Lucjan Świto

Resolution in Favour of Marriage — an Oppressive Relic of the Past? : The "favor matrimonii" Principle in Contemporary Law

Ecumeny and Law 5, 263-276

2017

Ecumeny and Law, vol. 5 (2017)
pp. 263—276

Lucjan Świto
University of Warmia and Mazury in Olsztyn

Resolution in Favour of Marriage — an Oppressive Relic of the Past? The *favor matrimonii* Principle in Contemporary Law

Key words: marriage, durability of marriage, divorce, matrimonial law

Although the *favor matrimonii* principle, that is, 'favour for marriage', does not occur *expressis verbis* in contemporary legal documents, it is more and more often criticised for being an oppressive rule which deprives the human being of their freedom and imprisons them in the chains of an unwanted relationship. In secular law it is manifested, for example, in postulates to liberalise divorce premises and in requests to grant rights — which are attributable to marriage — to other forms of interpersonal relations. In canon law science some opinions are expressed against "favouring" the institution of marriage and demanding — in cases of doubt as to the validity of matrimonial consent — being in favour of personal freedom, and, first of all, in favour of freedom to enter into another marriage. Apart from exposing the *favor libertatis* or *favor personae* principles, in the tendency critical towards *favor matrimonium* there is a position recognising the primacy of *ius connubi*, or questioning the presumption of marriage validity based on the *salus animarum* argument.

Therefore, the question should be asked whether the *favor matrimonii* principle has not become a relic of the past? Does it still preserve its validity in the contemporary normative dimension? Is marriage durability of value, and is marriage treated in such a perspective in the contemporary

legal dimension? The answer to those questions will be sought by reaching out to the analysis of the provisions of canon law and secular law.

1. Canon law

The analysis of the provisions of the Code of Canon Law formulated by John Paul II shows clearly that the legislator covers the institution of marriage with special care. Undoubtedly, the reason for which marriage holds a privileged position in the canon legal order is its social importance and its sacramental dimension. Entering into marriage cannot come down only to purely personal and private relations between spouses, since marriage initiating the family constitutes the foundation of society, whereas raised to sacramental dignity, it means indissoluble community, distinguished from any other human relations.

In accordance with canon doctrine, the *favor matrimonii* principle, which treats marriage in a privileged way, includes a purely private dimension, referring to the freedom of entrance into marriage (*favor matrimonii antecendes*), and an institutional dimension, referring to the validity of marriage and the certainty of its condition (*favor matrimonii consequens*). The *favor matrimonii* principle, meaning favour for marriage, is often based on the *favor iuris* principle, relating to presumptions (*praesumptio*).[1]

1.1. *Favor matrimonii antecedens*

The *favor matrimonii antecendes* principle, consisting in protecting the freedom of contracting a marriage, refers to the constitutive moment of marriage and is expressed in norms facilitating its establishment. The right to enter into marriage (*ius connubii*) is one of the most fundamental and inalienable human rights, resulting from human dignity, which is secured by canon legal order, thereby reducing to the minimum the interference of an ecclesiastical legislator limiting the freedom of the bride and groom.[2]

---

[1] See L. Świto: *Zasada „favor matrimonii" w Kodeksie Prawa Kanonicznego z 1983 r.* In: L. Świto, M. Tomkiewicz (eds.), *Favor matrimonii? Teoria i praktyka*. Olsztyn 2014, pp. 59—70.

[2] W. Góralski: *Studia nad małżeństwem i rodziną*. Warszawa 2007, pp. 173—194.

