.⁶⁷

3.2. Pastoral care

The Church must provide pastoral care for mixed marriages and especially it should support the Catholic spouse in fulfilling their commitments and caring for unity and indissolubility of the marriage. It is therefore necessary that the leaders of the two communities work together in this regard, especially in situations of conflict.⁶⁸ The pastoral care should in the first place seek to nurture the faith and broaden the religious

⁶⁶ CCL, canon 1127 § 2.

⁶⁷ CCL, canon 884 § 4. THE PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY: *Directory for the application of principles and norms on ecumenism*, no. 159. Cf. FC 67.

⁶⁸ KONFERENCJA EPISKOPATU POLSKI: *Instrukcja Episkopatu Polski w sprawie duszpasterstwa małżeństw o różnej przynależności kościelnej* [Polish Bishops' instruction on the pastoral care of marriages of different confessions], no. 6.

knowledge (obedience to Christ, formation of conscience, clarification of religious problems). Interfaith communities where people can share their experience can also be helpful. What is more, the pastoral care should seek to strengthen morality (e.g. cherishing love, loyalty, and respect). This is of great importance especially when there are differences in teaching on specific issues. The Church should also support the spouses in celebrating festivals and emphasize the significance of common religious practices (e.g. prayer, reading the Bible, celebrating holy days). Some kind of bond with the church of the spouse is also needed. The priest is there to help understand and respect the non-Catholic community as well as participate in ecumenical services and the liturgy of the spouse's Church. Finally, a mixed marriage should receive support in the Catholic upbringing of the children.⁶⁹

3.3. Participation in the Eucharist (Lord's Supper)

The Eucharist is an important part of the spiritual life. After all “the family’s communal journey of prayer culminates by sharing together in the Eucharist, especially in the context of the Sunday rest. Jesus knocks on the door of families, to share with them the Eucharistic supper.”⁷⁰

This is very difficult for mixed marriages, or even impossible for most of them. The doctrinal differences between religions, especially in ecclesiology and sacramentology, prevent a widely practised intercommunion from the Catholic perspective. In this regard the Pontifical Council for Promoting Christian Unity reminds us: “Although the spouses in a mixed marriage share the sacraments of baptism and marriage, Eucharistic sharing can only be exceptional and in each case the norms stated above concerning the admission of a non-Catholic Christian to Eucharistic communion, as well as those concerning the participation of a Catholic in Eucharistic communion in another Church, must be observed.”⁷¹

The norms are: sharing the Catholic faith in the Eucharist and great desire to receive the Holy Communion.⁷² Given the current Church rules and the efforts to support sacramental unity between spouses, it is worth con-

⁶⁹ Ibidem, chap. V.

⁷⁰ AL 318.

⁷¹ THE PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY: *Directory for the application...*, no. 160.

⁷² CCL, canon 844 § 4; JOHN PAUL II: *Encyclical “Ecclesia de Eucharistia”*, no. 46.

sidering some practical solutions, for instance, a more widespread consent for non-Catholic spouses who do not treat Christ's presence in the Eucharist as merely spiritual or symbolic to receive Holy Communion. However, it is difficult to see an analogous movement by Catholics towards participation in the Lord's Supper celebrated in Protestant communities, given the different understandings of the ecclesial authority. This is a matter for further consideration, so that these decisions would apply to the universal Church and were consistent with the sacramental doctrine. The mere desire to receive the Holy Communion and show unity at the Lord's Table is not enough.⁷³

Thus, the pain of not being able to participate in the Eucharist together must be given a thought. It may be experienced as an exclusion in a confessional marriage, which may make the spouses feel wounded in their relationship to the Churches. Therefore, the desire for Holy Communion needs to be recognized and skilfully satisfied by discovering the signs leading up to it, such as spiritual communion or blessing.⁷⁴ Even if it is not sacramental communion, it leads to an encounter with the living Jesus and strengthens the faith of the spouses.

Putting the discussion about intercommunion aside, it may be worth to raise the question of participation in Sunday liturgy or worship, which is a challenge, especially for Catholics who are obliged to attend the Holy Mass every Sunday and on holy days of obligation.⁷⁵ A tension may appear at this point, because it is rather unreasonable to expect people to attend two services and separate attendance does not help them experience their marriage and the Christian faith together. It seems fair, therefore, to consider the suggestion that mixed marriages attend Sunday liturgy alternately in their churches or congregations. Participation in a Protes-

⁷³ In a letter sent in 2018 to Cardinal Reinhard Marx, then President of the German Bishops' Conference, Cardinal Luis F. Ladaria, Prefect of the Congregation for the Doctrine of the Faith, presented Pope Francis' assessment of the proposed wider admission of non-Catholic spouses to Catholic Communion in Germany: appreciating the multiple ecumenical efforts between the Catholic Church and Evangelical Churches in Germany, it is necessary to bear witness to faith together and be active in various areas of social life, but the question of intercommunion must be clarified at the level of the universal Church, by authorized bodies of the Holy See. In grave and urgent necessities, the decision can be taken by the diocesan bishop. See DEUTSCHEN BISCHOFSKONFERENZ: *Brief des Präfekten der Kongregation für die Glaubenslehre vom 25. Mai 2018*, <https://www.dbk.de/themen/oeкуmene> [accessed 20.10.2023].

