

Tomasz Gałkowski

The Matrimonial Covenant as the Nature of Things (of Marriage)

Ecumeny and Law 1, 79-92

2013

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

TOMASZ GAŁKOWSKI

Cardinal Stefan Wyszyński University in Warsaw, Poland

The Matrimonial Covenant as the Nature of Things (of Marriage)

Keywords: nature of things, marriage, matrimonial covenant

Legal regulations concerning matrimony, both public ones and the ones within religious associations, belong to — as it was written by G. Radbruch — the situations in which, as in no other regulations, a materialistic definition of an idea and its dependence on legal reality emerges in a spectacular way.¹ This situation is caused by the fact that in marriage the birthrights and social rights, which are governed by their own, peculiar rules, clash. The law, not being able to control them, enters into an unceasing conflict with them.² For a long time legislators have been facing the necessity and possibility of spreading law regulations over a community of two people called marriage, which is ordered to procreation and upbringing of offsprings. Legal activity on this subject has to stand up to the natural conditions (the nature of things) of two people who form a community of life, which is always influenced by particular social and cultural factors. Social connections contribute to the determination of legislation, and simultaneously affect the legal structure of marriage, which largely strays from the natural foundations.³

¹ Cf. G. RADBRUCH: *Filozofia prawa*. Warszawa 2009, p. 158

² Cf. *Ibidem*.

³ For example, public law treats differently biologically the same relationship of a man and a woman — once as a matrimony and another time as an informal relationship (cohabitation). Moreover, differences concern the regulation of parental attitude that is shaped towards children born in marriage and illegitimate ones. An example of an increasing interference of regulations are those which are formed under the influence of spreading gender and queer theories.

Also the regulations in the Code of Canon Law of the Latin Church concerning matrimonial law several times refer to nature although they do not invoke the natural law distinctly. These code canons will constitute the point of reference for the following elaboration, whose aim is to point out the components, which might prove to be useful in the ecumenical dialogue.

1. Social Circumstances and Matrimonial Law

Changes occurring in the social structure contributed to the development of new regulations. These changes are observed in the transition from an organic family community to the community whose members start to lead more and more individualized lifestyle, which at the same time causes the loss of the community's original character. This phenomenon followed the rise of capitalist structures, in which the new reality made members of the family community engage in activities outside the family, which caused the state community develop, yet at the expense of the family one. The family ceased to be, as it had been before, an independent economic household and self-sufficient consumer environment. New structures emerged (services and work places, new housing estates and thus new relations going considerably beyond the family itself) connected with economic commitment of family members (gainful employment). The family was no longer organic and self-reliant. Its new model was formed, in which family relationships and bonds assumed the character of relations between particular family members. The previous economic functions of the family were taken over by the omnipresent economy. The consequence of this state of affairs was the elimination of former stabilizing foundations of the family community and the development of new, either women's or later youth's emancipation movements. Stabilizing family bonds focused on the collectiveness of aims of family life began to yield to a new family structure based on personal, psychological or philosophical ties. On account of the fact that these bonds were dominated by the principle of partnership, family and matrimony, which developed, were based on more and more rare relationships and connections, losing their public character in favour of private structure. The aftermath of this state of affairs is the fact that public institutions show less and less interest in the stability and continuance of marriage, since the effects of the activity outside marriage do not affect the very existence and functioning of a family as significantly as before. Scarce public interest in marriage and its insufficient social protection considerably contributed to its lesser stability and permanence.