This principle is expressed, first of all, in Canon 219 of the Code of Canon Law, which states that all faithful have the right to be free from any constraint in the selection of the state in life, and Can. 1058 of the Code of Canon Law, which states that marriage can be entered into by everyone unless it is prohibited by law. Limitations in exercising the right to enter into marriage introduced by the ecclesiastical legislator are always exceptional and they require a clear legislative disposition,[3] since they concern circumstances regarded by the ecclesiastical legislator as incompatible with the acceptance of the state of married life, taking into account personal, church and social reasons, and particularly the protection of the essential value of the institution of marriage itself, as well as the care of the souls' salvation (*salum animarum*).[4] Limitations to exercise the right to marriage include, first of all, diriment marriage impediments,[5] requirements put to matrimonial consent,[6] the necessity to keep a canonical form,[7] and also prohibitions resulting from Can. 1071 of the Code of Canon Law, which are effective, however, only on pain of sanctions as a result of base acts in marriage.[8] Some of the limitations mentioned are of an absolute nature;

[3] Can. 1075 CIC: "§ 1. It is only for the supreme authority of the Church to declare authentically when divine law prohibits or nullifies marriage. § 2. Only the supreme authority has the right to establish other impediments for the baptized". Translator's note: the excerpts of the Code of Canon Law are quoted from: http://www.vatican.va/archive/ENG1104/_INDEX.HTM, access: 1 June 2018.

[4] Moneta: *Il diritto al matrimonio (can. 1058)*. In: P. Bonnet, C. Gullo (eds.), *Diritto matrimoniale canonico*, Vol. 1. Vatican 2002, p. 192.

[5] Age impediments (Can. 1083 § 1 CIC), impotence to have intercourse (Can. 1084 § 1 CIC), bond of a prior marriage (Can. 1085 § 1 CIC), different faith (Can. 1086 § 1 CIC), sacred orders (Can. 1087 CIC), public perpetual vow of chastity (Can. 1088 CIC), abduction (Can. 1089 CIC), bringing about the death of a spouse (Can. 1090 CIC), consanguinity (Can. 1091 CIC), affinity (Can. 1092 CIC), public propriety (Can. 1093 CIC), kinship by way of legal relationship (Can. 1094 CIC).

[6] Can. 1057 CIC.

[7] Can. 1108 CIC: "§ 1. 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 in Cann. 144, 1112, § 1, 1116, and 1127, §§ 1–2 [Translator's note: the Polish version of the canon refers to exceptions made in 1127, §§ 2—3]. § 2. The person who assists at a marriage is understood to be only that person who is present, asks for the manifestation of the consent of the contracting parties, and receives it in the name of the Church."

[8] Can. 1071 CIC: "§ 1. Except in a case of necessity, a person is not to assist without the permission of the local ordinary at: 1/ a marriage of transients; 2/ a marriage which cannot be recognized or celebrated according to the norm of civil law; 3/ a marriage of a person who is bound by natural obligations toward another party or children arising from a previous union; 4/ a marriage of a person who has notoriously rejected the Catholic faith; 5/ a marriage of a person who is under a censure; 6/ a marriage of

however, the vast majority of prohibitions may be repealed by means of a dispensation or a permit. The possibility of obtaining a dispensation from the limitations in contracting a marriage is undoubtedly the expression of the *favor matrimonii antecedens* principle.

1.2. *Favor matrimonii consequens*

The *favor matrimonii consequens* principle expresses an even more privileged position of marriage in the Code of John Paul II of 1983, expressed in the norms which protect an existing marriage. They may become legal presumptions[9] or regulations directly ordering the protection of marriage.

Marriage protection by means of presumptions, that is, legal arrangements which constitute the criterion of recognising the validity of marriage without any need to prove it, relates to the *favor iuris* principle. They set a formal marriage in a privileged position and order the regarding of it as valid until the contrary is proven. The presumptions occurring in canon matrimonial law are there to protect against entering into invalid marriages and to guarantee the stability and durability of already existing marriages.

The basic norm protecting an existing marriage by means of presumption is Can. 1060 of the Code of Canon Law, which states that law favours marriage (*favor iuris*), and that is why, in case of doubt, the validity of a marriage must be upheld until the contrary is proven. Marriage invalidity is proven according to norms indicated by canon procedural law. *Favor matrimonii consequens* is thus expressed in the fact that if marriage has an external form of celebration, it is considered valid, and thus applicable, regardless of whether it was celebrated in an ordinary or an extraordinary canon form. It is important that both parties — pursuant to Can. 1101 § 1 of the Code of Canon Law — express in words or by means of signs their consent to enter into marriage. The lack of consent between the externalised intention to enter into marriage and the internal will does not cause marriage invalidity until the contrary is proven, since law

a minor child when the parents are unaware or reasonably opposed; 7/ a marriage to be entered into through a proxy as mentioned in Can. 1105. § 2. 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 Can. 1125 have been observed with necessary adaptation."