⁷⁴ DEUTSCHEN BISCHOFSKONFERENZ: *Mit Christus gehen...*, no. 27.

⁷⁵ "On Sundays and other holy days of obligation, the faithful are obliged to participate in the Mass [...]" (CCL, canon 1247). "A person who assists at a Mass celebrated anywhere in a Catholic rite either on the feast day itself or in the evening of the preceding day satisfies the obligation of participating in the Mass" (CCL, canon 1248 § 1).

tant service or Orthodox liturgy should then be recognized by the Church legislation as fulfilling the obligation to celebrate Mass. Since receiving the Holy Communion every Sunday is not an obligation, spouses can thus be helped in their efforts to build joint integrity, without compromising on Eucharistic norms. By praying together in a church setting the spouses will undoubtedly build a deep unity between them. In view of this, it is worth rethinking a change of the canonical norm in relation to Catholics, so as to help them avoid dilemmas of conscience.

3.4. Sacraments for children

The legal and spiritual approach to the baptism of children in mixed marriages is still a challenge. Let us present the canonical aspect first. It must be remembered that when the Catholic partner requests permission from the competent ordinary for a mixed marriage he or she must make a promise to do all in his or her power to baptize the children in the Catholic Church and to raise them in the Catholic faith. The non-Catholic party should be informed of such a promise.⁷⁶ This was upheld by the 1993 Ecumenical Directory, which makes it clear, however, that the Catholic parent does not fall subject to the Church censure if a child is baptized and brought up in the community of the non-Catholic parent.⁷⁷ This is an effect of the inter-confessional dialogue and taking into account various local circumstances. It is worth remembering though that in the Middle East, for example, children are always baptized in the community of the father. Irrespective of this, it is necessary to take into account the need to take care that the child must be brought up in faith if the baptism is to bear proper fruit in his or her life.⁷⁸ For this to happen, the child must be surrounded with a consistent and faith-friendly atmosphere at home,

⁷⁶ “1/ the Catholic party is to declare that he or she is prepared to remove dangers of defecting from the faith and is to make a sincere promise to do all in his or her power so that all offspring are baptized and brought up in the Catholic Church; 2/ the other party is to be informed at an appropriate time about the promises which the Catholic party is to make, in such a way that it is certain that he or she is truly aware of the promise and obligation of the Catholic party” (CCL, canon 1125 § 1—2).

⁷⁷ “If, notwithstanding the Catholic’s best efforts, the children are not baptized and brought up in the Catholic Church, the Catholic parent does not fall subject to the censure of Canon Law.” THE PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY: *Directory for the application...*, no. 151.

⁷⁸ Cf. THE SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH: *Instruction on infant baptism “Pastoralis actio”*, no. 30.

which can be created if the parent professing a different religion respects the religious identity of the children.

3.5. Denominational religious practices

Spirituality manifests itself also in rituals and draws strength from the experience of the Church, so being faithful to one's own Church cannot be underestimated. With all the existing theological, devotional, liturgical, calendar and other differences, it is by no way easy to keep one's identity and at the same time bring about unity in the marriage. Unfortunately, with such tensions in hand, it may happen that the spouses distance themselves from religion, diminish the value of the other party's faith or engage in covert proselytism. There is also the danger of religious indifferentism or syncretism.⁷⁹ Adequate information on that needs to be provided to the couple before the wedding and the spouses should be offered opportunities to form their spiritual life together.

3.6. Approach to morality

Morality is an important element of spirituality. It applies to everyday life issues (such as acting honestly, building relationships, communicating), but also to special questions, for example in the sphere of ethics of sex (e.g. contraception) or bioethics (e.g. in case of in vitro fertilization).⁸⁰

⁷⁹ Cf. A. MOROZ: "Małżeństwa mieszane wyznaniowo — w stronę sekularyzacji czy akulturacji?" *Studia Społeczne* 24 (2014), pp. 31—47.