Multifaceted and increasingly intricate development of conjugal and family life makes legislators lose control over them. Furthermore, law-makers are forced to deal with matrimony from many different points of view (as a moral and economic community, as an educational authority or a subject of social and population policy, as a secular, state and religious institution, but, on the other hand, also as a fundamental social, cultural and economic unit), the consequence of which is a hugely diverse way of its regulation. However, the multifaceted character of conjugal life forces such regulations, which will be capable of harmonizing its particular aspects.⁴ Here appears a discord between the idea mentioned in the beginning and legal reality which has to take into account a certain average resulting from separate, individual cases, thus harmonizing the possibility of social coexistence of all the people who make up the conjugal and family community. This situation was highlighted as early as before the Second World War by G. Radbruch, who already noticed that contemporary matrimonial law was affected by crisis. It stemmed from the fact that the legal form of marriage, which was far from ideal, often made life difficult for the spouses. The ideal of marriage based on the eternal bond coming from erotic experience could not always translate into reality if it was not supported by strong family and parental interest. Thus, the range of tools enabling dissolving of a marriage (disintegration of conjugal life, temporary marriage, trial marriage) was widened.⁵

The fact that the Church of Christ came into being in the worldly order brought about the necessity of confronting community bonds existing in it and resulting from Christ's will with the law of public communities, in which the Church was developing. It adopted and accepted as its own the norms from the Roman law as long as they did not contradict the teachings of Church about matrimony.⁶ A constant and unchanging component of Christian teaching about marriage was the principle of unity and indissolubility of marriage, to which Church law was subordinated. In Christian Europe the teaching of Church about matrimony constituted the only and indisputable source of regulations both at Church and public forum.⁷ A uniform legal order on the issue of matrimony collapsed as a result of the Reformation and the above mentioned social changes aiming at the capitalist order. Contrary to Church matrimonial

⁴ Cf. A. SKOWRONEK: *Sakramenty wiary. Spotkania z Chrystusem w Kościele w profilu ekumenicznym*. T. 3: *Małżeństwo i kapłaństwo jako spotęgowanie chrześcijańskiej egzystencji*. Włocławek 1996, pp. 30—32; G. RADBRUCH: *Filozofia prawa...*, pp. 159—160.

⁵ Cf. G. RADBRUCH: *Filozofia prawa...*, pp. 163—164

⁶ Cf. B. KURTSCHIED: *Historia Iuris Canonici. Historia institutorum*. Romae 1951, pp. 79—83.

⁷ Cf. G. DUBY: *Il matrimonio medievale*. Milano 1994.

law, which was based on an inviolable and unquestionable foundation of marriage expressed by its unity and indissolubility, public law in marital issues began to adjust to new life forms which were developing within marriage and family, losing sight of former ideas and principles.

However, one cannot dismiss the positive components of the changes that occurred in both church and public matrimonial law. Undoubtedly, church matrimonial law, also in response to movements emerging inside the church, has come a long way determined by the development of the theology of marriage, from regulations emphasizing the institutional elements of matrimony to defining it as a covenant, which determines the present regulation. A similar positive transformation can be observed in public legal orders, which under the influence of discovering human subjectivity in the period of Romanticism began to discern and understand marriage as a partnership of two equal people. The way to gaining the awareness of matrimonial covenant by Church was both long and difficult. Yet, the category of covenant with regard to matrimony can become a keystone around which one might seek solutions on the ground of ecumenical dialogue.

Unlike in the development of contemporary public matrimonial law, church matrimonial law did not have to make an effort to harmonize particular situations resulting from conjugal and family life. It remained faithful to the idea of unity and indissolubility of marriage, which, however, assumed different shapes in the consequences of life forms.

The history of Christian understanding of matrimony was affected over the centuries by ways of thinking alien to Christianity. Among them, Gnostic Manichean image of a human based on substantial dualism and, as a consequence, on antisomatism, contempt for human corporality. Moreover, Christian anthropological reflection was greatly influenced by the Roman view of the law of nature, which to a large extent emphasized the procreative character of marriage, and the Stoic philosophy, which devalued the elements of satisfaction and pleasure of conjugal life, thus suggesting rigorous frames of presenting it.⁸

The Christian concept of matrimony was greatly affected by the teaching of St. Augustine. What should be stressed is the fact that he distinguished three goods of marriage (offspring, fidelity and sacrament) and depicted marriage itself as a reflection of one and indissoluble love of Christ to his Church. On the other hand, unfortunately, Augustinian teaching about the goods of marriage together with his pessimism when it comes to the issue of human sexuality almost equal to that of an animal, contributed to the fact that for many centuries it was observed in Church