[9] Namely, presumptions which the law itself establishes (*praesumptio iuris*) in contrast to human presumptions (*praesumptio hominis*) which a judge formulates (Can. 1584 CIC).

always has to protect legal activities performed formally, because without them the certainty of legal transactions would be undermined.[10]

The application of Can. 1060 of the Code of Canon Law, expressing the favour of law for formal marriage, regardless of the actual situation, is included in Can. 1107 and Can. 1086 § 3 of the Code of Canon Law. Can. 1107 of the Code of Canon Law states the presumption of matrimonial consent validity in the situation when the bride and groom are affected by some diriment impediment or if a canon form of marriage was not adhered to,[11] whereas Can. 1086 § 3 of the Code of Canon Law presumes the validity of marriage entered into with an impediment of a different religion.[12]

A legal presumption protecting an existing marriage also occurs in Can. 1061 § 2 and Can. 1152 § 2 of the Code of Canon Law. Can. 1061 § 2 of the Code of Canon Law states the presumption of consummating a marriage if spouses live together[13], which strengthens the stability and durability of marriage, since after the parties start to live together, marriage should be regarded as absolutely indissoluble. And thus, when potentially applying for a *super rato* papal dispensation it would first be necessary to invalidate the established presumption. On the other hand, Can. 1152 § 2 of the Code of Canon Law protects the durability of marital relations, which, as a result of the adultery of one of the spouses, qualifies for permanent separation. If the innocent spouse observes conjugal living for six months from the moment of learning about the other spouse's adultery, it is presumed that a cause for separation has ceased to exist.[14]

Apart from the above-mentioned legal presumption, the Code of John Paul II also includes other provisions which order the protection of marriage and secure the durability and stability of marriage. The expression of protection of an existing marriage is Can. 1085 § 2 and Can. 1707 § 1 of the Code of Canon Law, introducing the necessary requirements which

[10] Can. 1101 § 2 CIC.

[11] Can. 1107 CIC: "Even if a marriage was entered into invalidly by reason of an impediment or a defect of form, the consent given is presumed to persist until its revocation is established."

[12] Can. 1086 § 3 CIC: "If at the time the marriage was contracted one party was commonly held to have been baptized or the baptism was doubtful, the validity of the marriage must be presumed according to the norm of Can. 1060 until it is proven with certainty that one party was baptized but the other was not."

[13] Can. 1061 § 2 CIC: "After a marriage has been celebrated, if the spouses have lived together consummation is presumed until the contrary is proven."

[14] Can. 1152 CIC: "Tacit condonation exists if the innocent spouse has had marital relations voluntarily with the other spouse after having become certain of the adultery. It is presumed, moreover, if the spouse observed conjugal living for six months and did not make recourse to the ecclesiastical or civil authority."

need to be met in order to enter into another marriage, when the previous one has been contracted invalidly[15] or if a spouse is missing.[16] On the other hand, the durability and stability of a marriage is secured by the provision of Can. 1122 of the Code of Canon Law, which orders the inscription of the marriage contracted in the marriage and baptism registers[17], and the provision of Can. 104 of the Code of Canon Law, which obliges spouses to live together,[18] and also the provision of Can. 112 § 1 of the Code of Canon Law, entitling the change of a ritual when entering into marriage or during marriage, without the need to obtain a rescript from the Apostolic See.[19]

Protection of marriage durability is also secured in the norms of canon procedural law.[20] The provisions of Can. 1674 and Can. 1675 of the Code of Canon Law prohibit appealing the validity of marriage by persons other than living spouses or a promoter of justice. Similarly, the protection of marriage durability is stipulated in the provision of Can. 1433 of the Code of Canon Law, which imposes the obligation of the participation — on pain of nullity of the sentence — of the defender of the bond for cases concerning the nullity of marriage,[21] whose obligation is to propose and present everything which in a rational way can be

[15] Can. 1085 § 2 CIC: "Even if the prior marriage is invalid or dissolved for any reason, it is not on that account permitted to contract another before the nullity or dissolution of the prior marriage is established legitimately and certainly."