⁸⁰ The Catholic Church opposes in vitro fertilisation (IVF). Non-Catholic Churches and communities have their own interpretation of the morality of such practices. For example, the Evangelical Church of the Augsburg Confession in Poland allows IVF within marriage. See *Oświadczenie Kościoła Ewangelicko-Augsburskiego w RP w sprawie dopuszczalności stosowania metody in vitro*, https://old2020.luteranie.pl/o_kosciele/oswiadczenia_kosciola/w_sprawie_dopuszczalnosci_stosowania_metody_in_vitro.html [accessed 12.10.2023]. The Orthodox Churches are not radically against IVF, but have their concerns, especially with respect to the question of God's design for childlessness and IVF. Basically, the Orthodox Church does not recommend in vitro fertilization, but it does not sanction its use either. See THE HOLY SYNOD OF THE CHURCH OF GREECE, BIOETHICS COMMITTEE: *Basis Position of the Assisted Reproduction*, http://www.bioethics.org.gr/en/10_frame_5.html [accessed 12.10.2023]; THE HOLY SYNOD OF ORTHODOX CHURCH

One must have proper knowledge of his or her Church's teaching on the various moral norms, but at the same time they need to know the theological and moral stance of the spouse's Church. All of this must be done with mutual respect and remaining faithful to one's conscience. This sensitive area is particularly delicate because it has to do with deeply personal and intimate matters. It is therefore important for spouses to live spiritual life and be open to the Holy Spirit, so that the differences that may arise do not destroy their marital unity.

Conclusions

- a) In their daily lives mixed marriages may face plenty of difficulties and tensions arising between their respective religions and the marital communion. The lack of full unity between churches affects the relation between the spouses, not only with respect to their religions but in other areas too.
- b) Experience shows that mixed marriages are prone to conflict or religious relativism. A proper balance must be found between remaining faithful to the obligations arising from church membership and respecting the spouse's and the children's faith. Appropriate catechesis for people planning to get married is important then.
- c) Care for the spiritual life is a fundamental thing. It involves the duty to defend and guard the faith in the spouses and children. A focus on what is shared by Christian denominations and a responsible and constructive approach to doctrinal and ritual differences are key. There is a need for a more developed and concrete pastoral care of such marriages and families.
- d) Spouses must be offered formation of the conscience and assistance in making key religious decisions for themselves and their children. Some revision of the canon law seems necessary, especially with regard to decisions about the religion of children and the forms of fulfilment of the duty to participate in the liturgy on Sundays and holy days of obligation.

IN AMERICA: *Synodal Affirmations on Marriage, Family, Sexuality, and the Sanctity of Life*, <https://www.oca.org/holy-synod/statements/holy-synod/synodal-affirmations-on-marriage-family-sexuality-and-the-sanctity-of-life#Procreation> [accessed 12.10.2023].

- e) In-depth reflection and consultation on intercommunion is also needed. The lack of unity in the reception of Holy Communion affects mixed marriages. On the other hand, the Catholic understanding of the Eucharist cannot be undermined in any way.

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PRZEMYSŁAW SAWA

Matrimonia mixta — doctrine, droit et spiritualité
Réalité et défis

Résumé

L'appartenance religieuse différente des conjoints constitue un défi pour leur vie et la construction d'une famille stable. Réfléchir sur la réalité des mariages mixtes aide à guider un accompagnement pastoral approprié. Cet article présente la spécificité des mariages mixtes en matière de spiritualité, en se basant sur la doctrine, le droit et la pratique pastorale existants. Il aborde les valeurs communes et les expressions de la spiritualité chrétienne, ainsi que celles qui peuvent générer des tensions voire des crises. Cette réflexion ne se limite pas à la description du droit en vigueur et de la pastorale, mais propose des solutions plus claires, tant sur le plan pastoral que canonique.

Mots-clés: mariages mixtes, œcuménisme, intercommunion, éducation des enfants, spiritualité conjugale

PRZEMYSŁAW SAWA

Matrimonia mixta — dottrina, diritto e spiritualità
Realtà e sfide

Sommarìo

La diversa appartenenza confessionale dei coniugi rappresenta una sfida per la loro vita e per la costruzione di una famiglia stabile. La riflessione sulla realtà dei matrimoni misti offre un aiuto per intraprendere una corretta pastorale nei loro confronti. L'articolo presentato mostra la specificità dei matrimoni misti in ambito spirituale, basandosi sulla dottrina, sul diritto e sulla pratica pastorale fino ad oggi. Sono stati discussi i valori comuni e le manifestazioni della spiritualità cristiana, nonché quelli che possono causare tensioni e persino crisi. La riflessione non si limita a riferire il diritto vigente e la pastorale, ma suggerisce proposte di soluzioni più chiare, sia nel ambito pastorale che canonico.

