Piotr Majer

The Significance of the Canonical Form of Marriage

Philosophy and Canon Law 1, 157-174

2015

Philosophy and Canon Law vol. 1 (2015), pp. 157–174

Piotr Majer
The Pontifical University of John Paul II in Cracow, Poland

The Significance of the Canonical Form of Marriage

Abstract: The paper offers arguments for the canonical form of contracting marriage *ad validitatem matrimonii* which has been obligatory since the Council of Trent.

Responding to critique and postulates for abolishing the obligatory character of the canonical form, the Author presents its stricte ecclesiastical significance. In the face of the secularization of marriage, the canonical form of contracting marriage should allow the Church not only to exercise church jurisdiction over the marriage, but, first of all, to be a tool of testimony about the sacramentality of marriage and the guarantee of authenticity of the matrimonial sign towards both the future spouses and, *ad extra*, the world.

Keywords: canon law, marriage, canonical form

Introduction

In the Letter to Families *Gratissimam Sane*, Pope John Paul II, in indirect and rather a descriptive way, referred to the canonical form of marriage, underlining that the prospective spouses take their promises "before God and his Church" as the celebrant reminds them before they exchange their matrimonial consent. "Those who take part in the rite are witnesses of this commitment, for in a certain sense they represent the Church and society, the settings in which the new family will live and grow."[1]

[1] John Paul II, Letter to Families *Gratissimam Sane* (February 2, 1994). Acta Apostolicae Sedis [AAS] 86 (1994): 868–925, n. 10.

The paper attempts to present the canonical form of marriage in social and ecclesiastical dimensions, without entering into particular formal and legal problems (like, e.g., the function of "qualified" witness, other witnesses, faculty to assist at marriage, etc.). The article concentrates on the significance of the canonical form of marriage as the way of recognizing marriage in society.

It seems that today the obligation of the form in question *ad validitatem* of marriage is challenged. Contracting marriage is sometimes treated as a formality that offers nothing important for reality of the marriage. Sometimes the form is called "a red tape" or "just a piece of paper." It happens that instead of admitting momentousness of marriage, one speaks only about "legalization" of the relationship that has already existed. Definitely, the canonical form of marriage should be more appreciated and the reflection on it should be deepened.

What is the Canonical Form of Marriage?

The canonical form of marriage, as regulated by can. 1108 § 1 CIC,[2] is a legally defined way of manifesting the matrimonial consent. Although the marital consent is the cause that brings the marriage into being, it must be according to the church legislator's will "lawfully manifested."[3]

The canonical form of marriage must not be identified with the liturgical form of marriage. The latter contains the ceremonies or the rites, and is defined in the liturgical books.[4] It can assume various shapes—in "Ordo celebrandi Matrimonium" of the Roman rite one can find a number of rites to choose from, and, what is more, the rites can vary in different regions according to the adaptations made by the local Episcopal Conferences.

The canonical form of marriage must not be confused with the form of the sacrament of marriage—the canonical form consists of the actions prescribed by the law necessary for the matrimonial consent to be legally valid. The form of the sacrament is the marital consent of the prospective spouses. The con-

[2] Can. 1108–§ 1. Only those marriages are valid which are contracted in the presence of the local Ordinary or parish priest, or of the priest or deacon delegated by either of them, who, in the presence of two witnesses, assists, in accordance with the rules set out in the following canons and without prejudice to the exceptions mentioned in cann. 144, 1112 § 1, 1116, and 1127 §§ 2–3. § 2. Only that person who, being present, asks the contracting parties to manifest their consent and in the name of the Church receives it, is understood to assist at a marriage.

[3] Can. 1057 § 2 *Codex Iuris Canonici*. Hereafter as CIC.

[4] See can. 1119 CIC.

sent is the manifestation of the mutual giving and accepting of a man and a woman.[5]

Generally speaking, the form of a legal act, that is, a marriage contract, is a legally prescribed way of declaration of intent. This rule is accepted by Polish law. The intention of a person who is performing a legal act may be expressed by any behavior of that person which manifests his intention sufficiently.[6] Still, some of the provisions of the Polish law require a special form to perform some legal acts, for example, the written form of a declaration of intent, the written form with an officially certified signature or date, etc. Polish law connects specific legal effects with the lack of the defined form of the declaration of intent (invalidity, lack of the specified effects of a legal act, lack of evidence of the legal activity).[7]

In case of the canonical form of marriage, it must not be perceived in a broad sense, that is, in the sense of the form necessary for manifesting and declaring the intent in law (the intent must be expressed somehow to be the object for the legal regulation). The form of contracting marriage must not be treated only as "pure formality"[8]—even if the requirement is *ad validitatem matrimonii*—because the sense of the canonical form in the ecclesiastical reality has a deeper meaning.

It must be noticed here that the regulations of the canonical form of marriage in church law do not come from the Divine law, but from the Church's law. The requirements of the natural law are freedom from any impediment that comes from the law in question and the matrimonial consent without any defects. Natural law does not require that marriage be contracted in some public form.[9]

For centuries—up till the Decree *Tametsi* of the Council of Trent (1563)[10]—in canonical legal order, there was no obligation of observing any special form of contracting marriage *ad validitatem*. The Church, from the beginning, has recognized the matrimonial consent as the efficient cause, and has paid no attention

[5] See Federico Rafael Aznar Gil, *Derecho matrimonial canónico*, vol. III: *Cánones 1108–1165* (Salamanca: Publicaciones UPSA, 2003), 14–15, ft. 1. For more on the form of the sacrament of marriage, see Zbigniew Janczewski, "Materia i forma sakramentu małżeństwa," *Ius Matrimoniale* 18 (2013): 7–23.

[6] See art. 60 of the Polish Civil Code.

[7] See Teresa Mróz, "Forma czynności prawnej," in *Wielka Encyklopedia Prawa*, ed. B. Hołyst (Warszawa: Prawo i Praktyka Gospodarcza, 2005), 220–21.