⁸ Cf. A. SKOWRONEK: *Sakramenty wiary...*, pp. 18—19.

that procreation was the main aim of matrimony.⁹ The aspect of matrimonial covenant, whose Augustine was an unquestionable precursor, for many centuries did not assume the character which was given to it by the post-councillar theology of marriage and the canon law reflecting it. Matrimonial covenant from his perspective did not refer to love association and complete unity between a man and a woman. It remained at the level of one and indissoluble *remedium concupiscentiae* as his only argument, aiming at the procreation.

Church law concerning matrimony did not follow St. Thomas's teaching about marriage, either. Drawing on the Augustinian theory about the three goods of matrimony and following St. Bonaventure, St. Thomas pointed out their role in connection with the overall image of a human and the value of his/her existence. Only complete existence in Christ gives meaning to human sexuality, incorporated in personal love of spouses, following the example of covenant between Christ and the Church.¹⁰

In case of church matrimonial law, similarly to public matrimonial law, one can observe a certain gap. St. Thomas's teaching about marriage and conjugal love directed eventually at God as the ultimate foundation and goal of a human was not expressed in appropriate legal articles, the example of which is the First Code of Canon Law. This kind of legislation was certainly influenced by the Protestant movements with their complete negation of the sacramental character of marriage and its presentation only in reference to the law of nature. The response to the Protestant understanding of marriage was the declaration of the Council of Trent about the sacramental nature of marriage and, at the same time, its participation in the order of grace.¹¹ The resolutions of this council affected further development of matrimonial law focused on protecting the basic elements of marriage and its sacramental character against the opposing tendencies to deprive it of its sanctity and dignity and making it equal to institutions established by a human, which are subject to the authority of a man. The external situation, to some degree, forced church legislation to introduce such regulations which will emphasize the sole jurisdiction of Church over matrimony and protection of its sanctity.¹²

⁹ The Code of Canon Law 1917 stated clearly in can. 1013 § 1: *Matrimonium finis primarius est procreatio atque educatio prolis; secundarius mutuuum adiutorium et remedium concupiscentiae.*

¹⁰ Cf. *Sent.*, IV, d. 26—42.

¹¹ Cf. *Sessio 24*. W: A. BARON, H. PIETRAS: *Dokumenty Soborów Powszechnych*. T. 4. Kraków 2004, pp. 715—719.

¹² Despite the opinions of German theologians of 19th century (F. Probst, F.X. Linsenmann), who regarded conjugal love as an objective goal of marriage, Pope Leon XIII in his encyclical *Arcanum divinae sapientiae* from 10th February 1880 stressed the hierarchical order of married life (in reference to Eph 5:23—24), in which a woman enjoys the

The teachings of Vatican II about matrimony contained in the Apostolic Constitution *Gaudium et Spes* (nos. 47—52)¹³ caused the current matrimonial law of Church to create an order enabling personal development of spouses, whose relationship is demonstrated as the matrimonial covenant.¹⁴

2. The Nature of Things in Church Matrimonial Law

The Code of Canon Law in the regulation concerning matrimony, refers several times to the nature of things. These are canons which use the expression *natura sua* (can. 1061 §1,¹⁵ 1134¹⁶), *natura* (can. 1084 §1,¹⁷ 1098¹⁸), *naturalis* (can. 1055 §1¹⁹). The other canons in which the adjective *natural* (1071 §1.3, 1091 §1) was deployed use this expression in reference not to marriage, but to the responsibilities towards children from former marriage or born outside marriage. Additionally, in canon 1163 §2 and 1165 §2 marital impediments coming from the law of nature are

same dignity as a man, demonstrating a connection between Christ and the Church. Cf. J. WRÓBEL: *Małżeństwo*. III: *W Kościele katolickim. B. Aspekt moralny*. W: *Encyklopedia Katolicka*. Lublin 2006. T. 11, pp. 1072—1073.