Parole chiave: matrimoni misti, ecumenismo, intercomunione, educazione dei figli, spiritualità matrimoniale

Part Two

Reviews



Jakub KŘÍŽ: *Nepatřičné právo*
Příspěvky ke studiu nespravedlivých zákonů
[Inappropriate Law:
Contributions to the Study of Unjust Laws]
Prague: Leges, 2022

Under socialism, Czechoslovak jurisprudence was dominated by a political ideology of Marxism—Leninism, which was in particular reflected in the way it was taught at the time at universities, namely as the Theory of State and Law. The very name of the subject implies that, according to the ideologues of Marxism—Leninism, only the state can be the creator and guarantor of law. Philosophy of law was completely abolished and only the History of Political and Legal Doctrines was taught as a diachronic overview of important legal thinkers. After the year 1989, teachers of state and legal theory turned to a sociological conception of law, most notably Viktor Knapp in his book *Teorie práva* (Theory of Law; 1995). Pavel Holländer (2006), in turn, explicitly called his scholarly work “philosophy of law.” Therefore, it would be useful to look for other authors who would deal with the subtopics of legal philosophy in greater depth.

One such author is undoubtedly Jakub Kříž, who in his book *Nepatřičné právo...* (Inappropriate Law...) provides the reader with an insight into the complex issue of natural law. The title of the book sounds somewhat ironic, but it is in fact a reference to the well-known Radbruch formula (1946), according to which a codification of manifest injustice cannot be accepted as law. On the one hand, the author offers his reflections to readers with the view that they “open a door to a world of which law gradu-

ates are usually not very aware, even though their entire area of expertise is based on it” (p. 12). On the other hand, the author is aware that much has been written on the subject of inappropriate law albeit mainly abroad, and so he selects an Australian legal philosopher John Finnis and Robert Alexy, a German jurist, from the plethora of available literature. However, an examination of the literature used reveals that his scope of interest, while centred on these authors, is by no means exhaustive. For example, the ancient Greek philosophers, Plato and Aristotle, and many modern authors are also referred to and discussed.

The interpretive method and the overall approach to interpretation adopted by Jakub Kříž testify above all to the author’s affinity with the Thomistic way of thinking and reasoning, which enables him to grasp the material in a transparent and discursive form. In doing so, he also uses pedagogically attractive simile: “We find real necessity in a world of facticity dominated by the principle of causality. If an apple is separated from a tree branch, it cannot but fall to the ground. However, if a man is compelled by certain rules to do something, he may defy them, and act in accordance with his will” (p. 14). The author acknowledges that the thinking based on a just, “divine” law, which came from the Stoics, especially Cicero, and was “sanctified” in Thomas Aquinas’ *Summa Theologica*, was abandoned under the influence of the modern turn. However, in the various modern forms of natural-law thought, the theme of higher justice keeps returning, as can be seen in the example of Alexy, who “under the influence of the Radbruch’s formula, strips extremely unjust norms of their legal validity, thus reviving the classical natural-law maxim *lex iniusta non est lex*” (p. 20).

It is clear that Thomas Aquinas’ legal thought is rather rejected today because of its being rooted in theology (p. 22). Thus, natural law thinking is only accepted if it avoids ontological, metaphysical claims or the thesis of the existence of God (p. 28). A general part of Catholic moral theology is close to the account of basic human goods developed by neoclassical natural-law theory (pp. 31—35). The highest of the seven goods is life, but “peace in relation to God, the gods, or some non-theistic but super-human source of meaning and value” comes last. The first principle of practical reasonableness in human action was not discovered until the neoclassical natural law school; it had already been formulated by Thomas Aquinas as the requirement that “good is to be done and striven for, and evil is to be avoided.” There has also been a rediscovery of Aquinas’ notion “that it is in practice unreasonable (and therefore wrong) to choose an action which one finds in one’s deepest nature to be unreasonable, or not to choose an action which one’s judgment of reason says one ought to choose, no matter how mistaken one’s judgment of conscience may be.

This principle thus includes the obligation to follow an erroneous conscience” (pp. 42—43).

Another major difference with Marxism—Leninism and other statist theories of law is the separation of law from the necessary connection with state power, understood as the guarantor of the legal norm, which is absent in the moral norm: “Law would be necessary even in a society of angels or completely law-abiding people, precisely because of its coordinating function. Even in an ideal society, which would do without a system of sanctions because all its members would fully obey the law, it would be necessary, for example, to lay down rules of the road” (p. 45). Law does not primarily enforce people’s actions, but enables individuals to realise important human goods that would either not be realisable at all or would be very difficult and only partially realised without law.