[16] Can. 1707 § 1 CIC: "Whenever the death of a spouse cannot be proven by an authentic ecclesiastical or civil document, the other spouse is not considered free from the bond of marriage until after the diocesan bishop has issued a declaration of presumed death."

[17] Can. 1122 CIC: "§ 1. The contracted marriage is to be noted also in the baptismal registers in which the baptism of the spouses has been recorded. § 2. If a spouse did not contract marriage in the parish in which the person was baptized, the pastor of the place of the celebration is to send notice of the marriage which has been entered into as soon as possible to the pastor of the place of the conferral of baptism."

[18] Can. 104 CIC: "Spouses are to have a common domicile or quasi-domicile; by reason of legitimate separation or some other just cause, both can have their own domicile or quasi-domicile."

[19] Can. 112 § 1 CIC: "After the reception of baptism, the following are enrolled in another ritual Church sui iuris: 1/ a person who has obtained permission from the Apostolic See; 2/ a spouse who, at the time of or during marriage, has declared that he or she is transferring to the ritual Church *sui iuris* of the other spouse; when the marriage has ended, however, the person can freely return to the Latin Church."

[20] R. Sobański: "Ochrona małżeństwa w kanonicznym prawie procesowym." *Prawo Kanoniczne* 52(2009) Issues 3—4, pp. 155—171.

[21] Can. 1433 CIC: "If the promoter of justice or defender of the bond was not cited in cases which require their presence, the acts are invalid unless they actually took part even if not cited or, after they have inspected the acts, at least were able to fulfill their function before the sentence."

referred to against the nullity or dissolution of marriage.[22] On the other hand, to recognise and deliver a judgement in a case concerning the nullity of marriage, the participation of not only one judge is required — as in ordinary cases — without a collegiate tribunal.[23]

An important norm of the procedural law expressing the *favor matrimonii consequens* principle is also Can. 1643 of the Code of Canon Law, which states that cases concerning the state of persons, not excluding cases concerning spouses' separation, are never transferred into the *res judicata* state. The consequence of that code norm is thus Can. 1644 of the Code of Canon Law enabling the undermining of each final judgement stating marriage invalidity by bringing in new serious evidence or arguments.[24]

Last but not least, and important from the point of view of the *favor matrimonii consequens* principle, are also provisions enabling convalidation of a marriage which was contracted invalidly, due to a diriment impediment, lack of consent or failure to preserve a canonical form.[25] The remedying of a defectively contracted marriage may be done — after prior removal of an impediment — in an ordinary and an extraordinary way. In the case of ordinary convalidation, it is necessary to renew the consent, without the necessity to apply a canonical form again. In such cases, the effects of marriage exist *ex nunc*, that is, from the moment the marriage becomes valid. On the other hand, extraordinary convalidation, that is, radical sanation, consists in recognition, by the act of authority of a diocesan bishop, of the previously celebrated invalid marriage. In such cases the legal effects of marriage *ex tunc* are recognised, that is, from the moment of celebrating the sanated marriage.[26]

[22] One should not forget that a defender of the bond should also act *pro rei veritate* and if (s)he is unable to bring forth reasonable arguments against the declaration of nullity, s(he) cannot present irrelevant, i.e. irrational arguments. According to Thomas Sanchez, if a marriage is valid, it should be protected, but in other cases the spouses cannot be ordered to live in an invalid union, which also constitutes favor *matrimonii* ("Hic est matrimonii favor: irritum dissolvere ac validum tueri").

[23] Can, 1425 § 1 CIC.

[24] T. Pieronek: "Nova causae propositio." *Forum iuridicum* 1(2002), pp. 243—252.

[25] Can. 1156—1165 CIC.

[26] T. Pawluk: *Prawo kanoniczne według Kodeksu Jana Pawła II*. Tom 3: *Prawo małżeńskie*. Olsztyn 1996, pp. 228—240.