¹³ Cf. U. NAVARRETE: *Structura iuridica matrimonii secundum Concilium Vaticanum II*. Roma 1988.

¹⁴ Cf. CIC, can. 1055 § 1.

¹⁵ A valid marriage between the baptized is called *ratum tantum* if it has not been consummated; it is called *ratum et consummatum* if the spouses have performed a conjugal act in a human fashion which is suitable in itself for the procreation of offspring, to which marriage is ordered by its nature (*ad quem natura sua ordinatur matrimonium*) by which the spouses become one flesh.

¹⁶ From a valid marriage there arises between the spouses a bond which by its nature is perpetual and exclusive (*vinculum natura sua perpetuum et exclusivum*). Moreover, a special sacrament strengthens and, as it were, consecrates the spouses in a Christian marriage for the duties and dignity of their state.

¹⁷ Pre-existing and perpetual impotence excluding the possibility of an intercourse, whether on the part of a man or a woman, whether absolute or relative, nullifies marriage by its very nature (*ex ipsa eius natura dirimit*).

¹⁸ A person contracts invalidly who enters into a marriage deceived by malice, perpetrated to obtain consent, concerning some quality of the other partner which by its very nature (*qualitatem, quae suapte natura consortium*) can gravely disturb the partnership of conjugal life.

¹⁹ The matrimonial covenant, by which a man and a woman create a partnership of the whole of life and which is ordered by its nature to the good of the spouses (indole sua naturali *ad bonum coniugum*) and the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament between the baptized.

discussed. Yet, the code does not mention such impediments. Regulations concerning matrimony contained in the binding code do not state, unlike the previous code (can. 1068 §1), that the object regulated by the norm comes from the law of nature. Therefore, the current code does not contain clear codification of the law of nature in reference to conjugal issues. As the canons quoted above indicate, the object of legal regulation is justified by the very nature of marriage.

Contrary to the former one, in the code currently in force some significant changes occurred in connection with referring the object of regulation to the nature of things. The former code in canon 1068 §1 talked about the impediment of impotence, which makes marriage invalid by the law of nature. In the present code, statement of the invalidity of marriage due to this impediment results from the very nature of marriage. The new statement aroused a discussion among canonists and divided them into two groups, one recognizing the obstacle stemming from the natural law according to the canonistic tradition and the other not recognizing it. In the latter case, the obstacle of impotence is explained by either positive church resolution or the very nature of marriage, which, however, requires settling what belongs to the essence of marriage.²⁰ Nonetheless, the formulation referring to the nature of marriage does not exclude the statement that the impediment can originate from the natural law.

The alteration of the statement referring to the nature of marriage in the current canon 1084 §1 can also be discussed in another context. The task of the legislator is not to formulate regulations settling the issues of theological and philosophical nature, but to provide specific legal solutions. This solution is pronouncing the existence of the impediment of impotence. Deciding whether the obstacle comes from nature or the positive law depends on the current state of knowledge on this issue. Impotence as the subject of the norm has not appeared in the unerring teaching of Church magisterium yet. The formulation in which it is stated that it comes from the nature of marriage itself does not determine substantially (with regard to content) whether the norm originates from the natural law or not, but shows the source of its binding power.²¹ This binding power results from, as far as the current state of knowledge is concerned, the marriage itself, which means that marriage itself justifies the existence of the impediment.

Under the influence of a personalistic view of marriage presented during Vatican II, deception by fraud of one of the nupturients was also men-

²⁰ Cf. H. STAWNIAK: *Niemoc płciowa jako przeszkoda do małżeństwa*. Warszawa 2000, pp. 135–144.