[8] See Enrico Vitali, Salvatore Berlingò, *Il matrimonio canonico* (Milano: Giuffrè, 2003), 113.

[9] See Francesco Bersini, *Il diritto canonico matrimoniale. Commento giuridico-teologico-pastorale* (Torino: Elle Di Ci, 1983), 118.

[10] See Council of Trent, Session 24 (November 11, 1563), Canons of the reform of marriage, in Heinrich Denzinger, *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum* (Bologna: Edizioni Dehoniane, 1995), 740–41.

to the formal requirements, and has accepted the form of contracting marriage which was used at that time and in different countries. It should be mentioned that the Church always insisted that the contracting of marriage should be accompanied by a priest's blessing.[11] Roman law, which did not require fulfilling any special formalities for the validity of marriage, but only the will of staying in marriage, had a considerable influence on the canonical regulations in this matter.

Despite the polemics, which accompanied the enactment of the canonical form as the necessary condition for validity of marriage,[12] and the difficulties involved in implementation of the decree of the Council of Trent,[13] the provisions about the canonical form had a huge impact on the discipline of the Church in the following centuries.

In the face of the Church's jurisdiction over the marriages being challenged during the Reformation period, formalization of the manifestation of the matrimonial consent and the requirement that the marriage be contracted publicly, *in facie Ecclesiae*, under the sanction of invalidity, could be seen as the optimal means for the defense of the canonical marriage and the jurisdiction of the Church over the sacrament.

Hazard of too Formal Presentation of the Canonical Form

Requirement of the canonical form produces the danger of understanding marriage as a bond whose nature is only legal, because it was contracted according to law. In this perspective, marriage differs from the concubinage only because there was a ceremony that made the cohabitation between a man and a woman legal, and their sexual intercourses, until then sinful, became morally acceptable.[14]

This understanding of marriage causes that what is put in the first place is not the matrimonial consent, which is *causa efficiens* of marriage, but the form

[11] See more Anna Tunia, "Kształtowanie się kanonicznej formy zawarcia małżeństwa," *Roczniki Nauk Prawnych* 18 (2008): 129–59, n. 1.

[12] See Jean Gaudemet, *El matrimonio en Occidente* (Madrid: Taurus Humanidades, 1993), 330–33.

[13] See Tunia, *Kształtowanie się kanonicznej formy*, 136.

[14] For a critical opinion about it, see Pedro-Juan Viladrich, *Agonía del matrimonio legal. Una introducción a los elementos conceptuales básicos del matrimonio* (Pamplona: EUNSA, 1984), 119–20.

of contracting the marriage—marriage is legally contracted only when a priest or a deacon with proper faculty assists at the ceremony.

In this sense, one can comprehend contracting marriage as only "a mere formality," or call the marriage "just a piece of paper"—what is, to a certain extent, understandable. "Formalism and lawfulness constitute today two big smokescreens, which make perceiving the genuine nature of marriage very difficult."[15]

The picture of marriage as interpersonal reality is being obscured by the formal and bureaucratic aspects of it. Aversion to the latter—especially when a legally established relationship designated as "marriage" is not a true marriage—turns into a critique of marriage itself.[16]

Meanwhile the legal dimension of marriage does not emerge from the way it was contracted, but from the fact that a man and a woman who are married are in the relation of justice: they have rights and duties, they are obliged to certain behaviors. Marital love (understood not as the reality of affection, emotion, but as the will of doing good for the spouse) becomes the obligation. The spouses, who mutually give and accept one another, not the provisions of law or the form of celebration of marriage, play the central role in contracting marriage, and they are exclusive creators of the bond.[17] The canonical form of marriage is not a *causa efficiens* of marriage; it is only a requirement for its validity.[18] It does not mean that the canonical form is deprived of its importance or proper sense.

To interpret the sense of canonical form of celebration of marriage one must, first of all, realize that the marriage is not a ceremony or life experience, but it is an interpersonal reality of a man and a woman who are contracting marriage. Those to be married want not so much to be called "the spouses" and "to live like the spouses" as "to be the spouses." This is why the ceremony of entering into marriage, regardless the ceremonial aspects, if deprived of the element of giving and accepting one another as a mutual gift, would not be the sign of initiating the marriage, but rather of some kind of a fake marriage.[19] Every legal regulation of the way of entering into marriage is just a secondary

[15] Viladrich, *Agonía del matrimonio legal*, 119.

[16] See Viladrich, *Agonía del matrimonio legal*, 121–22. See also Ginter Dzierżon, "Funkcje formy kanonicznej w kanonistycznym systemie prawa małżeńskiego," *Ius Matrmoniale* 7 (2002): 114–15."

[17] See Miguel Ángel Ortiz, "Forma canónica del matrimonio," in *Diccionario General de Derecho Canónico*, ed. Javier Otaduy, Antonio Viana, Joaquín Sedano, vol. IV (Pamplona: Thomson Reuters Aranzadi, 2012), 64.

[18] Miguel Ángel Ortiz, ed. "La forma canonica quale garanzia della verità del matrimonio," in *Ammissione alle nozze e prevenzione della nullità del matrimonio* (Milano: Giuffrè, 2005), 142.

[19] See Ortiz, *Forma canónica*, 64.

causa efficiens comparing to the natural reality, which is to be respected by the legislator.[20]

And although the act of contracting marriage, that is, the act of manifesting the will for marriage (matrimonial consent), is one of the most personal decisions taken by a person during his or her life, many provisions of canon law protect the right to freedom and absolute self-determination of the future spouses whose consent cannot be supplied by any human power.[21] The act in question is not only the subject of interest of the two persons who are entering marriage, but it also concerns other communities: the society, the community of the Church, and the family. As one can read in the Apostolic exhortation *Familiaris Consortio*: "Marriage […] is not an event that concerns only the persons actually getting married. By its very nature it is also a social matter, committing the couple being married in the eyes of society."[22] The act of celebrating marriage causes that a man and a woman are being perceived and defined as a husband and a wife—the spouses.