In some cases, it is very clear that the positive legal norm has an obvious natural law inspiration. The prohibition of rape is such an example (pp. 49—50). In most other cases, however, one must resort to a process that Thomas Aquinas calls *determinatio* — “a kind of specification of general things” (p. 51). Thus, according to Aquinas, the legislator’s activity resembles that of the architect. However, while the examples of the architect or the rules of the road are recurrent in the literature, the author has recently found an interesting example of this *determinatio*, namely the implementation of European directives setting only general objectives and presupposing the use of diverse means of national law (p. 51, footnote 180). However, legislators may also seek to make legislation as detailed and as specific as possible, leading to a “legislative whirlwind” or “normative dash” based on the idea that every social problem can be solved by enacting legislation (p. 53, footnote 189).

The author proves that the notion of an unjust law as no law at all (*lex iniusta non est lex*) is incompatible with legal positivism. Unjust rules are rules that are directed against or in favour of certain groups, rules established in contravention of the prerogatives of an authority (*ultra vires*), rules contrary to the *rule of law* or denying a fundamental human right (p. 60). If compliance with the law is considered a moral obligation, then there is a perceptible conflict, for example, with a judge or official who is supposed to apply a law that he or she is convinced is unjust (p. 64).

The author deals with law and religion and it is not surprising that the book contains an example from this field, which the author wants to use to indicate the difference in the exercising of religious freedom as a collective right: “For example, the USA and the Czech Republic share the concept of the right of a community of persons of the same religious faith to an autonomous legal existence. In the Czech Republic, it is speci-

fied in such a way that these communities of believers can acquire legal personality in the form of a legal entity referred to as a church or religious society. In contrast, in the legal system of most US states, no specific legal form is reserved for churches, and communities of believers thus exercise their right to autonomous legal existence through general legal forms such as single-member corporations, religious trusts, or membership corporations” (p. 78). As an example of an extremely unjust law, the book cites one of the Nazi anti-Jewish measures, namely the deprivation of German citizenship of Jews (p. 89) and, in connection with this, the 1968 ruling of the Federal Constitutional Court in the case of the citizenship of a Jewish lawyer. Here the Court applied Radbruch’s formula of the intolerable degree of conflict between law and justice (p. 94).

According to the author, the root of the *ius naturale* controversy is the question of knowledge, that is, to what extent man is able to merge reality with reason and to what extent people can reach a common consensus on the basis of knowledge. Practice requires the establishment of rules and order, so that if there is no consensus, the right of the stronger will be realized: “The negative solution of the noetic problem plunges man into a random world and a society without order. A world of the stronger and a world of sentiment. Noetic scepticism renders rational considerations about the natural structure of human society untenable” (p. 119). The noetic theme is then followed by the anthropological theme: “Without an appreciation of the notion of the person, human dignity, and freedom, considerations of natural law are useless. The negation of human freedom denies the possibility of rationally motivated action, and thus ultimately renders impossible the existence of natural law, morality, and ethical evaluation of human actions” (pp. 121–122). In these concluding remarks, the author’s Thomism-rooted thinking again comes to the surface, which, moreover, corresponds to the principles that guide the teaching office of the Catholic Church in assessing the moral conduct of man.

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Róbert GYURI: *Zákon o slobode náboženskej viery
a postavení cirkví a náboženských spoločností*
Komentár
[Act on Freedom of Religious Belief and the Status
of Churches and Religious Societies:
Commentary]
Bratislava: Wolter Kluwer SR, 2021

The issues of religious freedom and specifically the constitutional and administrative legal status of churches and religious societies are not often dealt with in Slovak literature and legal science — an exception is the specialised Institute for Legal Issues of Religious Freedom, which has the status of a department at the Faculty of Law of the University of Trnava. Although the author of the reviewed publication teaches at the Department of Public Law at the Faculty of Public Administration of the University of Pavol Jozef Šafárik in Košice, he is one of the permanent collaborators of the above-mentioned specialised institute in Trnava.

His detailed commentary on the Act on Freedom of Religious Belief and the Status of Churches and Religious Societies (Act No. 308/1991 Coll., as amended) fills a significant gap, as until now there has been no comprehensive work dealing with the entire Act, which is the basic special legal regulation of Slovak confessional law — the previous expert publications dealt either with the history of the entire commented Act or with partial areas regulated by it. To understand the commented law, however, it is necessary to take into account that it was adopted at the time of the Czechoslovak federation (which broke up into two separate states,

the Slovak Republic and the Czech Republic, on 1 January 1993) and was based on the Czechoslovak human rights law — the Charter of Fundamental Rights and Freedoms No. 23/1991 Coll., which was incorporated in both successor states of Czechoslovakia as part of their constitutional legal order, but with the difference that the Constitution of the Czech Republic does not contain human rights provisions and refers to this Charter, while the Constitution of the Slovak Republic contains human rights provisions. Therefore, the author refers not only to the aforementioned Charter, but also to the Constitution of the Slovak Republic. These human rights provisions are based on a number of multilateral international treaties and agreements.