²¹ Cf. R. SOBAŃSKI: *Nauki podstawowe prawa kanonicznego*. T. 2: *Teologia prawa kościelnego*. Warszawa 2001, p. 58.

tioned in the current code among the drawbacks of conjugal consent. The personalistic view of marriage shows that nupturients should express conjugal consent voluntarily after familiarizing themselves with its subject, so that there will not be a dissonance between the desired and actually existing subject. Deception concerns the attribute of a person, which may seriously disrupt the unity of conjugal life. It constitutes a new subject of legal regulation, at the same time arousing discussion about its origin. Most opinions point out its positive origin, although there are also those which indicate its connection with the natural law. Then, the reference to the nature of things in code formulations does not determine the legal natural or positive source of the norm. There is also a transitional view which acknowledges that in some cases deception by fraud may arise from the natural law. We encounter such a situation when the error, which arises from deception and which restricts the contractor's freedom, harms the essence of the legal act (essential error) causing its invalidity by its very nature as long as it assumes the form of the condition *sine qua non*.²²

From the above canons that refer to the nature of things emerges the following image of marriage, which is liable to legal regulation: a) it is a matrimonial covenant, whose aim is, by nature, the good of the spouses; b) it is ordered by its nature to give birth to offspring; c) it is by its nature exclusive and perpetual (the only one and indissoluble); d) it comes into being as a result of voluntary decision of both sides, which is contradicted by deception by fraud concerning the attribute of a person, which, by its nature, can seriously disrupt the unity of conjugal life; e) it is invalid because of its nature when an impediment of impotence exists.

3. The Nature of Things

By the concept of a thing, whenever law refers to it in the expression “the nature of things,” one should understand each thing that is a subject to legal regulation. Marriage itself is also such a thing.²³ It is more difficult to define nature, the understanding of which is not consistent. It is connected mainly with the cognitive process which we use to learn about nature as well as with the doubt concerning defining the relation between nature and conclusions resulting from it and relevant for legal thinking and,

²² Cf. W. GÓRALSKI: *Małżeństwo kanoniczne*. Warszawa 2011, pp. 188—189.

²³ In the systematics of the previous Code of Canon Law marriage was discussed in the book entitled *De rebus*.

as a consequence, for making law, which refers to it as its source. “Nature” can be generally regarded as a determining foundation which conveys the essence of a subject and its meaning as the essence of things (*essentia rei*). The essence and meaning of a subject express the essential character of existence.²⁴ Whenever law refers to the nature of things, it indicates that there is a certain specific material in it that is suitable for preliminary legal regulation, which should be taken into consideration when a given thing becomes its subject. These are factors which determine the content of legal norms. Among them are the elements thanks to which we can get to know the regularities governing a given thing, which, together with external determinants created by a man, constitute a whole liable to regulation.

It does not mean, though, that the range and extent to which the nature of things affects norms — if a legislator refers to it — will always be the same and expressed in this way. It depends above all on the measure of cognition of a given thing (the state of knowledge as for example with regard to deception with malice aforethought), but also on the legislator’s will to acknowledge the nature of things as a source of law made by him. Accepting the nature of things as a determinant of the content of legal norms outlines borderlines which he cannot trespass while establishing them. A legislator cannot establish norms whose content contradicts the nature of things. On the other hand, accepting the nature of things demonstrates these elements which should necessarily be included in the content of the established legal norms, at the same time constituting obligatory guidelines for them and defining the area of legal order.²⁵

The above definition of the nature of things from the point of view of legal interest points out to its role in making law. This role does not come down to being a rule for the legislator and a model for the norms established by him in a technical sense. The objective of the nature of things is to give the “spirit” to the legal norms, which should reflect inherent obligation existing in things. Thanks to the nature of things, insight into the essence and meaning of things enables us to find out that in things there is also immanent obligation, which cannot be shown solely by the very essence and meaning of an object.²⁶ A legislator, referring to the nature of things in the process of creating righteous (material) law combines the elements which can be interpreted from the nature of things together with the purpose requirements of the established law.

²⁴ Cf. A. Kościć: “Pojęcie ‘natury rzeczy’ we współczesnej filozofii prawa.” *Prawo. Administracja. Kościół* 2—3 (2000), p. 37.

²⁵ Cf. *Ibidem*, pp. 38—40.