Marriage as an Ecclesial Reality

Catechism of the Catholic Church, justifying the necessity of the canonical form of marriage, indicates that the presence of the priest or the deacon, as well as the two witnesses during the ceremony "visibly expresses the fact that marriage is an ecclesial reality."[23] John Paul II, in His address to the Tribunal of Roman Rota on January 28, 1982, underlined that "for us the marriage consent is an ecclesial act. It establishes the 'domestic Church' and constitutes a sacramental reality where two elements are united: a spiritual element, […] and a social element as an organized hierarchical society."[24]

Marriage introduces the spouses into an ecclesial order (*ordo*), and creates rights and duties in the Church between a husband and a wife and towards their children.[25] Also, those who are married are bound to the whole ecclesiastical community by the special obligation to strive for the building up of the people of God through their marriage and family.[26] Marriage and the Christian family built on it become a seed of the new Christians and the fundamental group unit

[20] See Viladrich, *Agonía del matrimonio legal*, 122–23.

[21] See can. 1057 § 1 CIC.

[22] John Paul II, *Familiaris Consortio*, n. 68.

[23] CCC, 1630.

[24] John Paul II, *Address to the Tribunal of the Roman Rota* (January 28, 1982). AAS 74 (1982): 449–54, n. 5.

[25] See CCC, 1631.

[26] See can. 226 § 1 CIC.

of society in which, by the net of mutual connections among families and links inside the society, it becomes a source of Christian influence in the world.[27]

It is not the point that the marriage comes into being in the ecclesiastical community, as it is done in any other human community. The sacramental dimension of marriage requires that the marriage must be contracted *in facie Ecclesiae*, as public and liturgical act,[28] with the priest's blessing—which in the tradition and order of the Catholic and the Non-Catholic Easter Churches has a fundamental character[29]—and in the presence of the two witnesses, who are the representatives of the community of believers. It is worth underlining this special, but quite often neglected, aspect of the role of the witnesses of the ceremony of contracting marriage. They are not just the guarantors of the validity of contracting marriage as a legal act, but they are "representatives of the Christian community which, through them, participates in a sacramental act relevant to it, because a new family is a cell of the Church."[30]

The commentaries about the participation of the two witnesses in the ceremony of marriage often become content with underlining that—in distinction from the presence of the "qualified" witnesses—they do not play any active function. The two witnesses are not obliged to *formally* participate, which would be connected with the special intention of being the witness and even with the awareness of fulfilling this function. Law does not require that the personal data of the two witnesses be noted down in the documents. The only requirement is minimal perceptual ability,[31] and ability to give testimony about the contracted marriage.[32]

Meanwhile, the role of the two witnesses is more significant than only the ability of perceiving reality, and, potentially, giving the testimony. It is the reason why they are to be encouraged to "prepare themselves properly for the sacrament of Reconciliation and the Eucharist."[33] It means that the two witnesses of marriage, generally speaking, should be Catholics, but, of course, it is not a requirement *ad valorem matrimonii*.[34]

---

[27] See Javier Hervada, "Sub can. 226," in *Código de Derecho Canónico. Edición bilingüe y anotada. A cargo de Instituto Martín de Azpilcueta* (Pamplona: EUNSA, 2007), 208–209.

[28] See CCC, 1631.

[29] See can. 828 § 1 i 2 CECC. See more Urszula Nowicka, *Szafarz sakramentu małżeństwa. Studium historyczno-prawne* (Wrocław: Papieski Wydział Teologiczny, 2007), 185–92.

[30] Pontifical Council for the Family, *Preparation for the Sacrament of Marriage* (May 13, 1996), n. 55.

[31] The two witnesses must not have a heavy mental disorder, or have no eyesight, or no hearing, or be under the influence of alcohol, or in any way lacking perception.

[32] See Ludovicus Bender, *Forma iuridica celebrationis matrimonii. Commentarius in canones 1094–1099* (Romae: Desclée, 1960), 45–46; Alberto Bernárdez Cantón, *Compendio de derecho matrimonial canónico* (Madrid: Tecnos, 1991), 220.

[33] Pontifical Council for the Family, *Preparation for the Sacrament of Marriage*, n. 55.

[34] What is interesting, in the project of reform of canon law, which was sent for consultation by the Pontificium Consilium de Legum Textibus in 2011, among prohibitions that could be used

Functional Meaning of the Canonical Form of Marriage

The Council of Trent, while enacting the canonical form of marriage required for the validity of marriage, was moved mainly by the concern to act against the bigamy.[35] It must be remembered that at that time, there was no obligation, quite well known nowadays,[36] to record every single marriage both in the baptismal register and in the marriage register.[37] The obligation in question constitutes today the best means of preventing the bigamy. Introducing the canonical form of marriage in the Decree *Tametsi*, the council was motivated by the need to avoid invalid marriages.[38]

Also today—although canon law has worked out better means, than in the Trent times, of establishing the freedom to marry (mainly the obligation of presenting the proof of baptism with annotations from the church records)—the above-mentioned function of the canonical form of marriage is still evoked as a justification of its legal binding. *The Catechism of the Catholic Church* expresses this idea in the following words—"the public character of the consent protects the 'I do' once given and helps the spouses remain faithful to it."[39]

What matters now is not so much the idea, so important to the Fathers of the Council of Trent, of preventing bigamous marriages by revoking the validity of the marriages contracted without the presence of a priest (*matrimonia clandestina*), as generally speaking—the idea of providing the possibility of the effective supervision over the canonical marriages: preparation for marriage,

as a disciplinary punishment there was the prohibition against being the witness of marriage (prohibitio "adstandi ut testis in celebratione canonica matrimonii"). See Pontificium Consilium de Legum Textibus, *Schema recognitionis Libri VI Codicis Iuris Canonici* (Typis Vaticanis, 2011), 24, can. 1336 § 3, 11º.