2. Secular law

The *favor matrimonii* principle can also be found in contemporary secular law. The principle of adjudicating in favour of marriage was applied in the Hague Convention of 1977 on the Celebration and Recognition of the Validity of Marriages, the provisions of which were structured in such a way as to ensure recognition of the validity of as many marriages as possible. In contemporary private international law the *favor matrimonii* principle can be found in Art. 49 § 2 of International Private Law, which provides recognition, in the Republic of Poland, of the formal validity of marriages contracted by Polish citizens or by foreigners abroad, in accordance with local law or *lex patriae* of the parties. This principle can also be referred to Art. 48 of International Private Law, which imposes on a Polish court adjudicating in cases concerning the nullity of foreigners' marriage the obligation to take into consideration the issue of the compliance of the *lex patriae* of the party with the fundamental principles of the legal order of the Republic of Poland.[27]

In Polish family law the *favor matrimonii* rule was applied straightforwardly in the Decree of 3 February 1947, through which the validity of marriages contracted by Polish citizens in a civil form in the USSR and in a religious form or *solo consensu* before liaison officers or camp commanders on the territory of the Third Reich was recognised.[28] In the current provisions of family law the principle under discussion can be perceived in Art. 17 of the Family and Guardianship Code, which allows the possibility of annulling a marriage only in cases clearly provided for in the act, and in the possibility of convalidating a marriage contracted despite an existing impediment.

The reason for invalidating a marriage can be marital impediments resulting from Polish law, failure to meet the requirements posed by a proxy, and some declarations of will. Therefore, in the following cases it is possible to apply for marriage annulment: age impediments,[29] incapacitation impediments,[30] mental disease impediments,[31] bigamy impediments,[32]

---

[27] See K. Pietrzykowski: *Zawarcie małżeństwa i przesłanki jego ważności w prawie międzynarodowym prywatnym*. Warszawa 1985, pp. 126—127.

[28] Ibidem.

[29] The Polish Family and Guardianship Code (KRO), Art. 10 § 1.

[30] KRO, Art. 11 § 1.

[31] KRO, Art. 12 § 1.

[32] KRO, Art. 13 § 1.

parentage and affinity impediments,[33] adoption impediments,[34] state excluding conscious expression of the will to marry,[35] mistake as to the persons,[36] threat,[37] an impediment concerning power of attorney.[38]

Convalidation of an invalid marriage is possible in the situation when the required age is achieved,[39] incapacitation is revoked,[40] an adoption relation is dissolved,[41] when the other marriage loses the feature of bigamy due to the fact that the first marriage ceased as a result of the death of the spouse being a bigamist.[42]

The said *favor matrimonii* principle constitutes a superior interpretation directive manifested in the postulate of the benefit of the doubt in favour of a contracted marriage, that is, in the postulate to maintain a marriage. To some extent, that principle is also present in administrative and court proceedings preceding the contraction of a marriage. It is reflected by a possibility that the court has to grant permission to contract a marriage despite the existence of a specific impediment,[43] and facilitating entering into marriage between Polish citizens and foreigners. In this last case, the *favor matrimonii* principle can be noticed, for example, in a court proceeding concerning exempting a foreigner from the obligation to submit evidence of his/her capability to contract a marriage.[44]

[33] KRO, Art. 14 § 1.
[34] KRO, Art. 15 § 1.
[35] KRO, Art. 15 (1) § 1.1.
[36] KRO, Art. 15 (1) § 1.2.
[37] KRO, Art. 15 (1) § 1.3.
[38] KRO, Art. 16.
[39] KRO, Art. 10 § 3.
[40] KRO, Art. 11 § 3.
[41] KRO, Art. 15 § 3.
[42] KRO, Art. 13 § 3.
[43] KRO, Art. 10 § 1, Art. 12 § 1, and Art. 14 § 1.
[44] In accordance with Art. 56.1 of the Polish Law on Civil Status Acts, a foreigner who intends to marry has the obligation to provide the head of a civil registry office with a document confirming that the foreigner is capable of contracting a marriage under the applicable laws and regulations (the Law on Civil Status Acts of 29 September 1986, Dz. U. [Journal of Laws] No. 36, item 180, as amended; hereinafter: CSA). However, pursuant to Art. 56 of the CSA, if the foreigner encounters major obstacles in obtaining the document, the court may exempt the foreigner from said obligation — in non-litigious proceedings — at the foreigner's request.