²⁶ Cf. *Ibidem*, p. 41. Thereby, the nature of things plays, to some extent, the role of a mediator combining “existence” and “obligation” and allowing to create norms which are a result of the “golden rule” and categorical imperative.

4. The Nature of Christian Marriage

The binding Code of Canon Law refers to the nature of marriage several times. It is a relationship exclusive and perpetual in nature that is directed at the good of spouses and the procreation of offspring. In such a definition of the nature of things one can find elements negatively determining law which cannot oppose them. These are the exclusiveness and perpetuity of the relationship. Therefore, the law cannot establish norms which allow betraying the unity and indissolubility of marriage. Elements positively determining matrimonial law will refer to the good of spouses and their offspring, the scope of which is virtually unlimited.

Can the nature of marriage defined this way be a footing in ecumenical dialogue if in the Protestant communities and in the Orthodox Church exists a possibility of re-entering into marriage? Trying to answer this question one should at the same time take note of the Catholic definition of the nature of marriage, which evolved in history and was finally reflected in legislation. The previous Code of Canon Law while discussing the nature of marriage did not refer to the good of the spouses, which originates from the nature of marriage itself. It also did not mention clearly the procreation resulting from the nature of marriage. Giving birth to offspring was rendered an objective of marriage and not something which comes from its very nature. Similarly, the unity and indissolubility of marriage was explained by the fact that matrimony is a sacrament. Comparing the previous codification to the binding one reveals that in the teachings of Church, based on the unchanging foundations of unity and indissolubility of marriage, a significant revolution has taken place, which is proved by the regulation currently in force.

When we talk about the legal nature of marriage, what we mean is Christian marriage. We do not mean a “natural marriage,” since according to the Catholic theology it is a part of divine order of creation and salvation. Luther’s negation of participation of Christian marriage in the order of salvation does not mean that marriage remains only in the secular domain. According to Luther’s teaching about two kingdoms, it is a divine institution through which God’s Kingdom is realized in the worldly life. Therefore, marriage is simultaneously human and divine reality, it is a sign by which God’s Kingdom enters this world. It appears that separating the order of creation from the order of salvation — even if Luther rejected the sacramental character of marriage²⁷ — does not have

²⁷ M. Luther’s understanding of a sacrament refers to its being directly established by Christ. New Testament writings do not mention such a gesture of Christ towards marriage.

to be regarded as an alternative,²⁸ which gives a chance of ecumenical dialogue. Christian understanding of a sacrament clearly shows that it is a visible sign of invisible grace, in which through a material element such as a relationship of two people, God's reality descends on spouses, becomes present and realizes God's kingdom.

In Catholic, Orthodox and Protestant understanding of marriage there are differences. Theologians discuss the possibility of doctrinal rapprochement in the ecumenical field. Certain agreements have already been reached. One of them is accepting in 1976 by Joint Commission for Theological Dialogue between the Roman Catholic Church and Reformed Churches, a document in which marriage is commonly defined referring to the biblical category of covenant.²⁹ The common acknowledgement of the category of covenant for defining marriage emphasizes that in the understanding of both Churches, the conjugal bond between a man and a woman reflects the mystery of God's love in Jesus Christ to His Church and is the source of grace without which Christian marriage would be deprived of its foundation.

Applying the category of covenant to define matrimony, apart from the host of theological connotations, can also become a starting point for deliberations concerning the nature of things. With the current state of knowledge and theological awareness one can ponder upon the nature of marriage on the basis of this category. My intention is not to draw particular conclusions, since they require profound philosophical analysis concerning the notion of the nature of things and theological conditions of individual Christian religions, but to point out to certain elements which are contained in the concept of the nature of things (matrimonial covenant) and the consequences for the ecumenical dialogue resulting from it.

1. The nature of things, as it was described above, is quite an extensive realm and it is difficult to enumerate all the elements it comprises. It defines certain borderlines which cannot be trespassed and indicates the elements which should be contained in it. Finding out about these elements depends on the adopted cognitive methods and final acknowledgement. An example of broad depiction of the elements of marriage is the definition of what is understood by the good of the spouses (their rights and responsibilities, factors determining the ability to grasp them and, as a consequence, fulfill them) and the good of offspring (excluding having children causes the invalidity of conjugal agreement and means not only the will not to give birth to it but also the will excluding the right to conjugal acts, the obligation to protect the conceived life or the education itself).