[35] See Bender, *Forma iuridica*, 15.

[36] See cann. 1121 § 1, 1122 § 1, and 2 CIC.

[37] The Council of Trent introduced the obligation of registration of marriage in the marriage register. Earlier there was no such obligation, although in some places there was a custom of keeping such records. The order of registering the marriages in the baptismal records was introduced by Decree *Ne temere* from 2 August 1907 (S. Congregatio Concilii, Decr. *Ne temere*, CIC Fontes, vol. VI, 867–70, n. 4340).

[38] "But while the holy council recognizes that by reason of man's disobedience those prohibitions are no longer of any avail, and considers the grave sins which arise from clandestine marriages, especially the sins of those who continue in the state of damnation, when having left the first wife with whom they contracted secretly, they publicly marry another and live with her in continual adultery, and since the Church, which does not judge what is hidden, cannot correct this evil unless a more efficacious remedy is applied." Council of Trent, Session 24, *Canons of the reform of marriage*.

[39] CCC, 1631.

verification of legal capacity of the future spouses, integrity of the matrimonial consent to be manifested, proper notification of the marriage in church records, and the possibility of potential annulment of the marriage.

In short, the canonical form of marriage safeguards the Church's exercise of jurisdiction over marriages.[40] Despite the fact that significant changes occurred in the field of the centuries-old conflict between the Church and state regarding the power over marriages of the Catholics, and that the departure from the confrontation policy has taken place, and that the accent has been put on the positive aspect of mutual relations of the two subjects (that is, the cooperation for the common good), the issue concerning the jurisdiction in question has not yet been solved.

Legal biding of the canonical form of marriage contracted by the Catholics is the expression of the aspiration of the Church to protect the possibility of exercising jurisdiction over marriages, which would be impossible or would be so much harder if the marriages were not contracted *coram Ecclesia*.

Questioning the Legitimacy of the Canonical Form of Marriage *ad validitatem matrimonii*

Even though the arguments of ecclesiastical, sociological, and legal nature weigh in favor of applying the specific form of contracting marriages, quite often the requirement of obligatory form of marriage is being questioned, especially its necessity for the validity of marriage.

Although such ideas were present at the Council of Trent,[41] today no one challenges the authority of the Church to enact requirements *ad validitatem* of marriage. Still, there are currently some reservations as to the need of keeping in force the requirement of canonical form for the validity of marriage, especially in light of the fact that the legal order instituted by state seems to fulfill quite well the need for public form of contracting marriage as well as its legal certainty by means of the civil form of marriage and civil registrations of it.[42]

[40] See Edward Górecki, "Jurysdykcja Kościoła katolickiego nad małżeństwem kanonicznym," in *Skutki cywilnoprawne małżeństwa kanonicznego ze szczególnym uwzględnieniem prawa w Polsce, Słowacji i Republice Czeskiej*, ed. Piotr Ryguła (Kraków: Scriptum, 2014), 35–44.

[41] See Bender, *Forma iuridica*, 17.

[42] The views of the representatives of canon law are presented in short form in Aznar Gil, *Derecho matrimonial*, 24–28.

Such reservations have been articulated in propositions for the Second Vatican Council[43] and they are expressed also today.[44]

There are some scholars who claim that objections against the marriages contracted without the presence of a priest, which are called *matrimonia clandestine*,[45] have no rational foundations in today's circumstances. The requirements given by the state law are sufficient for the protection of the public character of marriage and they are adequate to prevent the bigamy.[46]

Resignation from the requirement of canonical form for the validity of marriage would make contracting marriage easier for the people who consider themselves unbelievers or in case of the mixed marriages, or the marriages contracted between the people of different than the European culture, and so on.

Some claim that, in the Trent era, the prevention of contracting marriages without canonical form was justified, because there was no marriage register for marriages contracted outside the Church, but today there are registers of civil marriages.[47]

Others allege that the obligation of canonical form of marriage is the excuse for intentional contracting the invalid marriages by the Catholics, who are aware of the fact that marriage contracted without the canonical form is invalid. By doing this, the Catholics can easily free themselves from the bond and, without any consequences, they can contract a new marriage. According to this argument, so easy and cynical multiplication of invalid marriages favors "the divorce mentality" and harms the souls. On the other hand, the Catholics who are not aware of the church regulations contract marriages in non-canonical form and contract them invalidly, depriving themselves of the grace of the sacrament.[48]

---

[43] See Ortiz, *La forma canonica*, 162–63.

[44] See Alberto de la Hera, "Sobre el signo nupcial y los diversos significados de la forma: algunos temas para el debate," in *El matrimonio y su expresión canónica ante el III Milenio. X Congreso Internacional de Derecho Canónico*, ed. Pedro-Juan Viladrich, Javier Escrivá-Ivars, Juan Ignacio Bañares, Jorge Miras (Pamplona: Eunsa, 2001), 543–44.

[45] Often the term *matrimonium clandestinum* is translated as "secret marriage." This translation is proper, but only in terms of language (*clandestinus* means: secret, underground). The translation does not offer the essence of the technical term. *Matrimonia clandestina* is not marriage contracted secretly (as it is in case of can. 1131 CIC), but foremost marriage contracted without the presence of the priest. The Council of Trent admited that such marriages were valid only when contracted before the *Tametsi* Decree.

[46] See Piotr Kroczek, "Ocena *raison d'être* norm dotyczących kanonicznej formy zawarcia małżeństwa w warunkach polskiego prawa cywilnego. Przyczynek do dyskusji." *Analecta Cracoviensia* 41 (2009): 469–81.

[47] See Javier Otaduy, "Abandono de la Iglesia católica por acto formal. Comentario al *Motu Proprio Omnium in mentem*." *Ius Canonicum* 50 (2010): 605–606.