Taking into account this common basis from the time of the Czechoslovak federation, it also follows that the author, in addition to the Slovak literature and case law of Slovak courts, also makes extensive use of Czech professional literature and case law of Czech courts, especially of the Supreme Court, the Supreme Administrative Court and the Constitutional Court; in addition, in many cases he refers to the case law of the European Court of Human Rights and foreign courts (especially the Federal Constitutional Court [German *Bundesverfassungsgericht*]).

In addition to these sources, the author often considers the legal regulations in many related provisions of the Slovak legal system, with an emphasis on linking the relevant provisions and reflecting practical problems that have already arisen or may arise in the application of individual legal provisions in practice.

Concordat agreements concluded by the Slovak Republic are also an important source of Slovak confessional law: The Fundamental Agreement of 2000, the Agreement on the Spiritual Service to the Faithful in the Armed Forces and Armed Corps of the Slovak Republic of 2002, and the Agreement on Catholic Education and Training of 2004, as well as very similar national agreements concluded with 11 other churches and religious societies: the Agreement between the Slovak Republic and Registered Churches and Religious Societies of 2002 (counterpart of the basic agreement with the Holy See), the Treaty between the Slovak Republic and Registered Churches and Religious Societies on Religious Education and Training of 2004 and the Treaty between the Slovak Republic and Registered Churches and Religious Societies on the Exercise of Pastoral Service to their Believers in the Armed Forces and Armed Corps of the Slovak Republic of 2005, which are concluded on the basis of the first amendment of the commented upon Act of 2000 (the possibility of concluding such national agreements and treaties is absent from the Czech Constitution).

The publication contains an extensive commentary on individual provisions of the law commented upon in the procedure of its structure, namely, in the following topics:

- general provisions (individual religious freedom and its manifestations, the practice of religion, the celebration of holidays and Sundays, religious education of children);
- churches and religious societies (their descriptive definition, their autonomy, collective or corporate religious freedom, persons exercising clerical activities and respect for their right to confidentiality as well as the right to enter public service facilities);
- registration of churches and religious societies (registering authority — Ministry of Culture of the Slovak Republic, preparatory body of a church and religious society for its registration, required number of members, form of the proposal for registration, basic document of a church and religious society, review of the proposal for registration, changes of registered data, registration of church legal entities, cancellation of registration of a church and religious society, subsidiary application of the Administrative Code);
- the final provisions (the reconstitution of the legally operating churches and religious societies listed in the Annex to this Act, transitional provisions, repeal provisions).

From the point of view of ecumenism and interreligious dialogue, the emphasis on the parity of all registered churches and religious societies is important, as all have the same legal possibilities, especially in the aspect of their activities in the public sphere. However, it is true that the real possibilities and the actual implementation strongly depend on the number of believers and the focus of the individual churches and religious societies.

From the same point of view, the issue of registration of churches and religious societies, that is, the establishment of conditions for registration, is even more important. Very briefly, the negative criteria are listed in § 15: whether the establishment and activities are not contrary to the legal order of the Slovak Republic, to the protection of the safety of citizens and public order, health and morals, or whether they do not infringe upon the rights of other legal persons and citizens. Positive requirements are contained in Section 12, among which the requirement (specifically mentioned in Section 11) for the number of signatures of their members of full legal age holding citizenship of the Slovak Republic and permanent residence in the territory of the Slovak Republic stands out — this number has varied throughout history. Initially, 20,000 signatures of persons supporting the application for registration (not necessarily members) were required, changed by the 2007 amendment to a requirement

of 20,000 members, finally increased by another amendment in 2017 to a requirement of 50,000 members. This requirement is factually and legally questionable. On the factual side, it is true that, according to the results of the 2021 census (the informative value of which is questionable both because of the factuality of the answer to the religious affiliation question and the highly subjective nature of the answer to it), of the 18 churches and religious societies registered to date, the requirement of 50,000 members (without the possibility of ascertaining whether they are adults and citizens of the Slovak Republic with permanent residence on its territory or not) is fulfilled by only 5 Christian churches, and above all, that this requirement effectively excludes the registration of another church and religious society. (For comparison: in the Czech Republic, not only is the minimum condition far fewer for 300 adults, but in addition to citizens of the Czech Republic, it can also include foreigners with permanent residence in the Czech Republic; in the Russian Federation and Hungary, 10 persons, in Poland, 100 persons.) From a legal point of view, it is therefore a serious question whether such a high requirement is adequate (from the viewpoint of the principle of proportionality) and whether it is unfairly discriminatory or even unconstitutional. Such a high number has therefore been heavily criticised not only by the professional community, both domestic and foreign, but has also been the subject of judicial examination. In 2008, the General Prosecutor's Office of the Slovak Republic filed an opinion in which it questioned the constitutional conformity of the required minimum membership (then 20,000 persons) and filed a petition for a declaration of its unconstitutionality by the Constitutional Court of the Slovak Republic. The ruling of the Constitutional Court, rendered by its plenary session on 3 February 2010, did not grant the motion of the General Prosecutor's Office on the grounds, *inter alia*, that religious groups may exercise religious freedom individually without restriction and collectively in the form of a civil association. The dissenting opinion was joined by Judge of the Constitutional Court Lajos Mészáros, who, on the contrary, agreed with the reasoning of the General Prosecutor's Office and argued that the Constitutional Court's ruling lacked a proper distinction between individual and corporate religious freedom. For my part, it should be noted that religious communities in the form of a civil association do not enjoy the specific rights granted to registered churches and religious societies, particularly in the area of marriage, participation in public institutions and fiscal concessions. The author himself does not hide his reservations about the Constitutional Court's opinion in his very extensive commentary on the minimum membership requirement (on Section 11) spanning 33 pages.