²⁸ Cf. A. SKOWRONEK: *Sakramenty wiary...*, pp. 41—42

²⁹ Cf. *Ibidem*, p. 43.

Positive determinants of the nature of marriage do not constitute a moot point in the ecumenical dialogue. Controversial issues emerge when one of the partners neglects their duty to take care of the spouse's or child's good, and at the same time the other side suffers as a result of it. The Catholic approach guards the unity and indissolubility of marriage. The Orthodox Church and Protestantism allow splitting of sides and re-entering into marriage.

2. The unity and indissolubility of marriage are for the Catholic faith the negative determinants of the nature of marriage. It means that one can never transcend them and establish law which would oppose the unity and indissolubility allowing opposite possibilities. In the Orthodox Church, which refers to the rule of *oikoumene* (appropriateness, understanding) there is a possibility of partners splitting up and re-entering marriage, though the second marriage is considered inferior to the first one. Remarrying is against the practiced religion but tolerated due to human weakness. Dispensation from the first marriage is supposed to fulfill the rule of preserving the indissolubility of marriage. The Protestant churches do not acknowledge the rule of indissolubility of marriage because they do not regard marriage as sacrament.

As far as the Orthodox Church is concerned, one should notice that although its practice with regard to the indissolubility of marriage contradicts the principle of indissolubility of marriage preached by the Catholic Church, the Council of Trent consciously did not condemn the eastern pastoral practice, allowing it to exist peacefully as a component of a particularistic Church form of Christian life.³⁰ The conciliar statement deprived of anathematism together with the unceasing Eucharistic unity of the Catholic and Orthodox Church allows one to assert that the former accepts the principle of economy existing in the Orthodox Church.³¹

Discussing the issue of indissolubility of marriage, one can venture to put together the positive and negative determinants of the nature of marriage as a covenant which reflects the unceasing God's covenant with the human originating in the act of creation. It is from this very act, directed at the order of salvation, that we decipher the divine purpose of the indissolubility of marriage, which does not have to be justified by its sacramental dignity. The order of creation indicates that marriage is indissoluble not because it is a sacrament, but because according to the Catholic and Orthodox teaching, it was raised to this dignity by Christ.

3. The sacramental character of marriage in the Catholic Church was solemnly declared at the Council of Trent. It is not accepted by the Protes-

³⁰ Cf. *Ibidem*, p. 88.

³¹ Cf. *Ibidem*.

tant communities, which does not mean that they acknowledge a secular character of marriage, as it was stated above. The very contract or liturgical form required to ensure its validity is not the sacrament of matrimony. If the nature of covenant is a constant bond created by the spouses for their own good and the good of their offspring, recognized by all Christian churches, it should be highlighted that the covenant itself, which personalizes the unceasing covenant between Christ and His Church, is the sacrament. Entering into marriage spouses not only receive the sacrament the moment a unity between them is created, but continually remain in it as in a relationship fulfilling God's covenant with Church.³²

Reflections, the starting point of which constitute the statements of the Code of Canon Law referring to the nature of marriage, can be — together with biblical and theological deliberations — a reference point in ecumenical discussions. The Catholic Church does not establish law with regard to ecumenical commitment. The code regulations concern only the congregation of the Latin Church,³³ but the reasons of specific legal solutions, and especially the elements of their reference given in the regulations, can be searched for in the ecumenical dialogue, opening the way to further formulations.

³² Cf. T. GAŁKOWSKI: "Instytucja małżeńska w świetle instytucjonalnej koncepcji Kościoła Soboru Watykańskiego II." *Łódzkie Studia Teologiczne* 20 (2011), pp. 89—102.

³³ Cf. Can. 1.