[48] See Piotr Kroczek, "Does Obligatory Canonical Form of Marriage Contribute to *salus animarum*?" *Folia Canonica* 12 (2009): 23–30; Kroczek, "Should Canonical Form still be Required for the Validity of Marriage? the Future of Can. 1108 CIC 1983," in *„Iustitia et Iudicium."*

These opinions are usually combined with the postulates of "restoration" of civil marriage. It means that the canonical form of marriage would be necessary but only *ad liceitatem*, not for validity of marriage. Some of the faithful could decide to contract marriage according to civil form.[49] The postulates are nothing new. They appeared in the 1960s,[50] also in the context of the possibility of creating the so-called "natural marriage," that is, the marriage without the property of sacramentality,[51] by the baptized person who does not have enough faith necessary to be a minister and a subject of the sacrament of marriage.[52]

Among different proposals, there is one that argues that the civil ceremony should be treated as the first step necessary for a valid marriage (as a sacrament or as just a marriage). For those who would wish, there would be the second step—a priest's blessing.[53]

The question arises: would this be the case of contracting canonical marriage in civil form or the case of contracting civil marriage which would be regulated only by state law? The latter marriage can be terminated by divorce, and the marriage in question is without any reference to the religion or the sacrament. The civil marriage is often, in practice, made equal with the factual unions of a man and a woman, and sometimes, in case of the legal regulations of some states, with the unions of people of the same sex. The difference is not only the form of marriage, but the legal shape of marriage, and first of all, the difference is the lack of indissolubility of any civil marriage.[54]

Civil marriage has moved away from one marriage to such a degree that today some propose—as a case of specific protest, under the category of conscience clause—that Catholics should give up the civil effects of marriage. Acceptance of the effects is, according to some, equal to taking part in distorting

Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz, ed. Janusz Kowal, Joaquin Llobell (Città del Vaticano: Libreria Editrice Vaticana, 2010), 857–79.

[49] See Aznar Gil, *Derecho matrimonial*, 26.

[50] See, critically about such proposals, Rafael Navarro-Valls, "Forma jurídica y matrimonio canónico. Notas críticas a las tesis canonizadoras del matrimonio civil." *Ius Canonicum* 14 (1974): 63–107.

[51] It would mean questioning the rule of identity between the agreement and the sacrament in the marriage between the baptized persons (see can. 1055 § 2 CIC).

[52] The answer to the postulates was offered in the Apostolic Exhortation of John Paul II, *Familiaris Consortio*, n. 68. Among many studies on this subject, see Tomás Rincón Pérez, "El requisito de la fe personal para la conclusión del pacto conyugal entre bautizados según la Exh. Apost. Familiaris Consortio," *Ius Canonicum* 23 (1983): 201–36; Grzegorz Leszczyński, *Osoba ochrzczona niewierząca a sakrament małżeństwa* (Łódź: Wydawnictwo Archidiecezji Łódzkiej, 2004), 56–73.

[53] See Navarro-Valls, *Forma jurídica*, 69–71 (The author summarizes the voices from academic literature).

[54] See Remigiusz Sobański, "*Velut Ecclesia domestica* a cywilna forma zawarcia małżeństwa," *Roczniki Teologiczno-Kanoniczne* 30, part 5 (1983): 33–34.

the institution of marriage, and this must be in the name of the truth simply rejected.[55]

Even if such radical postulates are impossible to keep up due to the order expressed in can. 1071 § 1, 2º CIC of gaining civil recognition for the marriage and existence of objective reasons for this norm,[56] it would be very dangerous to recognize the civil form of contracting marriage as the equal form to canonical one.

Another objection to the requirement of the necessity of the canonical form of marriage for the validity of marriage has been voiced. After *motu proprio—Omnium in mentem* of October 26, 2009,[57] went into effect and again bound all the Catholics by the obligation of observing the canonical form of marriage, even those who by a formal act defected from the Catholic Church,[58] the objection has been voiced that this regulation would lead to multiplication of invalid marriages and, at the same time, it would limit the *ius connubii* of those of the Faithfull who are formally and spiritually far away from the Church, and who have no motivation to respect canonical form of marriage when they contract marriage with non-Catholics or with the apostates.[59]

The Pope Benedict XVI's decision of the novelization of can. 1117 CIC (the analogical can. 834 § 1 CCEC 1988 did not contain the clause of the formal act of defecting from the Church), was made, similarly to the Council of Trent's decision, to eliminate *matrimonia clandestine*—as it is expressed in the justification of the law[60]—which were contracted outside the Church (most often in the civil registry office) by the Catholics, who had been separated from the church community by the formal act and who, very often, were not aware of the canonically binding character of such marriages.[61]

---

[55] See Hugo de Azevedo, "Perché registrare civilmente i matrimoni canonici?," *Studi Cattolici* 48 (2005): 767–69, n. 537; de Azevedo, "A objecção de consciência á transcrição do matrimónio canónico no Registo Civil," *Forum Canonicum* 3 (2008): 153–57.

[56] See Piotr Majer, *Zawarcie małżeństwa kanonicznego bez skutków cywilnych (kan. 1071 § 1, 2º Kodeksu Prawa Kanonicznego)* (Kraków: Wydawnictwo Naukowe PAT, 2009), passim.

[57] Benedict XVI, Motu proprio *Omnium in mentem*, AAS 102 (2010): 8–10.

[58] Can. 1117 CIC promulgated in 1983 excluded the Catholics, who have left the Church "by a formal act" from the obligation of observing canonical form of marriage. Thus, the Catholic who left the Church by a formal act, contracting marriage with other Catholics who are in the same situation or with the non-Catholic, would contract marriage also validly in civil form. After the novelization of law in 2009 it has been no longer possible.

[59] See Otaduy, *Abandono de la Iglesia católica*, 612, 619–21, 624.

[60] "[…] many of the marriages would be *de facto* secret (*clandestina*) for the Church."