Conclusions

The *favor matrimonii* principle occurs in the normative orders analysed above. Although in each of them it holds a similar protective function, it does not mean, however, exactly the same, and its scope is different in each of the systems being analysed. In canon law the *favor matrimonii* rule is not only a norm stipulated directly in the regulation, but referring to it as a legal presumption (*in dubio standum est pro valore matrimonii*) clearly reinforces its character. Yet Polish law does not stipulate such scope of protecting a marriage.

However, regardless of its scope and power, the "favour for marriage" principle gives some benefits both to spouses and the family set up by them, and to the state. The potential assistance of the state, realised in the form of different benefits, is of a subsidiary nature. Upon contracting a marriage, spouses assume mutual responsibility, both in personal and property areas. They also have specific rights and obligations towards other members of the family established by them, particularly towards the minor children they have together. Due to this, it is essential that marriage is a durable relationship. It is crucial both to spouses, who can count on mutual support, also in the future, especially in sickness and old age, and to the state, whose obligation to provide help to persons in a difficult situation has been marginalised. Furthermore, one should also pay attention to the special importance of the durability of marriage to the minor children of both spouses.

Thus, regardless of different tendencies undermining the sense of marriage durability, the *favor matrimonii* principle is not a relic of the past. It occurs in contemporary legal systems protecting the institution of marriage (although to a different degree). Perhaps it raises some oppressive associations, limiting human freedom, but the law, which exists to protect fundamental human values, cannot be different.

Bibliography

Codex Iuris Canonici. Auctoritate Ioannis Pauli PP. II promulgatus. Kodeks Prawa Kanonicznego. Przekład polski zatwierdzony przez Konferencję Episkopatu Polski, Pallotinum 1984.

Góralski W.: *Studia nad małżeństwem i rodziną*. Warszawa 2007.

Moneta: *Il diritto al matrimonio (can. 1058)*. In: P. Bonnet, C. Gullo (eds.), *Diritto matrimoniale canonico*. Vol. 1. Vatican 2002.

Pawluk T.: *Prawo kanoniczne według Kodeksu Jana Pawła II*. Tom 3: *Prawo małżeńskie*. Olsztyn 1996.
Pietrzykowski K.: *Zawarcie małżeństwa i przesłanki jego ważności w prawie międzynarodowym prywatnym*. Warszawa 1985.
Sobański R.: "Ochrona małżeństwa w kanonicznym prawie procesowym." *Prawo Kanoniczne* 52(2009) 3—4, 155—171.
Świto L.: *Zasada „favor matrimonii" w Kodeksie Prawa Kanonicznego z 1983 r.* In: L. Świto, M. Tomkiewicz (eds.), *Favor matrimonii? Teoria i praktyka*. Olsztyn 2014, pp. 59–70.
Pieronek T.: "Nova causae proposition." *Forum iuridicum* 1(2002), pp. 243—252.
Ustawa z dnia 25 lutego 1964 r. — Kodeks rodzinny i opiekuńczy, Dz.U. 1964, 9, 59.
Ustawa z dnia 29 września 1986 r. — Prawo o aktach stanu cywilnego, Dz.U. 1986, 36, 180.

Lucjan Świto

Resolution in Favour of Marriage — an Oppressive Relic of the Past? The *favor matrimonii* Principle in Contemporary Law

Summary

The present article undertakes the subject of *favor matrimonii* principle, that is, 'favour for marriage' in the national and canon law regulations. The principle, even though it is absent *expressis verbis* from contemporary legal documents, it is more and more often criticised for being an oppressive rule which deprives the human being of their freedom and imprisons them in the chains of an unwanted relationship. Resultantly, the author asks whether the *favor matrimonii* principle has not become a relic of the past? Does it still preserve its validity in the contemporary normative dimension? Is marriage durability of value, and is marriage treated in such a perspective in the contemporary legal dimension? The answer to those questions will be sought by reaching out to the analysis of the provisions of canon law and secular law.