TOMASZ GAŁKOWSKI

Małżeńskie przymierze jako natura rzeczy (małżeństwa)

Streszczenie

Przepisy kodeksu prawa kanonicznego Kościoła łacińskiego w kwestii małżeństwa kilkakrotnie odwołują się do natury rzeczy. Sformułowanie to nie przesądza merytorycznie (co do treści) o prawnonaturalnym lub nie charakterze normy, wskazując jedynie na źródło pochodzenia normy wiążącej. Naturę można uznać za określającą podstawę, która oddaje istotę przedmiotu i treść jego znaczenia jako istotę rzeczy. Przy obecnym stanie wiedzy naturę małżeństwa można ująć w kategorii przymierza, co do której zgadzają się kościoły chrześcijańskie. W naturze przymierza znajdują się elementy negatywnie determinujące prawo regulujące związek małżeński, przeciwko którym prawo nie może stanowić norm (jedność i nierozzerwalność) oraz elementy pozytywne, których zasięg jest bardzo szeroki (dobro małżonków i potomstwa). Rozważania wokół natury rzeczy w obecnym stanie jej poznawalności stanowią (obok rozważań biblijno-teologicznych) element dialogu ekumenicznego. Tylko wspólne i współzależne rozpatrywanie wszystkich determinantów w odniesieniu do natury rzeczy stwarza szansę na porozumienie.

Słowa kluczowe: natura rzeczy, małżeństwo, przymierze małżeńskie

TOMASZ GAŁKOWSKI

L'alliance matrimoniale comme nature des choses (mariage)

Résumé

Les dispositions du code de droit canonique de l'Église latine concernant le mariage se réfèrent à la nature des choses à quelques reprises. Cette formule ne définit pas (sur le fond) le caractère juridique-naturel ou non de la norme, elle montre uniquement la source de la norme contraignante. On peut reconnaître en nature une base qui détermine l'essence de l'objet et le contenu de sa signification comme nature des choses. À l'état des connaissances actuel, la nature du mariage peut être définie dans les catégories d'alliance, sur laquelle toutes les Églises chrétiennes sont d'accord. Dans la nature de l'alliance se trouvent des éléments qui déterminent négativement le droit réglant le mariage, contre lesquels le droit ne peut pas constituer des normes (unité et indissolubilité), ainsi que des éléments positifs, dont la portée est très large (bien des époux et des enfants). Les réflexions sur la nature des choses dans l'état actuel de sa connaissance constituent (à côté des considérations bibliques et théologiques) un élément du dialogue œcuménique. Seule une considération commune et interdépendante de tous les déterminants par rapport à la nature des choses, est une chance de l'entente.

Mots-clés: nature des choses, mariage, alliance matrimoniale

TOMASZ GAŁKOWSKI

Il patto coniugale come natura delle cose (del matrimonio)

Sommarío

Le norme del diritto canonico della Chiesa latina per quanto concerne il matrimonio, si riferiscono spesso alla natura delle cose. Detta formula non determina (quanto al contenuto) se la norma abbia o meno un carattere giuridico-naturale, limitandosi ad indicare la fonte di provenienza della norma vincolante. La natura può essere considerata come base che delinea l'essenza dell'oggetto e il contenuto del suo significato in quanto essenza delle cose. Considerando lo stato attuale della conoscenza, la natura del matrimonio può essere definita come patto coniugale, su cui sono d'accordo le Chiese cristiane. Nella natura del patto ci sono elementi che, in maniera negativa, determinano la legge che regola il matrimonio, contro i quali la legge non può stabilire norme (unità e indissolubilità), ma anche elementi positivi (come il bene dei coniugi e dei figli) la cui portata è molto ampia. Le riflessioni sulla natura delle cose allo stato attuale della sua conoscibilità sono (accanto alle riflessioni biblico-teologiche) un elemento del dialogo ecumenico. Solo una riflessione congiunta ed interdipendente sulle cause determinanti riguardanti la natura delle cose può portare ad un accordo.

Parole chiave: natura delle cose, matrimonio, patto coniugale