[61] Formulation of can. 1117 before its novelization in 2009 was very disputable and caused many polemics among the commentators, especially the term "a formal act of separation from the Church" was not clear. Only the circular letter of the Pontifical Council for Legislative Text, *Actus formalis defectionis ab Ecclesia catholica* (March 13, 2006), *Communicationes*

After the novelization of the can 1117 CIC, those Catholics who are contracting only civil marriages are contracting them invalidly. For a valid contraction of marriage they must observe the canonical form. The Catholics are obliged to respect the norm, but, due to the fact that they have chosen to defect from the Church, they are not going to do it.

It causes the invalidity of such marriages in the church legal order. To avoid this, the canonical form of marriage would have to be not required *ad validitatem matrimonii*. On the other hand, it must be remembered that such persons who defected from the Church by the act of apostasy are unlikely to seek the canonical validity for their marriage. What is more, in case of the repentance and coming back to the communion with the Church, they accepted with surprise the information that they were bound by canonical marriage.[62]

The Apostolic Dimension of the Canonical Form of Marriage

If the idea that the marriage contracted in the civil form is also valid in the Church were to spread, the Church would practically lose the possibility of exercising jurisdiction over the canonical marriage and, in the longer perspective, over marriage as a reality that comes from the Creator himself. How would it be possible, for instance, in such a situation, to confirm a free state of a person—and to avoid remarrying after divorce—with a deep conviction of conscience that the marriage is valid and recognized by the Church, with all disciplinary and moral consequences such as, for example, the possibility of receiving the Holy Communion?

In talking about the control or exercise of jurisdiction, the point is not only to take actions of the stricte supervising nature. The significance of the canonical form does not exhaust the legal certainty of the contracted marriage (such a legal certainty can be given by any public form—also a civil one.)[63] Even if the

38 (2006): 170–72, brought some relevant directions for proper interpretation of the act in question, but the document did not solve all the problems.

[62] This inconvenience was mentioned in *motu proprio Omnium in mentem*: "The new law also made difficult the return of baptized persons who greatly desired to contract a new canonical marriage following the failure of a preceding marriage."

[63] Although in the literature the difference between the function of the canonical form of marriage and the civil form is underlined. The first form is to guarantee, first of all, the public character and legal certainty of the act of contracting marriage. The second one has a constitutive character. Contracting marriage in accordance with the formalities creates the legal supposition *iuris tantum*. It means that it allows the contrary proof, that the matrimonial consent as

arguments of the social nature would not be convincing enough for justification of the necessity of the canonical form ad *validitatem* of marriage, the ecclesiastical dimension of the canonical form must be still underlined and deepened.

The canonical form of marriage connected with a liturgical form should manifest authentic matrimonial consent—a sacramental sign.[64]

Reception of the matrimonial consent in nomine *Ecclesiae*[65] by the assisting person gives not only the certainty about the consent (as a confirmation of the fact of expressing the consent and the legal consequences of it), but also the guarantee—of course not an absolute one—that the consent of the parties is a genuine one.[66]

The canonical form of marriage is a specific reassurance of the Church about the integrity of matrimonial consent expressed by the future spouses. Allowing them to take part in the ceremony,[67] the Church confirms that the consent in question is a real expression of their mutual giving and accepting one another for the purpose of establishing marriage.[68]

This confirmation is not, of course, an absolute one. Rather, it creates the foundation of the supposition (which can be overcome) of the validity of marriage.[69] Without the preparatory actions, which are the compulsory result of the need of the canonical form of marriage (the preparatory actions include: religious education, liturgical preparation, establishing the freedom to marry, verification of the integrity of the consent[70]), there would be no practical means to make sure that the marriage which is to be contracted would measure up to the requirements given by the teaching of the Church.[71]

---

casua efficiens of marriage was manifested in a proper way. Civil law, creates *praesumptio iuris et de iure*. It means that in civil law there is no place for simulation (see can. 1101 § 2 CIC) as the reason of invalidity of marriage. The conditions are treated as non-existent. Civil law, generally speaking, is not eager to challenge the validity of matrimonial consent, which was formally manifested in the way prescribed by law, which is contrary in canon law. The law in question recognizes the primacy of real consent. It is the reason why formulation of the allegations about the excessive formalism is false. See Enrique Lalaguna, "Función de la forma jurídica en el derecho canónico," *Ius Canonicum* 1 (1961): 215–27.

[64] See Aznar Gil, *Derecho matrimonial*, 26–27.

[65] See can. 1108 § 2 CIC.

[66] See Lalaguna, "Función de la forma," 218; Dzierżon, *Funkcje formy kanonicznej*, 116–18.

[67] In practice, the liturgical form of marriage and canonical form of marriage are mutually connected; still one must be aware of the difference between them.

[68] It is the strict sense of the words of John Paull II from *Familiaris Consortio*, n. 68: "However, when in spite of all efforts, engaged couples show that they reject explicitly and formally what the Church intends to do when the marriage of baptized persons is celebrated, the pastor of souls cannot admit them to the celebration of marriage."

[69] See can. 1060 CIC.

[70] See can. 1063 and 1066 CIC.

[71] See Ortiz, *La forma canonica*, 138–39.

It seems insufficient to postulate keeping the canonical form only *ad liceitatem* of marriage, with keeping, at the same time, the obligation for the spouses to come, after contracting marriage according to civil form or any other form, to the Ordinary or the pastor, in order to verify if the marriage meets the requirements of legal capacity of the parties and could be considered as a valid marriage, and registered in the church registers of marriage.[72]

This project produces some serious objections—how to treat marriages, when the spouses did not come to the pastor? It can be presumed that the vast majority of the persons who are contracting marriage outside the Church would not be interested in canonical verification of their bond of marriage.