The analysis carried out leads to a conclusion that even though the *favor matrimonii* principle occurs in the analysed normative systems and it equally serves there as a protective measure, it is not, however, identically understood and its scope in each of the systems is slightly different. In canon law the *favor matrimonii* principle is not only a norm unequivocally defined in a regulation, but it is further reinforced by having obtained a status of a presumption of law (*in dubio standum est pro valore matrimonii*). The latter scope of legal protection is not envisaged for marriage in the Polish legal system.

Lucjan Świto

Arbitrer en faveur du mariage — un vestige oppressif du passé ? Le principe *favor matrimonii* dans le droit contemporain

Resume

Le présent article aborde le problème du principe *favor matrimonii*, c'est-à-dire « la faveur à l'égard du mariage » dans le droit polonais et canonique. Ce principe, bien qu'il ne figure pas *expressis verbis* dans les recueils juridiques contemporains, est de plus en plus souvent soumis à la critique en tant que principe oppressif qui prive l'homme de sa liberté et l'emprisonne dans les entraves d'une relation non désirée. Cela étant, l'auteur de l'article, en analysant la législation polonaise et canonique, tente de trouver les réponses à des questions telles que : Le principe *favor matrimonii* n'est-il pas devenu un vestige du passé ? Garde-t-il toujours son actualité dans le droit normatif contemporain ? La dureté du mariage est-elle une valeur et si c'est bel et bien dans une telle optique qu'est traité le mariage dans le droit contemporain ?

L'analyse effectuée conduit à la conclusion que, bien que le principe *favor matrimonii* figure dans les ordres normatifs analysés en y exerçant une fonction protectrice pareille, cela ne signifie pourtant pas exactement la même chose et sa dimension dans chacun des systèmes analysés est différente. Dans le droit canonique, le principe *favor matrimonii* n'est pas seulement une norme définie explicitement dans la réglementation, mais sa conception comme une présomption légale (*in dubio standum est pro valore matrimonii*) renforce visiblement son caractère. Une telle dimension de la protection du mariage n'est pourtant pas prévue dans le droit polonais.

Mots clés : mariage, dureté du mariage, divorce, droit matrimonial

Lucjan Świto

La decisione in favore del matrimonio: vestigio oppressivo del passato? Il principio del *favor matrimonii* nel diritto contemporaneo

Sommario

L'articolo presentato intraprende il problema del principio del *favor matrimonii* ossia della "preferenza per il matrimonio" nel diritto polacco e canonico. Tale principio, anche se non figura *expressis verbis* nelle raccolte giuridiche contemporanee, viene tuttavia sottoposto a critica sempre più frequentemente, come principio oppressivo che priva l'uomo della libertà e lo tiene prigioniero nelle catene di un'unione non voluta. Pertanto l'autore dell'articolo, attraverso un'analisi della legislazione polacca e canonica, prova a misurarsi con quesiti quali: il principio del *favor matrimonii* non è ormai diventato un vestigio del passato? Continua a mantenere la sua attualità nella dimensione normativa contemporanea? La durabilità del matrimonio è un valore ed è proprio in tale ottica che viene trattato il matrimonio nella dimensione giuridica attuale?

L'analisi eseguita porta alla conclusione che sebbene il principio del *favor matrimo-*

nii figuri negli ordini normativi analizzati svolgendovi una funzione tutelante simile, ciò non significa tuttavia precisamente la stessa cosa e il suo campo in ciascuno dei sistemi analizzati è differente. Nel diritto canonico la regola del *favor matrimonii* è non solo una norma definita direttamente nella prescrizione, ma la sua impostazione come presunzione giuridica (*in dubio standum est pro valore matrimonii*) ne rafforza chiaramente la natura. Un campo di tutela simile del matrimonio non è invece previsto dal diritto polacco.

Parole chiave: matrimonio, durabilità del matrimonio, divorzio, diritto matrimoniale