It is evident that the current wording of the Act on Freedom of Religious Belief and the Status of Churches and Religious Societies, in force in the Slovak Republic, is evaluated by the author of the commentary mostly positively, albeit with some reservations, which shows that the legal regulation is always part of the way of searching for the correct and adequate regulation of relations between the state and churches. It is certainly a publication worthy of attention from the point of view of both legal scholarship and legal practice.

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Tomasz P. TERLIKOWSKI:
Rozdzieleni bracia
Szeptyccy, historia Polski i Ukrainy
[Separated Brothers:
The Szeptyckis, history of Poland and Ukraine]
Wydawnictwo WAM, Kraków: 2023

The reviewed book by Tomasz P. Terlikowski presents the fate of the family of Jan Kanty Szeptycki and Zofia Szeptycka (née Fredro), and their sons, at the turn of the 19th and 20th centuries. The author attempts to show the history of Poland and Ukraine as illustrated by the example of the Szeptycki family, which he underscores in the subtitle, but fails to do so, instead giving only a minor contribution to the general attempt to understand the relations prevailing in various borderland families. According to Terlikowski, the personal religious and, by extension, national choices of individual members of the Szeptycki family had an impact on the formation of the national identity of Poland and Ukraine.

The ambitious goal of bringing the reader closer to an understanding of the intricate relations in the southeastern territories of the former Republic of Poland, and in the times described in the first part of the book, located within the borders of the partition belonging to the Austro-Hungarian Empire, has not been fully achieved. On the one hand, the subject matter taken up may arouse the interest of a reader seeking answers to a very current, including from today's perspective, topic concerning Polish–Ukrainian relations. On the other hand, there are concerns about the proper interpretation and reporting of historical events.

Both the book's main title, *Rozdzieleni bracia* (Separated Brothers), and the photographs included on the cover, featuring only two brothers, suggest that the reference point for the undertaken considerations will be the division, at least along the ideological lines, between the two brothers, Roman and Stanisław. However, this division is difficult to find in the content of the book, in fact quite the contrary, according to the version presented by the author, there was full harmony in the family. Therefore, what kind of separation does the author suggest? After World War I, all the brothers Szeptycki were citizens of the Republic of Poland, serving it only in different capacities. Stanisław, in the Polish army, Roman (Andrzej, the name adopted after joining an order) and Kazimierz (Klemens, his monastic name) dedicated their lives to serving God. Yet other brothers, Leon and Aleksander, oversaw their businesses in their land estates.

Speaking more broadly, in reference to the Szeptyckis' history it can be said that this borderland family has always served God and the cause of the people, or more so, the social group it represented. At the end of the 19th century and the beginning of the 20th, when the national consciousness of the broad masses was being formed, it was not only the Szeptycki family that sought its identification, but also many other borderland families, among whom there occurred divisions. Whether these were divisions based on ancestry or just place of residence among the local population, it is difficult to say unequivocally today.

The author of the biography of the Szeptycki family, Tomasz P. Terlikowski, has described the changing fortunes of this family in order to pinpoint the sources of the decisions made by its members. The study is based on numerous archival sources, academic and popularizing works, which should imply reliable analysis of the presented family and its achievements, but leaves some doubts arising from the lack of a deeper analysis of the prevailing religious and socio-political situation at the time, especially in this part of Europe.