Recognition, as a general rule, of the civil form of marriage as a sufficient ground for valid contraction of canonical marriage, that is, the so-called "canonization" of the civil form of contracting marriage,[73] would cause, first of all, diminishing of the sacramental dimension of marriage. But the dimension in question is to be protected by the institution of canonical form of marriage.[74]

By keeping the obligation of canonical form of marriage, the Church desires that the marriage should not be deprived, in the social awareness, of the sacramental sign, and the Church be seen as the giver of the blessing for marriage.

The ultimate reason for keeping the canonical form is the requirement of recognizability of the sacramental sign of marriage. It allows keeping and defending the other significant characteristics of the marriage in the face of the secularization of the institution. One of the signs of the secularization is the depravation of marriage's public and legal dimension and pushing it into the realm of private reality and treating the marriage only as a matter of conscience. It is done simultaneously with the process of making equal, in practice and in law, the marriages with other forms of cohabitation.

The canonical form of contracting marriage has really the apostolic significance and it differs from the civil form of marriage. Civil law limits its horizons to the earthly community. Church law, although it is the law of the earthy community, does not close itself within the limits of the current time. The latter law is the law of the community of salvation and the law must give testimony. Although it fulfills its function in the world, it does not give orders to the world; it strives for the recognition of the Church's actions by the world.[75]

---

[72] See Ortiz, *La forma canonica*, 170. It would be administrative proceeding analogical to the proceeding of legalization of marriages contracted by the Catholics in the Orthodox Church, where the form of marriage bids only *ad liceitatem* (see can. 1127 § 1 CIC). See Leszek Adamowicz, "Aspekt prawno-liturgiczny zawarcia małżeństwa katolików z prawosławnymi," in *Kanoniczno-liturgiczne aspekty zawierania małżeństw mieszanych i im podobnych*, ed. Urszula Nowicka (Warszawa: Wydawnictwo Gaudentinum, 2014), 80–81.

[73] See can. 22 CIC.

[74] See Navarro-Valls, *Forma jurídica*, 97.

[75] See Sobański, *Velut Ecclesia domestica*, 38–39.

The canonical form of contracting marriage is one of a number of the institutions of the Church law that fulfill the role in question. It should be the sign of the genuine marriage—the authentic mutual act of giving and accepting man and woman, who—strengthened by the grace of the sacrament—establish, in the face the Church and the world, a partnership of their whole life.

Bibliography

Adamowicz, Leszek. "Aspekt prawno-liturgiczny zawarcia małżeństwa katolików z prawosławnymi." In *Kanoniczno-liturgiczne aspekty zawierania małżeństw mieszanych i im podobnych*, edited by Urszula Nowicka, pp. 69–81. Warszawa: Wydawnictwo Gaudentinum, 2014.

Aznar Gil, Federico Rafael. *Derecho matrimonial canónico*, vol. III of *Cánones* 1108–1165. Salamanca: Publicaciones UPSA, 2003.

Azevedo, Hugo de. "Perché registrare civilmente i matrimoni canonici?." *Studi Cattolici* 48 (2005): 767–769, n. 537.

Azevedo, Hugo de. "A objecção de consciência á transcrição do matrimónio canónico no Registo Civil." *Forum Canonicum* 3 (2008): 153–157.

Benedict XVI. *Motu proprio Omnium in mentem* (October 26, 2009). AAS 102 (2010): 8–10.

Bender, Ludovicus. *Forma iuridica celebrationis matrimonii. Commentarius in canones 1094–1099*. Romae: Desclée, 1960.

Bernárdez Cantón, Alberto. *Compendio de derecho matrimonial canónico*. Madrid: Tecnos, 1991.

Bersini, Francesco. *Il diritto canonico matrimoniale. Commento giuridico-teologico-pastorale*. Torino: Elle Di Ci, 1983.

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

Council of Trent, Session 24 (November 11, 1563), "Canons of the reform of marriage." In Heinrich Denzinger, *Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum*, pp. 740–741. Bologna: Edizioni Dehoniane, 1995.

Hera, Alberto de la. "Sobre el signo nupcial y los diversos significados de la forma: algunos temas para el debate." In *El matrimonio y su expresión canónica ante el III Milenio. X Congreso Internacional de Derecho Canónico*, edited by Pedro Juan Viladrich, Javier Escrivá-Ivars, Juan Ignacio Bañares, and Jorge Miras, pp. 537–544. Pamplona: EUNSA, 2001.

Dzierżon, Ginter. "Funkcje formy kanonicznej w kanonistycznym systemie prawa małżeńskiego." *Ius Matrmoniale* 7 (2002): 111–118.

Gaudemet, Jean. *El matrimonio en Occidente*. Madrid: Taurus Humanidades, 1993.

Górecki, Edward. "Jurysdykcja Kościoła katolickiego nad małżeństwem kanonicznym." In *Skutki cywilnoprawne małżeństwa kanonicznego ze szczególnym uwzględnieniem prawa w Polsce, Słowacji i Republice Czeskiej*, edited by Piotr Ryguła, pp. 35–44. Kraków: Scriptum, 2014.

Hervada, Javier. "Sub can. 226." In *Código de Derecho Canónico. Edición bilingüe y anotada. A cargo de Instituto Martín de Azpilcueta*, pp. 208–209. Pamplona: EUNSA, 2007.

Jakubiak, Tomasz. "Prawno-liturgiczne aspekty zawierania małżeństw z osobami, które formalnym aktem wystąpiły z Kościoła katolickiego." In *Kanoniczno-liturgiczne aspekty zawierania małżeństw mieszanych i im podobnych*, edited by Urszula Nowicka, pp. 41–67. Warszawa: Gaudentinum, 2014.

Janczewski, Zbigniew. "Materia i forma sakramentu małżeństwa." *Ius Matrimoniale* 18 (2013): 7–23.

John Paul II. Apostolic Exhortation *Familiaris Consortio* (November 22, 1981). AAS 74 (1982): 81–191.

John Paul II. *Address to the Tribunal of the Roman Rota* (January 28, 1982). AAS 74 (1982): 449–454

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

Kroczek, Piotr. "Does Obligatory Canonical Form of Marriage Contribute to 'salus animarum'?" *Folia Canonica* 12 (2009): 23–30.