From the very beginning, we are confronted with a comprehensive narrative dedicated to the children of Jan Kanty and Zofia Szeptycki. This is especially true of their son Roman (later Archbishop Metropolitan Andrey). Perhaps this is due to the rich literature on him, or perhaps it is all about the process of "Ukrainianization" of the Archbishop, which becomes intriguing when considered during the period of rebuilding Polish-Ukrainian relations, especially after the outbreak of the Russian-Ukrainian war in 2014 and the full-scale war waged by Russia since February 2022. It is also unclear whether the information on the Latin Church reflects the author's personal relationship to God and the Church, or is a desire to show Archbishop Andrey in a positive light. This also

applies to the second of the brothers, Kazimierz (brother Klemens). The advanced thesis of the Polish origin of the Szeptycki family seems to be not quite correct, since it is a typical Ruthenian family, and only through its family connections, it began to strengthen its ties with Polishness. The brothers' mother, Zofia, was the daughter of Aleksander Fredro and "was, by culture, upbringing and identity, Polish" (p. 31). Therefore, did the author overemphasize the ties of the two brothers to the Ukraine, or was it just a matter of showing their return to their roots? There is no doubt, however, that the Szeptycki family connection to the Roman Church was very close, and this very fact made not the Eastern Orthodox Church, but the Greek Catholic Church the reference point for finding an identity, no longer Ruthenian, but Ukrainian.

What the book lacks is a presentation, at least in a brief way, of the outline of the history of the Greek Catholic Church with its differentiation within the Eastern Churches and its duties in the community of the Church subordinate to the Pope. Unfortunately, a reader who lacks the prerequisite knowledge may not understand why Kazimierz Szeptycki traveled to Western Europe to study theology. Understanding the roots of the Greek Catholic Church will highlight the differences between Greek Catholics in the Russian and Austro-Hungarian partitions. Also, Roman Szeptycki's decision to enroll at secular studies at the German University of Breslau in the mid-1880s may have fueled his later pro-Germany stance during World War II.

A discerning reader might expect the author to explain the various connections that emerged and the choices that resulted from them in the future, especially since the minds of the young member of the Szeptycki family must have been formed somewhere, including outside the family. It is a pity that we do not find this information in the book. Nevertheless, Terlikowski remains faithful to the understanding of reality within the framework he adopted. He accepts as essential and a matter of certainty the existence of a close connection between the Szeptycki family and the papacy, and at the same time shows the profound development of the religious life of two of the brothers, oriented towards the communities of the Eastern Catholic Churches. For a better understanding of the discussed issues the considerations presented in the book are based on rich sources, however, they do not contain all the information that could confirm the political, social and religious attitude of Archbishop Andrey in particular. Unfortunately, the author does not quite succeed in presenting the intricacies of Metropolitan Andrey's life and spiritual development, linked to the construction of the religious life of the Greek Catholic Church and the Ukrainian national identity in an approachable way.

Throughout the monograph, attention should be given to the author's theses and conclusions. Admittedly, it is necessary to emphasize the cross-sectional nature of the study, and the interesting assumptions made, which direct not only the issue of the Szeptycki family itself towards religion, but also the Latin and Greek Catholic Church. This move toward practical solutions taken in the successive stages of the Szeptycki family's life is shown in ten chapters relating to: the origins of the family; its uprooting from the original rite; the preparation for the various career paths of Jan Kanty's sons; the climb to the top of social and professional development; the changes in the attitudes of individual brothers; the collapse of the world in which the family's father, Jan Kanty, lived and in which he built his position; the building of a new reality in connection with World War I and the disintegration of the previous world order; the maintenance of brotherly ties despite the increasing differences in the brothers' socio-political views; the attempt to build a new reality, and the crumbling and ruin of the previous world and previously existing opportunities.

Delving into the content of the book, the reader becomes familiar with the author's assumptions signaled by its title. The very topic is still relevant today, and at least to some extent brings the complexities of the brothers Szeptycki's thinking in a context related to the life of the Church and their own choices, by showing the differences that can divide the Polish and Ukrainian peoples. From this perspective, the author undertakes an analysis of the successive stages of the brothers' lives, pointing out the construction of national identity and thus emphasizing that it is not something added to the Church community, but is its integral and inviolable element. The reader can see both the phenomenon of faith beyond the effects of purely liturgical activity, but it also makes it possible to see in the Church a community in which national identity is a space for the development of the gifts that constitute its unity and contribute to the development of the Church community. Even when describing the period before and during World War II, Terlikowski remains true to his premise of presenting each of the characters described in a positive light. He does not show more extensively the entire social and political background, so that the reasons for the ideological and political choices made do not always remain clear, and this can cast a shadow over seemingly morally upright characters. After all, it was the attitude of the Archbishop Metropolitan of Lviv Andrey during World War II that had the effect of halting his beatification process.

Tomasz Terlikowski's monograph fits in the current situation regarding the problems of Ukrainian Christians, related to the recognition of the Eastern Orthodox Church as the dominant religion and the place and

role of the Greek Catholic Church in Ukraine. What remains is to hope that religion and a sense of national identity will not only move toward Christian unity, but will also enable dialogue between nations, especially the neighboring ones.

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