Kroczek, Piotr. "Ocena 'raison d'être' norm dotyczących kanonicznej formy zawarcia małżeństwa w warunkach polskiego prawa cywilnego. Przyczynek do dyskusji" *Analecta Cracoviensia* 41 (2009): 469–481.

Kroczek, Piotr. "Should Canonical Form Still Be Required for the Validity of Marriage? The Future of Can. 1108 CIC 1983." In *"Iustitia et Iudicium." Studi di diritto matrimoniale e processuale canonico in onore di Antoni Stankiewicz*, edited by J. Kowal and J. Llobell. Città del Vaticano: Libreria Editrice Vaticana, 2010: 857–879.

Lalaguna, Enrique. "Función de la forma jurídica en el derecho canónico." *Ius Canonicum* 1 (1961): 215–227.

Leszczyński, Grzegorz. *Osoba ochrzczona niewierząca a sakrament małżeństwa*. Łódź: Wydawnictwo Archidiecezji Łódzkiej, 2004.

Majer, Piotr. *Zawarcie małżeństwa kanonicznego bez skutków cywilnych (kan. 1071 § 1, 2º Kodeksu Prawa Kanonicznego)*. Kraków: Wydawnictwo Naukowe PAT, 2009.

Mróz, Teresa. "Forma czynności prawnej." In *Wielka Encyklopedia Prawa*, edited by Brunon Hołyst, pp. 220–221. Warszawa: Prawo i Praktyka Gospodarcza, 2005.

Navarro-Valls, Rafael. "Forma jurídica y matrimonio canónico. Notas críticas a las tesis canonizadoras del matrimonio civil." *Ius Canonicum* 14 (1974): 63–107.

Nowicka, Urszula. *Szafarz sakramentu małżeństwa. Studium historyczno-prawne*, pp. 185–192. Wrocław: Papieski Wydział Teologiczny, 2007.

Ortiz, Miguel Ángel. "Forma canónica del matrimonio." In *Diccionario General de Derecho Canónico*, edited Javier Otaduy, Antonio Viana, Joaquín Sedano, vol. IV, pp. 63–73. Pamplona: Thomson Reuters Aranzadi, 2012.

Ortiz Miguel Ángel. ed. "La forma canonica quale garanzia della verità del matrimonio." In *Ammissione alle nozze e prevenzione della nullità del matrimonio*, pp. 137–186. Milano: Giuffrè, 2005.

Otaduy, Javier. "Abandono de la Iglesia católica por acto formal. Comentario al Motu Proprio *Omnium in mentem*." *Ius Canonicum* 50 (2010): 601–627.

Pontifical Council for the Family. *Preparation for the Sacrament of Marriage* (May 13, 1996). Vatican City: Libreria Editrice Vaticana, 1996.

Pontificium Consilium de Legum Textibus. "Actus formalis defectionis ab Ecclesia catholica." (March 13, 2006). *Communicationes* 38 (2006): 170–172.

Pontificium Consilium de Legum Textibus. *Schema recognitionis Libri VI Codicis Iuris Canonici*. Typis Vaticanis 2011.

Rincón Pérez, Tomás. "El requisito de la fe personal para la conclusión del pacto conyugal entre bautizados según la Exh. Apost. Familiaris Consortio." *Ius Canonicum* 23 (1983): 201–236.

S. Congregatio Concilii, Decr. *Ne temere*. CIC Fontes, vol. VI, pp. 867–870, n. 4340.

Sobański, Remigiusz. "*Velut Ecclesia domestica* a cywilna forma zawarcia małżeństwa." Roczniki Teologiczno-Kanoniczne 30, part 5 (1983): 27–40.

Tunia, Anna. "Kształtowanie się kanonicznej formy zawarcia małżeństwa." *Roczniki Nauk Prawnych* 18 (2008): 129–159, n. 1.
Viladrich, Pedro Juan. *Agonía del matrimonio legal. Una introducción a los elementos conceptuales básicos del matrimonio*. Pamplona: EUNSA, 1984.
Vitali, Enrico, and Salvatore Berlingò. *Il matrimonio canonico*. Milano: Giuffrè, 2003.

Piotr Majer

L'importance de la forme canonique du mariage

Résumé

L'article présente l'argumentation justifiant l'exigence de la forme canonique de la conclusion du mariage exigée *ad validitatem matrimonii* depuis le concile de Trente. Vu les critiques et les revendications de l'abolition du caractère nécessaire de la forme canonique, l'auteur expose son importance strictement religieuse. Étant donné la sécularisation du mariage, la forme canonique de sa conclusion devrait non seulement permettre à l'Église d'exercer d'une façon efficace la juridiction sur le mariage, mais avant tout constituer un outil de témoignage du caractère sacramentaire du mariage et une garantie de l'authenticité du signe de mariage aussi bien à l'égard des futurs époux qu'ad extra à l'égard du monde.

Mots clés: droit canonique, mariage, forme canonique

Piotr Majer

Il significato della forma canonica del matrimonio

Sommario

L'articolo presenta gli argomenti che giustificano il requisito della forma canonica del matrimonio richiesto ad validitatem matrimonii a partire dal Concilio di Trento. Tenuto conto delle critiche e delle richieste dell'abolizione del carattere obbligatorio della forma canonica, l'autore espone il significato di quest'ultima in senso stricte ecclesiale. Di fronta alla secolarizzazione del matrimonio, la sua forma canonica non solo dovrebbe permettere alla Chiesa di esercitare un'efficace giurisdizione sul matrimonio, ma soprattutto dovrebbe essere uno strumento per assistere il sacramento del matrimonio e per garantire l'autenticità del carattere del matrimonio ad entrambe le parti contraenti e all'infuori di esso.

Parole chiave: diritto canonico, il matrimonio, forma canonica